Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

REPLY COMMENTS OF FREE PRESS

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INTRODUCTION AND SUMMARY

"Title II provides a flexible, light-touch approach for the preservation of open communications networks. Common carrier principles in general are both perfectly suited and absolutely necessary to maintaining nondiscrimination principles and nondiscriminatory outcomes. This is true not only in monopoly settings, but in deregulated and competitive markets too. It's true for all telecom services, not just those delivered on copper telephone wires."[1]

We wrote the preceding paragraph to open our reply comments almost three years ago in September 2014, in the prior open internet proceeding. Our assessment then remains entirely true today. Just a few things have changed. First, there are more than two-and-half years of broadband deployment data and internet economy performance measurements on the books since the adoption of the *Open Internet Order* in 2015,[2] all demonstrating the truth of our arguments. Second, there is a new FCC Chairman that has closed his mind to this truth – evidence be damned, as far as he seems to be concerned. And he may have the votes to undo the 2015 order.

But as we and others demonstrated in our initial comments, little else has changed in the intervening years. Nothing changed the answer to the question of proper classification for broadband internet access service ("BIAS") providers under Title II. Nor could any evidence regarding investment by such providers change this statutory definition, despite the Chairman's myopic focus on this solitary metric and his willful distortion of it. No new facts or changed circumstances called into question the rationale for the *Open Internet Order*. Just the converse: indicator after indicator shows the Net Neutrality rules and the legal framework on which they rest are working to promote expression, political organization, education, and innovation online.

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[1] *See* Reply Comments of Free Press, GN Docket No. 14-28, at 2 (filed Sept. 15, 2014) ("Free Press 2014 Reply Comments").

[2] *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*").

Amid all the spin, hyperbole, and *ad hominem* attacks on Free Press both by this Chairman and the cable and phone companies he favors, one thing is clear: neither the Commission's *Notice*,[3] nor any broadband provider arguments offered in response to it during the initial comment period, articulated a "reasoned explanation"[4] for the undue and unwise change in course that the *Notice* proposed.

The track record for the rules, along with the public input amassed in the past few years and the past few months, all counsel retention of the *Open Internet Order* – not its destruction, as the *Notice* contemplates, based in large part on the unfounded assertion that internet users did not benefit from it.[5] In the past two years, the public has come to rely upon Title II-based Net Neutrality rules, and the internet has thrived with them in place.

For instance, more than 47,000 informal complaints came to the Commission, with hundreds of individuals contacting the Commission's Open Internet Ombudsperson for assistance in resolving disputes with broadband providers. Although the Commission was slow to begin releasing these complaints in response to a Freedom of Information Act request,[6] it has finally begun to do so. But it still must explain how its erroneous assertions (about lack of public interaction with the rules, and with the Commission's consumer assistance and enforcement mechanisms) can be trusted as a basis for the proposals made in the *Notice*. That is, unless this Commission is so hell-bent on repealing the *Open Internet Order* that it intends to ignore the fact that such complaints' existence directly contradicts a number of conclusions the *Notice* posited.

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[3] *See In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("*Notice*").
[4] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009)).
[5] *See, e.g.*, *Notice* ¶¶ 97–98.
[6] *See* National Hispanic Media Coalition, Motion for Extension of Time, WC Docket No. 17-108 (filed Jul. 6, 2017) ("NHMC Motion").

The previous Commission also used the framework established in the 2015 order, along with the transparency rules carried over from the 2010 open internet proceeding, to investigate and in some cases take action against wireless carriers' throttling and other harmful practices. Without need for any such complaints or enforcement actions, the interconnection disputes that marred internet users' experiences until at least 2014 also seemed to resolve themselves – improving greatly, not coincidentally, after the Commission confirmed its intent in the *Open Internet Order* to monitor internet traffic exchange arrangements for harms to BIAS subscribers and edge providers alike.[7] And, as we detailed in our own initial comments, broadband providers' speeds and capabilities improved after the adoption of the *Open Internet Order*, with BIAS providers' willingness to invest coming as a direct consequence of their understanding that their path to continued prosperity is through capacity expansion, not the artificial capacity restriction that discriminatory business models like paid-prioritization would incentivize.

All of this is why millions of people have filed in this docket to support retention of the *Open Internet Order*. It is working, as we have noted on numerous occasions now. The reliable record evidence submitted in initial comments in this proceeding demonstrate that the 2015 order, and the reclassification decision on which it is based, have been a smashing success. This is not some John Oliver-fueled commie conspiracy, as the Chairman feverishly imagines when he tries to explain away both the obvious strength of the current Net Neutrality framework as well as its popularity. This is what it looks like when real people understand the stakes of policy decisions and decide to participate in our democracy. The Commission should wake up and listen, instead of refusing to address irregularities in the public commenting process while resorting to gimmicks to delegitimize and squelch the voices of concerned people.

[7] *See, e.g.*, *Open Internet Order* ¶ 199.

Alas, this Commission is so unwilling to slow its fight against nondiscriminatory broadband telecommunications that it has sacrificed reasoned decision-making for procedural missteps and substantive fallacies, closing its mind to the facts on the record. And contrary to the *Notice*'s misreading of history, access to the internet always has relied on common carrier principles – even as technologies, markets, and regulatory interpretations evolved. Yet returning those principles to solid legal footing with the reclassification decision made part of the 2015 order obviously made them stronger. It was the best and only path to open internet rules that are enforceable, and that were able to withstand appellate review for the first time in a decade.

Setting them on the right foundation again also made these principles better understood.[8] Survey after survey demonstrates that people understand the nature of, and indeed demand, the transmission pathway on offer from BIAS providers. Across the political spectrum, internet users see broadband as essential rather than optional – and see Net Neutrality rules as essential too.[9]

Broadband providers know which way the wind is blowing – and cannot help but contribute their own hot air. There is no greater evidence of Net Neutrality's inherent sensibility and popularity than ISPs' sudden but intentionally misleading embrace of open internet rhetoric. The record (and public discussion around this proceeding) is littered with disingenuous paeans by companies and politicians actively trying to undermine the rules' solid legal foundation[10] and claiming – falsely – that some new act of Congress is necessary to repeal and replace the sound and flexible protections we have today.

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[8] *See* Harper Neidig, "Poll: 60 percent of voters support FCC's net neutrality rules," *The Hill* (June 23, 2017).

[9] *See, e.g.*, Comments of Free Press, WC Docket No. 17-108, at 43 (filed July 17, 2017) ("Free Press Comments") (citing Freedman Consulting July 2017 poll and IMGE July 2017 poll).

[10] *See* Comments of Comcast Corporation, WC Docket No. 17-108, at 2 (filed July 17, 2017) ("Comcast Comments"); Comments of AT&T Services, Inc., WC Docket No. 17-108, at iii (filed July 17, 2017) ("AT&T Comments"); Comments of Verizon, WC Docket No. 17-108, at 1 (filed July 17, 2017) ("Verizon Comments").

Yet there is no controversy here, outside of "official" Washington. Real people love and rely on these rules preserving open internet access. The current rules address not just throttling, blocking, and paid prioritization by broadband providers, but other unreasonably discriminatory and harmful practices too. These rules allow entrepreneurs to compete in the online marketplace without having to cough up extra fees to ISPs to reach such broadband providers' customers. The rules make certain that people of color working to create a society in which their lives matter do not have to worry about having their voices blocked by a broadband provider that fears what they have to say. The rules also ensure activists, dissidents, and speakers of all political stripes that no provider of telecommunications services can block lawful content and speech on the broadband networks that connect us to one another.

These rules do not address every legal question, power imbalance, or structural dynamic in play in the internet ecosystem writ large. That is hardly a strike against them. Those who call for abandoning the current strong rules we have in place today, in favor of some more perfect compromise that is supposedly just around the corner, are doing no favors for internet users in reality. They are intent on weakening Net Neutrality protections by conflating the issues and hoping no one notices.

