

November 30, 2017

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation: *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108.

Dear Ms. Dortch:

On November 28, 2017, I met with Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety for Commissioner Rosenworcel. On November 29th, I met separately with Amy Bender, Legal Advisor, Wireline for Commissioner O’Rielly; Jamie Susskind, Chief of Staff for Commissioner Carr; and Claude Aiken, Legal Advisor, Wireline, for Commissioner Clyburn. In all of the meetings, I discussed CCIA’s concerns regarding the fate of the Internet ecosystem – startups, small businesses, nonprofits, consumers, and BIAPs – if the FCC adopts the Chairman’s proposed *Report & Order*¹ in the proceeding referenced above.

CCIA, for over four decades, has stood for open markets and competition, including strong rules to protect the open Internet. CCIA maintains that the FCC should keep its 2015 *Open Internet* rules,² which were approved by the D.C. Circuit just one year ago.³ I urged that the FCC seriously consider the consequences of abandoning its Congressionally designated role.

Some proponents of the draft *Report & Order*, including the FCC Chairman and the Acting Chairwoman of the Federal Trade Commission (FTC),⁴ believe that the FTC is capable of stepping into the void that the FCC is set to leave regarding oversight of BIAP practices. However, just a few years ago, the late FTC Commissioner J. Thomas Rosch, a Republican, stated: “Given its institutional design, the FTC may not be well suited to deal with the subject of internet neutrality.”⁵ CCIA recognizes that the FTC has a long history of enforcing consumer protection and competition laws; however, CCIA asserts that the FTC cannot enforce open

¹ *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108 (rel. Nov. 22, 2017) (“Draft *Report & Order*”).

² *In re Protecting and Promoting the Open Internet (OIO)*, 30 FCC Rcd. 5601 (2015).

³ *U.S. Telecom Ass’n v. Fed. Comm’n Comm’n (USTelecom)*, 825 F.3d 674 (D.C. Cir. 2016).

⁴ Ajit Pai, Chairman, Fed. Comm’n Comm’n, Remarks of Chairman Ajit Pai on Restoring Internet Freedom (Nov. 28, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1128/DOC-347980A1.pdf; Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Putting the FTC Cop Back on the Beat Remarks at The Future of Internet Freedom An R Street Institute and Lincoln Network Event (Nov. 28, 2017), https://www.ftc.gov/system/files/documents/public_statements/1280393/putting_the_ftc_cop_back_on_the_beat_mko.pdf.

⁵ Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission? Remarks of J. Thomas Rosch Commissioner, Federal Trade Commission before the Global Forum 2011: Vision for the Digital Future Brussels, Belgium (Nov. 7, 2011) at 19, http://globalforum.items-int.com/gf-gf-content/uploads/2014/04/Thomas_Rosch_SPEACH.pdf.

Internet rules regarding telecommunications network management in the same ways that the FCC can. Businesses, startups, consumers, the Internet ecosystem will suffer as a result of this *Report & Order*.

- **Congress Designed the FCC and FTC as Two Different Agencies that Do Two Different Things.**

It is important to note the critical differences between the FCC and FTC. The agencies were created by Congress at different times, with different jurisdictions and different regulatory capabilities. The Communications Act clearly designates the FCC as the expert agency of the Federal government that oversees communications networks.⁶ The FCC has jurisdiction over a sector of the economy while the FTC's consumer protection mandate is unspecialized, and extends over several sectors of the economy.

The differences in their jurisdictions are also reflected in the differences between the capabilities that Congress gave to the respective agencies. Congress gave the FCC the ability to enforce *ex ante* rules to prevent certain behaviors by providers of telecommunications services. In contrast, Congress gave the FTC mostly *ex post* enforcement authority with limited *ex ante* rulemaking capabilities. The practical effect of these two different authorities and capabilities is that FTC's *ex post* actions are aimed at restoring market competition that has been distorted due to business anticompetitive conduct. Sector-specific, *ex ante* rules are therefore needed in this case, to prevent economic harms that may result given that the market lacks sufficient competition to discipline harmful behavior.

