

Statement of Jonathan Banks
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Before the Massachusetts Senate on Senate No. 2376

March 28, 2018

My name is Jon Banks and I am pleased to provide remarks on behalf of USTelecom on these bills.

USTelecom is an association of broadband providers that shared a heritage of providing voice telephone service, but are now investing billions of dollars a year to deliver broadband service to connect businesses and consumers to the internet. Our members range from very large providers like Verizon, to companies like Blackfoot Telephone, a co-operative serving rural Montana. Our members provide voice and broadband service throughout the country. And, many of our members are small businesses that provide service to just a few thousand subscribers.

Net Neutrality

The often passionate debate we have been having for the last several years over the internet is not one about goals. All of our members support an open internet or net neutrality; the principle that consumers should be able to access all legal content and applications, regardless of the source, using their broadband internet access services. Our members, large and small, have invested hundreds of billions of dollars to help build the Internet, and have been delivering an open experience to their customers for years.

The current debate over the internet is, again, not over goals or openness, but over what is the best legal framework for achieving those goals and keeping the internet open. From the communications industry perspective, the basic legal framework that was put into place by the Communications Act of 1934 for voice telephone service has never been the right framework. Fortunately, under the leadership of Bill Clinton and Al Gore, Congress passed an update in 1996. The internet was in its infancy then, but there was a strong bi-partisan consensus that it should not be regulated under the existing 1934 public utility framework. Congress declared that “it is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by State or Federal regulations.” 47 U.S.C. §230(b)(2).

A wise Federal Communications Commission chairman noted that “the best decision government ever made with respect to the internet was ... not to impose regulation on it.” That Chairman was Bill Kennard, appointed by President Clinton. Kennard’s future-focused and pro-consumer philosophy became the lodestar for internet policy, allowing the internet to grow up outside of a rigid set of rules under a single federal framework.

This light-touch internet policy—the belief it should be allowed to grow and innovate outside of a rigid framework -- was a bi-partisan success for two decades. Broadband providers invested over 1.5 trillion dollars in building broadband networks, innovation thrived and new internet content, applications and business models became part of our daily lives. Consumers accessed the content they wished – as they wanted to. And entrepreneurs built internet companies from tiny start-ups to giant economic forces that all of us use.

In 2015, the FCC undertook a major change of course. Breaking with years of successful experience, and the forward-looking, pro-innovation lighter touch policy approach supported by President Obama and

his FCC Chair for the first 6 years of his Administration, and put in place under Bill Clinton, the FCC put broadband under the restrictions of the 1934 Act.

Our concern was that this heavy-handed approach would inevitably reduce investment and innovation and it appears to have done so, with investment in broadband infrastructure declining by about \$2 billion dollars from its recent peak in 2014 of roughly \$78 billion. (USTelecom analysis available at: <https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex>). See Figure 1. It increased the long-term risks to further development and growth of the internet and internet economy. And, the reclassification greatly increased uncertainty as companies tried to develop new customer-friendly options like free or sponsored data.

That is why we support the recent action by the FCC. Without high and rising levels of broadband investment and innovation, we will never be able to connect all of rural America to the internet, and we will not be able to reduce the barriers to adopting and using the internet that keep too many people from reaping the benefits of connecting to the internet. Similarly, without rising investment and innovation, broadband networks will not be able to meet the skyrocketing demand from already connected consumers for more and faster access to higher quality content and services delivered 24/7. See Figure 2.

The FCC's recent action restores a framework that long supported and will now continue to support more investment and innovation, which will be necessary to meet the growing needs of consumers and small businesses, while putting in place a strong consumer protection framework. The FCC requires providers to be transparent with their customers about the services they provide and how they run their networks. If they are not, the FCC has pledged to take action. Further, the FCC's recent decision puts the Federal Trade Commission firmly back in the driver's seat when it comes to consumers and their expectations about their broadband service.

The two agencies have signed an agreement to work together in this area creating a unified federal framework. The FTC is the nation's leading consumer protection agency – committed to preventing unfair and deceptive acts and practices -- and shares authority with the Department of Justice over preventing anti-competitive actions that threaten harm to consumers or competition. Practices by internet service providers, websites, search engines or others that threaten to harm or deceive consumers, or that may be unfair to consumers are subject to FTC review and action. The FTC's vast experience with enforcing consumer and competition protections, coupled with strong coordination with the FCC puts two federal agencies on the consumer protection beat. And, the FCC has recognized that enforcement of general consumer protection laws by state Attorneys General adds another layer of protection.