Throughout the record in this proceeding, broadband providers promise they have no intention of engaging in the harmful practices that the current rules rightly prohibit.[11] Yet their refusals to acknowledge plain facts – about their broadband investments, the shape of their networks, and the nature of the telecommunications service they offer to their customers – leave us extremely skeptical. In short: We do not believe you.

[11] *See, e.g.*, AT&T Comments at 1 ("And regardless of what regulatory regime is in place, we will conduct our business in a manner consistent with an open Internet.").

In this reply, we once again explain the history of the Communications Act and of Net Neutrality protections that fostered innovation and investment throughout the last twenty years – both before and after they were put on the right legal footing in the 2015 order. We once again address disingenuous broadband provider arguments that their separate offer of information services, or even their use of some information processing capabilities (such as DNS or caching), transforms broadband internet access from a telecom service into an information service. We also reply once again to the similarly ill-founded yet even more absurd claim that because BIAS provides access to other entities' information services, like email or search, the underlying transmission service likewise is transmogrified into an information service.

Based on new facts that came to light after initial comments were filed – namely, statements made by Chairman Pai in a congressional oversight hearing – we expand on our initial comments regarding the Commission's improper pre-determination of issues in this docket. As we explained in our initial filing, the *Notice* relies on faulty data to justify its inaccurate conclusions and predictions about broadband investment under Title II. With the Chairman's new statements to go on, we add here to our discussion of the procedural infirmities that this bad analysis creates for a Commission that has pre-judged the issue on the basis of feeble evidence. We also address once more the unfounded criticisms of our broadband investment findings, reinforcing the Commission's need to focus its attention on broadband deployment results – not just the raw dollar figures that are the object of Chairman Pai's fixation and his obfuscation too. The Commission should abandon this ill-conceived proceeding and instead work to implement the *Open Internet Order* in full while working in earnest to make internet access affordable for all.

I. Broadband Internet Access Services are Properly Classified as Telecommunications Services Under Title II.

As we showed in our initial comments, and have consistently explained throughout the full course of the Commission's series of open internet proceedings and related dockets, BIAS providers unambiguously offer telecommunications services.[12] Broadband providers' initial comments are littered with tired arguments to the contrary, re-litigating US Telecom's losing claim before the D.C. Circuit Court of Appeals that "broadband is unambiguously an information service."[13] We reply as the court did: None of these arguments are persuasive. The D.C. Circuit's judgment was correct, as public interest groups, consumer watchdogs, and open internet advocates[14] – along with dozens of broadband providers[15] – illustrated in their comments.

Because we have so thoroughly explored and exhausted this topic in the instant docket and our filings over the past decade, we need not repeat all of our explanations now. Yet we pause briefly to refute some of the new twists on the failing arguments made by AT&T, Comcast, and other broadband providers in the initial comment round, echoing their own consistent(ly wrong) claim that the Commission should find "the language, structure, and history of the Communications Act not only permit but compel an information service classification."[16] This argument fatally misreads *Brand X* and the governing statutes, and it falls apart under the defects in its own logic.

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[12] *See, e.g.*, Free Press Comments at 41–64 .
[13] *See US Telecom Ass'n. v. FCC*, 825 F.3d 674, 701 (D.C. Cir. 2016).
[14] *See, e.g.*, Comments of The Open Technology Institute at New America, WC Docket No. 17-108, at 24 (filed Jul. 17, 2017) ("OTI Comments"); *see also* Comments of Public Knowledge and Common Cause, WC Docket No. 17-108, at 27 (filed Jul. 17, 2017) ("Public Knowledge & Common Cause Comments"); Comments of Engine, WC Docket No. 17-108, at 24 (filed Jul. 17, 2017); Comments of NASUCA, WC Docket No. 17-108, at 14 (filed Jul. 17, 2017); Comments of the Electronic Frontier Foundation, WC Docket No. 17-108, at 17 (filed Jul. 17, 2017).
[15] *See, e.g.*, Letter from 41 ISPs to Ajit Pai, WC Docket No. 17-108 (filed June 27, 2017); Comments of Peter Folk, CEO Volo Broadband, WC Docket No. 17-108 (filed July 12, 2017).
[16] *See* AT&T Comments at 59–60 (emphasis is original).

A. The Commission Should Reject AT&T's Unwelcome Invitation to Misread Decisions Made in the 1980s and 1990s and Misapply Them to Today's Broadband Marketplace.

AT&T is the chief character in this unwelcome return viewing of the classification follies that pre-dated the 2015 *Open Internet Order*. It once again rehashes its flawed reading of the history of the Communications Act and the *Computer Inquiries*, as well as the Commission decisions interpreting and implementing those frameworks. We addressed that history at length in our initial comments,[17] as did other commenters that properly comprehend it, and need not recount all of it here.

Doubling down on its previous bad bets in the 2014 docket that led to the *Open Internet Order*, and then in the D.C. Circuit review of that decision the following year, AT&T makes the odd argument that the Commission should look past the Telecommunications Act of 1996 and base its current judgments solely in analogies to proceedings from the Bell era.

The company argues that since the definitions of telecommunications services and information services derive from definitions established in the *Computer Inquiries,* and then adopted in the Bell-era consent decree and Modification of Final Judgment ("MFJ"), the Commission must base its future interpretation of those legal constructs on analogies to the technologies and legal standards developed at the time.[18] To support this claim, AT&T looks to the Supreme Court's guidance for statutory interpretation in *Sekhar v. United States*, which noted that when a term "is obviously transplanted from another legal source, . . it brings the old soil with it."[19] Yet neither the *Sekhar* decision itself nor ordinary principles of *Chevron* deference support this proposition.

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[17] *See* Free Press Comments at 10–34; *id.* at 36–38.
[18] *See* AT&T Comments at 61.
[19] *See Sekhar v. United States,* 133 S. Ct. 2720, 2724 (2013).

First, *Sekhar* was concerned with the ongoing interpretation of the common law crime of extortion (which the case described as one of "the oldest crimes in our legal tradition").[20] Indeed, the "old soil" principle that AT&T cites here refers to a common law crime some 370 years old. Compared to these truly ancient precedents, the soil in which the 1996 Act was planted is brand new. Importing this principle does not work.

Second, as even AT&T itself must acknowledge, the MFJ and *Computer Inquiries* were based in large part on the Commission's interpretation of its own rules and authority, but the passage of the 1996 Act superseded them.[21] After insisting that the Commission must rely on the MFJ and these earlier pronouncements as if they have some force of law greater than the prevailing statute, AT&T finally acknowledges that "the relevant issue is not whether the Act froze in place prior classification decisions, but whether Congress intended to codify the pre-1996 Act legal standards for determining whether a service was an enhanced service."[22]

These legal standards were ultimately incorporated into the Act itself, in much the same shape as the Commission left them to be sure, but now with the force of statute. (Ironically enough, in light of the lobbying blitz that broadband providers have mounted calling for a "legislative solution" to Net Neutrality, Congress did indeed adopt a comprehensive and still-valid legislative solution to this classification question in 1996 and did on an overwhelmingly bipartisan basis.) Thus, even with all of AT&T's spilled ink, we are back where we started: conducting an inquiry about the correct classification for BIAS given the text of the Communications Act and the nature of the service offered – per *Brand X.*

[20] *Id.*
[21] *See* AT&T Comments at 62.
[22] *See id.* at 67.

Nevertheless, it bears explaining here at some length that AT&T's argument is not just extraneous. It is also just plain wrong. In transporting the "old soil" over from the pre- and post-1996 Act implementing decisions, AT&T has once again managed only to soil itself. Luckily, this mess in the carrier's 2017 comments can readily be cleaned up with a bit of digging

AT&T first assumes its conclusion without proving it, arguing that internet access and (allegedly) similar services were always and necessarily treated as "enhanced services" (in the parlance of the *Computer Inquiries*) or "information services" (under the Act). It then tries to rewrite the history of the Commission's decisions, and even AT&T's own pronouncements on this very topic, in order to retrofit its analysis onto the *Brand X* decision and that case's progeny.

