Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Repealing Internet Freedom	WC Docket No. 17-108

REPLY COMMENTS OF FREDERICK E. ELLROD III

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I. INTRODUCTION

Prior to the 2015 Open Internet Order ("OIO"),[1] opponents frequently argued that there were no problems that needed to be remedied. That argument was spurious. At least 32 apparent net neutrality violations by Internet service providers (ISPs) have been publicly reported.[2] Moreover, these problems occurred during a period in which ISPs sought to keep detectable violations to a minimum, for fear of triggering regulatory oversight. If the possibility of federal regulation were removed, there would no longer be a reason for ISPs to limit such behavior.

But the *reverse* of the industry's former argument is now actually valid. The sky has not fallen since 2015. ISPs continue to invest in their networks. There is no present crisis demanding Commission action. On the contrary, even industry sources such as NCTA proclaim

[1] In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (2015).

[2] *See, e.g.*, April Glaser, *Why the FCC Can't Actually Save Net Neutrality*, Electronic Frontier Foundation (Jan. 27, 2014), accessed August 27, 2017 – as of the beginning of 2014 alone. *Cf.* "In the Matter of Restoring Internet Freedom," WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 at ¶ 50 (May 23, 2017).

continuing improvement in Internet access – when they are speaking to investors and the public, rather than trying to convince regulators that they are suffering from onerous burdens.[3]

II. THE AMERICAN ECONOMY REQUIRES A COMMON CARRIER COMMUNICATIONS SYSTEM.

The Notice of Proposed Rulemaking ("NPRM") in this proceeding opens by saying, "[f]or almost twenty years, the Internet flourished under a light-touch regulatory approach."[4] This statement is correct only insofar as it recognizes that access to the public Internet started out as a common carrier service, conducted over Title II telephone lines. Users' ability to gain the benefits of dial-up service, and later broadband Internet access service ("BIAS"), hinged on an Internet that behaved like a common carrier, allowing unfettered communication among users (including *inter alia* both consumers and edge providers) without interference by the carriers. It is that flourishing market that the NPRM seeks to dismantle.

Common carriage does not necessarily imply the application of Title II of the Communications Act. Congress could, in principle, create a new common carrier regime under regulatory conditions specific to the Internet. But the Commission in 2015 adopted Title II classification as the soundest and most dependable method of ensuring common carriage, after its attempts to do so using more cautious methods had twice been rebuffed by the courts. Any suggestion that the Commission can ensure open access to the Internet *without* Title II

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[3] *See, e.g.*, NCTA, *America's Internet Speeds Continue to Soar* (June 2, 2017); America is Catapulting into a Gigabit Future (August 24, 2017) (both accessed August 27, 2017). *See also* Comment of Open Media and Information Companies Initiative (Open MIC) at 3-9 (July 14, 2017); Comments of the Writers Guild of America West, Inc. at 3-4 (July 17, 2017) ("Writers Guild Comments"); sources cited in April Glaser, *Trump's FCC Chairman Is Misleading Congress About Net Neutrality*, Future Tense (July 26, 2017) (accessed August 27, 2017).

[4] NPRM at ¶ 1.

classification, at this stage, bears a heavy burden of proving that any proposed lesser means will be sustained on appeal.[5] The Commission is, of course, free to recommend that Congress enact appropriate legislation to achieve a solution beyond the Commission's existing powers.

The American economy requires pathways by which anyone can freely communicate with anyone else, just as it requires physical roads that anyone can traverse to reach any location (which is why the Constitution itself specifically authorized Congress to "establish post offices and post roads"[6]). If the Commission allowed ISPs to convert the Internet into a set of walled gardens, "curated" for their own purposes by the ISPs,[7] it would become imperative for the *federal government* to build a real Internet, where users' communications would be fully protected by the First Amendment.[8] Surely the Commission does not wish to make so massive and expensive a federal project necessary, when simply continuing to require neutral treatment of traffic by private-sector common carriers could achieve the same ends.

III. THE NPRM'S GROUNDS FOR REVERSING THE OPEN INTERNET ORDER ARE INSUFFICIENT.

The NPRM suggests that eliminating net neutrality rules is "likely to increase infrastructure investment."[9] It is not enough, however, simply to assume that giving ISPs the ability to extract monopoly-type rents from the nation's Internet commerce will result in greater infrastructure investment. As recent mergers and acquisitions demonstrate, ISPs are just as

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[5] *See, e.g.*, Reply Comments of the California Public Utilities Commission at 6-10 (August 22, 2017).

[6] U.S. Constitution, Art. I, Section 8.

[7] *Cf.* Giuseppi Macri, *Obama FCC Chief Says Net Neutrality Repeal Will Turn the Internet Into Cable*, Inside Sources (July 26, 2017) (accessed August 27, 2017).

[8] *Cf.* NPRM at ¶ 104.