Privacy

Our members have made strong commitments to protecting the privacy of their customers and have long operated consistent with the Federal Trade Commission's privacy framework. That framework was built on careful analysis that balanced consumer privacy interests with consumer interests in an innovative internet that delivers services, some of which are supported by advertising, makes tailored recommendations and provides customized services. Customer information is essential to delivering these services that consumers expect to have. The FTC framework has been successful precisely because it balances these consumer desires. For example, the type of consumer choice under the FTC

framework is dependent upon the type of information. Sensitive information, such as health and financial information, social security numbers and information about children generally call for opt-in consent. The proposed legislation would treat a vast swath of consumer information beyond sensitive information as subject to use as if it were sensitive, thereby subjecting consumers to needless requests to make affirmative choices, degrading their Internet experience. Moreover since it would only apply to one segment of the ecosystem, consumers would be confused as to the actual impact of their choices.

The report and proposed legislation do not appear to undertake any analysis of whether the economic and consumer welfare costs of these constraints on beneficial uses of data outweigh the benefits, if any, associated with such restrictions. The treatment of web browsing and app usage data as if they were “sensitive” information departs from longstanding FTC guidance and practice across the internet ecosystem. It will interfere with the ability of consumers to receive the customized services and capabilities they enjoy today and will reduce the flow of information about new products and discount offers. It also will hinder the ability of internet service providers to innovate by developing and furnishing new customized offerings and to provide much-needed competition in the highly concentrated online advertising market. These costs to consumers and competition will be incurred with little, if any, corresponding benefit to consumer privacy, since the same broadband consumer data that internet service providers will be constrained from using will continue to be used by all other internet ecosystem entities subject only to the FTC’s more flexible and more pro-consumer regulatory approach. Tilting the playing field like this will simply end up reducing competition and harming consumers.

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The proposed legislation would explicitly attempt to impose state net neutrality rules on the operation of internet access service in direct contravention of the FCC’s recently adopted framework. The proposed legislation would do this through several avenues, including regulating interconnection agreements, regulating broadband internet access service providers, establishing a labelling requirement for broadband internet access services and through state contracting. In addition, the legislation would create a privacy regulatory framework that conflicts with the FCC’s longstanding approach to balancing privacy and the delivery of services that consumers want.

The internet is an inherently interstate or international service, and has always been viewed as such by the FCC and the courts. A single webpage may load on a computer in Massachusetts bringing with it bits and pieces of content from dozens of computers located in different states and possibly different countries. It would be impossible to separate out traffic that might somehow flow only within a particular state. And, given how internet traffic flows between, among and across states, a patchwork of state laws attempting to regulate how content and services are delivered over the internet would simply be unworkable. Separate Massachusetts laws attempting to regulate the same conduct through different avenues would create an overlapping patchwork even within the state. In particular, the IP interconnection agreements that the proposed legislation appears to include typically cover traffic flows between providers on a nationwide or regional basis with interconnection occurring at multiple points around the country. These agreements do not separate out traffic flowing to particular states.

In addition to being unwise, state efforts to regulate the internet that are directly inconsistent with federal policies, as these would be, would also be preempted by federal law. As detailed above, the FCC

has put into place a carefully calibrated framework to both protect consumers and competition on the internet and to encourage the investment and innovation we need to broaden the reach of our networks and increase their capacity. This federal policy cannot be overridden by separate state laws or regulations, whether directly or indirectly, for example, through labelling or state purchasing. This proposed legislation appears to attempt to put in place a broad system of state regulation of providing internet access service that the FCC has explicitly rejected. By doing this, the bills would run directly counter to the FCC's recent order and they are unlikely to withstand legal review. Although section 253(b) of the Communications Act of 1934 provides for state authority to take certain actions, as noted in the March, 2018, Report of the Special Senate Committee on Net Neutrality, that section applies only to "telecommunications services." When the FCC's Restoring Internet Freedom order takes effect, broadband internet access service will be an "information service" and will not be a "telecommunications service." Thus, section 253 will provide no support for the actions contemplated by this proposed legislation.