To this end, AT&T falsely suggests that even when the Commission "required telephone companies to 'unbundle' the transmission functionalities underlying any enhanced service they offered . . . the retail service remained unregulated."[23] And from this improper assertion, AT&T argues that "[t]he USTelecom panel majority misunderstood" the historical regulatory classification for DSL because "[DSL] providers were always understood to offer only an enhanced service (and after 1996, only an 'information service') to their retail customers, exempt from Title II regulation. They offered a Title II 'basic service' only when, as required by the unbundling rule, they sold the transmission component separately to wholesale customers[.]"[24]

The problem for AT&T in all of this fictionalized history is that the story is contradicted by contemporaneous sources no less authoritative than – yes, you guessed it – AT&T itself. It wouldn't be a Free Press Net Neutrality reply comment without catching AT&T in some such ridiculously contorted act of self-contradiction. Back in 2014, we noted with some pleasure AT&T's clearly stated opposition in 2002 "to the reclassification of any wireline broadband

[23] *Id.* at 65.
[24] *Id.*

service as an unregulated Title I service."[25] It'd be hard for AT&T to have opposed such reclassification back in 2002 if DSL already were an "information service" at that point – let alone hard to understand why the Commission needed to adopt the 2005 *Wireline Broadband Order* if this already was the state of the world as early as 1996. But the tale gets even better.

Tracing back to its origin the language that AT&T botches in its 2017 comments, we arrive at the Commission's 1998 *Advanced Services Order*, much discussed in Free Press's 2014 comments and reply comments and our initial filing in this docket too.[26] That 1998 decision recognized that an "xDSL-enabled transmission path" was a telecom service, and not inextricably intertwined with any information processing capabilities, while it labeled "Internet access" offered over that pathway an "information service."[27] The type of internet access available over the transmission pathway was indeed an information service, of the variety that AOL and other non-facilities-based dial-up ISPs made available over common carrier phone lines.[28] That did nothing to change the nature of the DSL service then on offer from facilities-

[25] Free Press 2014 Reply Comments at 28 (quoting Letter to Ms. Marlene Dortch, Secretary, Federal Communication Commission, from Joan Marsh, Director, Federal Government Affairs, AT&T, CC Docket No. 02-33 *et al*., at 2 (filed Aug. 16, 2002)). We also expressed some small amount of glee in our 2014 replies over AT&T's admission, in a 2013 special access pleading, that a Title II framework with forbearance there meant carriers had "invested billions of dollars to deploy state-of-the-art broadband networks, confirming the Commission's conclusion that forbearance would promote the paramount federal policy of fostering deployment of advanced services." *Id.* at 29 (quoting Comments of AT&T Inc., WC Docket No. 05-25, at 3 (filed Apr. 16, 2013)).

[26] *See, e.g.*, Free Press Comments at 28.

[27] *See id.* (quoting *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 36 (1998) ("*Advanced Services Order*")).

[28] *See id.* at 27–28 ("It is clear that the *Stevens Report* conclusions were based on, and meant for 1998-era third-party dial-up ISPs that reached their customers via common carrier facilities typically owned and operated by another entity – not the vertically integrated broadband internet access services of the carriers themselves today. This likewise explains the letter signed by Senators Ron Wyden and John Kerry, among others, [with its] reference to . . . third-party providers that were far and away the predominant internet access portals of the day.").

based telecom providers, however, just as the ability to reach information services online does nothing to detract from the telecom service classification of BIAS today.

What then of AT&T's claim that "the retail service remained unregulated" when 90s-era telecom companies sold DSL directly to individual users instead of selling it on a wholesale or unbundled basis? The *Advanced Services Order* passage cited in our initial comments reported that no commenter in that 1998 proceeding had seen fit to "disagree with our conclusion that a carrier offering such a [DSL] service is offering a 'telecommunications service.'"[29] And which commenters did the Commission cite to support that passage back in 1998? Why, AT&T itself, which had told the Commission that Title II resale obligations applied to "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[30] As AT&T told the Commission in real time in 1998, the Commission had placed "a general obligation on the ILECs to make all of their retail services available at wholesale rates."[31]

AT&T's new notion that DSL offered at retail was somehow an information service after the passage of the 1996 Act would render the 2005 *Wireline Broadband Order* moot, but that's not the only problem with it. More to the point when it comes to refuting AT&T's new twist on its string of anti-Title II arguments in the recent open internet dockets, this claim directly contradicts the Commission's and AT&T's own contemporaneous description of the regulatory status for DSL in the immediate wake of the 1996 Act.

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[29] *See id* at 28.
[30] Consolidated Reply Comments of AT&T Corp., CC Docket Nos. 98-11, 98-26, 98-3, at 11 (filed May 6, 1998) (internal quotation marks omitted) (emphasis added).
[31] *Id.* (emphasis added).

B. Information Service Classification and Telecommunications Service Classification are not Mutually Exclusive.

The broadband provider argument that BIAS must be classified as an information service is based on a fundamentally flawed reading of the relevant Telecom Act definitions. Providers like Comcast, Verizon, and AT&T (and the Commission too) argue that an information service classification precludes any part of the service being classified as a telecommunications service – suggesting that these categories must be mutually exclusive.[32] As AT&T writes in its comments:

> Because it is an information service, Internet Access cannot be a "telecommunications service" because the Commission has long found – and no one today seriously disputes – that the categories of "information service" and "telecommunications service" are "mutually exclusive": a single service cannot be both.[33]

For the record, one quite clearly could dispute this characterization. While the providers repeat this assertion over and over, there is no good textual support for it in the Communications Act,[34] as the D.C. Circuit recognized in *US Telecom* when it rejected such claims by the petitioners in that case.[35] Broadband providers try to appropriate the *Stevens Report*, but as we have shown that decision dealt with over-the-top 90s-era dial-up ISPs and not modern facilities-based BIAS.[36]

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[32] *See, e.g.*, Comcast Comments at 20 ("Moreover, because BIAS is an information service, it cannot also be a telecommunications service."); *see also Notice* ¶ 40 ("We believe this conclusion regarding mutual exclusivity is correct based on the text and history of the Act."); Verizon Comments at 28 ("The Telecommunications Act defines two mutually exclusive categories of communication services by reference to their functionalities….")

[33] *See* AT&T Comments at 69.

[34] Verizon cites Section 230 of the Communications Decency Act as textual proof, which has no bearing on how BIAS ought to be classified. *See* Verizon Comments at 29 & n.87.

[35] *See US Telecom Ass'n*, 825 F.3d at 702 ("[T]his argument ignores that under the statute's definition of 'information service,' such services are provided 'via telecommunications.' . . . This, then, brings us back to the basic question: do broadband providers make a standalone offering of telecommunications? US Telecom's argument fails to provide an unambiguous answer to that question.").

[36] *See* Free Press Comments at 26 (quoting *Stevens Report* language describing an era when it was true that "Internet access providers, typically, own no telecommunications facilities" but instead would "lease lines, and otherwise acquire telecommunications, from telecommunications providers." This emphatically does not describe the facilities-based BIAS providers of today.)

Buying the providers' argument on this question of mutual exclusivity, coupled with their argument that merely providing a pathway to information renders something an information service, would lead to the information service classification swallowing practically every telecommunications service including most telephone services.[37] AT&T, just as the *Notice* itself does,[38] argues that BIAS must be an information service because it:

> "offer[s]" consumers the "capability" to "acquir[e]" and "retriev[e]" information from websites, to "stor[e]" information in the cloud, to "transform[]" and "process[]" information by translating plain English commands into computer protocols, to "utiliz[e]" information through computer interaction with stored data, and to "generat[e]" and "mak[e] available" information to other users by sharing files.[39]

Ending the inquiry here leads to absurd results. One can transform a telephone service into an information service with a simple rhetorical flourish. By AT&T's own logic, landline services "offer" consumers the "capability" to "acquire" and "retrieve" information from directories, voicemail services, and interactive voice response systems. Landline services allow customers to "store" information via voicemail and other data storage services, "transform" and "process" the human voice and tones into electrical signals,[40] and "generate" and "make available" information via directories and other interactive voice response systems.

