August 20, 2018

Joseph J. Simons
Chairman

Rohit Chopra
Commissioner

Maureen K. Ohlhausen
Commissioner

Noah Joshua Phillips
Commissioner

Rebecca Kelly Slaughter
Commissioner

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century

Dear Chairman Simons and Commissioners:

Free Press thanks the Commission for announcing this proceeding and accepting comments on "Competition and Consumer Protection in the 21st Century." Free Press is a nationwide nonprofit with nearly 1.5 million members fighting to protect people's rights to connect and communicate. We have mobilized against consolidation in telecommunications and broadcast services, fought for and worked to protect Net Neutrality under Title II of the Communications Act, defended privacy, and sought to protect civil rights and foster a technology and media sector free from racial discrimination. We hope to work with the Federal Trade Commission on many of these topics throughout this series of hearings.

In this first comment, on the topic of competition and consumer protection issues in communication, information, and media technology networks, we focus on the FCC's ill-advised 2017 repeal of its Net Neutrality rules—and its effective abdication of oversight of broadband internet access service ("BIAS") providers, which the FCC suggested grants that oversight to the FTC.[1] The Communications Act, properly read, classifies BIAS providers as common carriers, and applies to them unique responsibilities of nondiscrimination. The FCC's contention in the FCC 2017 Order, that the FTC can adequately protect a free and open internet, is untenable. In order to protect the open internet and online competition in the 21st century, BIAS providers should be treated as common carriers under Title II of the Communications Act.

[1] *See* Restoring Internet Freedom, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd 311 (2017) ("FCC 2017 Order").

Nondiscrimination Law in the Communications Act is a Vital Safeguard for Telecommunications Networks.

The duty of nondiscrimination is essential for telecommunications networks and has been a staple of U.S. communications law for over a hundred years.[2] Just as telephone network providers cannot tell their customers who they may call or what they may say on the telephone, broadband internet access providers may neither dictate nor unduly influence what their customers see online. These principles of nondiscrimination and common carriage, when applied to BIAS providers, are commonly known as Net Neutrality. The rules adopted by the FCC in 2015, and then cast aside by the FCC 2017 Order, prevented blocking, throttling, paid prioritization, and other unreasonable interference with traffic transmitted over the network.

As we discussed at length in our FCC comments opposing the FCC's 2017 Order,[3] these protections have been and continue to be vital to free speech and the dynamism seen in the edge market online:

> People and businesses utilized common carrier networks to access other essential services, first confined to plain old telephone service but eventually including a whole host of information processing capabilities that likewise ran over that same telecommunications network.
>
> The nondiscrimination obligations attached to these networks kept them open for innovation without prior approval, and for free expression too, without the threat of unreasonable interference by the carrier. The [FCC's] enforcement of nondiscrimination protections, along with the limited liability concept embodied in common carriage, protect commercial freedoms for network users to be sure; but they are also essential to personal freedoms and the exercise of our basic free speech rights.[4]

This principle of nondiscrimination on telecommunications networks facilitates free speech on the edge of those networks. Under this principle, ISPs are insulated from liability for the speech they carry over the network. This shields them from political influence that may seek to censor controversial speech, but it also prevents them from unduly favoring their own commercial content—and from favoring or disfavoring any content, for that matter.

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[2] *See, e.g.*, 24 Stat. 379 (1887) ("Interstate Commerce Act").
[3] *See* Comments of Free Press, WC Docket No. 17-108, at 43 (filed July 17, 2017) ("Free Press 2017 FCC Comments").
[4] *See id.* at 13.

In an era of rampant consolidation, this principle prevents ISPs from using their considerable market power as internet gatekeepers to quash competitors and small players in the content market. But it also prevents BIAS providers from unduly discriminating against or interfering with lawful content on any basis whatsoever, not based solely on either competitive concerns or on consumer protections against deceptive practices.

The FCC is the Appropriate Agency to Oversee BIAS Providers and Title II is the Appropriate Classification for Broadband Internet Access Service.

Prior to Chairman Pai's tenure at the FCC the agency's work on Net Neutrality had entirely centered around developing a legal framework for enforcing BIAS providers duty of nondiscrimination—or at very least, a framework for preventing BIAS provider blocking and interference with user choices—not whether another agency ought to take the lead in oversight of BIAS provider practices.

The FCC's mandate to oversee communications networks generally and telecom networks in particular is set by the Communications Act, which divides communications services into classifications including "information services" like websites, video, applications and other content-generating or storage services; and "telecommunications services," which transmit such information. The former are generally unregulated by the FCC, depending on the particular statutes and rules in play, but the latter are governed by Title II of the Communications Act as common carriers.

