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

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

REPLY COMMENTS OF
MEDIAFREEDOM

I. Introduction

MediaFreedom[1] would like to reiterate from its initial 17-108 comments our request that the Restoring Internet Freedom (RIF) rulemaking eliminate the Open Internet Order's ("OIO") regulatory overreach, especially as it pertains to the re-classification of ISPs as common carriers. Similarly, MediaFreedom also urges that the resulting rules get rid of, or greatly relax, the FCC's present Net Neutrality regulations on throttling, blocking and paid priority. On the whole, the OIO's Title II Net Neutrality regime is not needed – it does not serve today's converged marketplace, nor the free speech interests of the ecosystem, consumers and society as a whole. The balance of these Reply Comments rebut the spurious contentions by OIO supporters that the rules "do not regulate the Internet," and that they comport with the First Amendment. Neither such contention could be further from the truth.

II. The OIO Regulates The Entire Internet Ecosystem, Not Just ISPs

Most of the commenters in favor of the OIO roundly dismiss the idea that the OIO regulates the Internet ecosystem. As one commenter stated, "[t]he Commission has never regulated 'the Internet,' and nothing in the 2015 order changed that."[2] But this is logically and factually incorrect. During a 2011 Hill briefing (discussing Julius Genachowski's then-Net Neutrality rule), Jefferey Eisenach laid this claim bare, simply noting:

1 MediaFreedom.org is a market-oriented, IRS 501(c)(3) non-profit organization, operating as a watchdog of the so-called digital watchdogs by providing counterpoint to their advocacy in the Congress, the executive branch, the courts, in the states / localities and elsewhere. MediaFreedom.org is supported in part by communications industry and foundation contributions.

2 *See, e.g.,* Comments of Free Press, filed in WC Docket No. 17-108 (July 17, 2017).

> "So, what it's really doing, I think, is [that the FCC is] getting ready to assert authority over the whole operation. And implicitly, it's doing that. I mean, *the Net Neutrality Order is as binding on Apple as it is on Comcast, right? It is equally forceful in saying 'Apple, you can't do the following contract with Comcast,' as it is in saying to Comcast 'You can't do the following contract with Apple*."[3] (Emphasis added)

That statement is as true of the Genachowski rule and it is of the current OIO. The bans on throttling, blocking and paid priority would mean nothing if they applied only to ISPs; they of necessity and design affect the ISP and the behavior of other Internet players with whom they may partner. If a non-ISP's business model calls for any of the above-mentioned bans, well, it had better find another one.

This is of especial concern for the small Internet entrepreneur who wants to use any legitimate tool he or she can to gain a leg up on competition. That entity should be allowed to mix his or her labor, in liberty of contract / association, with ISPs in ways that benefit them mutually. To the extent those partnerships do not contravene public policy (such as for contracts of adhesion, or for illegal acts, etc.), the presumption must be that they should be allowed.

The OIO denies this. It places the onus on the ISP and its partners to forgo business tools employed in every sector of our economy to bring immense benefit to consumers, the marketplace and society. It walls off and protects markets that could be more competitive. It prevents new markets and solutions from proliferating. It takes converged, vertically integrated companies away from a rule-of-reason approach to business development and moves them backward to the Computer Inquiries' separation rules, or the FCC's so-called Fin-Syn prohibitions, which ultimately frustrated the public interest by locking off innovation, competition and voice with an unnecessarily myopic, regulatory prophylaxis.

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3 *See, e.g.,* Mike Wendy, "Eisenach was right – Net Neutrality regulates the entire Internet," MediaFreedom Blog (December 26, 2016), *available at:* http://mediafreedom.org/2016/12/eisenach-was-right-net-neutrality-regulates-the-entire-internet/.

If the OIO's rules were designed to bring about the "next Google" or garage start-up, one should take that with a "big grain of salt," as Free State Foundation's Randy May recently opines. He points out just how important removing the OIO's Internet regulation would be for the new entrant, writing:

> ...[A]bsent rigid net neutrality anti-discrimination mandates, emerging competitors might have an opportunity to strike deals with Internet service providers that give them the opportunity to differentiate themselves with innovative market offerings that appeal to new consumer demands. Or that absent an absolute ban on paid prioritization, new entrants might have an opportunity to strike deals with Internet service providers that allow them more readily to offer innovative new applications.[4]

What May reveals is that in removing the OIO's arbitrary barriers, competition at all layers of the ecosystem would flourish instead of being distorted / frustrated by the bureaucratically-mandated silos / protection-racket erected by the present rule. To this end, the RIF must tear down these silos and free the entire Internet from the OIO's restrictive shackles.

III. The OIO Stands Against The First Amendment

One pro-OIO commenter bluntly asserts, "There is no First Amendment bar to the net neutrality rules."[5] Another states, "by addressing bottlenecks, [the common carrier regime of the OIO] is best suited for promoting these interests of free expression," adding that, in their view, paid prioritization represents a particular form of evil that must be prevented by the OIO, because "[i]f broadband providers can discriminate among content, they can effectively pick winners and losers, interfering with the public's ability to freely educate itself about political, cultural, and social issues – education that is critical to our democracy."[6]

MediaFreedom wholeheartedly disagrees with these fallacious assertions. Not only do the

4 *See* Randy May, "The Next Google," Free State Foundation Blog (August 28, 2017), *available at* http://freestatefoundation.blogspot.com/2017/08/the-next-google.html.
5 Comments of Free Press.
6 *See, e.g.,* Joint Comments of Public Knowledge and Common Cause, "Updated Version," filed in WC Docket No. 17-108 (July 19, 2017).

