December 7, 2017

Ms. Marlene H. Dortch

Secretary

Federal Communications Commission

445 12th Street, SW

Washington, DC 20554

**Re: Restoring Internet Freedom WC Docket No. 17-108.**

Dear Ms. Dortch:

This written *ex parte* replies to the draft Declaratory Ruling and Report and Order (*Draft Order*) in the above captioned proceeding. Specifically, I write to respond to the following:

1. The Commission fails to explain why investment, rather than increases in speed and deployment, are the relevant measures of the success or failure of the current broadband regulatory regime.
2. The Commission nowhere evaluates the significant disruption in traffic caused by the “peering dispute” between Netflix and the largest ISPs which took place from 2013-2014. This is profoundly relevant, for multiple reasons. The Commission failed to consider the widespread impact on the broadband ecosystem during the “peering dispute” because of prolonged, sustained congestion of interconnection points.[[1]](#footnote-1)
3. The Commission’s novel description of how an ISP functions, if adopted will cause ISPs to lose their current status under the Digital Millenial Copyright Act (DMCA) as “transitory digital networks” protected by the safe harbor provision of Section 512(a), and would instead require carriers to comply with the more onerous and burdensome conditions of the DMCA’s “Notice and Takedown” provision.[[2]](#footnote-2)
4. Finally, while I appreciate the Commission’s determination that I am a better judge of Comcast’s motivations in the Bittorrent blocking than the Commission itself,[[3]](#footnote-3) the conclusion of the blog post cited undermines the basic premise of the Commission’s conclusion that permitting such “network management” techniques encourages the creation of artificial scarcity and provides an alternative to the expense of investing in network improvement and expansion. Accordingly, if the Commission intends to defer to my evaluation, it should – as an APA matter – defer to my entire evaluation.

**The Commission Fails To Explain Why Consistent Growth in Speed and Deployment – the Hallmarks of Success Under the Explicit Direction of Congress – Are Ignored In Favor Of Irrelevant Evaluation of Carrier Expenditures.**

Congress has been quite explicit in why it has conferred on the Commission the responsibility to ensure timely deployment of broadband to all Americans. The Broadband Data Improvement Act of 2008, amending Section 706 of the 1996 Telecommunications Act, explicitly found that continuing progress in deployment and adoption is vital to the continued health and economic wellbeing of the nation.[[4]](#footnote-4) These findings were further reinforced by the explicit findings in the American Recovery and Reinvestment Act which emphasized the important social and economic benefits that derive from constantly improving broadband capacity and speed.

No one questions the evidence in the record that in the two years since the Commission reclassified broadband and adopted the open Internet rules, carriers have provided ever faster speeds. Indeed, Charter posted on its policy blog that it had significantly increased its investment, dramatically improving speeds for customers, because “Since 2014, Charter has invested more than $21 billion in these critical areas.”[[5]](#footnote-5) While it is certainly true that investment by carriers (and others) bears some relationship to these improvements. It is also true that one would expect that continued changes in technology would – in accordance with Moore’s Law – allow providers to upgrade their networks at lower cost.

The Commission’s analysis is utterly irrational, in that the less efficiently an ISP makes capital investment, the more successful the Commission’s policy. Sprint was forced to completely dismantle its WiMAX Network and replace it with an LTE network, but the Commission would consider this massive rebuild as evidence of a policy success for no better reason than Sprint spent money. By contrast, ISPs increasing the efficiency of investment to produce higher speed more cheaply – what one would expect of profit maximizing firms – constitutes proof of a failure of Commission policy.

To believe this, to quote the 3rd Circuit from *Prometheus Radio v. FCC*, “would require us to take leave of our senses.” But the Commission nowhere explains how the purported decline in investment can be considered a failure of policy, rather than a triumph of profit maximizing efficiency. This is why it is the benchmarks that *Congress* requires, rather than the Commission’s conclusion that spending is spending regardless of the efficiency of the result. This might be true if Congress had intended deployment of broadband as some sort of eternal Keynsian stimulus, but it makes no sense given the stated purpose of Congress contained in Section 1301 and the ARRA.

**The Commission’s Failure To Consider the Broad Consequences of the Two Most Egregious ISP Conduct Failures of 2014 Is Arbitrary and Capricious.**

In recent days, Chairman Pai and Commissioner Carr have repeatedly emphasized that they merely intend to return the regulatory regime to what it was in 2014. Even if that were what the Order actually does (which it is not), this is noteworthy because the two most egregious examples of ISP behavior occurred in 2014 – and the Commission nowhere discusses them.

First, the largest ISPs and Netflix continued to have an interconnection dispute beginning in 2013 to 2014. Public reaction to the revelation that Netflix was forced to pay an additional interconnection fee to Comcast to deliver its content at suitable speed to make the service usable created the largest public backlash to date against the failure of the Commission to have meaningful net neutrality rules. It was this incident that prompted the famous John Oliver episode on network neutrality, which called out this specific incident as “cable fu\*\*ery.” This became the archetype for the public of why net neutrality rules were necessary, and as a consequence the Commission included in the 2015 Order rules to ensure reasonable interconnection conditions.

This incident is also noteworthy because, as documented by M-Labs and reported by OTI,[[6]](#footnote-6) the damage was not limited to Netflix alone. The congestion of the interconnection links produced widespread harm and degraded operation of *all* Internet traffic. As the Commission discussed extensively in the 2015 Order, this caused widespread harm to consumers and enterprise customers. Yet the Commission does not even *discuss* this incident and its impacts when considering whether to eliminate its authority over interconnection or the last mile.

Additionally, despite the prolonged nature of the dispute, the substantial ire of customers and the public, and the widespread associated spill over harm, neither the FTC nor popular backlash mitigated the conduct. Additionally, Charter is using the text of the *Draft Order* to seek dismissal of the state consumer protection law suit filed by the Attorney General of New York. The massive failure of every single safeguard cited in the *Draft Order* with regard to the longest and most prolonged incident that prompted the 2015 Order undermines the Commission’s conclusion with regard to their sufficiency. Likewise, the failure of the Commission to consider that Verizon continued to use it’s “super cookie” until the Commission reclassified broadband as Title II undermines the conclusion that broadband carriers are in the least deterred by the threat of FTC enforcement.

**The Description of ISP Services Adopted Is Not Consistent With The DMCA Safe Harbor Currently Provided to ISPs.**

The insistence that ISPs and edge providers be treated identically supports the same conclusion. Yet the Commission nowhere even assess the risk, or additional cost, of subjecting ISPs to this more intrusive regime.

Respectfully submitted,

*/s/ Harold Feld*

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1. *See* Beyond Frustrated: The Sweeping Consumer Harms As A Result of ISP Disputes, Open Technology Institute (2014) (“*Beyond Frustrated*”). [↑](#footnote-ref-1)
2. 17 U.S.C. §512. [↑](#footnote-ref-2)
3. See *Draft Order* Footnote 412. [↑](#footnote-ref-3)
4. 47 U.S.C. § 1301. [↑](#footnote-ref-4)
5. http://policy.charter.com/blog/increasing-broadband-speeds-giving-customers-less/ *See also* Harold Feld, “NCTA Agrees Virtuous Cycle Totally Working,” Wetmachine (June 12, 2017) and sources linked to therein. Available at http://www.wetmachine.com/tales-of-the-sausage-factory/ncta-agrees-title-ii-virtuous-cycle-totally-working-or-pais-economics-v-the-actual-real-world/ [↑](#footnote-ref-5)
6. *More Then Frustrated supra.* [↑](#footnote-ref-6)