

**The Energy and Technology Committee
Public Hearing, March 8, 2018**

**Senate Bill No. 2
An Act Concerning
*Internet Service Providers and Net Neutrality Principles.***

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Senators Winfield, Formica, and Representative Reed, my name is Gigi Sohn, and I have been an advocate for open, affordable and democratic communications networks for nearly 30 years. I am currently a Distinguished Fellow at the Institute for Technology Law and Policy at Georgetown Law and a Mozilla Fellow. I served as Counselor to former FCC Chairman Tom Wheeler from 2013-2016. In 2015 had the privilege of helping to enact the strongest ever network neutrality rules under the strongest legal authority – Title II of the Communications Act of 1934. Thank you for the opportunity to submit this testimony in support of SB 2.

Why Net Neutrality is Vital to an Open Internet

The creators of the Internet intended that this network of networks be neutral – that control be at the ends of the network, with no gatekeepers in the middle picking winners and losers. In this way, the Internet is completely different from communications networks like broadcasting and cable. Those are top-down systems where a gatekeeper controls what you see and when you see it.

The Internet has made possible what was impossible before – anybody with a connection can provide a multitude of different types of content, applications and services with the click of a button. Online business have sprung up in every industry imaginable, bringing with it economic opportunity and flexibility where none existed before. Advocates on all sides of cultural, social and economic issues can speak to the public and organize. Creators who could never find audiences without the permission of big media companies are finding fame and fortune and in many cases, just a lot of fun. And innovation has exploded – when broadband became a reality just some 15 years ago, there were no search engines, no social media, no smartphones, no ride-sharing or crowd-sourcing applications. Two recent studies by the Internet Association demonstrate that Internet sector is 6 percent of US GDP and contributes about 3 million American jobs.¹ It is also the fastest growing sector of the economy. There are also nearly 24

¹ Siwek, *Measuring the US Internet Sector* (2015), found at <https://cdn1.internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

million online income positions in the US (for example, an Etsy seller, an Amazon seller or a Lyft driver).²

Prior to 2002, when the FCC deregulated broadband Internet access, finding that it was classified as an “information service” under Title I of the Communications Act, the average American had a choice of 13 dial-up Internet service providers.³ This is because Title II of the Communications Act, which regulates “common carriers” like telephone companies, required dominant network providers to make those networks available to competitors.⁴ Once the FCC took internet access out of Title II, this robust competition dried up overnight. The result is that, according to the most recent FCC numbers, 75% of Americans have access to 2 or fewer BIAS providers, and nearly half have access to 1 or fewer.⁵

The lack of competition and the gatekeeper role that BIAS providers play in providing the “on-ramp” to the Internet has given them, in the words of the FCC⁶ and the United States Court of Appeals for the District of Columbia Circuit,⁷ the “incentive and ability” to block, throttle and otherwise discriminate in favor or against certain Internet content and services, and in particular, content and services in which they have a financial or other interest. Over the past 15 years, there have been a number of documented instances of such discriminatory behavior,⁸ belying the claim by opponents that net neutrality protections are “a solution in search of a problem.”⁹ And these are only the instances we know about. What we also know is that in the

² Hooton, *The True Size of the Online Labor Force* (2017), found here <https://internetassociation.org/reports/true-size-online-labor-force/>.

³ The FCC had always treated telephone broadband Digital Subscriber Line (DSL) service as a Title II service. In 2002, it was faced with the question of whether then-new cable modem services should be classified as telecommunications services under Title II. The FCC ruled that cable modem services were information services under Title I, and that ruling was upheld as one under the agency’s discretion by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 US 967 (2005). Following that decision in 2005, the FCC also deregulated DSL, mobile broadband service and broadband over powerlines.

⁴ 47 USC Sec. 251.

⁵ *Internet Access Services Report, Status as of December 31, 2016* (February 2018) found at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0207/DOC-349074A1.pdf

⁶ *Report and Order on Remand, Declaratory Ruling and Order in GN Docket 14-28* (released March 12, 2015) Para 78-101.