AT&T here reads "via telecommunications" out of its exploration of the statute. Verizon continues this line of thinking, arguing that "if broadband Internet access service could be deemed a telecommunications service simply because it delivers information, there would be no principled basis for distinguishing between telecommunications services and information services."[41] This is exactly backwards. No one disputes that, for example, an email service

[37] *See* Free Press Comments at 52.
[38] *See Notice* ¶ 27.
[39] *See* AT&T Comments at 68.
[40] Unless we are mistaken and telephone service is an elaborate system of cups and fishing wire.
[41] *See* Verizon Comments at 40.

provided by Verizon is an information service. Yet neither the *Notice* nor the broadband providers answer the question posed by the D.C. Circuit: "do broadband providers make a standalone offering of telecommunications?"[42] The answer is emphatically yes, no matter what these providers do to pretend that broadband does not "merely" transmit information when that is precisely what it does.[43] And that transmission service is not magically transformed into an information service merely because it transmits information in precisely the manner contemplated by the twin definitions in the 1996 Act. "Telecommunications" is "the transmission . . . of information of the user's choosing," per Section 153(50) of the Act. This Commission cannot and must not be fooled by the trick these broadband providers attempt. They would have the telecommunications services definition disappear from the statute altogether – taking advanced telecommunications services, offered on reasonably nondiscriminatory terms, right along with it into the ether.

C. Neither the D.C. Circuit in *US Telecom* nor the *Open Internet Order* Itself Misreads Brand X.

We briefly return to *Brand X*[44] to address AT&T's claim that the *Open Internet Order* and the D.C. Circuit's 2016 decision upholding it misread the Supreme Court case, and AT&T's accusation that these more recent orders find statutory ambiguity where there is none. Unsurprisingly, we disagree with AT&T's characterizations once more. AT&T argues that because the *Brand X* Court reached its conclusion without a wholesale reexamination of the 2002 Commission determination that cable modem service should be classified as a Title I service, the statute is necessarily unambiguous.[45]

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[42] *US Telecom Ass'n*, 825 F.3d at 702.
[43] *See* Verizon Comments at 40.
[44] *See NCTA v. Brand X Internet Serv's*., 545 U.S. 967 (2005)
[45] *See, e.g.*, AT&T Comments at 83.

But the most generous reading of the case for AT&T's bad argument here is that the Court merely described the information service classification as "unchallenged" by petitioners in *Brand X*,[46] and further suggested that it "need take no view" on questions such as the proper understanding of DNS in the context of broadband service "for purposes of this response."[47] The Court's silence on such points is just that, and not conclusive as AT&T would have it. The *Brand X* Court also engaged in a *Chevron* step II exercise in determining the reasonability of the Commission's Title I classification for BIAS within the confines of the Communications Act. That the Court felt such an exercise was necessary is evidence at least of the Commission's flexibility in making a classification determination subject to *Chevron*'s standards.[48]

More importantly, the *Brand X* Court clearly went on to hold that ambiguity exists regarding the nature of the "offer" to BIAS customers.[49] It is this particular question that turns "not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided."[50] Together, these factors support a two-step analysis wholly permissible under a fair reading of *Brand X*. First, a factual determination regarding the nature of the service that BIAS providers offer, based on a determination of what the "consumer perceives the service being offered"[51] is. Then, a reasoned determination by the Commission whether that service on offer is an information service or a telecommunications service within the contours of the Communications Act.

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[46] *See Brand X*, 545 U.S. 987.
[47] *Id.* at 999, n.3.
[48] Indeed, the *Brand X* Court "first consider[ed] whether we should apply *Chevron*'s framework to the Commission's interpretation of the term 'telecommunications service'" and then "conclude[d] that we should" while also holding that "the Court of Appeals should have done the same." *Id*. at 980.
[49] *See id.*; *see also id.* at 989.
[50] *Id* at 991.
[51] *Id* at 976.

On that first prong, the record in this proceeding has amassed a bevy of evidence. As we noted in our initial comments, BIAS providers hold themselves out to be telecommunications providers, and their customers overwhelmingly believe that they are purchasing a telecommunications pathway between their own devices and the other edges of the network.[52] Neither BIAS providers' use of caching nor DNS is determinative in this regard. We dare say that vanishingly few BIAS customers are at all aware of these network services that facilitate the connection between a customer's device and an edge destination. These services, like automated switchboards, are invisible and imperceptible to consumers; they do not technically or legally change the nature of the transmission on offer; and they do not change internet users' perception of same. Moreover, the small population of BIAS customers that do intimately understand DNS and caching services – network engineers – believe BIAS providers' role in providing anything other than a neutral transmission service has decreased since 2002.[53]

The *Brand X* Court clearly felt there was some ambiguity in the statute, in terms of the standalone offer of telecom services by broadband ISPs. We believe, as Justice Scalia did in *Brand* X, that BIAS providers unambiguously do offer such a telecom service. But the point at present is that broadband providers' arguments in this docket once more amount to nothing more than an amateur disappearing act. They cannot make the *Brand X* court's pronouncements on *Chevron* deference disappear, nor alter the subject matter to which that Court applied such deference.

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[52] *See* Free Press Comments at 42.

[53] *See* Joint Comments of Internet Engineers, Pioneers, and Technologists, WC Docket No. 17-108, at 15 (filed July 17, 2017) ("Thus, this example also illustrates how the role ISPs play in the Internet ecosystem has changed since 2002. In the early days of the Internet, caching and processing was a key component of running an ISP and managing its network; today, that role is filled by third parties, and once again customers and edge services simply expect ISPs to transmit data to and from their destinations, be they servers run by third party CDNs inside the ISPs network, or distant servers on the other side of the globe.").

II. The Record Demonstrates That the *Open Internet Order* Did Not Negatively Impact Broadband Deployment, Which Continued at an Historic Pace as BIAS Providers Upgraded to Meet Demand for Telecommunications Services Capable of Transmitting High-Quality Online Video.

In recent testimony before the House Energy and Commerce Committee's Subcommittee on Communications and Technology, during a discussion of the Commission's current proposal to abandon the *Open Internet Order*, Representative Doyle asked Chairman Pai "what kind of comment would cause you to change your mind?" Chairman Pai responded, "economic analysis that shows credibly that there's infrastructure investment that has increased dramatically" in the wake of the 2015 order.[54]

In Free Press's initial comments in the instant proceeding, we offered voluminous analysis of the precise type requested by Chairman Pai. While some of this analysis was new (*i.e.* our analysis of the Commission's Form 477 Deployment data), other parts of that analysis had been available to the Chairman (and Commission staff) for several weeks preceding his House testimony. Despite this, the Chairman appears eager to parrot much less rigorous and deeply flawed analysis that supports his preconceived conclusions on this matter. This suggests that his views are based in ideology, that no information would move him off of his current position, and that therefore the conclusion of this proceeding is predetermined. As we discuss in greater detail in Part III below, and as should be obvious to anyone who cares about fact-based decision-making, this kind of prejudice in agency rulemaking is a big problem. (To put it mildly.)

But if the Chairman's statements before the House truly were sincere, and he really is open to facts that contradict his pre-existing beliefs, then we respectfully suggest these facts are readily available. As we documented in our initial comments:

[54] *See* Oversight and Reauthorization of the Federal Communications Commission, House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce (July 25, 2017) ("Pai Oversight Hearing Testimony").

