Statement of Jon Leibowitz

on

How the FTC Can Protect Consumers in the Broadband Marketplace through its Competition and Consumer Protection Authority

before the

Connecticut Energy & Technology Committee

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Chairs Formica, Winfield, and Reed, Vice-Chairs Doyle, Hwang, and Slap, Ranking Member Ackert, and Members of the Committee, my name is Jon Leibowitz, and I appreciate the opportunity to testify today. From 2009 through 2013, I served as the Chairman of the Federal Trade Commission ("FTC"), appointed by President Obama, and before that as a Commissioner from 2004 to 2009. During my time at the FTC, we worked extensively, and on a bipartisan basis, to tackle broadband competition and consumer protection issues. I am now a partner at the law firm of Davis Polk and Wardwell LLP, where I advise clients on antitrust, consumer protection, and privacy matters. I also co-Chair the 21st Century Privacy Coalition.[1] Our organization's members have asked me to offer my perspective on the issues pending before your Committee based on my experience at the FTC and as a long-time supporter of net neutrality. While I am appearing on behalf of the Coalition, the opinions expressed herein are my own.

I. Summary

- The end of Title II Internet regulation at the Federal Communications Commission ("FCC") does not mean that consumers will no longer be protected from harmful actions taken by broadband providers, and it will not undermine consumers' online activities. To be sure, the sky did not fall for broadband providers when the FCC imposed Title II regulation in 2015. But that decision came with real costs. According to the FCC, broadband investment diminished during the two-year period of Title II regulation. Moreover, as a result of the FCC's decision, the FTC—the nation's foremost consumer protection and competition agency, which has brought cases against the largest broadband companies and edge providers—lost its enforcement jurisdiction over broadband providers. Now that the FCC has reversed its 2015 decision, the sky will not fall for consumers. This is true in part because the recent

[1] Our organization's members include the nation's leading broadband companies, who are committed to upholding net neutrality principles and maintaining an open Internet for consumers.

FCC decision, by reclassifying broadband Internet access as an information service, restores the FTC's ability to protect consumers and competition in the broadband market.

- Broadband providers are committed to upholding net neutrality principles and maintaining an open Internet for consumers. To that end, the nation's leading broadband providers have made commitments not to block, throttle, or unfairly discriminate in the transmission of lawful Internet traffic.
- Public commitments from broadband providers are binding and enforceable at the federal and state level, including at the FTC with its restored enforcement authority over broadband providers, the FCC, and by State Attorneys General. In addition to ensuring broadband providers honor their commitments, the FTC can also bring enforcement actions to prohibit unfair practices and unfair methods of competition. Together, the FTC and FCC have the tools necessary to hold broadband providers accountable for transparency and their other public commitments at the federal level, and State Attorneys General can do the same, using their existing consumer protection authority.
- Broadband providers support legislation to create clear and predictable rules of the road to ensure a free and open Internet for consumers and to encourage broadband providers to invest and innovate. However, Internet access is an inherently interstate service, and federal law preempts state and local regulation of broadband services. As a result, such legislation must be enacted at the federal level, which is also the right policy outcome: The same protections should apply to consumers in every state because they are using the same Internet access services.
- That is not to say that states cannot be a meaningful part of this debate. The State of Connecticut can and should play a productive role in this conversation by calling for a

federal legislative solution and providing input regarding how to best protect consumers. By encouraging Congress to move beyond partisanship and focus on practical solutions, stakeholders in a free and open Internet can help cement a meaningful and permanent resolution to an issue that should have been resolved a long time ago.

- In the meantime, broadband providers are committed to ensuring an open Internet. Robust federal enforcement of existing laws will ensure that companies are held accountable and consumers remain protected.

II. Broadband providers are committed to upholding net neutrality principles and maintaining an open Internet.

The core principles at the heart of net neutrality are freedom to unfettered access to all lawful Internet content, transparency about broadband providers' practices, and guardrails to ensure broadband providers do not engage in anticompetitive practices that could stifle innovation in the Internet ecosystem. These principles do not require regulation under Title II of the Communications Act to be maintained.

For more than 20 years, the Internet thrived as it ascended from a niche dial-up service with only a few million early-adopters to the dominant social and economic force that it is today. And until March 2015, it did so while classified as an "information service" subject to the "light-touch" regulatory approach to broadband that was originally adopted by a Democratic Administration, and then embraced on a bipartisan basis for nearly two decades. *See* Appendix A.