⁷ *Verizon v. FCC*, *supra* at 645.

⁸ Free Press: Net Neutrality Violations, A Brief History, found at <https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history>.

⁹ Brenner, *Net Neutrality is a Solution in Search of a Problem*, Forbes (September 25, 2012), found at <https://www.forbes.com/sites/ciocentral/2012/09/25/net-neutrality-a-solution-in-search-of-a-problem/#55bcefe93fc5>.

absence of these protections, BIAS providers have admitted that they will, at a minimum, ask online content and service providers to pay for priority service.¹⁰

The 2015 Open Internet Order

The 2015 Open Internet Order did two critical things.¹¹ First, it adopted rules that prohibit broadband Internet access service (BIAS) providers from blocking, throttling or otherwise discriminating against or in favor of certain Internet traffic. Importantly, the rules prohibit “paid prioritization,” or the creation of fast lanes for online content and service providers willing to pay for faster and better quality delivery to the consumer. These rules ensure that consumers, and not the broadband industry, determine who wins and who loses on the Internet.

Equally as important, the 2015 Open Internet order restored FCC authority to oversee the broadband market by reclassifying BIAS as a “telecommunications service” under Title II of the Communications Act of 1934. The decision to ground the 2015 net neutrality rules in this title of the Communications Act resulted in the US Court of Appeals for the District of Columbia Circuit upholding the rules in June 2016.¹² Two previous attempts by the agency, first in 2008 to enforce net neutrality principles¹³ and second in 2010 to adopt net neutrality rules¹⁴ were invalidated by the very same court¹⁵ because of the FCC did not use the proper legal authority to support them.

Abdication of the FCC’s Role Protecting Consumers and Competition

On December 14, 2017, the Trump FCC, led by its Chairman Ajit Pai, repealed the 2015 rules and reversed the 2015 decision to classify BIAS as a telecommunications service under Title II, saying that the agency lacked the legal authority to oversee the BIAS market.¹⁶ In doing so, the FCC expressly abdicated its role protecting consumers and competition in the broadband

¹⁰ *Verizon v. FCC*, *supra* at 645-646 (“Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users. See *id.* at 17918-19 ¶¶ 23-24. Indeed, at oral argument Verizon’s counsel announced that ‘but for [the Open Internet Order] rules we would be exploring those commercial arrangements.’ Oral Arg. Tr. 31”).

¹¹ *Report and Order on Remand, Declaratory Ruling and Order*, *supra*.

¹² *US Telecom Ass’n v. FCC*, 825 F.3d 674 (DC Cir. 2016).

¹³ *Memorandum Opinion and Order* in File No. EB-08-IH-1518 & WC Docket No. 07-52 (released August 20, 2008), found at https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf

¹⁴ *Report and Order* in GN Docket No. 09-191 & WC Docket No. 07-52 (released December 23, 2010), found at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

¹⁵ *Comcast Corp. v. FCC*, 600 F.3d 642 (DC Cir. 2010) (invalidating 2008 decision); *Verizon v. FCC*, 740 F.3d 623 (DC Cir. 2014) (invalidating 2010 rules).

¹⁶ *Declaratory Ruling, Report and Order, and Order* in WC Docket 17-108 (released January 4, 2018) found at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0223/FCC-17-166A1.pdf.

market. This abdication was unprecedented. For over 15 years, both Republican and Democratic FCC Chairs believed that the FCC had the responsibility and the authority to oversee the market for broadband Internet access. The Trump FCC, on the other hand, has decided that even though the FCC was created over 80 years ago to oversee networks, that the Federal Trade Commission (FTC), an agency which oversees broad swaths of the economy, is best equipped to oversee access to the most important network of our time – the Internet.

While the Wheeler FCC worked closely with the FTC and that agency has many strengths, it has neither the technical expertise nor adequate legal powers to protect consumers and competition in the broadband market adequately.¹⁷ First, the FTC is an enforcement agency – it doesn't have rulemaking authority and as such, must be selective about when they bring enforcement actions. Rules are important because they protect consumers and innovators **before** they are harmed. Rules moderate bad behavior and let consumers and innovators know what their rights are. If a BIAS provider discriminates against a small online business, the time it takes for the FTC to bring an enforcement action (if it does at all), can spell the difference between that business' survival or demise.