- The number of Census blocks with two or more ISPs offering service with downstream speeds at or above 25 Mbps increased by 42 percent following the *Open Internet Order*.
- At the end of 2014, approximately one-third of the population had access to two or more ISPs offering 25 Mbps or higher-level services. By mid-2016, more than half of the population could purchase broadband at this speed threshold from two or more ISPs.
- At the end of 2014, only 10.5 percent of the population had access to one or more wired ISPs offering consumer services above the 300 Mbps downstream threshold. But just 18 months later, this had more than doubled to nearly 23 percent of the population able to access this level of broadband service.
- Examples of specific ISP company growth include:
    - Comcast sharply increasing the speeds of its offerings in the months following the *Open Internet Order*, from a Census block-average of 129 Mbps to 191 Mbps.
    - Cox going from offering 300 Mbps and higher-level service in none of its Census blocks to doing so in 68 percent of its blocks following the *Open Internet Order*.
    - AT&T improving performance, such that at the end of 2014 AT&T offered 25 Mbps and higher-level downstream speeds to consumers in just 5 percent of its Census blocks, but by mid-2016 offered this level of service in nearly 40 percent of its territory – a massive increase that reaches more than 50 percent of the population living in AT&T's service area.
    - Specifically improving in its rural blocks, AT&T saw its average available downstream speed double from 9 Mbps to 18 Mbps during the period following the Commission's adoption of the *Open Internet Order*.
- Among cable company ISPs (which, thanks to NCTA reporting standards, disclose in their quarterly SEC filings the specific amounts of capital expenditures they devote to network infrastructure):
    - During the two years following the *Open Internet Order* vote, cable-industry physical-network investments increased 48 percent when compared to the amount invested in such facilities during the two prior years.
    - Cable's core network investments accelerated dramatically during 2016 (a $2.1 billion increase over 2015, compared to 2015's $0.8 billion increase over 2014).
    - That one-year increase in cable-industry core network investments during 2016 marked the biggest single-year jump since 1999.

These facts and the other data in our initial comments reflect a historic period of investment, deployment, and innovation across the entire internet ecosystem in the wake of the *Open Internet Order*. In addition to the numbers we presented regarding deployment and investment, we copiously documented each publicly traded ISPs' comments made to their own

investors and investor analysts, which clearly reflected these broadband providers' justified belief that the Commission's 2015 order had no negative impact on their broadband deployments. The weight of this evidence is overwhelming, and certainly indicates the "dramatic" level of market growth the Chairman demands.

Despite this evidence – which is the well-known reality for the broadband industry analyst community – certain companies and industry-funded commenters continue to trot out the lie that Title II has harmed broadband investment. But as we explain below, these commenters' efforts are lazy, terribly incomplete, self-serving, and misleading, and they do not meet the standard of analytical rigor required to support the dramatic policy change the *Notice* proposed.

A. Proponents of the Lie That Title II Restoration Harmed Investment Failed to Confront the Litany of Publicly Available Information That Disproves This Claim, Choosing to Focus on Industry-Manipulated Aggregate Totals, and Falsely Finding a Causal Relationship Despite Contrary Evidence.

The *Notice* is based in part on the assertion that the restoration of Title II for broadband telecommunications services, and the adoption of what are essentially status-quo affirming nondiscrimination rules, has harmed broadband investment and deployment. This notion is presented as if it is a perfectly reasonable assumption of cause and effect that needs little if any confirming evidence, even though it is a highly implausible outcome based on the known facts about the broadband market.

No commenter bothered attempting to confront the copious, specific examples of investment and deployment (by many internet "ecosystem" sectors, including BIAS providers) contained in Free Press' May 2017 report *It's Working*. Our report provided overwhelming circumstantial and direct evidence on the lack of any negative investment impact due to the 2015 Title II restoration. Commenters simply regurgitated the weak and debunked claims contained in a blog post written by industry-funded economist Hal Singer, and a similar claim from US

Telecom (as well as blog posts derived from and echoing these two sources, published by other industry-funded groups such as Free State Foundation and ITIF). The Singer and US Telecom analyses claiming to demonstrate a Title II-based investment harm, and the comments that cited these sources, each solely focused on the change in the aggregate total of capital investment by some vague and unspecified tabulation for the broadband industry as a whole. This total was either a manipulated figure for a subset of firms (Singer), or a manipulated figure constructed in an opaque manner (US Telecom).

As we explained in our comments, this myopic focus on a single aggregate figure for capital investment is analytically inappropriate, particularly when it is done to the exclusion of massive amounts of evidence contradicting the claims based on that manipulated industry aggregate figure. This is for several reasons. The focus on a single figure:

(1) misses the details of what is happening at specific companies, some of whom are large ISPs on the downswing of a normal deployment cycle, which alone could skew the aggregate value because of the relative size of the firms involved;

(2) presumes that the raw spending on capital investment is an appropriate metric for changes in broadband capacity deployment, when it is not;

(3) embeds without room for debate the belief that if the direction of the aggregate value is down, that this decline was caused in whole or in part by Title II's restoration;

(4) embeds the belief that capital expenditures must always go up, and thus fails to reconcile the reality that many ISPs (especially but not exclusively cable MSOs) have upgraded their systems to capabilities far beyond what consumers currently demand, or will demand for many years even with the growth of online video;

(5) ignores the reality that ISPs, as rational profit-maximizing firms, are motivated to reduce capital expenditures to the greatest extent possible, a desire shared by institutional shareholders; and

6) ignores the fact that local competition and demand for high-capacity, nondiscriminatory broadband telecom services, amongst a bevy of other factors (including, *e.g.*, a given firm's debt portfolio) have a far greater actual impact on any given firm's investment decisions than the potential impact from uncertainty about future regulation – especially if the likelihood of that intervention is low).

The record in this proceeding reflects the folly of the Commission's and ISP lobbyists' singular focus on the (supposed) aggregate change. Singer and US Telecom were only able to arrive at their result by manipulating two ISPs' recent capital expenditures (AT&T's and Sprint's), in order to manufacture an aggregate investment decline. Neither analysis attempted to reconcile the hundreds of explanations from these two companies that directly explained why and how they allocated the capital they did preceding and following the *Open Internet Order*. And no commenter that held up the Singer or US Telecom analysis as causal proof of Title II harm, while dismissing one small portion of Free Press's analysis (our aggregate capital investment total for all publicly traded retail ISPs) even bothered to address the fact that the U.S. Census Bureau's data showed an increase in telecom industry capital spending following the order, with that increase driven by large growth in wired carrier investment.

Anti-Title II commenters were content to flippantly dismiss Free Press's analysis without addressing it in any substantive manner. The Commission does not have this luxury. It can of course consider Singer and US Telecom's aggregate totals alongside the aggregate tally we produced. But it has to go further. It has to look at the data on actual network investments made in SEC filings by cable company ISPs, which shows a remarkable period of growth following the *Open Internet Order*. It has to look at its own Form 477 deployment data (which Free Press summarized in our initial comments) that show a remarkable level of new, higher capacity deployments following the 2015 order's adoption to, particularly by LECs (which face a much more economically challenging upgrade path than incumbent MSOs).

Commenters professing Title II harms did none of this work. They simply regurgitated simplistic and misleading analysis that focused on the singular aggregate industry figure. After citing this supposed aggregate decline, these commenters then committed the logical fallacy of

post hoc ergo propter hoc, concluding that of course Title II was to blame. And in the case of certain ISPs, commenting here, they even went so far as to ignore their own financial results and comments to their investors. Comcast provides an egregious example of this kind of behavior, showing how ISPs speak out of both sides of their mouth by lying to the Commission while telling the truth to their investors and the SEC. Even though Comcast's CFO told investors "it's the fear of what Title II could have meant, more than what it actually did mean," and even though Comcast's current network investments are higher than at any other time in the company's history, Comcast's lawyers pretended in their comments that none of this is true. Citing Comcast's D.C. heavyweight insider David Cohen (and not its CEO, nor its CFO's contradictory statements), Comcast told the Commission, "making an assessment based on capital intensity as opposed to the actual capital spend, 'the leveling off and even reduction of capital intensity since the adoption of Title II suggests that Comcast's capital spend alone is going to decrease more than $2.5 billion over a three year period' compared to what it would otherwise have been. This data further undermines Free Press's absurd claim that the imposition of common carrier regulation has been or will be a boon to broadband investment."[55]

But it is Comcast that is acting in absurd fashion here, not in the least because Free Press never made any claims about a common carrier-caused "boon" for broadband investment. We simply offered voluminous evidence to refute the claim that common carriage restoration negatively impacted the industry's pre-*2015 Open Internet* Order vote trajectory. More important at the moment is the inexplicable fact that Comcast's lawyers and D.C. lobbyists appear to be ignorant of their own company's financial data – or else purposefully misstating that data in order to game the system and gain a regulatory "victory" by reversing a successful policy.