- **Differences in the FTC's Enforcement will Create Suboptimal Results for the Internet Ecosystem.**

The differences between FCC's and FTC's authorities extends to their enforcement capabilities. Because the FTC has generally acted as an *ex post* competition enforcer, it typically addresses competition harms after they have occurred. This is instructive if the FCC does indeed abolish its *Open Internet* rules, thereby leaving its oversight responsibilities to the FTC. If the *Open Internet* rules disappear, there would be no rules proscribing a BIAP that decides to block, throttle, or otherwise generally discriminating in a harmful way the traffic flowing through its network. Because the FCC currently has bright-line rules proscribing this behavior, it can actively investigate and can compare any alleged violation against those prohibitions. If the FCC eliminates the *Open Internet*, the FTC would have to wait for a BIAP to act and then for an end user (consumer, startup, nonprofit, etc.) to be harmed and to file a complaint. Then, the FTC would have to be persuaded to begin an investigation.

⁶ 47 U.S.C. § 151 (2012).

- **The Highly Concentrated BIAS Marketplace Would Pose Problems for FTC Enforcement.**

The FTC's competition role has generally focused on responding to problematic acts or practices in otherwise competitive markets; however, the market for BIAS is highly concentrated. BIAPs control a bottleneck through which content must pass to reach subscribers, meaning that BIAPs have a unique ability to foreclose competitors. If a BIAP engages in discriminatory conduct, because of the lack of competition, most consumers and businesses have few if any options for switching if they are harmed. For example, over the past few years, there has been a proliferation of online video streaming options, including some by proponents of this draft *Report & Order*.⁷ These services have become popular with consumers because the *Open Internet* rules provide assurances that their BIAP is not allowed to block, throttle, or discriminate against streaming options that the BIAP does not own. Without enforceable, bright-line rules, a BIAP could charge an unaffiliated service inflated prices or deny access to the BIAP's content. The FCC should consider the effects of the draft *Report & Order* on emerging services and technologies like "Internet of Things" (IoT) devices that require connectivity and could similarly be affected if BIAPs are allowed to favor their own products and services on their networks.

- **It is Currently Unclear How the FTC Would Enforce Against Discrimination on Communications Networks.**

The fact that Congress gave the FCC and FTC different jurisdictions is even more salient in light of the recent Ninth Circuit ruling in *FTC v. AT&T Mobility*,⁸ which held that the exemption⁹ for common carriers from FTC enforcement is status-based, rather than activities-based. Even if the FCC successfully re-reclassifies BIAS through this proceeding, because most major BIAPs provide common carrier telephony services in addition to BIAS, under that decision, they will remain outside of FTC jurisdiction.

It is unclear how the FTC could effectively pursue enforcement actions against a BIAP that decides to engage in practices that would be proscribed under the current *Open Internet* rules. It has been suggested that the FTC could use Section 5 of the FTC Act because it prohibits "unfair methods of competition" (UMC), including conduct that violates either the antitrust laws or Section 5 standing alone. While the FTC has a history of using Section 5 to protect consumers from unfair or deceptive acts and practices in data security and privacy,¹⁰ it is unclear how Section 5 would be applied if a BIAP began arbitrarily blocking or throttling content from a competitor, and current FTC Commissioner Terrell McSweeney has identified "limits to the

⁷ See David Lieberman, *AT&T Launching DirectTV Now with Introductory Offer of 100+ Channels for \$35 a Month*, DEADLINE HOLLYWOOD (Nov. 26, 2016), <https://deadline.com/2016/11/att-introduces-directv-now-1201860668/>.

⁸ Fed. Trade Comm'n v. AT&T Mobility, L.L.C., 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

⁹ Fed. Trade Comm'n Act, 15 U.S.C. § 45(a)(2) (2012).