Second, the FTC has construed its ability to protect consumers and competition very narrowly. Section 5 of the Federal Trade Commission Act makes illegal "unfair and deceptive trade practices." The FTC has interpreted Section 5 so that it only brings enforcement actions against companies that either lies or fails to inform customers about activities in which it is engaging. In other words, if a BIAS provider tells its customers that it will block, throttle or otherwise discriminate and does so, the FTC will likely do nothing. At a recent conference at the University of Colorado Law School, Republican former FTC Commissioner William Kovacic called Section 5 a "zombie law," because the FTC rarely enforces it beyond clear cases of deception and omission.

It is my belief that the "choice" between FCC and FTC oversight of the broadband market is a false one. When an industry, like the broadband industry, is so vital to the social, economic, cultural and civic well-being of our nation, it is prudent to have more than one regulator. This is true in sectors such as banking, transportation and health care.¹⁸

SB 2 and the Role of the States in Preserving Network Neutrality

¹⁷ Current FTC Commissioner Terrell McSweeney explained the limitations of her agency to enforce net neutrality principles in recent testimony to Congress. *Oral Statement of Commissioner Terrell McSweeney to the House Judiciary Committee*, November 1, 2017, found at https://www.ftc.gov/system/files/documents/public_statements/1268963/mcsweeney_oral_testimony_to_us_house_of_representatives_committee_on_the_judiciary_11-1-17.pdf.

¹⁸ At a recent conference at Georgetown Law School, I recommended that the prohibition on FTC oversight of common carriers be repealed, and that Section 5 enforcement be strengthened. See <https://georgetown.app.box.com/s/r6obzzuy75rshyefcx6ic27pg6e00ywo>.

By abdicating its role protecting consumers and competition, the FCC has left a gaping hole. SB 2 will help to fill it. This commonsense legislation reinstates the 2015 net neutrality rules for Connecticut consumers and in doing so, the state joins at least 26 other states seeking to ensure that BIAS providers in their states abide by net neutrality protections.

When the federal government leaves a gap in protecting consumers, the states must step in. And while the FCC purports to preempt the states from doing so, their argument for doing so is weak for two reasons.¹⁹ First, Congress has made clear that when it comes to communications networks like BIAS, the states have a role in protecting consumers. Indeed, the FCC and the states regulated telephone and cable service for decades. Second, the FCC cannot say it has no authority to oversee the broadband market and at the same time, pre-empt the states from doing so. The FCC's pre-emption power is directly tied to its regulatory power. The FCC has washed its hands of broadband oversight – it cannot now also wash the states' hands.

The BIAS providers' criticism that it would be difficult, if not impossible, for them to comply with numerous different state net neutrality requirements is disingenuous at best. Again, these same companies deliver cable and telephone service, which is regulated by the states, and in the case of cable service, often by local communities. More importantly, the broadband industry **was at the forefront** of the effort to repeal the 2015 Open Internet order – a federal framework that protected consumers and allowed the industry to thrive. Having succeeded, the industry has no grounds to complain about states like Connecticut seeking to protect its citizens.

In any event, it will likely take years for there to be a final determination as to whether a law like SB 2 is pre-empted. Any lawsuits claiming pre-emption will likely be folded into the larger lawsuit against the FCC's December 14 repeal order, a lawsuit joined by 23 States Attorneys General, including Connecticut's. The state's consumers cannot afford to be unprotected from the anti-consumer and anti-competitive practices of BIAS providers while this case makes its way through the courts.

Conclusion

I applaud the courage and foresight of Senator Duff and his colleagues to protect an open Internet for the citizens of Connecticut. I urge the General Assembly to pass this SB 2 without delay.

¹⁹ For a more in depth discussion of the preemption issue, see Feld, *Can the States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes*, found at <http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes/>.