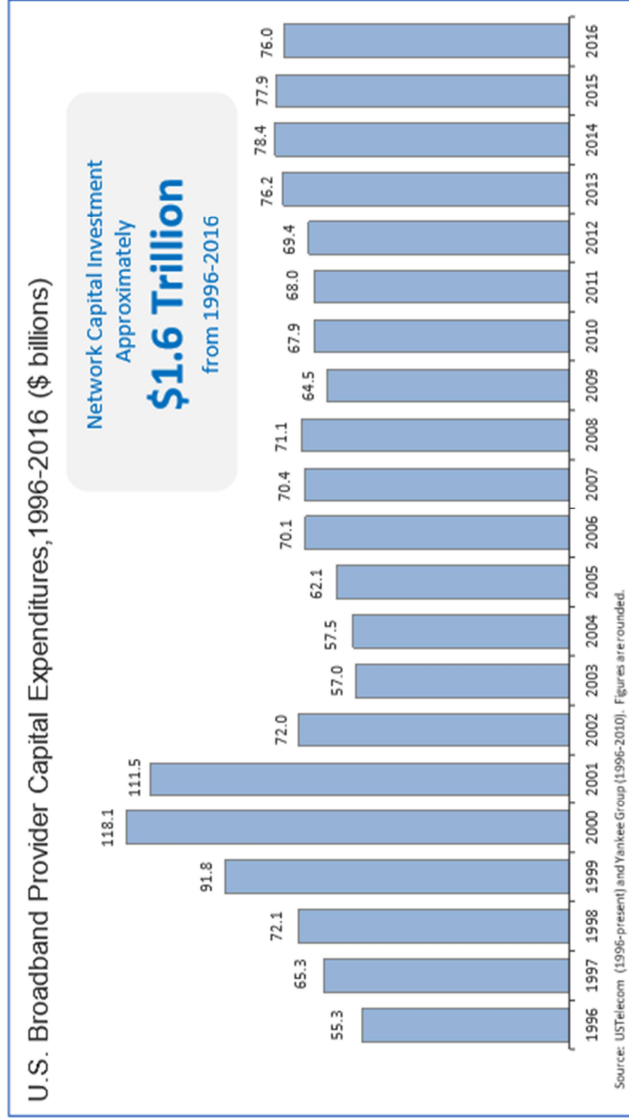
Federal Legislation

USTelecom members and other broadband providers have invested \$1.5 trillion dollars over the last twenty years building the best – as measured by usage -- internet networks in the world. Figure 3. To help maintain our lead, we support Congress putting into place permanent, enforceable federal net neutrality rules that reflect a modern pro-consumer approach to broadband and the internet. These rules should guarantee consumers a clear, single set of protections that will be in force as they use the internet wherever they are. A permanent federal legislative framework will provide consumers with protections as they use the internet and broadband providers with the clarity they need to keep investing billions to deliver internet service across the country.

Thank you for the opportunity to present our views.

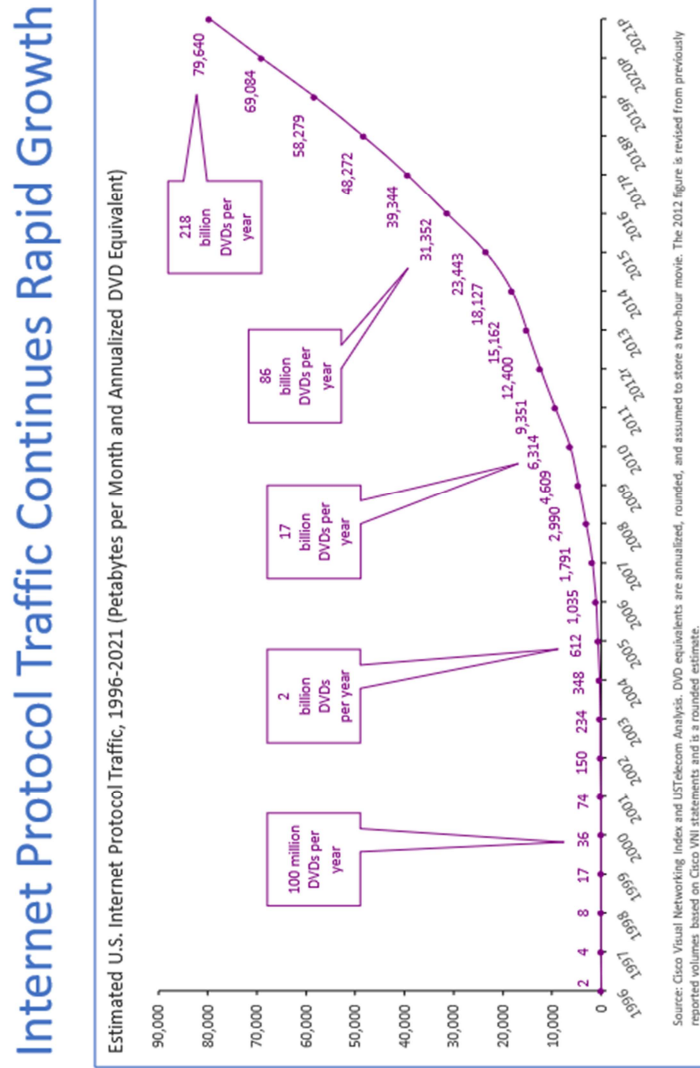
Figure 1

Competing Broadband Providers Have Invested \$1.6 Trillion in Capital since 1996



Data includes wireline, wireless, and cable providers.

Figure 2



U.S. IP traffic is projected to grow 2.5x in the next five years

Figure 3