In an attempt to deregulate broadband internet access, the Bush administration in 2002 began tinkering with the legal status of BIAS providers and, as the current FCC has done, reclassified BIAS as an information service—the same regulatory classification as ordinary websites and other content on the network's edge. Still, the Bush FCC and Obama's first FCC chair tried to retain Net Neutrality rules under this regulatory classification and did not abdicate their proper oversight role for the nation's broadband network.

That approach, however, consistently failed in court. The FCC twice unsuccessfully argued, in 2010 and 2014, that it could stand up a regime that enforces common carriage-like rules against blocking, throttling, paid prioritization, or other types of discrimination by BIAS providers without properly classifying them as Title II "telecommunications carriers" under the Communications Act. Notably, in Verizon's successful appeal of the FCC's non-Title II Net Neutrality rules in 2014, the court affirmed that facilities-based providers of two-way communications have traditionally been thought of as common carriers and that the FCC has a

"long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet."[5]

After a decade and a half of debate, lawsuits, and rulemakings, the FCC under Chairman Wheeler in 2015 finally restored BIAS providers to their proper classification as Title II common carriers and promulgated strong and legally supportable Net Neutrality rules under that framework.[6] This regulatory framework was ratified by the DC Circuit twice (on a petition for review[7] and then upon rehearing *en banc*). And yet, the new FCC overturned those rules in December 2017 and returned BIAS to a "Title I" classification as an information service, effectively abdicating oversight over internet access services and suggesting that the FTC might prevent harmful behavior by BIAS providers going forward.

Title I Classification, Coupled with FTC Oversight of Some BIAS Provider Practices Under Current FTC Authority, Cannot Prevent Abuses.

The FCC 2017 Order leaves only a modified transparency rule in place for BIAS providers, requiring merely that they disclose their traffic management practices, in theory in order to facilitate FTC enforcement of any BIAS provider disclosures and promises. The FCC imagines "that the oversight over ISPs' practices that the [FCC], FTC, and other antitrust and consumer protection authorities can exercise as a result of the transparency rule likewise will promote innovation and competition, spreading the benefits of technological development to the American people broadly."[8]

However, the FTC seemingly might only prosecute BIAS providers for violations of their own disclosed terms of service, which ISPs like Comcast quietly changed while awaiting the effective date for the repeal of Net Neutrality.[9] As we discuss below, neither Section 5 nor antitrust authority can protect internet users from abuses by BIAS providers. The FTC cannot fill this void.

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[5] *See Verizon v. FCC,* 740 F.3d 623, 638 (D.C. Cir. 2014).
[6] *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("Open Internet Order").
[7] *See US Telecom Ass'n. v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016).
[8] *See* FCC 2017 Order ¶ 234.
[9] *See, e.g.*, Jacob Kastrenakes,"ISPs won't promise to treat all traffic equally after net neutrality," *The Verge,* (Dec 15, 2017), https://www.theverge.com/2017/12/15/16768088/internet-providers-plans-without-net-neutrality-comcast-att-verizon.

The FTC's Regime Designed to Prevent Anticompetitive Behavior Will Not Prevent the Proliferation of BIAS Provider Anticompetitive Practices and Other Harms.

Free Press and others have identified critical weaknesses in relying on current laws against anticompetitive practices to enforce Net Neutrality.[10] The FTC's current antitrust regime—and indeed any regime that focuses solely on harms to competitors of BIAS providers' legacy voice, video, and other vertically integrated services—cannot address the multitude of harms, including non-economic ones, that will arise from violations of Net Neutrality principles. Period.

First, bright-line rules and prohibitions are critical to protect Net Neutrality. Without them, small or start-up firms harmed by anticompetitive behavior or any unreasonably discriminatory BIAS provider practices would need to convince the FTC to investigate and undergo antitrust litigation—a costly and time-consuming endeavor.[11] The expense and time-consuming nature of undertaking antitrust enforcement clearly prices out new entrants to the market. If current laws regarding monopolization, horizontal restraints, or lessening of competition in merger reviews could even be construed to apply, the operator of a service suffering from anticompetitive practices would need to demonstrate that it was a competitor to the ISP's own service offerings and further show that it suffered a harm.

This would require years of litigation for smaller entities. Sally Hubbard, an attorney and former state antitrust official explained that "[i]f I'm a startup being throttled or otherwise discriminated against—perhaps because my company competes against a vertically integrated ISP—and my only recourse is to bring an antitrust suit, I'd just close up shop. Antitrust litigation takes too much time and money."[12] Vulnerable and small competitors will start disappearing long before the FTC can act, creating a chilling effect on new entrants and distorting the market in favor of large incumbents.