[55] Comcast Comments at 32.

Capital intensity, as we explained in our initial comments, is one of many analytical figures that are useful to a complete understanding of industry trends; but as it is a figure produced from two separate components (capital expenditures and revenues) it is subject to short-term changes from changes in either component (and in either direction).[56] Nevertheless, we cited Comcast's own financial data showing that its capital intensity had increased sharply following the adoption of the *Open Internet Order*, which puts truth to the lie that Comcast's capital intensity is in decline. In Figure 1 below, we offer a highlighted screen capture of a Comcast SEC filing showing this increase (from 13.9 percent in 2014 to 15.2 percent in 2016), in case Comcast's lawyers don't know where to find this information.

Figure 1: Comcast's Capital Expenditures and Capital Intensity (2014-2016)

Consolidated Capital Expenditures
($ in millions; unaudited)

COMCAST

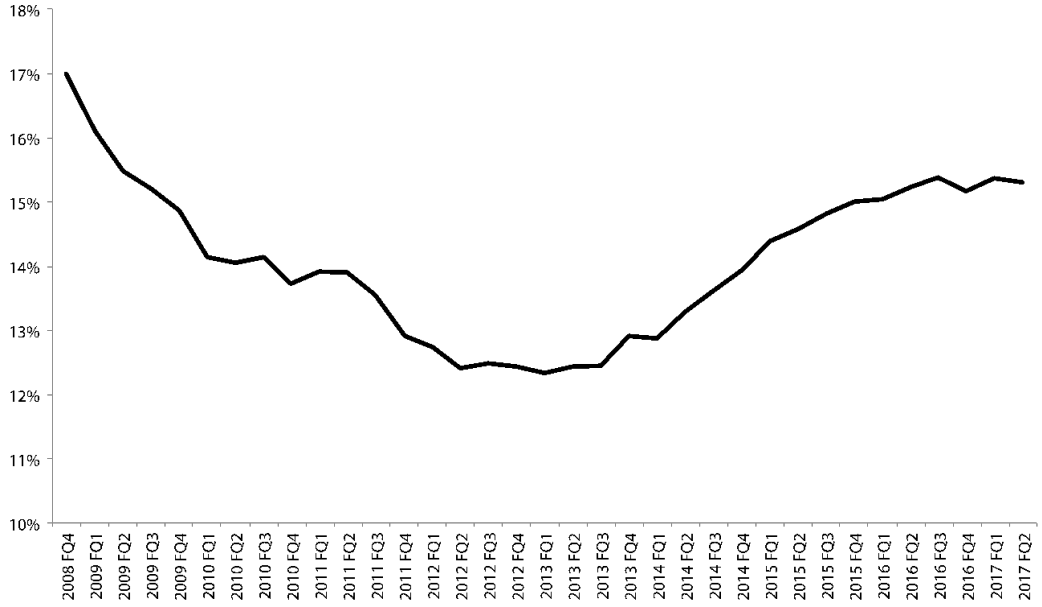
	2014					2015					2016				
	1Q	2Q	3Q	4Q	FY	1Q	2Q	3Q	4Q	FY	1Q	2Q	3Q	4Q	FY
Customer Premise Equipment (CPE)[1]	$726	$826	$890	$955	$3,397	$839	$881	$1,019	$959	$3,698	$868	$927	$1,039	$831	$3,665
Scalable Infrastructure[2]	$222	$366	$355	$432	$1,375	$272	$397	$356	$514	$1,539	$351	$464	$488	$524	$1,827
Line Extensions[3]	$123	$155	$183	$212	$673	$177	$208	$238	$263	$886	$230	$296	$329	$353	$1,208
Support Capital[4]	$74	$147	$217	$273	$711	$158	$192	$240	$327	$917	$127	$194	$188	$387	$896
Total Cable Communications Capital Expenditures[5]	$1,145	$1,494	$1,645	$1,872	$6,156	$1,446	$1,678	$1,853	$2,063	$7,040	$1,576	$1,881	$2,044	$2,095	$7,596
Percent of Total Cable Communications Revenue	10.6%	13.5%	14.9%	16.5%	13.9%	12.6%	14.3%	15.8%	17.2%	15.0%	12.9%	15.1%	16.3%	16.3%	15.2%
Total NBCUniversal Capital Expenditures	$291	$298	$295	$337	$1,221	$268	$272	$289	$557	$1,386	$295	$360	$336	$461	$1,452
Corporate, Other and Eliminations Capital Expenditures	$12	$6	$10	$15	$43	$12	$21	$23	$17	$73	$14	$30	$26	$17	$87
Total Consolidated Capital Expenditures	**$1,448**	**$1,798**	**$1,950**	**$2,224**	**$7,420**	**$1,726**	**$1,971**	**$2,165**	**$2,637**	**$8,499**	**$1,885**	**$2,271**	**$2,406**	**$2,573**	**$9,135**

Source: Comcast December 31, 2016 Financial Supplement.

[56] Free Press Comments at 163 ("But even capital intensity can be somewhat misleading, depending upon the rate of growth of each of the metric's components. For example, during 2013, T-Mobile invested $4 billion in capital equipment and took in $24.4 billion in revenues. This equated to a capital intensity of 16.5 percent, or $16.50 of capital invested for every $100 in revenue. In 2016 T-Mobile's capital expenditures were $4.7 billion, a 16 percent increase above its 2013 capex level; but its revenues in 2016 were $37.2 billion, more than 50 percent higher than 2013. Combined, this means that during 2016, T-Mobile invested $12.60 in capital for every $100 in revenues – a capital intensity of 12.6 percent. This trajectory mirrors that of the ISP industry overall, with capital expenses rising at a slightly lower rate than revenues are, resulting in a slow decline in capital intensity . . . . The lesson here is a well-worn business truism: you have to spend money to make money. In the ISP industry, with enormous economies of scale and high entry barriers, this return on investment is one of the safest bets possible.").

In Figure 2, we present Comcast's capital intensity by quarter since 2008 (data presented on a trailing 12-month basis to reduce quarterly variability), which clearly shows that Comcast's comments claiming the company's capital intensity declined in the wake of reclassification are wrong. It also shows that capital intensity at the company actually was in decline for years preceding the *Open Internet Order* and the 2014 proceeding that led to it, at a time when Comcast's network spending was flat while its revenues continued to grow (*see* Figure 3).

Figure 2: Comcast Cable Capital Intensity 2008–2017
(Cable Segment Capital Expenditures as a Percent of Cable Segment Revenues, 12-Month Trailing)



Source: Comcast SEC Filings

But even if Comcast's capital intensity were in decline, and even if that figure does decline going forward, it does not mean that Title II is the culprit. Again illustrating that Comcast may have failed to read our comments or to keep track of what its executives are telling investors, we quoted Comcast at length on the matter of the trajectory for its capital intensity. In one of the more recent statements we quoted,[57] Comcast's CFO told investors:

[57] *See* Free Press Comments at nn. 423–424.