¹⁰ See Comments of FTC Staff, WC Docket No. 17-108, at 13; *see generally* Privacy and Security, Fed. Trade Comm'n, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security>.

effectiveness of [the FTC's] tools in policing nondiscrimination on networks and protecting competition in markets that are already highly concentrated.”¹¹ Some, including a former Republican FTC Commissioner, have cautioned against using Section 5 as standalone authority.¹²

Pursuant to Congressional direction, the FCC has developed expertise regarding the dynamics of the BIAS marketplace, BIAP network management practices, and detection of network discrimination. These are areas of expertise that the FTC does not have but would be necessary if a complaint were brought against a BIAP that engaged in practices currently proscribed by the *Open Internet* rules.¹³ Moreover, if the FCC abdicates, the FTC would have to expand its mandate to address the BIAPs market failure. Congress would have to provide additional resources to ensure that the FTC can properly take on this new, substantial workload.

- **Bundling Competition and Network Enforcement Within One Agency Has Previously Failed.**

The practical effect of the draft *Report & Order* is that the FTC would assume the FCC's regulatory responsibilities for the Internet sector. While there are many examples where competition and consumer protection have been bundled under a single agency, combining sector-specific regulation and competition has previously proven unsuccessful. The Organisation for Economic Co-operation and Development (OECD) has commented on attempted combinations of antitrust and sector regulators, identifying key differences that explain how they can lead to unsuccessful outcomes: “Sectoral regulation by definition applies to specific sectors (usually network industries or natural monopolies) and can involve activities like setting prices or access rules, granting licenses, and engaging in ongoing monitoring of the industry; whereas, competition laws generally apply economy-wide and place emphasis on market-driven solutions involving minimal ongoing oversight.”¹⁴

¹¹ Comments of Terrell McSweeney, Commissioner, Fed. Trade Comm'n., WC Docket No. 17-108 (July 17, 2017), at 3, https://www.ftc.gov/system/files/documents/public_statements/1231533/mcsweeney_-_fcc_comment_7-17-17.pdf [hereinafter “Comments of FTC Commissioner McSweeney”].

¹² William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L. J. 929, 933 (2010), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-and-application-section-5-ftc-act-marc-winerman/2010kovacicwinermanpolicyapp.pdf (“Since enactment of the FTC Act in 1914, the adjudication of cases premised on the Sherman Act, rather than upon the FTC Act, has provided the main vehicle for setting boundaries for business behavior.”); *see also id.* at 933-34 (“One would be hard-pressed to come up with a list of ten adjudicated decisions that involved the FTC's application of Section 5 in which the FTC prevailed and the case can be said to have had a notable impact, either in terms of doctrine or economic effects.”).

¹³ *Accord* Oral Statement of Commissioner Terrell McSweeney House Judiciary Committee (Nov. 1, 2017), https://www.ftc.gov/system/files/documents/public_statements/1268963/mcsweeney_oral_testimony_to_us_house_of_representatives_committee_on_the_judiciary_11-1-17_.pdf (“While it is true that the FTC possesses a great deal of expertise in the areas of antitrust and consumer protection, it does not possess specialized subject-matter expertise in telecommunications, data network management practices, or in detecting instances of data discrimination.”).

¹⁴ *Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015 Key points of the Roundtables on Changes in Institutional Design*, OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, (May

Recent experiences show that bundling a sector-specific regulator with a competition/antitrust authority can yield harmful results. The experience of the *Comisión Nacional de los Mercados y la Competencia* (CNMC) is illustrative and analogous to what could happen if this draft *Report & Order* is approved. In 2013, Spain combined its competition and regulatory authorities, which included its telecommunications regulator. However, this experiment failed so spectacularly that Spain is now separating its competition and sectoral regulators.¹⁵ Since the CNMC came together, prices for telecommunications services have increased notably, especially for mobile.¹⁶ Spain has a highly concentrated fixed and wireless broadband marketplace. In addition to governance problems at the combined agency, it has been criticized as ineffective in policing harms, and courts have overturned its decisions.¹⁷ The European Commission strongly criticized the agency, in particular, for not conducting an analysis of the telecommunications marketplace since 2012.¹⁸ Furthermore, prominent economist Gerard Llobet opined: “Without a doubt, it is necessary to break up this Frankenstein CNMC and look for a more coherent and operative structure of these organisms . . . In all regulated markets, the role of the CNMC is much less important than it would be desirable (and of what is usual in countries with more mature institutions) and, in some markets, the reforms that were carried out during the last legislative session contributed to the superregulator having even more reduced powers.”¹⁹

18, 2016),
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)1/ANN9/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En).