Past FTC commissioners have agreed with these arguments against exclusive FTC jurisdiction over BIAS provider practices. "While it is true that the FTC possesses a great deal of expertise in the areas of antitrust and consumer protection, it does not possess specialized subject-matter expertise in telecommunications, data network management practices, or in detecting instances of data discrimination. That expertise is housed at the FCC. These are very

[10] *See* Free Press 2017 FCC Comments at 68.
[11] Abigail Slater, "The FTC and Net Neutrality's Plan B," Regulatory Review (Aug. 16, 2018), https://www.theregreview.org/2017/08/16/slater-ftc-net-neutrality/.
[12] Sally Hubbard, Washington Bytes, "The Future of Antitrust Enforcement: Innovation, Wage Inequality and Democracy," Forbes (June 15, 2017), https://www.forbes.com/sites/washingtonbytes/2017/06/15/the-future-of-antitrust-enforcement-innovation-wage-inequality-and-democracy/#3a440933145d.

real and significant limits to the effectiveness of the FTC's tools in policing nondiscrimination on networks and protecting competition."[13] The late-FTC Commissioner J. Thomas Rosch, a Republican, believed that the FTC should not, and could not, safeguard Net Neutrality. He thought "the FTC should stay out of the business of regulating internet neutrality" because it was "not altogether clear to [him] that antitrust principles can be applied to advance the goals of internet neutrality."[14]

The FTC's Enforcement Regime Will Not Address All the Harms Invited by the the FCC's Repeal of Net Neutrality Protections.

The FTC's harm-based approach, focused largely or exclusively on preventing harms from deceptive (meaning undisclosed) practices, cannot adequately protect internet users. That's because properly disclosed Net Neutrality violations likely would not run afoul of the FTC's Section 5 authority to protect consumers from deceptive practices. And despite a few vague references in the 2017 FCC Order to the FTC's authority to prevent unfair practices too, there is no credible theory articulated by the FCC (or anyone else) about how the FTC would go about reviving that portion of its statute to meet this need, as the FCC flounders to name a single example of unfair BIAS provider conduct other than undisclosed conduct.[15]

The FCC's fumbling attempt to center the proceeding around a cost-benefit analysis highlights this point. The FCC essentially assumes that disclosed discrimination is not harmful, and even then cabins itself to a cramped reading of network nondiscrimination that focuses on economic harms alone—even for harms to free expression.[16] The FCC 2017 Order failed to cite a single one of the millions of internet user comments that voiced the importance of a neutral network to organizing online for racial justice or taking part in the marketplace of ideas. Other normative values at risk include unfettered access to information and the ability for individuals to become content providers themselves without asking or paying an ISP for permission first. None of these harms would find adequate remedy at the FTC.

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[13] Terrell McSweeny, Commissioner, Federal Trade Commission, Oral Statement of Commissioner Terrell McSweeny before the House Judiciary Committee (Nov. 1, 2017).

[14] *See* J. Thomas Rosch, Commissioner, Federal Trade Commission, Remarks of J. Thomas Rosch before the Global Forum 2011: Vision for the Digital Future Brussels, Belgium, "Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission?" (Nov. 7, 2011).

[15] *See, e.g.*, FCC 2017 Order ¶ 141 ("The market competition that antitrust law preserves will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression.").

[16] *See id.* ¶ 153 ("The market competition that antitrust law preserves will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression.").

Further, even beyond the incalculable costs of these normative harms, many existing business practices that do not violate antitrust law—such as the cable-TV business model—nonetheless severely limit consumer choice, or artificially increase the price to access particular types of content. Thus, even where traditional economic harms the Commission seeks to prevent are implicated, the FTC can only offer partial protection—unlike the proactive protections against unreasonable discrimination and interference available to the FCC under Title II.

The FTC Simply Lacks the Expertise and Experience to Safeguard Net Neutrality.

The FTC does not have the necessary expertise to adequately safeguard broadband consumers. In comments submitted to the FCC during its rulemaking, the FTC argued for jurisdiction over BIAS "as set forth" in the FCC's NPRM and bolstered its argument by recounting its "extensive privacy and data security expertise."[17] The FCC then set forth a final order that drastically surrenders nearly all of its own jurisdiction over BIAS, attempting to saddle the FTC with the responsibility to exercise vigilance over harms it has no experience in detecting in a sector in which it lacks expertise.

