

August 21, 2017

The Honorable Ajit Pai, Chairman
The Honorable Mignon Clyburn, Commissioner
The Honorable Michael O’Rielly, Commissioner
The Honorable Brendan Carr, Commissioner
The Honorable Jessica Rosenworcel, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Chairman Pai, Commissioner Clyburn, Commissioner O’Rielly, Commissioner Carr, and Commissioner Rosenworcel,

We, the undersigned organizations representing a diverse group of civil rights, media, technology, library, arts, and consumer advocates, are deeply troubled that the Federal Communications Commission (FCC) has failed to make critical evidence available for public review and comment in the above-referenced proceeding. We urge the FCC to make publicly available all documents requested by the National Hispanic Media Coalition (NHMC) in its May 1, 2017 Freedom of Information Act (FOIA) request. NHMC’s request sought all open Internet consumer complaints the FCC has received since the 2015 *Open Internet Order* went into effect and all documents related to the ombudsperson’s interactions with Internet users. Based on the reasons stated below, we ask the Commission to release this critical evidence for public review and comment and allow the public time to fully assess the behavior of Internet Service Providers (ISPs) since June 2015 when the *Open Internet Order* went into effect.

First, the Notice of Proposed Rulemaking (NPRM) in this proceeding directly calls for the documents at the heart of NHMC’s FOIA request. In the NPRM, the FCC poses several questions about whether consumers have been harmed or received any benefits from the reclassification of broadband as a Title II telecommunications service. In the NPRM, the FCC asks, “[i]s there evidence of actual harm to consumers sufficient to support maintaining the Title II telecommunications service classification of broadband Internet access service?”¹ It also asks, “[c]onversely, what, if any, changes have been made as a result of Title II reclassification that have had a positive impact on consumers?”² Access to informal complaint mechanisms and redress for harms caused by ISPs is a clear benefit to consumers. Additionally, access to the open Internet ombudsperson is a critical consumer protection, yet the FCC’s NPRM proposes to eliminate the role without looking at any of its own evidence.³ The FCC has confirmed that there

¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60, 15, para. 50 (May 23, 2017) (NPRM).

² NPRM at 15, para. 51.

³ NPRM at 27, para. 97 (proposing to eliminate the ombudsperson role).

are approximately 1,500 emails documenting interactions between the ombudsperson and Internet users, and to date, has yet to release a single email for public review and analysis.⁴

Second, based on the nature of these documents, they should be subject to review and comment before the FCC moves forward with its proposal to repeal the 2015 *Open Internet Order*. The Commission should have made the public aware of and released these documents prior to initiating the current proceeding. The FCC's proposal leans heavily on reversing the classification of broadband as a Title II telecommunications service back to a Title I information service.⁵ It is disturbing that the FCC has apparently failed to review documents that are in its exclusive possession prior to crafting an NPRM to repeal the very rules that established these enforceable mechanisms to redress consumer harms. Consumers likely use the informal complaint mechanism to address harms caused by ISPs that violate the current bright-line Net Neutrality rules and transparency rules. Over 47,000 consumer complaints have been submitted against ISPs since June 2015, and carriers provided approximately 18,000 responses to those complaints, and there are 1,500 emails documenting interactions between the ombudsperson and Internet users.⁶ These numbers alone should give the Commission pause. However, only a full analysis of these consumer complaints and ombudsperson documents will allow the public to fully answer questions posed in the NPRM.

Third, the FCC's failure to address, analyze, and release all these documents for review and comment prior to the close of the current comment deadline raises procedural concerns under the Administrative Procedure Act. In a rulemaking proceeding an "agency must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between facts found and the choice made."⁷ Additionally, "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."⁸ In order for the FCC to adequately and fully address these procedural concerns, it must not only release the documents requested by NHMC, but also allow additional time for comment and analysis. As it stands, the Commission has unreasonably delayed the release of such documents. NHMC filed its FOIA request on May 1, 2017, and thus far the Commission has agreed to produce only a tiny fraction of the total complaints, and for most of those only by September 1, 2017,⁹ months after the initial request and after the close of the reply comment deadline.

⁴ See National Hispanic Media Coalition letter to Chairman Ajit Pai, Commissioner Mignon Clyburn, and Commissioner Mike O'Rielly, WC Docket No. 17-108 (filed Aug. 10, 2017) *available at* [insert link]

⁵ *NPRM* at 6, para 24.

⁶ See *Restoring Internet Freedom*, WC Docket 17-108, Order, DA 17-686 at para. 4 (WCB 2017) (*Order Denying Extension*).

⁷ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983) (internal citations and quotations omitted).

⁸ See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (2008) (internal citation and quotations omitted).

⁹ See *Order Denying Extension* at para. 4.

Every day of delay is one more day that the FCC shirks its duties. In the interest of proper rulemaking the FCC should immediately release the over 47,000 consumer complaints and the ombudsperson documents and allow the public sufficient time to review and comment on them. This would allow the Commission and the public the ability to more adequately and fully assess the benefits to consumers and the behavior of ISPs since the 2015 *Open Internet Order* went into effect.

Respectfully,

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American Civil Liberties Union
Center for Democracy & Technology
Center for Media Justice
Center for Rural Strategies
Color of Change
Common Cause
Electronic Frontier Foundation
Fight for the Future
Free Press
Native Public Media
New America's Open Technology Institute
OpenMedia
Popular Resistance
Public Knowledge
United Church of Christ, OC Inc.