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JOHN BARRASSO, M.D.
CHAIRMAN, SENATE REPUBLICAN POLICY COMMITTEE

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FCC's Dishonest "Net Neutrality" Regulations

In December 2010, the Federal Communications Commission (FCC), on a 3-2 party line vote, adopted its Open Internet Order – often referred to as the "net neutrality" rules – that reversed the longstanding policy choice to leave the Internet unregulated. The misguided decision subjects Internet providers to heavy-handed regulations. Proponents of the rule claim it is needed to protect consumers, promote innovation, and ensure the Internet continues to flourish. The Internet's history, marketplace realities, and the law do not back their case.

A History of Light Regulation on the Internet

Since the Internet's infancy in the Clinton Administration, the FCC had treated the Internet as a lightly regulated "information service" under Title I of the 1934 Communications Act. Democrats and Republicans agreed that in order to allow the Internet to grow into the success it is today, it should be left unregulated. As a bipartisan group of Senators wrote to the FCC in 1998, there was nothing -- in the historical record or in the 1996 changes to the earlier Act -- suggesting "that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services." They added, "were the FCC to reverse its prior conclusions … it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being." The Democrat-led FCC shared this view at the time.

In 2005, the Commission adopted an Internet Policy Statement that included five open Internet principles. The FCC did not adopt enforceable rules at this time, but said it would work to "incorporate these principles into its ongoing policymaking activities."

Then in 2008, on a 3-2 vote with two of the Commission's three Republicans dissenting, the FCC punished Comcast for slowing some traffic using the web service BitTorrent, in violation of the earlier open Internet principles. Republican commissioner McDowell argued in dissent that "the Commission did not intend for the Internet Policy Statement to serve as enforceable rules but, rather, as a statement of general policy guidelines."

The next FCC Chairman, Julius Genachowski, set out to deliver on one of President Obama's campaign promises: that the FCC would adopt enforceable net neutrality regulations. These

plans suffered a setback in April 2010, when the U.S. Court of Appeals for the D.C. Circuit ruled unanimously that the FCC lacked the statutory authority to enforce the Internet Policy Statement in the Comcast case. The Court said that if it were to accept the Commission's argument it would "virtually free the Commission from its congressional tether."

Genachowski then announced in May 2010 that the FCC would reverse its long standing policy of treating the Internet as an information service under Title I. In a desperate attempt to find some legal authority to regulate the Internet, the FCC would reclassify it as a "telecommunications service" under Title II of the Act. This move would subject the Internet to a 19th century "common carrier" regulatory framework that was originally designed to regulate monopoly railroads in earlier laws.

Opposition to this Internet power grab by the Obama FCC was intense and bipartisan. Thirty-seven Republican Senators sent a letter to Chairman Genachowski urging him to abandon his plan, as did a bipartisan majority of the House.

Tortured FCC Logic

Despite the congressional opposition, the FCC's Title II docket remains open today and the Open Internet Order that was adopted effectively imposes the common carriage requirements of Title II on broadband service providers. The FCC rule prohibits fixed and wireless broadband providers from blocking any lawful content online and requires fixed providers to treat all Internet traffic equally.

In an attempt to find a statutory justification for the Open Internet Order, the FCC first made an irrational finding on broadband deployment in order to trigger a provision in Section 706 of the 1996 Telecommunications Act. Up until this time, this provision had been interpreted to be strictly deregulatory. The FCC, for the first time, found that broadband was not being deployed to all Americans in a reasonable and timely manner. The facts indicate otherwise. According to the FCC's own National Broadband Plan, in 2010, 95 percent of Americans had access to broadband -- up from approximately 15 percent just seven years earlier.

By finding that broadband was not being deployed in a timely manner, the FCC was directed under Section 706(b) of the 1996 Act to "take immediate action to accelerate deployment … by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." This deregulatory provision was reinterpreted by the Democrats at the FCC to authorize new regulatory powers that Congress never gave the Commission.

The FCC also attempted to justify its new far-reaching regulations on baseless claims that consumers may be harmed at some future date. The Commission admitted in its order that it is taking action based on what may occur, not harms that are actually occurring: "[B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so. A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider's only option for reaching a

particular end user. Thus broadband providers have the ability to act as gatekeepers." There is no evidence that consumers are being harmed in a way that justifies a federal agency micromanaging private sector broadband networks.

It should also be noted that the rule includes numerous exceptions for content delivery networks, peering arrangements, Internet backbone providers, among others that would otherwise violate the rule. All of these exceptions are for innovations that have improved service and the efficiency of the Internet – ultimately benefitting consumers – but would violate the Order without the carve out. The Internet continues to evolve rapidly, and the Commission's actions will effectively force broadband service providers to seek FCC permission before making further innovations to improve the customer experience.

The Next Watershed: *Verizon v. FCC*

Claiming that the FCC lacks the legal authority to adopt and enforce net neutrality rules, Verizon Communications sued the Commission. The oral argument in the case occurred on September 9, 2013, at the U.S. Court of Appeals for the D.C. Circuit.

Specifically, Verizon argued that on its face Section 706 does not deal with the matter at hand -- 706 addresses accelerating the construction of networks and is not about how those networks are managed. The rule adopted by the FCC does not say its purpose is to promote deployment – and nothing in the Order will promote competition among "last mile" providers (those providing services to consumers) – but rather is to "preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression. To provide greater clarity and certainty regarding the continued freedom and openness of the Internet, we adopt three basic rules."

In addition, Section 230(b) of the Communications Act states that, "It is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Verizon also argued that the FCC's order relegates its broadband service to common carriage status, a classification the Communications Act prohibits imposing on information services.

A decision is not expected for several months and perhaps not until 2014. Regardless of the outcome of the case, it is likely the fight over Internet regulation will continue.