¹⁵ Melissa Lipman, *Spain Looks To Split Up Young Competition Watchdog*, LAW360 (Mar. 1, 2017), <https://www.law360.com/articles/897005/spain-looks-to-split-up-young-competition-watchdog>; see also Luis Castro, *Farewell to the young CNMC*, OSBORNE CLARKE (Feb. 27, 2017), <http://www.osborneclarke.com/insights/farewell-to-the-young-cnmc-2/> (explaining how CNMC will now be split into the Independent Regulatory Authority of the Markets (“AIREM”), which will supervise regulated economic sectors, like gas and electricity markets, communications, and railways and airports, and the Independent Authority on Defence of Competition (“AIDeCo”) will be enforce the European and Spanish competition laws as well as consumer protection laws).

¹⁶ Claudi Pérez and Ramón Muñoz, *Bruselas expedienta a la CNMC por no analizar el mercado de telecomunicaciones*, EL PAÍS (Oct. 16, 2017), https://elpais.com/economia/2017/10/15/actualidad/1508091768_015919.html (“At the end of 2016, the average consumption of Spanish households for telecommunications services cost 69.2 euros per month (VAT included), 4.7 euros more than a year earlier, according to the report *La Sociedad en Red 2016*, which was developed by the National Observatory of Telecommunications and the Information Society (ONTSI) of the Ministry of Industry”) (translated from original text in Spanish).

¹⁷ Francisco Marcos, *Cuatro años de CNMC: menos defensa de la competencia y peor supervisión regulatoria*, EL PAÍS (Oct. 10, 2017), https://elpais.com/economia/2017/10/10/actualidad/1507660618_461566.html.

¹⁸ See Pérez and Muñoz, *supra* note 16 (mentioning a letter from the Vice President of the European Commission, Andrus Ansip, requesting that the CNMC investigate “whether the telecommunications market is really competitive, and, in that case, impose measures to prevent abuse of significant market power”) (translated from original text in Spanish).

¹⁹ Gerard Llobet, *La Separación de la CNMC: Reforma o Distracción*, NADA ES GRATIS (Apr. 4, 2017), <http://nadaesgratis.es/gerard-llobet/la-separacion-de-la-cnmc-reforma-o-distraccion> (translated from original text in Spanish).

The combination of Spain's sectoral regulator of a highly concentrated market and its competition authority provides examples of how the FCC's draft *Report & Order* could leave consumers, businesses, and the entire internet ecosystem worse off. As discussed previously, sectoral regulators focus on their sectors of expertise and write specific rules tailored to their industries that often aim to prevent abusive practices. Competition authorities generally take a more macro view and focus on *ex post* enforcement. As evidenced in Spain, these agencies often have conflicting mandates that could lead to regulatory paralysis or capture. In the case of practices that are currently proscribed by the *Open Internet* rules, there is serious concern that a competition authority like the FTC, would be ill-equipped to police network management practices.

- **Businesses Depend on Certainty – the FCC's Draft *Report & Order* Creates Uncertainty.**

CCIA agrees with FTC Commissioner McSweeney that “*ex ante* rules (like the *Open Internet* rules) provide innovators with confidence that discriminatory network access will not threaten their chances for competitive success.”²⁰ There are numerous businesses and emerging industries that depend on connectivity. The assurance that their Internet traffic will be treated the same as more established and potentially deep-pocketed competitors ensures that they have an equal chance to reach prospective customers.

CCIA continues to take issue with the Commission's over-reliance on two overly-simplistic reviews of industry investment data. The FCC should consider the experiences of businesses that fall outside of the twelve biggest BIAPs. Earlier this year, forty smaller ISPs explained to the FCC that net neutrality rules have actually helped investment.²¹ For example, other studies show that based on ISP filings to the SEC, investment actually increased 5.3% or \$7.3 billion, from 2013-14 to 2015-16.²² Furthermore, the trade association for cable providers proclaims on its website that “Cable has invested over \$275 billion in capital infrastructure over the last 20 years” with an accompanying graphic, showing investment continued to increase in 2014, 2015, 2016, and 2017, contradicting its own claims that the *Open Internet Order* decreased investment.²³ The FCC should consider other investment statistics, including venture capital investors; for example, “More than 7,750 venture-backed companies received \$69.1 billion in funding in 2016, representing the second highest annual total—after 2015—in the past 11

²⁰ Comments of FTC Commissioner McSweeney, at 4.

