

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



December 7, 2017

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 requirements³ 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

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 order⁹ conspicuously excludes the only paragraph regarding Section 257 authority for transparency provisions¹⁰ 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

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).

December 7, 2017

Hon. Ajit Pai
Federal Communications Commission
445 12th Street, Southwest
Washington, D.C. 20554

Dear Chairman Pai:

We are more than 30 advocates for press freedom, journalism, free expression and open government, united in our opposition to your planned repeal of the Federal Communications Commission's successful open-internet rules.

We understand that you plan to vote on this repeal on Dec. 14. We urge you to reconsider your plans and cancel that vote. You must not abandon Net Neutrality, nor abandon in the process the agency's congressional mandate to prevent unreasonable discrimination by the broadband providers that carry the internet traffic of everyone in this country.

In 2014, groups and organizations like ours wrote to your predecessors at the agency. We called on them to protect online free-speech rights by grounding open-internet rules in the FCC's clear authority under Title II of the Communications Act. The FCC did just that in February 2015, preserving the open character of this essential communications infrastructure. The federal courts have upheld those rules twice since then.

This was a tremendous victory for free speech and freedom of the press. The open internet is today our main conduit for expression and information. It is our library, our printing press, our delivery truck and our town square. Journalists, academics, governments and local communities depend on it to connect, communicate and collaborate every day. And as old models for news and information evolve or decline, the internet presents opportunities for new and independent media outlets to emerge.

Your plans could change all of that. Letting broadband providers block, throttle or discriminate against online content, services and applications gives them tremendous power. Allowing them to relegate disfavored speakers and content to slow lanes while prioritizing the viewpoints of those who are willing or able to pay more would change the open character of the networks we rely on to communicate, cover the news and tell our stories.

Your proposal would give entrenched media, cable and telecom companies like AT&T, Comcast, and Verizon life-and-death control over the voices and businesses of independent news gatherers. It would give them unfettered power over our viewers and readers, potentially blocking not just what people can see on any single website or powerful online platform, but what they can find anywhere

online. This would have a chilling effect on our rights and our ability to access, report and share information free of gatekeeper control by those large broadband providers.

Contrary to the arguments you have presented, the current rules pose no threat to innovation and investment. Research citing broadband providers' own financial disclosures makes it clear that these companies are still investing in better and faster networks, undeterred by either the rules or the legal framework you intend to discard.

You have suggested that broadband-provider transparency and promises alone will fill this vacuum. But we can't rely on or expect private entities to behave. These companies want to privilege certain speakers over others to increase the return to their shareholders. They have no interest in serving the public.

From the beginning of our nation, U.S. laws and leaders have protected the right to free expression and dissemination of information over public and private networks alike. They have acknowledged the fundamental need for our speech to be delivered without discrimination. Freedom of the press was not simply the freedom to print, but also the freedom to distribute speech across the country through the postal service. Our ability to use that network (and its successors) is central to our ability to self-govern.

To preserve the open internet as a vibrant space for press freedom and freedom of information, the FCC must continue to follow the law set out in Title II of the Communications Act. It must continue to treat broadband internet access services as telecommunications services, subject to longstanding prohibitions against discrimination and blocking. And it must not move ahead with its dangerous plan to remove any semblance of the open-internet rules grounded in that law.

Signed,

Faiz Shakir

American Civil Liberties Union

Jason Zaragoza

Association of Alternative Newsmedia

Steven Renderos

Center for Media Justice

Brandi Collins-Dexter

Color Of Change

Sue Udry

Defending Rights and Dissent

Janine Jackson

Fairness & Accuracy In Reporting

Craig Aaron

Free Press

Trevor Timm

Freedom of the Press Foundation

Rory O'Connor

Globalvision, Inc.

Dylan Smith

Local Independent Online News Publishers (LION)

Tracy Rosenberg

Media Alliance

Jo Ellen Kaiser

Media Consortium

Bryan Mercer

Media Mobilizing Project

Christopher Finan

National Coalition Against Censorship

Alex Nogales

National Hispanic Media Coalition

Loris Taylor

Native Public Media

Art Neill

New Media Rights

Irving Washington

Online News Association

David Moore

Participatory Politics Foundation

Suzanne Nossel

PEN America

Margaux Ewen

Reporters Without Borders

Andrew Rasiej

Personal Democracy Forum

Civic Hall

New York Tech Alliance

Rebecca Baker

Society for Professional Journalists

Hadar Harris

Student Press Law Center

Alex Howard

Sunlight Foundation

Roy Gutterman

Tully Center for Free Speech

Jan Gerlach

Wikimedia Foundation

Sam Gregory

WITNESS

Beau Willimon

Writers Guild of America, East

Ellen Stutzman

Writers Guild of America, West