As noted above, former FTC Commissioners have explicitly noted that the Commission lacks the expertise to do this work.[18] Nothing in the FTC's comment in the 2017 repeal proceeding highlights the network management or architecture expertise it would need to detect and ameliorate attacks on the open internet. Nor does the FTC even claim to possess comparable expertise to that accrued by the FCC in this field. Instead, the FTC proposes to remedy to this lack of expertise by sharing that of the FCC. While such interagency cooperation is not uncommon, it does suggest that both the FCC and the FTC in their Memorandum of Understanding recognize that network management expertise resides within the FCC.[19]

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[17] *See* Comments of the Staff of the Federal Trade Commission, WC Docket 17-108 (filed July 17, 2017) ("FTC Comments").

[18] *See* Comments of Terrell McSweeny, WC-Docket 17-108 (Jul. 17, 2017).

[19] *See* FCC-FTC Restoring Internet Freedom Memorandum of Understanding ¶ 4 (2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf:

> To further support coordination and cooperation on these matters, the Agencies will continue to work together to protect consumers, including through:
>
> - Consultation on investigations or enforcement actions that implicate the jurisdiction of the other agency;
> - Sharing of relevant investigative techniques and tools, intelligence, technical and legal expertise, and best practices in response to reasonable requests for such assistance from either Agency; and
> - [...]

Even Commissioner Maureen K. Ohlhausen, a staunch advocate for the proposed FCC regime, conceded in 2015 that one clear authority would be better than two for regulatory clarity.[20] Here, the FTC does not have clear authority to safeguard net neutrality on its own, while the FCC clearly possesses the authority—but for the current FCC's improper statutory interpretation and surrender of that congressionally granted power. And given the FTC staff's own uncertainty over the bounds of its authority,[21] the FTC should instead refuse to engage in the the FCC's losing gambit.

The FCC's *Ex Ante* Rules Are Necessary to Deter Net Neutrality Violations.

Net Neutrality requires *ex ante* rules because *ex post* enforcement alone does not deter discriminatory conduct within a meaningful period following an alleged violation. Other commenters in the FCC repeal docket discuss this at length.[22] Since the FCC's repeal, several BIAS providers have openly discussed their intention to experiment with discriminatory practices.[23] This comes after years of ill-advised forays into discriminatory behavior even under previous bright-line rules and prior FCC open internet regimes (founded on ultimately unsuccessful Title I classification frameworks, but nonetheless prohibiting BIAS provider practices that ISPs often attempted nonetheless).[24] Replacing those rules with *ex post* litigation spanning years, especially where the regulated industry has vigorously resisted <u>any</u> regulations seems naïve at best.

The FTC Should Acknowledge It Cannot Adequately Prevent BIAS Provider Discrimination.

The FTC must acknowledge that it lacks the authority and expertise to adequately protect the open internet and must heed the warnings of Commissioner Rosch:

> If the FTC were to join the FCC in regulating internet neutrality, then we would also risk damaging our own institutional credibility with Congress and the courts

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[20] *See* Maureen Ohlhausen, Commissioner, Remarks of FTC Commissioner Maureen K. Ohlhausen At the American Enterprise Institute, "Regulatory Humility In Practice" (Apr. 1, 2015).
[21] *See* FTC Comments at 22 n.95 ("[T]he FTC separately continues to advocate to Congress that it repeal the common carrier exception, which would give the FTC jurisdiction over both BIAS and traditional common carrier services, such as telephony.").
[22] *See* Open Technology Institute Comments, WC Docket No. 17-108, 14-21 (filed July 17, 2017) ("OTI Comments").
[23] *See, e.g.,* Karl Bode, "Sprint's CEO Thinks This Whole Killing Net Neutrality Thing Is Pretty Nifty," Techdirt (Mar. 1, 2018), https://www.techdirt.com/articles/20180227/09262539315/sprints-ceo-thinks-this-whole-killing-net-neutrality-thing-is-pretty-nifty.shtml; Chris Mills, "AT&T didn't waste any time abandoning net neutrality," BGR (Feb. 23, 2018), https://bgr.com/2018/02/23/att-net-neutrality-wireless-plans-ugh/.
[24] *See* OTI Comments at 15.

> because we would be attempting to impose our enforcement agenda under Section 5 in a relatively young industry in which we have not yet fully assessed the impact of various methods of competition, acts or practices on consumer welfare.[25]

However "young" broadband as a service may be here a decade later, the FTC cannot ignore that real Net Neutrality protections require a common carriage framework under a light touch application of Title II of the Communications Act, just as the FCC's 2015 order adopted. Only that framework at present allows for a ban on blocking, throttling, prioritization, and other discriminatory practices that harm internet users' economic opportunities and free expression—even when disclosed to users, and even when not aimed at BIAS providers' voice and video competitors. Anything less threatens the free and open internet and will harm all internet users, BIAS consumers, ordinary content creators, and competition at the edge.

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[25] *See* Rosch, *supra* note 14.