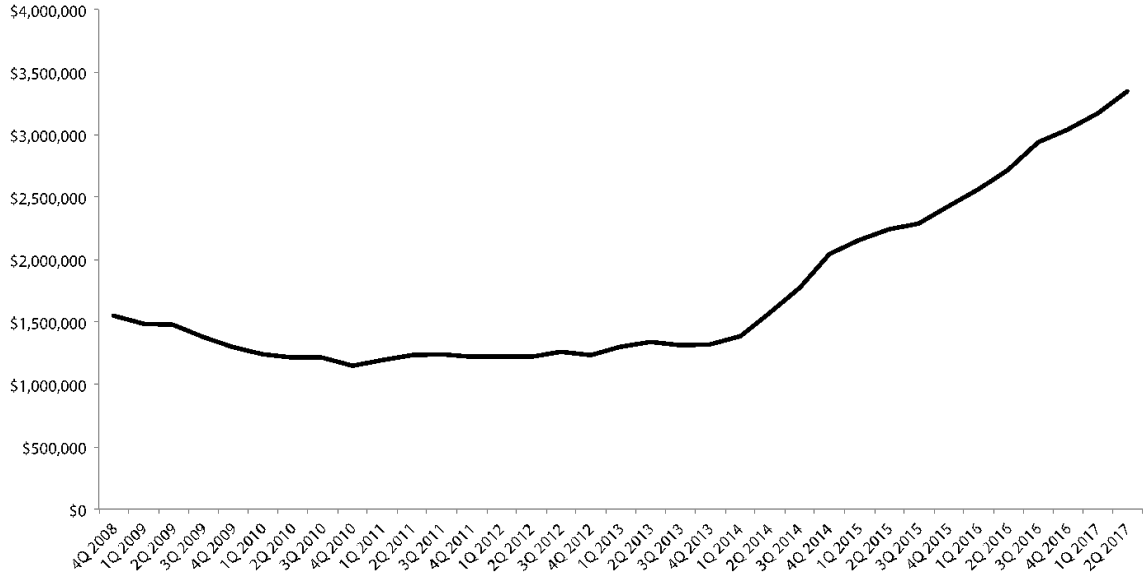
> The full year was led by customer premise equipment, including X1 and wireless gateways, which remain the largest component of our capital expenditures, though spending declined modestly year over year. We also invested in our network through increased spending in line extensions as we extended our network to more business and residential customers and in scalable infrastructure as we invested to increase our network capacity. These investments enhance our competitive position, allowing us to continue to take advantage of opportunities to grow penetration and market share by delivering the best broadband product to more homes and businesses. For 2017, spending on CPE is expected to continue to decline while we increase our investment in network capacity as well as our investment in line extensions to reach more customers. As a result, our outlook is for 2017 capital intensity to remain flat to 2016 at approximately 15 percent. [. . .] Longer term, as spending on CPE continues to decline as X1 scales and shifts to less expensive IP devices, we expect to see a decline in overall capital intensity.") (emphases added)

There it is, plain as day: Comcast's network capacity investments continue to increase, but given its progress on X1 set-top box/gateway router deployment, its customer premise equipment investments are expected to decline. On this year-end 2016 investor call, nowhere did Comcast indicate that Title II had impacted its investments or deployments – though, unlike on all other investor calls preceding it for nearly two years, the topic of Title II did come up with a direct question of how a Trump FCC's potential repeal of the rules would impact Comcast's investments. As he did in every other instance, Comcast's CEO declined to say that Title II had or would impact Comcast's own investments. Comcast execs merely said they were encouraged by the Commission "revisiting the authority of the government to go to places that they said they weren't going to but legally they could go to in the Open Internet order with Title II."[58]

[58] *See* Comments of Brian Roberts, Chairman & CEO, Comcast Corp., Q4 2016 Comcast Corp. Earnings Call (Jan. 26, 2017) ("I think regulatory certainty for investors is the same as it is for management: it helps you have the confidence to make long-term plans. And the kind of discussion we've been having this morning, whether it's fiber or other investments in in-home equipment and what your business opportunities are, the more uncertainty, the less encouraging it is to want to invest. So we are encouraged by the prospect of rules that we believe will encourage that investment, stimulate investment, whether that's tax decreases or revisiting the authority of the government to go to places that they said they weren't going to but legally they could go to in the Open Internet order with Title II.").

The inarguable truth is that Comcast's investment is one of the brightest spots in a galaxy full of bright spots in terms of broadband capacity enhancements and investment in the Title II-era. None of this means, as we were careful to note in our initial comments, that everyone in the country has access to affordable broadband service yet. Far from it, unfortunately. But business is booming for the broadband industry, and the numbers show it. As we illustrate in Figure 3, Comcast's network investments were in decline, even as it deployed its initial DOCSIS 3.0 upgrades,[59] and stayed flat until around the same time the Commission started the latest open internet proceeding. Its network investments have increased ever since, with no sign of any Title II-related harm caused by the supposed uncertainty to which its CEO oh-so-vaguely refers. This observation of Comcast's actual results is supported by the real-time comments Comcast made to investors (likewise documented in our initial comments).

Figure 3: Comcast Network Investment* 2008–2017 ($000, 12-Month Trailing)
[*Line Extensions, Upgrades/Rebuilds, Scalable Infrastructure]



Source: Comcast SEC Filings

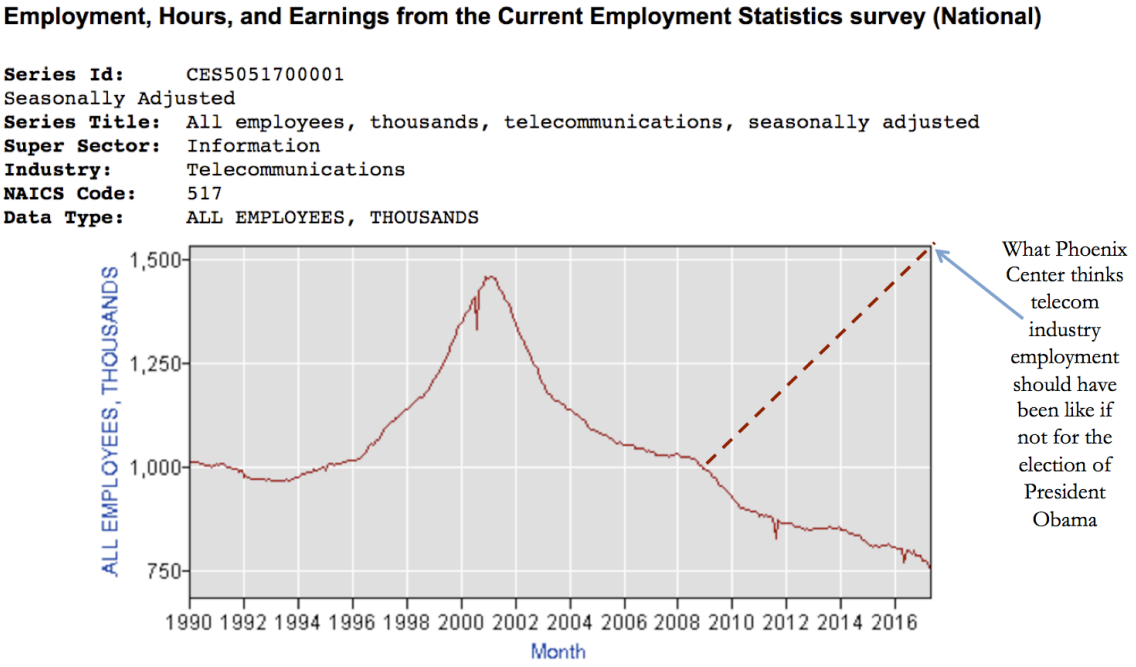
[59] For further discussion of this history, with Comcast expanding capacity even while its investments declined because of the lower costs associated with deploying more advanced technology, see Free Press Comments at 131.

In its comments in this docket, Comcast (like other commenters) wasn't content hiding the truth found in its SEC filings. It also parroted uncritically the highly dubious analysis produced by the broadband industry-funded Phoenix Center. In that analysis, Phoenix employed a perfectly reasonable methodological approach (differences in differences), which would be fine if used by an honest broker willing to be critical of its own analysis and biases. But the Phoenix Center, with its notorious history of reversing most of its previously held positions the moment its primary IXC benefactors were acquired by the Baby Bells, are no such honest broker. Both of the Phoenix Center "studies" cited by various industry commenters completely ignored actual marketplace evidence, and simply relied on a crude "past correlation must equal future correlation" approach.