OIO's per se bans jettison eight decades worth of precedent, which would allow for reasonable discrimination – even as they would apply to "BIAS-provided" paid priority services – they also stand against the First Amendment, being a prior restraint on the speech and association rights of ISPs and their speech partners. Whatever the *public interest* is and its ostensible call to protect against private "gatekeepers" so they do not "pick winners and losers" in the information economy, it / the OIO does not have the authority to override the First Amendment. If there is any per se ban to protect free expression here, it's to prevent the government from imposing its view of what the correct "digital broccoli" or other viewpoints are for Americans. The OIO plainly ignores this, censoring ISPs and their speech partners to achieve what the FCC believes is proper free expression for the Internet.

Silicon Valley's response stemming from the Charlottesville riots highlights the absurdity of the present "anti-gatekeeping" rule. The very companies which championed "free speech" via Net Neutrality – e.g., Google, Facebook, Twitter and other Silicon Valley oligarchs – are now knee deep in expunging their own properties (and users) of speech they don't approve of in light of the recent upheaval. This is not to mention last year's fake news hysteria, which had the Valley working to curate "better" news choices for users; efforts to end online "hate" and bullying; and establishment of Orwellian "trust and safety councils," among other work, from some of the aforementioned companies to prune "undesirable voices" from their virtual real estate.

Their actions say they own the issue, and they are working in overdrive to make their brand better and "safer." For whom? For their shareholders. But not free speech. MediaFreedom is alright with this, however. That is their wont, legal and otherwise. But, they can keep their free speech preaching to themselves, especially as it pertains to the OIO / Title II Net Neutrality – a law they wrote with President Obama and the prior FCC designed to stop the "evil" ISPs from *blocking free speech*.

Silicon Valley and the "edge" are now using a piece of the law – the '96 Telecom Act's Section 230 – to extricate the "hateful" weeds from their platforms, blocking speech that doesn't suit their brand image. The ironic thing here is that ISPs, too, can avail themselves of that same piece of the law

(which the OIO could not rewrite or undo)[7] to block harassing or otherwise objectionable speech if they wanted to *but have chosen not to*. All speech may traffic across their networks, unlike those of "free speech" Silicon Valley. Consequently, it seems the real censors are the Silicon Valley oligarchs, not the ISPs.

This regulatory disparity / absurdity must end. If the OIO were truly "open," it would foster all business models and speech partnerships, including much maligned paid priority agreements. It does not. "Open" means only what Uncle Sam decides it is; no one else may make that determination. In an open society which depends on the free flow of information to prosper, speech regulations (should they ever be needed) must be crafted with a strong presumption toward fostering as much speech and information as possible. The previous Title I "light touch" regime achieved that in a way which benefited competition, consumers and society, without perverting the underlying speech and technology markets which delivered those benefits. The OIO moves in the opposite direction, being at its essence a "media reform" law that by design must limit the voice of some – e.g., ISPs and their partners – in order to build a "fair" society for the collective. It does so flagrantly despite the fact that exceptional circumstances, which would allow some leeway on First Amendment matters, are plainly absent.[8] This abridgment of speech and association rights must be rejected in the final RIF rule.

IV. The RIF Will Help Congress Resolve "Net Neutrality" Once And For All

As we stated in our initial comments, MediaFreedom believes the RIF rulemaking represents an important step in rectifying much of the regulatory overreach of the prior Commission. If the rulemaking does not gut the former rules in their entirety, we hope those that remain will provide a "light touch," comprehensive Federal framework to guide the development and growth of the Internet ecosystem – one which recognizes the preeminent Federal interests at stake here, but which also allows states to experiment consistent with this framework, such as for one-touch legislation / rules (and their

7 47 U.S.C. § 230(c)(2)(A) allows an "interactive computer service," such as that provided by an edge provider and / or an ISP, to block, among other things, "harassing" or "otherwise objectionable" content at their good faith discretion.

8 Such as the presence of market power in the broadband marketplace, or a *de jure,* monopoly-regulated marketplace, among other factors.

like) to remove barriers to the placement of communications infrastructure for the marketplace, etc.

In the long run, however, Congress will have to deal with the Chevron-fueled policy ping-pong game, which the rulemaking cannot do on its own. MediaFreedom does not prefer the idea of legislative (or even regulatory) Net Neutrality because we believe the market, among other mechanisms, does a far better job of regulating the Internet than do prophylactic laws or rules. But, the reality of the situation is that Net Neutrality will continue to suck the energy out of U.S. communications policy until Congress stops this mess once and for all.

To this end, MediaFreedom believes Congress should at a minimum "clarify" the FCC's expansive powers to police the "open Internet"; and allow reasonable business practices, like paid priority and flexible use of end-user data, subject to clear FTC jurisdiction, applied equally across the entire ecosystem. That stated, we urge you to move forward with your efforts to fix the "fix" that was never needed in the first place – Title II Net Neutrality – as it will rapidly heal the marketplace from the injuries of the last Commission, while also bridging the gap to a more permanent solution from Congress to put this needless, two-decade-long "debate" to rest.

V. Conclusion

The OIO bollixes up the entire Internet with needless, anti-competitive and free speech-killing regulation. This does not serve the Internet ecosystem and will not help it grow. Accordingly, we urge the Commission to eliminate, or greatly pare back, the OIO so that we may return to the "light touch" regulation which made the Internet so tremendous for individuals, the marketplace and society as a whole.

Respectfully submitted,

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