Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF HANCE HANEY
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Free Press argues: 1) broadband Internet access service "clearly fits the definition of telecom service," 2) "no viable foundation" for the 2015 *Open Internet* rules presently exists without Title II and 3) the *NPRM's* claim that the *Open Internet Order* 'has put at risk online investment and innovation' is "preposterous."[1]

Free Press and others overlook the fact that the Supreme Court decisively affirmed that broadband Internet access is a Title I information service in 2005, and that the high court could review the Commission's 2015 decision to subject ISPs to Title II utility-style regulation[2] and reach a different conclusion than the D.C. Circuit Court of Appeals. Therefore, the open Internet debate is not necessarily "settled," as parties such as the Internet Association contend, nor does the Commission's 2015 decision imposing Title II utility-style regulation necessarily rest on a "solid legal foundation" that is "legally sustainable."[3] If the D.C. Circuit decision stands, consumers, investors and innovators will face permanent uncertainty due to the fact that broadband Internet access can be regulated or deregulated depending on which party is in power or ideology is ascendant. Far from creating unnecessary uncertainty in the market, the

[1] Comments of Free Press, WC Docket No. 17-108 (Jul. 17, 2017) at 5-7.
[2] *See, e.g.*, "Supreme Court gives cable industry more time to appeal net neutrality ruling," by Harper Neidig, *The Hill* (Jul. 20, 2017).
[3] Comments of the Internet Association, WC Docket N. 17-108 (Jul. 17, 2017) at 2-3.

Commission is making it possible to achieve a reliable outcome with this proceeding. Free Press, the Internet Association and other advocates of dependable bright line rules ought to be talking to their members of Congress, not pressuring the Commission let alone intimidating commissioners.[4] There is a viable alternative to Title II for classifying broadband Internet access—it's called an Act of Congress.

As the Commission noted in paragraph 34 of the *NPRM*, there is compelling legislative history to suggest Congress did not intend to expand Title II to include advanced services, not to mention Congress' declaration in section 230 of the '96 Act 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."[5] The information services classification has protected and nurtured the Internet since the '96 Act was signed into law. For example, two years after the law was enacted the Commission was called upon to resolve an unintended consequence (in the view of some powerful lawmakers and special interests). Defenders of universal service and firms that relied on access charges hadn't anticipated that the Internet would enable substitutes for basic telecommunications services when the '96 Act was drafted. Within two years they became alarmed that Internet service providers could jeopardize affordable phone service. If the Commission had found that ISPs furnished both telecommunications and information services, ISPs would have had to contribute to universal service and pay interstate access charges on their telecom-related revenues. This would have entailed a significant financial burden for ISPs and could have suppressed demand for advanced services.

[4] "Why 'Net Neutrality' Drives the Left Crazy," by Tunku Varadarajan, *Wall Street Journal* (May 19, 2017).
[5] *NPRM*, WC Docket No. 17-108 (May 23, 2017), para. 34.

The Commission affirmed that the telecommunications and information categories in the 1996 Act are mutually exclusive, *i.e.*,

> when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it uses telecommunications to do so.[6]

This was not an arbitrary decision. The Commission tried unsuccessfully for years to maintain a dividing line between telecommunications and information services (previously referred to as basic and enhanced services), ultimately concluding that it wasn't possible.

> [The Commission] found that no regulatory scheme could "rationally distinguish and classify enhanced services as either communications or data processing," and any dividing line the Commission drew would at best "result in an unpredictable or inconsistent scheme of regulation" as technology moved forward. Such an attempt would lead to distortions, as enhanced service providers either artificially structured their offerings so as to avoid regulation, or found themselves subjected to unwarranted regulation. The Commission therefore determined that enhanced services, which are offered "over common carrier transmission facilities," were themselves not to be regulated under Title II of the Act, no matter how extensive their communications components. (footnotes omitted.)[7]

Finally, with regard to the claim by Free Press that there is no risk to online investment and innovation from net neutrality regulation as well as Dr. Christopher Hooton's contention that there has been "No negative impact on telecom infrastructure investment, broadband

[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998), para. 39.
[7] *Id.*, para. 27.

infrastructure investment, or cable infrastructure investment…", Dr. George S. Ford has observed several analytical flaws. Correcting for inflation only, Free Press' data shows capital expenditures are down significantly, according to Dr. Ford—similar to the decline Chairman Pai cited in announcing his intent to review the 2015 *Open Internet Order*.[8] The analysis prepared by Dr. Hooton for the Internet Association contains "made up" data, according to Dr. Ford. Cable industry investment has actually declined 11% since the Commission's 2015 *Open Internet Order* while investment by the member firms of USTelecom has declined 19% over the same period.[9]

[8] G.S. Ford, A Further Review of the Internet Association's Empirical Study on Network Neutrality and Investment, PHOENIX CENTER POLICY PERSPECTIVE No. 17-10 (Aug. 14, 2017) (available at: http://phoenix-center.org/perspectives/Perspective17-10Final.pdf).

[9] G.S. Ford, Reclassification and Investment: An Analysis of Free Press' "It's Working" Report, PHOENIX CENTER POLICY PERSPECTIVE No. 17-04 (May 22, 2017) (available at: http://phoenix-center.org/perspectives/Perspective17-04Final.pdf).

CONCLUSION

Neither Free Press nor the Internet Association or other parties to this proceeding make a compelling case that the statutory definition of a Title II telecommunications service is anywhere near a good fit for broadband Internet access service. They must look to Congress to find the remedy they are seeking. So far they have failed to prove that investment in the network has ne been negatively impacted.

Respectfully Submitted,

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