²¹ Letter from A Better Wireless, NISP, LLC *et al.* to Ajit Pai, Chairman, Fed. Comm'n's Comm'n (Forty ISPs Letter) (June 27, 2017), available at <https://ecfsapi.fcc.gov/file/106271543602165/ISP%20letter%20to%20FCC%20on%20NN%2C%20Privacy%2C%20Title%20II.pdf>.

²² Ellen Satterwhite, *Internet Association Debunks Claims that Strong Net Neutrality Protections Hurt Internet Investment*, DISTRICT DISPATCH (May 17, 2017), <http://www.districtdispatch.org/2017/05/debunk-claim-net-neutrality-protections-hurt-investment/>.

²³ *Tracking Cable's Investment in Infrastructure*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, <https://www.ncta.com/industry-data> (last visited Nov. 29, 2017).

years.”²⁴ The FCC should also look at emerging industries,²⁵ like IoT, where contrary to the Singer/Ford timelines, “Deal count and capital invested were relatively steady from 2007 to 2013; two years later, however, both totals had nearly doubled on a yearly basis.”²⁶ CCIA encourages the FCC to examine the substantial record evidence that contradicts the Singer and Ford data reviews.

- **CCIA Supports Calls for Public Hearings.**

Recently, two Commissioners have called for public hearings to be held on this issue.²⁷ Given the complexity of the issue and its potential wide-ranging effects on the U.S. economy, CCIA encourages the FCC to hold public hearings on the draft *Report & Order*.

This *Report & Order* will actually exacerbate legal uncertainty and could adversely affect not only network investment, but also investment in other parts of the Internet ecosystem. Notwithstanding the lack of clarity regarding the FTC suddenly being thrust into oversight of communications networks where it has limited experience and from which Congress has previously exempted its authority, passing this draft *Report & Order* will further drag out this issue as it will undoubtedly be challenged at the appellate level.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission’s rules.

Respectfully submitted,

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²⁴ Press Release, Ben Veghte, NVCA, 2017 NVCA Yearbook Highlights Busy Year for Venture Industry and NVCA (Mar. 6, 2017), <https://nvca.org/pressreleases/2017-nvca-yearbook-highlights-busy-year-venture-industry-nvca/>.

²⁵ *Expanding Horizons: Corporate Investors Bet On Travel Tech*, CB INSIGHTS (Nov. 3, 2017), (“[T]he number of corporate-backed deals directed towards travel tech startups soared, growing from just 18 deals totaling \$154M in 2013 to over 65 deals worth \$1.7B in 2017 YTD.”).

²⁶ Mikey Tom, *IoT Breakdown: VCs betting billions on the connected world*, PITCHBOOK (Dec. 07, 2016), <https://pitchbook.com/news/articles/iot-breakdown-vcs-betting-billions-on-the-connected-world>.

²⁷ Jessica Rosenworcel, *I’m on the FCC. Please stop us from killing net neutrality*, THE LOS ANGELES TIMES (Nov. 22, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-rosenworcel-fcc-net-neutrality-repeal-20171122-story.html>; Mignon Clyburn, *The FCC Should Not Give Broadband Providers the Keys to Your Internet Freedom*, (Nov. 29, 2017), https://www.fcc.gov/news-events/blog/2017/11/29/fcc-should-not-give-broadband-providers-keys-your-internet-freedom?utm_campaign=Newsletters&utm_source=sendgrid&utm_medium=email (“My fellow Commissioners would benefit from hosting their own public forums and listening to the concerns raised by consumers and small businesses. Doing so would allow them to hear first-hand on what it means to access the internet without fear that their broadband provider will slow down or block their favorite online applications and services.”).

Marlene H. Dortch
November 30, 2017
Page 8

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