

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554**

In the matter of: )  
 )  
Protecting and Promoting the Open Internet ) GN Docket No. 14-28  
 )  
 )

To: Office of the Secretary

**COMMENTS OF WILLIAM B. CLAY**

**I. The Commission’s open Internet challenge: a 30,000-foot view**

1. The subject *Notice of Proposed Rulemaking* (“*NPRM*”) tentatively reaffirms the objectives of the Commission’s 2010 *Open Internet Order*,<sup>1</sup> which the DC Circuit struck down earlier this year.<sup>2</sup> The foundation upon which the DC Circuit’s ruling rests is the Commission’s 2002 decision to classify Internet transport as a “Title I information service” rather than as “Title II common carriage.” Yet in almost surreal *non sequitur*, the Commission seeks a method to “protect the open Internet that is not [based upon classifying Internet transport as] common carriage *per se*”.<sup>3</sup>

2. The *NPRM* describes the social and economic advantages of a universally-available and open Internet, yet seeks to safeguard those attributes by shoring up a regulatory regime

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1 *NPRM*, n. 1, ¶¶ 25-27, 39, 63, 81, and 91, *inter alia*.

2 *NPRM*, ¶ 23.

3 *NPRM*, ¶ 110 *et seq.*

conceived when commercial Internet transport was an immature sideline offering of, *inter alia*, cable TV operators and communication common carriers<sup>4</sup> and which has suffered several judicial rebuffs.

## **II. To err is human; to persist is diabolical**

3. The *NPRM* recites a continuing series of attempts by carriers to implement discriminatory and self-serving “network management” mechanisms, followed by *ad-hoc* Commission responses, key portions of which were then struck down by the courts as impermissibly imposing common carrier requirements on providers of “information services.” Yet the *NPRM* doesn’t explain in any detail why the Commission should not simply adopt the most obvious response to these judgments: classify Internet service as common carriage under Title II.<sup>5</sup>

4. Why does the Commission, while acknowledging the massive infrastructure, corporate, and social changes wrought by arguably the most disruptive telecommunication technology deployment since the integrated circuit, stubbornly cling to its repeatedly failed 2002 regulatory approach? Pride? Nostalgia? Inertia? Industry co-option?

5. If the Commission really wishes to preserve open Internet connectivity, it *must* confront the last of those influences, industry co-option.

## **III. A simple case study in industry-driven regulatory erosion**

6. For more than a decade, I observed first-hand the erosion of a much simpler regulatory regime in a lower-stakes industry sector than what this *NPRM* tackles.<sup>6</sup> That experience shows

4 *NPRM*, ¶ 149.

5 It at least it asks the question; *NPRM*, ¶¶ 4, 10, 65, and 96.

6 *I.e.*, channel allotment in the FM broadcast radio service. See William B. Clay’s *Informal Objections, Petitions for Reconsideration, Applications for Review, and Replies to Opposition* to Audio Division “minor” modifications, fac. 52553 file BPH-20020116AAG, fac. 25520 file BPH-20070119ABG, fac. 24230 file BMPH-20070119AES, fac. 34435 file

that only a strong and simple regulatory backbone that aligns industry incentives with Commission objectives can resist erosion of regulation intended to foster the public interest.

7. In less than 10 years, the broadcast industry turned upon its head the element of the Commission's channel allotment priority scheme that was intended to give small rural communities their own local FM station. A series of judicious industry-promoted "reforms" to a number of apparently-unrelated rules transformed the *same* channel allotment priority scheme into a system that gives incumbent licensees an exclusive right to pluck long-established FM stations out of their communities and reassign their licenses to well-served, larger, and more profitable areas.<sup>7</sup> This transformation baldly contradicts the Commission's clear and oft-stated public interest objective – still ostensibly in effect – for its "first local service" channel allotment priority.

8. Here's how industry-driven regulatory erosion turned a good rule bad:

1982 The Commission defines a system of four priorities to adjudicate among mutually exclusive applicant petitions to allot FM broadcast channels to communities. The first two priorities favor communities with no or only one "aural service" (broadcast radio reception), an uncommon situation. Priority 3 is "first local service," that is, an FM channel assigned to a community to which no other broadcast radio channel is licensed.<sup>8</sup> At this time, a broadcast license for a community generally obligates the licensee to originate most of its facility's programming from a studio located in that community.

1987 The Commission drops its requirement that programming originate from a studio located in the community to which a station is licensed.<sup>9</sup> This deprives the term "local service" of virtually every distinction (other than a signal strength requirement) from "aural service," yet a "first local service" channel allotment petition still has a priority 3 trump card over competing non-first-local-service channel allotment petitions.

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BPH-20070119AFW, fac. 164260 file BMPH-20070119AGG, fac. 34435 file BMPH-20080417AAY, and fac. 24230 file BLH-20090403BR, fac. 15839 file BMPH-20090724ACK.

