MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
1025 connecticut ave. nw, suite 1110
washington, dc 20036
tel 202.265.1490
fax 202.265.1489

freepress
www.freepress.net

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Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

RE: WC Docket No. 17-108

Dear Ms. Dortch:

Free Press has commented frequently in this proceeding on a wide range of issues raised by the Commission's May 2017 Notice of Proposed Rulemaking in the above-captioned docket.[1] We have disagreed with the Commission's proposal on many substantive and procedural grounds including but by no means limited to: the proposed reclassification of broadband internet access services as information services; the impact of the classification decision on investment; the proposed repeal of Net Neutrality rules prohibiting throttling, blocking, and paid prioritization; the adequacy of various sources of authority for the Commission to promulgate rules governing broadband internet access services; and the adequacy of the Commission's record evidence and conduct of this proceeding.

In general, Free Press supports the retention of transparency rules for broadband internet access service, but not solely those transparency provisions because that offers internet users no real protection. Yet even without regard to the inadequacy of the transparency claims in the Draft Order,[2] that proposal – and specifically the legal authority for it – were not noticed in the NPRM. Thus, the Draft Order's simplistic assertion that, for example, no party objected to the use of Section 257 as authority for transparency requirements[3] is easy to explain: if no parties objected to this proposal it is precisely because interested parties received no notice whatsoever of this legal authority theory. We had no opportunity to comment on the suitability of Section 257 as a substantive grant of authority for retaining transparency rules in the Draft Order, nor to point out the obvious flaws of such a claim.

The Draft Order proposes a consumer protection regime based solely on making broadband providers' traffic management practices (regarding blocking, throttling, and paid prioritization) transparent and known to either their customers or to the Commission.[5] The Draft Order's stated theory is that if users know their broadband providers' policies they can either

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[1] *See Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("NPRM").
[2] *See Restoring Internet Freedom*, WC Docket No. 17-108, Public Draft of Declaratory Ruling, Report and Order, and Order, FCC-CIRC 1712-04 (rel. Nov. 22, 2017) ("Draft Order").
[3] *See id* ¶ 229.
[5] *See id*. ¶¶ 229-38 & n.823.

switch providers or create a public outcry that will force an offending ISP to change its behavior. Against this backdrop, the Federal Trade Commission is predicted to help enforce ISPs' terms of service.[6]

Nevertheless, when explaining the source of the Commission's authority to adopt or retain any such transparency rules and effectuate this regime, the Draft Order merely asserts: "we continue to believe that section 257 provides us authority for the rule we adopt, and there are no objections in the record to relying on that source of authority again here" (emphasis added).[7]

The Commission may not read the record's purported silence on this point as either acquiescence or acceptance of its intention to exercise authority under Section 257. That is because the NPRM made no mention at all of Section 257, and read properly even suggests that the provision might not be considered as a potential source of authority in any new order. The omission seems purposeful. The NPRM's section seeking comment on supporting authorities specifically asks questions about the applicability of Section 706 and Section 230, and it includes a catch-all paragraph asking for comment on the various sources of authority cited in the Commission's *2010 Open Internet Order*.[8] Yet, the NPRM's relevant citation in this paragraph to that 2010 order[9] conspicuously excludes the only paragraph regarding Section 257 authority for transparency provisions[10] by specially citing only to the paragraphs surrounding it.

The importance that this Draft Order ascribes to transparency, and to Section 257 authority for such transparency requirements, cannot be overstated. And we now note that reliance on Section 257 alone, as a source of authority for transparency rules applicable to all broadband providers once reclassified as information service providers, is curious at best or even fatally flawed. As Section 257(a) makes painstakingly clear, the Commission may under that statute use "regulations pursuant to its authority under this chapter (other than this section)" to carry out certain tasks. 47 U.S.C. § 257(a) (emphasis added). Even assuming that Section 257's market entry barrier removal mandate could be read logically to provide authority for transparency obligations, it does not seem to be up to the job legally, based on the text's own disclaimer regarding its lack of substantive weight as authority for regulations.

As the entire proposed regulatory regime in the Draft Order rests upon the Commission's authority to promulgate transparency rules for broadband, failure to provide any notice that such authority was being contemplated and failure to explain how that section could suffice as sole authority for such provisions, are defects that the Commission cannot cure. Based on the Commission's omitting any mention of Section 257 in the NPRM, and specifically excising any incorporated references to it in the cite to the 2010 decision, the public could not have

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[6] *See id*. ¶¶ 205, 211-15.
[7] *Id*. ¶ 229.
[8] *See* NPRM ¶¶ 100-03.
[9] *See id*. ¶ 103 n.227 (citing to *2010 Open Internet Order*, 25 FCC Rcd 17905, 17972-80 & 17981, ¶¶ 124-35, 137). The discussion of Section 257 authority is only found in paragraph 136 of the *2010 Open Internet Order*, and the NPRM's cite to that decision expressly and conspicuously excludes that paragraph.
[10] *See 2010 Open Internet Order*, 25 FCC Rcd at 17972-80, 17981, ¶136.

anticipated the use of this legal authority, could not comment on its applicability, and certainly could not universally acquiesce to its use.[11] In fact, the Commission acknowledges the importance of public comment on this question in its flawed assumption of public acquiescence.

Transparency regarding the practices of broadband providers is a key tenet of any Net Neutrality protections, but transparency alone does not suffice. Nor does the flawed and unnoticed transparency proposal put forward here suffice to support what the Commission proposes. While we agree with the Commission that ISP practices ought to be exposed to daylight and public scrutiny, the legal foundation for any transparency rules is critical to the Draft Order's proposal. The Commission failed to notice that proposal properly and cannot rely on it here.

Respectfully submitted,

Matthew F. Wood
Policy Director
Free Press

Gaurav Laroia
Policy Counsel
Free Press

[11] *See* Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1260 (D.C. Cir. 2005) (quoting Shell Oil Co. v. EPA, 950 F.2d 741, 751 (1991)) ("[A]n unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated.") (internal quotations omitted).