**Statement of the Computer & Communications Industry Association (CCIA)**

Why Net Neutrality Matters: Protecting Consumers and Competition Through Meaningful Open Internet Rules

**Committee on the Judiciary**
**U.S. Senate**

September 17, 2014

CCIA hereby submits its statement for the record of the above-referenced hearing. CCIA is an international organization that represents companies of all sizes in the high technology sector, including computer software, electronic commerce, telecommunications, and Internet products and services.

Ever since our involvement in the antitrust case that resulted in the break-up of AT&T in the early 1980s, CCIA has been a strong and consistent advocate for open networks and full and fair competition. When the World Wide Web was launched in the early 1990s and for more than a decade following, dial-up connections to the Internet were common carrier telecommunications services subject to Title II of the Communications Act. AOL, Compuserv, Yahoo!, Amazon, Google, and eBay, on the other hand, were unregulated information services with nondiscriminatory access to the networks. After the FCC also classified both cable and telco provided broadband Internet access connections as unregulated "information services" in 2002-2005, CCIA worked vigorously for enforceable rules to keep the underlying transmission networks open for end users and so-called "edge providers" of online content and services. CCIA was a founding member of the Open Internet Coalition which at first championed enforceability of the FCC's 2005 Internet Policy Statement, that aimed to give consumers rights regarding online access to the services and content of their choice free of blocking. Comcast, in a case involving throttling of BitTorrent, challenged the enforceability of the FCC Internet policy in court and won. The Open Internet Coalition then began to focus on a modified, light touch common carrier framework for broadband Internet access.

In 2010 the FCC adopted Open Internet rules, which were then invalidated early this year in *Verizon v. FCC,* largely because Internet access was still classified as an information service, rather than as an essential two-way telecommunications service.

Post *Verizon*, American residential, business and nonprofit Internet consumers are all without any legal protections for the open Internet access they have come to expect and rely on in their daily life and work. Given our broadband Internet access network operators' newly confirmed freedom from legal obligations to end-users, open Internet access is at risk.

Despite the IAPs' claims that Title II reclassification will hamper incentives to investment in the network, no clear causal link has been articulated to support this contention. In fact, as Free Press has documented, Cable and Telecommunications companies invested *more* money in their networks when they were regulated as a Title II service. Furthermore, the IAPs have requested to be classified under Title II in the past in order to get the tax breaks and universal service subsidies that accompany it. Not surprisingly, IAPs did not complain then that such a classification would diminish their incentives to invest.

What is clear from the open Internet comments submitted to the FCC, however, is that without open access safeguards, investment and innovation in over-the-top Internet applications and services – which would need either the implicit or explicit permission of the IAPs – would be in real jeopardy. For the Internet marketplace to thrive, investors in start-ups need confidence that their products and services will be easily accessible to all online over the Internet.

Where network facilities competition is limited to duopoly or oligopoly conditions, the IAPs have basic economic incentives to profit from scarcity and congestion on their existing networks rather than invest in comprehensive upgrades.[1] Google Fiber and community broadband networks are only just getting started in a handful of cities and towns.

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[1] See James J. Heaney, *Why Free Marketeers Want to Regulate the Internet*, DE CIVITATE (Sep. 15, 2014), *available at* http://www.jamesjheaney.com/2014/09/15/why-free-marketeers-want-to-regulate-the-internet/ for economic analysis of need for regulatory safeguards for Internet access.

So the FCC must continue to promote greater network competition, which will spur greater investment by the IAPs. Meanwhile, the FCC must use its clear legal authority over telecommunications to prevent degradation of our Internet access. The IAPs' empty threat that open Internet rules will cause them not to invest in their networks is the same one they use traditionally to oppose any FCC action they do not like. Only companies with dominant positions facing insufficient competition can even get an audience for such threats. In a truly competitive market the need to beat the competition incentivizes investment and innovation.