7 See William B. Clay's *Comments, Reply Comments, Petitions for Reconsideration, Oppositions to Petitions for Reconsideration, and Replies to Opposition* in Media Bureau rule making dockets 05-210 and 09-52 and *William B. Clay v. FCC, et al.*, DC Circuit docket no. 08-1255.

8 *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88.

9 *Main Studio and Program Origination Rules for Radio and Television*, 2 FCC Rcd 3215.

- 1989 The Commission eliminates competition for an FM channel allotment when an incumbent licensee seeks to reassign its channel to a different community and the new assignment would be mutually exclusive with the channel's current assignment.<sup>10</sup> Commissioner James Quello's dissent accurately predicts, "[This] decision will give licensees the ability, indeed the incentive, to change their communities of license, modify their facilities, or both. [It] will set in motion the entire table of allotments for the FM and television services."
- 1989-2005 A trickle of two-step "FM move-ins" from rural communities to nearby major markets begins. Licensees "improve their facility" by first petitioning for non-competitive allotment of its channel to some suburb named on no broadcast license or allotment. Once that's done, the licensee applies for "minor modification" of its facility and shuts down the old rural station. The facility becomes a new urban station, almost always with a different staff and format, and always with a different market valuation many times that of its rural predecessor. The initial trickle becomes a steady stream that relocates over 250 stations by 2005.
- 2007 In response to broadcasters' pleas to "streamline" the time-consuming two-step move-in process, the Commission dispenses with petitions to change non-competitive channel allotments of existing facilities (1989 above) and combines both steps of the old process into a single "minor change" process.<sup>11</sup>
- 2009 The move-in stream has become a flood. Over 750 facilities have been allowed to abandon their old communities in favor of more attractive markets. When now-pending applications are included, around 10% of all licensed FM stations have abandoned their original community or will soon do so.
- 2011 The Commission sharply restricts the 2007 one-step move-in process into Census-recognized urbanized areas,<sup>12</sup> but the vast majority of technically-allowable urbanized-area move-ins have been consummated. The flow can continue unabated to smaller urban areas.

9. It took the broadcast industry only 7 years to transform the Commission's 1982 attempt to foster local FM service to small communities, turning it into a no-risk method to enrich incumbent licensees. In another 16 years, that method was "streamlined" into a high-speed production line that ultimately deprived over 900 smaller communities of their established

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10 47 CFR 1.420(i) as amended by *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd. 4870.

11 *Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212.

12 *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making*, 26 FCC Rcd 2556.

local FM service, justified on the dubious “public interest benefit” of increasing service to abundantly-served urban areas. The Commission partially corrected the faulty process 4 years later, well after most of its potential damage had in fact been inflicted upon small-town America.

#### **IV. The mature Internet need mature regulation to preserve its public interest benefits**

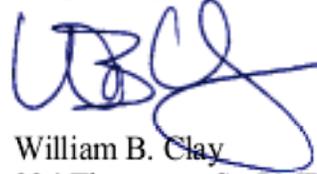
10. A similar process of regulatory erosion will rapidly and surely transform *any* Title I-based regime aimed at Internet openness into a tool that allows oligopoly carriers to expand their control and profit at the expense of their subscribers and the public interest. This is hardly a theoretical threat. One need only look at past attempts cited in the *NPRM* and then consider the ample “wiggle room” baked into the *NPRM*’s non-common-carrier regulatory structure.

11. It is hard to see the regulatory distinction between today’s Internet transport services and yesterday’s Plain Old Telephone Service (“POTS”) network. While there is competition among different underlying technologies and among different sets of carriers in different regions, the service available to consumers is nearly always a local oligopoly. Carriers take every opportunity to confusingly bundle their own content services with simple transport. Like the old phone companies, they then abuse their “network management” or “network protection” mechanisms to favor their own or allied vendors’ content services over competitors. Despite its rapidly-changing technical innards, commercial Internet transport seems to be a faithful regulatory replay of the old telephone oligopoly, carrying the same incentives for self-serving carrier misbehavior and bearing every hallmark of common carriage.

12. The most proven regulatory backbone in the Commission’s arsenal is Title II common carriage. This regulatory discipline boasts a highly successful, nearly century-long track record of fostering nationwide, universally-available, open telecommunications connectivity – without suffering frequent and fundamental judicial reversals. It has successfully fostered the

twin goals of the public interest and industry health over many years even in the face constant technical advancement. The Commission must not once more forswear applying this mature regulatory regime to an indispensable component of the Nations' communication infrastructure.

Respectfully submitted,



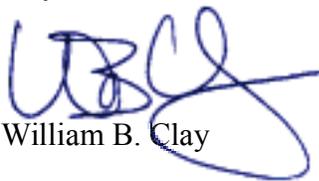
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*pro se*

July 15, 2014

### Verification

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 15, 2014.



William B. Clay