The outlier in terms of the FCC's regulatory approach to a free and open Internet was the two-year period—from 2015 to 2017—of "Title II" regulation. Title II was originally conceived as a means of regulating telephone common carriers in the 1930s. Under this common carrier regulatory framework, the FCC imposed an open-ended general conduct rule and other

prescriptive requirements. And critically, the FCC's decision to regulate broadband providers under Title II came at a cost. It actually *reduced* consumer protections for broadband customers by removing the jurisdictional authority of the FTC to enforce its consumer protection and competition authority against broadband providers.

In December 2017, the FCC voted to reverse its 2015 decision that had reclassified broadband providers as "common carriers" and imposed net neutrality rules under Title II of the Communications Act, thereby restoring broadband Internet access service as an "information service" under Title I of the Communications Act. The Internet was free and open before the FCC's *Title II Order* in March 2015, and that will continue to be so after the 2017 Order becomes effective. This is true in part because broadband providers are committed to upholding net neutrality principles and maintaining an open Internet for consumers, and in part because federal and state authorities, including the FTC with its restored enforcement authority, the FCC, and State Attorneys General, have the authority to hold broadband providers accountable to their commitments, and otherwise prohibit "unfair practices" and "unfair methods of competition" in the broadband Internet market.

Changes in policy at the FCC have not changed broadband providers' commitment to net neutrality principles. Each major broadband provider has publicly committed not to block or throttle lawful Internet traffic or engage in unfair discrimination against lawful content, applications, or devices. To do otherwise would be shortsighted. Broadband providers have invested billions of dollars in the infrastructure they use to provide Internet access. Adopting practices that limit the ability of their customers to use and enjoy that infrastructure would devalue their own investments by undermining their relationships with their own customers and reducing usage of their networks.

In addition to their voluntary commitments, under the new FCC *Order,* broadband providers will also be subject to detailed transparency requirements, which compel providers to

keep customers clearly informed of key information they need to evaluate broadband service offerings. Specifically, the *Order's* transparency rule requires broadband providers to disclose—publicly and in an easily accessible format—their network management practices, performance attributes, and commercial terms of service, as well as any practices related to blocking, throttling, and affiliated or paid prioritization, in order to "enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings." If a broadband provider were to attempt to engage in any such practices, they would have to disclose those practices under the new FCC regime. And that would not only provoke a swift consumer backlash, but as discussed below, invite government scrutiny.

III. The FCC, FTC, Justice Department, and State Attorneys General have authority to protect consumers and preserve the open Internet in the absence of federal legislation.

In the absence of Title II regulation, the FCC and FTC, as well as the Antitrust Division of the Justice Department and State Attorneys General, are well-equipped to ensure that broadband providers deliver on their commitments to preserve the free and open Internet that consumers expect, deserve, and need in order to thrive in the 21st century. Most importantly, by classifying broadband services as information services, the FCC's *Order* restores the FTC as a cop on the beat in the market for broadband services. Allowing my former agency to return to the work of policing broadband providers using its decades of experience protecting consumers and competition online is, to my mind, a good thing because, as the nation's leading consumer protection enforcement agency, the FTC has unique expertise and experience with regard to the Internet ecosystem as a whole and the broadband market in particular. In fact, this expertise gives the FTC a perspective the FCC cannot have, given its limited jurisdiction over only a small portion of the Internet. The FTC also has a track record of using its enforcement authority to hold companies accountable.

While the FTC has been sidelined with respect to its oversight of broadband providers since 2015, the agency is no newcomer to broadband issues.

- In 2000, before the term "net neutrality" had even been coined, the FTC conditioned the merger of AOL and Time Warner on the requirement that the merged company not interfere with or discriminate against the content transmitted by other Internet service providers operating on its network.
- In 2006, the FTC formed an Internet Access Task Force to assess the need for network neutrality regulation. Then-Chair Deborah Majoras took the opportunity to "make clear that if broadband providers engage in anticompetitive conduct, [the FTC would] not hesitate to act."
- In 2007, the FTC published its net neutrality report, *Broadband Connectivity Competition Policy*, which emphasized the importance of the FTC's antitrust and consumer protection laws in preserving a free and open Internet.
- And in 2015, just before Title II regulation went into effect, TracFone, at that time the nation's largest prepaid mobile provider, paid $40 million to settle FTC allegations that the company had throttled data speeds on consumers' ostensibly unlimited mobile data plans—a core net neutrality harm.