[9] NPRM at ¶ 53; *see also* ¶ 110.

likely to use more money to buy out other companies – or to increase dividends to their investors. It would be foolish to shower additional funds on ISPs for the sake of greater deployment without making such regulatory favors conditional on specific, verifiable infrastructure investments.[10]

The NPRM proposes to conduct a cost-benefit analysis of its proposed changes.[11] A thorough cost-benefit analysis would be a good thing, as long as it did not purport to exhaustively determine the public interest. But no cost-benefit analysis can be accepted unless it accounts for the effects on edge providers and consumers, as well as on ISPs, of rescinding the open Internet rules. The Internet economy is primarily composed of commerce *over* the Internet, not simply of revenues taken in by ISPs.

As Commissioner Clyburn's dissenting statement points out, the NPRM include "no cogent economic analysis."[12] On the contrary: "From reading the item, it would be reasonable to assume that the key open internet policy question is whether a policy increases or decreases broadband provider capital expenditures. It is a relevant question, but the only econometric analysis that the majority cites for support clearly states that it is "inappropriate [to] use . . . investment as a policy objective."[13] Commissioner Clyburn continues: "the NPRM's analysis fails to take into account what entrepreneurs invest in their internet business, what risk venture

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[10] The Comments of Verizon in this proceeding (July 17, 2017), at 12 ("Verizon Comments"), propose that ISPs have no incentive to "harm the customer experience." They have obvious incentives, however, to extract monopoly rents. *See also* Joint Statement of FCC Commissioner Mignon Clyburn and FTC Commissioner Terrell McSweeny (April 27, 2017) ("We believe Americans will see the Chairman's proposal for what it is: a gift to behemoth incumbent broadband providers at the expense of innovators and consumers").

[11] NPRM at ¶ 105.

[12] Dissenting Statement of Commissioner Mignon L. Clyburn, *see* NPRM at 62, 63 ("Clyburn Statement").

[13] *Id*. at 67 (footnote omitted).

capitalists plow into the internet and telecom market, and what consumers pay for and how they use all these services to create economic value. It even fails to account for broadband investments made beyond narrow capital expenditures, including spectrum purchases and M&A, both of which are indicia of a robust and profitable market for broadband services."[14]

The industry's offerings thus far bear out Commissioner Clyburn's concerns. For example, the Lerner & Ordover economic study presented by Verizon appears to give no attention to the costs the NPRM would impose on edge providers (and hence on their citizens and other businesses that are their customers).[15] Similarly, the Dippon study attached to the Comments of Comcast Corporation does not appear to consider the benefits of the existing rules for edge providers, or the harm of repealing those rules.[16] The discussion of "innovation" in the Comcast Comments (at 37-43) is also purely ISP-focused; it emphasizes "innovations" such as marketing pushes by ISPs to relieve subscribers of limitations the ISPs themselves have created. Comcast's comments include lip service to the interests of consumers (48), but this again relates purely to alleged innovation *by ISPs* and alleged job losses *by ISPs*.

No cost-benefit analysis, whether conducted by the Commission or by the industry, that fails to consider both financial and non-financial effects on the rest of the economy can be accepted as competent evidence or valid findings in this proceeding.[17]

Moreover, any cost-benefit analysis based on ISP behavior in recent years must take into account that ISPs have strong incentives to stall capital expenditures precisely in order to create a perception that investment is decreasing under the open Internet rules. Since most ISPs have

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[14] *Id*.

[15] *See* Verizon Comments.

[16] *See* Comments of Comcast Corporation (July 16, 2017) ("Comcast Comments").

[17] *See* Writers Guild Comments at 18-29.

significant market power, they can defer capital expenditures without the danger of losing customers as a result. Thus, a sound cost-benefit analysis would need to find a way to distinguish between genuine economic effects and intentional "regulatory blackmail" by those making the investments – reluctance to invest until regulatory favors are granted. In fact, however, as noted above, the objective evidence supports a finding of continuing investment in the Internet's infrastructure.[18]

IV. CONCLUSION

The NPRM would have us believe that the only alternatives are government "regulation" of the Internet, and ceding control of the Internet to a few powerful gatekeeper companies. It neglects the third alternative: an open, private-sector Internet that is free of private control on common carrier principles, and free of government control under the First Amendment.

For the reasons indicated above, the Commission should let the 2015 OIO stand. Repealing its rules would be arbitrary and capricious.

Respectfully submitted,

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[18] In recent comments, the Chairman has suggested he would demand a showing of dramatically *increased* investment to justify the existing rules. Jon Brodkin, *Democrat asks FCC chair if anything can stop net neutrality rollback*, Ars Technica (July 26, 2017) (accessed August 27, 2017). The Chairman's position has it backwards. The burden lies with the industry to show *negative* effects under the current law to justify dismantling net neutrality.