Antitrust law is designed to protect trade and commerce from unfair business practices and remedy anticompetitive market conduct by dominant firms and monopolies that reduces or eliminates competition. However, antitrust cases typically consume massive financial resources from both the private sector and the government and usually take years, and sometimes more than a decade, to prosecute. Furthermore, legal precedent around a firm's "duty to deal" with its competitors is murky and often contradictory, but it is generally recognized that even monopolists do not have to supply their competitors. Therefore, taking an antitrust approach to open Internet will not give the market the certainty necessary to ensure innovation and investment in all layers of the Internet.

Antitrust enforcement generally works best in markets where competition is the norm and not the exception. Under such conditions, individual cases can be used to restore a competitive market when a company acquires market power and uses it anti-competitively. Where markets are chronically less than competitive for structural reasons, expert agencies are generally tasked with ensuring that market power is not continually abused. Using antitrust enforcement to supervise a chronically non-competitive market is less desirable than the supervision of an expert agency tasked with promoting consumer welfare, as replacing an expert agency with a patchwork quilt of generalist court rulings is more expensive, creates more uncertainty, and does little to protect startups and smaller competitors who are often forced from the market before the court proceedings are finalized.

However, promoting competition is recognized as only part of the FCC's continuing obligation to protect "the public interest, convenience and necessity" regarding the universal availability of communications by wire and radio spectrum. The agency has the authority to make rules governing public access to everything from radio and TV stations to voice telephony, from satellite services to emergency services. Vibrant competition among communications companies certainly has public benefits that the FCC encourages and well recognizes, but the expert agency has specific responsibility for public communications services that goes beyond just disciplining behavior among commercial competitors.

The Internet is a network of interconnected networks that exchange data traffic at dozens of exchange points (IXPs) in the U.S. alone and many more around the globe. Online information service platforms pay for their own long-haul transit and larger ones often build or buy capacity from more localized content delivery networks (CDNs). Up to this point, markets are competitive. However, even when a U.S. business or household has a couple of choices for Internet access, once signed up with a particular company, that IAP has a monopoly on local delivery of Internet traffic to that subscriber. That is, the business or household not only must use that IAP for uploads, but nothing can be downloaded except through that chosen IAP. This terminating access monopoly provides an IAP the leverage to charge online content providers such as Netflix unlimited access tolls just to "open the door" and let the subscriber's requested video streaming through. That's true despite the fact that the subscriber has already paid monthly for that service. No party is getting or asking for anything "for free" here. The terminating monopoly also allows an IAP to impose discriminatory data caps that exempt its own affiliated content, such as premium sports or TV shows, but render other video choices that use equivalent bandwidth relatively more expensive. IAPs have a similar incentive and ability to charge competing providers of cloud and data storage services for local network access while their own cloud service would be free of such tolls, and therefore less expensive. Since end users cannot easily switch to a competing IAP that would not disadvantage their over-the-top choices, strong open Internet rules are urgently needed.

Even if IAPs do not have any intentions of discriminating against small businesses or nonprofits, selling priority speeds or quality of service to the largest online content companies will have the inevitable result of degrading throughput to other edge providers given the finite capacity of their networks. And once the harm is done, it will not only be too late for an aggrieved start-up to bring an antitrust case it cannot afford, it will be too late for the FCC to crack down and unwind all the contracts for paid prioritization that have proliferated. That's why the FCC must not waste time in adopting enforceable open Internet rules.

The impact of the FCC's decision on open Internet rules will be felt far into the future, not just in the U.S., but also around the world where the governments of many diverse nations take cues from ours. People everywhere need Internet access free from restrictions so they can access products and services, including personally empowering information online. While the term "net neutrality" has grown controversial in the U.S. and is susceptible to many conflicting definitions, the consensus goal of maintaining open Internet access is a strong bipartisan one that in fact the U.S. government works toward regularly at international multi-stakeholder meetings regarding Internet management. While the U.S. opposes any international regulation of the Internet, and cautions against national government restrictions like censorship and data localization mandates, we would certainly not take issue with any other nation's efforts to enshrine their own citizens' right to open Internet access into law, which is exactly what the FCC is aiming for in its current proceeding. And that task is of paramount importance for the growth and long-term health of the US economy.