This longstanding institutional expertise and the FTC's broad statutory authority to prohibit "unfair or deceptive acts or practices" ("UDAP authority") and "unfair methods of competition" under Section 5 of the FTC Act will allow the agency to use its existing authority effectively against broadband providers should the need to do so arise.[2] The FTC has long used its Section 5 authority to hold companies accountable for their public commitments. If a company violates its public commitments, the FTC can bring an enforcement action under a deception theory. Thus,

[2] "Unfair methods of competition" includes both Sherman Act and Clayton Act violations.

if a broadband provider violates disclosures made under the FCC's transparency rule, or violates its voluntary commitments not to block, throttle, or otherwise unfairly discriminate against lawful content, the FTC can bring an enforcement action and put a stop to that deceptive act or practice.

The FTC's consumer protection authority goes beyond simply holding companies accountable for their commitments. The agency can also use its "unfairness" authority to prohibit conduct that harms consumers. And critically, the FTC will once again be able to apply its robust privacy and data security enforcement model—which it has used to bring more than 500 enforcement actions against companies large and small—against broadband providers, just as it does across the rest of the Internet ecosystem.

Of course the FCC itself also has authority to enforce its own rules. Pursuant to the Memorandum of Understanding executed by the two agencies, the FCC will ensure that broadband providers are satisfying their disclosure obligations under the new transparency rule, while the FTC will use its consumer protection expertise to ensure that those disclosures are accurate.

In other words, broadband providers should expect vigorous enforcement from the FTC, which has a proven enforcement track record and has consistently used its consumer protection authorities, including its Section 5 "UDAP" authority, to bring cases against the largest companies operating online today, including edge providers like Amazon, Apple, Facebook, Google, and Twitter, companies like Comcast and AT&T, and content providers like Dish Network and DirecTV.

In addition to its consumer protection authority, the FTC also can use its broad antitrust authority to prohibit practices by broadband providers that harm online competition. Together with the Justice Department's parallel antitrust authority, this is a real hammer against practices that would unfairly favor or disfavor certain online content.

While a muscular enforcement regime remains in place at the federal level under existing law, states can also bring enforcement actions against broadband providers and edge providers under generally applicable consumer protection statutes that do not interfere with federal objectives. Connecticut Attorney General George Jepsen, in particular, has a proven track record of investigating conduct and protecting Connecticut consumers from bad actors online, as well as partnering with the FTC to protect consumers.

IV. Net neutrality requires a federal legislative solution.

All stakeholders in the Internet ecosystem should be frustrated by the continuing regulatory whiplash as Administrations change and policies shift. That is why the leading broadband providers support bipartisan federal legislation that will permanently preserve and solidify net neutrality protections for consumers, while providing clear rules of the road and regulatory certainty for broadband providers. Over the past decade, the FCC has engaged in multiple costly regulatory proceedings on the issue, none of which has achieved permanence. Congressional lawmakers on both sides of the aisle recognize the need for action, and if they can get beyond partisanship and focus on practical solutions, Congress could cement a meaningful and permanent resolution to an issue that should have been resolved a long time ago.

V. State-level net neutrality measures are preempted by federal law, raise serious constitutional questions, and are unwise as a policy matter.

A unified national approach is critical to the continued vibrancy of the Internet and enforcement of net neutrality principles. Nearly 50 years ago, long before the advent of the Internet, the D.C. Circuit recognized that the Communications Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole. . . . [F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." *Gen. Tel. Co. of Cal. v. FCC*, 413 F.2d 390, 398-401 (D.C. Cir. 1969). This recognition that communications networks must be subject to a federal framework was prescient, though its

authors could not have fathomed the amount of data that now traverses the Internet without regard for state or national lines.

In its *Order*, the FCC reiterated its longstanding position—shared by Congress, the FCC (including in its 2015 *Title II Order*), and each Administration since President Clinton's—that broadband Internet access "is a jurisdictionally interstate service," that "should be governed by a uniform set of federal regulations, rather than a patchwork that includes separate state and local requirements." This is because, "both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer)," making it "impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance." By its very nature, Internet service, which transports data across state and national boundaries, defies efforts to impose different, and potentially conflicting, standards on broadband providers in each state in which they operate. Broadband providers—and the Internet as a whole—depend on a uniform set of rules with consistent enforcement.

Moreover, one of the FCC's primary goals—mandated by Congress and shared by state policymakers—is to promote the widespread deployment of broadband networks. Broadband Internet access increasingly is linked to economic success in the digital age, and the FCC has found that state-by-state regulation of broadband would thwart this key objective. As the FCC's *Order* explains, if states and localities were to adopt their own net neutrality regulations, they would "significantly disrupt the balance" struck by the FCC and impede the provision of broadband facilities and services.

A. Federal law preempts states and localities from directly or indirectly regulating broadband Internet service.

Consistent with its longstanding policy that the Internet should be subject to uniform federal standards, the FCC's *Order* therefore prohibits state and local governments from imposing their own net neutrality requirements.

In its 2017 *Order*, the FCC explained that this express preemption is necessary because state and local efforts to regulate broadband "could pose an obstacle to or place an undue burden on the provision of broadband Internet access service." This rationale is not controversial. Recognition of the need to preempt state and local regulation is well-established and bipartisan. It is worth noting that this is wholly consistent with the approach taken by the Democratic-led FCC in its 2015 *Title II Order*, which reiterated the interstate nature of broadband Internet access services and announced the FCC's intent to preempt state laws inconsistent with its rules.

The FCC *Order's* preemption position is not only well-established in past practice at the FCC, but also is supported by substantial judicial precedent. As a threshold matter, the Supreme Court has made clear that "[f]ederal regulations have no less preemptive effect than federal statutes," *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), and that "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law," *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (internal quotation marks omitted).

Moreover, a federal policy of deregulation has no less preemptive force than one asserting new regulatory strictures. *See, e.g., Ark. Elec. Co-op v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (a federal determination that an area is best left "*un*regulated" carries "as much pre-emptive force as a decision *to* regulate"); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-

81 (8th Cir. 2007) ("[D]eregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation.") (emphasis in original).

These preemption principles apply with full force to preemption decisions made by the FCC. In particular, courts have long held that the FCC has authority to preempt state and local regulation of a communications service where "it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications" and where the FCC "determines that such regulation would interfere with federal regulatory objectives." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986). Importantly, this standard applies equally when the FCC asserts its authority to preempt state and local rules that interfere with its longstanding policy of nonregulation of information services. *See Minn. Pub. Utils Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

Judicial precedent also establishes that states cannot regulate indirectly what they are preempted from regulating directly. For example, a state may not end-run preemption by using its procurement process to impose contractual conditions on a broadband provider's provision of service to other consumers statewide. While a state may purchase services for itself as a "market participant," it may not impose conditions that extend beyond the state's pecuniary interest in the contract. The "market participant" exception does not apply where the "primary goal" of the procurement requirement is "to encourage a general policy rather than address a specific proprietary problem," *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999), and "[e]xracontractual effect is an indicator of regulatory rather than proprietary intent." *Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 189 (2d Cir. 2012). According to the U.S. Supreme Court, where a procurement requirement seeks to regulate conduct beyond the scope of the state contract, the action, "for all practical purposes, . . . is tantamount to regulation." *Wisc. Dept. of Industry v. Gould, Inc.,* 475 U.S. 282, 289 (1986). Therefore, a state law, regulation, executive order, or other similar measure that requires state

agencies to enter into contracts only with broadband providers that comply with specified net neutrality principles in their provision of service to customers throughout the state likely would be subject to preemption to the same degree as a law that imposes such obligations directly.

B. The federal courts are the appropriate venue for states to challenge the FCC's policy decision.

While the FCC's *Order* expressly preempts conflicting state and local net neutrality requirements, states that disagree with the FCC's policy approach are not without recourse. FCC orders are subject to direct review in the federal courts of appeal. If states wish to challenge the substantive policies put forward by the FCC, or the procedural means by which they were enacted, the federal courts of appeal are the appropriate venue. Indeed, the Connecticut Attorney General has made the decision to do just that. On January 16, Attorney General Jepsen signed a petition for review filed in the D.C. Circuit Court of Appeals, joining a number of other State Attorneys General challenging the FCC's *Order.* What states and localities may not do, however, is adopt net neutrality rules that contravene the policy determinations made by the FCC and that are expressly preempted by the FCC's *Order*.

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The Energy & Technology Committee would not be fulfilling its obligation to Connecticut residents if it did not engage carefully and thoughtfully on issues affecting Internet access. But in this case, state or local net neutrality measures are not necessary and would be harmful. Broadband providers are committed to ensuring that consumers have access to the Internet without blocking, throttling, or otherwise unfairly discriminating against lawful content, and are required under the FCC's new transparency rule to make detailed disclosures regarding network management and performance. These commitments and disclosures are binding and enforceable by federal agencies and State Attorneys General under existing consumer protection laws. Just as importantly, the FTC, the Justice Department, and State Attorneys General can also prohibit unfair practices and unfair methods of competition by broadband providers. And if

Congress can write bipartisan net neutrality legislation—something that I do believe is possible—that would give consumers even more, and permanent, protection.

Thank you for the opportunity to testify today. I look forward to answering any questions from Members of the Committee.

Appendix A

Net Neutrality Timeline

Internet thrives for more than 20 years before Title II without persistent competitive or consumer protection problems