This clumsy approach results in Phoenix Center concluding that capital expenditures should have risen a whopping 10 percent following the *Open Internet Order*, and because they didn't, Title II is to blame. It's the same approach Phoenix Center used to produce a laughable analysis concluding that, but for President Obama, the telecom industry would have employment levels higher than those seen at the peak of the so-called "telecom bubble" circa 2000. In this employment study, the Phoenix Center found a brief period of partial correlation between the telecom industry's employment changes and those in six other industries (Primary Metals, Computer and Electronic Products, Electrical Equipment and Appliances, Paper and Paper Products, Plastics and Rubber Products, and Travel Arrangement and Reservation Services). But the notion that these industries and the telecom sector should have continued to behave in the same manner and follow the same trajectory following the 2001–2002 recession, and leading up to the 2008 recession, is ludicrous. It completely ignores the secular, technology-driven changes occurring in the telecom sector.

The LEC's legacy business in switched voice has been in secular decline for more than a decade now. This is the primary reason that the telecom industry shed well over 450,000 jobs from 2001 to 2009, according to Bureau of Labor Statistics numbers. Figure 4 shows this trajectory, and compares it to the fantasy numbers that the Phoenix Center's shoddy analysis conjures instead.

Figure 4: U.S. Telecommunications Industry Employment: Reality vs. Fantasy



Source: BLS; Phoenix Center

Thus, the Phoenix Center pits telecom sector job numbers against those in other industries that did not experience the same kind of consistent declines, then makes the utterly irrational claim that telecom should have been adding jobs after 2009 – and after losing jobs precipitously for the 8 years before Obama was sworn in. This methodology is garbage in, garbage out: By picking as controls industries that (unlike telecom) were not in secular employment decline, and assuming telecom should have had the same relative growth as these other sectors, the Phoenix Center produced a strange result that would suggest the industry

should have 800,000 more jobs than it currently does – *i.e.*, more than twice the current level. For whatever reason, the Phoenix Center didn't do what a first-year analyst is trained to do when faced with a fantastical result: pause and contemplate that perhaps something is wrong with the methodology. Clearly none of the industry and industry-aligned commenters that recited the Phoenix Center's absurd findings put much of their own critical thought into it either.

In sum, Free Press didn't try and predict the future, nor the "but-for" world. What we did was meticulously document every piece of actual data available to us, from ISPs' SEC filings, to their statements to investors explaining their investments, to the Commission's own broadband deployment data. The totality of this evidence speaks for itself: the broadband industry's pre-2015 trajectory was not in any way, shape, or form harmed by the *Open Internet Order*, and in fact there was an acceleration in capacity-enhancing deployments in response to greater demand for streaming video-capable connections. The Chairman and his ISP industry friends may wish to embrace the fantasies peddled by Singer, US Telecom, and the Phoenix Center in lieu of the reality well known to actual industry observers. But the Commission cannot rely on shoddy analysis that portends to predict a "but-for" world based on spurious correlations and willful blindness to counterfactual examples undercutting this skewed world-view.

B. Free Press Meticulously Documented the Total Absence of ISP Comments to Investors Concerning Any Negative Impact from Title II Restoration on Their Broadband Deployments and Investments. Subsequent ISP Statements Continue to Affirm This Reality.

As we documented in our initial comments, the 2015–2017 era has been an amazing period of capacity growth in the U.S. broadband market. That is a verifiable reality, despite the *Notice's* anti-regulatory fantasy of a broadband market turned into an investment-free dystopia by Title II's restoration.

In the real world, the market's trajectory was unaltered: Cable company ISPs completed DOCSIS 3.0 upgrades and increased capital spending to push fiber deeper into their networks in preparation for DOCSIS 3.1-powered gigabit deployment. ILEC ISPs ramped up their short-loop fiber-fed and full fiber-to-the-home deployments in order to remain relevant in the face of cable's speed advantages as streaming video demand grows. And wireless carriers completed 4G LTE rollouts, pushed out 4G LTE-Advanced and other interim (and less costly) capacity enhancements, then set about securing permits and other rights-of-way access needs for the pending pre-5G network densification – an upgrade cycle that will once again require a period of higher capital spending.[60]

We characterize this as a verifiable reality, because it is just that: The ISPs make a wide variety of public, SEC-governed disclosures to investors, and submit detailed information about their network deployments to the FCC on a semi-annual basis. We reviewed and catalogued all of this data in our comments. If this proceeding is about putting Title II on trial for the crime of harming investment, then the only reasonable conclusion based on all available information and common sense is "not guilty."

[60] As we noted in our comments, the wireless industry has seen several multi-year periods of aggregate increases and decreases in capital investments for the sector, each centered around a large airwave standards evolution. Carriers are now in a downswing, though not as sharp as prior ones because of the ongoing small cell and network densification efforts that bring both short-term and long-term capacity benefits. But the wireless industry is preparing for another upswing in capital spending, even as network virtualization technologies create massive capital efficiencies. *See, e.g.*, Gabriel Brown, "Gigabit LTE Takes to the Air," *Light Reading* (Aug. 8 2017) ("Just a few years ago, Gigabit mobile broadband was almost unthinkable – in 2017 it will be a reality. Operators worldwide are starting to deploy Gigabit LTE. Sprint was the first operator to launch in the US market, with a live deployment at the New Orleans basketball stadium in March this year. And in June, AT&T announced that it had deployed its first '5G Evolution' market in Indianapolis, with a view to 20 more live markets by the end of the year."); *see also* Sarah Barry James and Adelaide Klonicki, "Wireless CapEx creeps north as 5G gets closer," *SNL Kagan* (Aug. 8, 2017). ("As the wireless industry begins work on 5G, the next-generation of wireless technology, operators are bracing for increased capital expenditures.").

One specific thing we documented in our initial comments is the fact that the topics of Title II, net neutrality, the open internet rules, and their collective impact on investment were not topics of discussion on ISPs' quarterly investor calls following adoption of the *Open Internet Order*. On these calls, analysts asked ISP CEOs and CFOs many specific questions concerning their investment decisions and trajectories, and the executives answered in copious detail The collective lesson from these question-and-answer sessions is that ISPs believe their best path to growth is through continued network investments. Some firms have completed upgrade cycles, and they are in cash-harvesting mode before they enter the next cycle. Others are in the midst of upgrades, and have given investors a general sense of how long their capital expenditures will remain at an elevated level.

Many broadband providers have spoken at length about how they are leveraging technological advances to deploy higher capacities at a lower capital cost than was required in prior upgrade cycles. And in the few instances where analysts have asked these executives how Title II (or its potential repeal) impacted their own company's investments, not one single executive indicated that Title II did have a concrete impact on their own numbers, nor quantified even generally how its repeal would impact their spending. The common refrain prior to the November 2016 election was that reclassification had no impact, and the response subsequent to the election typically has been a vague string of platitudes about how the potential repeal is "encouraging."

During the period between the initial comment deadline and reply comment deadline in this proceeding, many broadband providers held their Second Quarter 2017 investor calls. Once again, the topic of Title II is almost completely absent from the minds of the ISPs and the analysts whose job it is to care deeply about factors that may impact these firms' spending. Once

again, broadband providers have meticulously detailed the motivations behind their prior capital investments and planned investments, with explanations that universally portray a strong level of confidence in this market and a total lack of concern for Title II's (supposed) impact.

For example, Comcast continued its post-reclassification investment growth streak in the second quarter of 2017, with total capital expenditures up 4 percent from the prior-year period. But even this increase masks what Comcast is investing in its broadband networks, as the total amount includes capital spent on customer premise equipment, and that segment is down due to the company's X1 rollout having progressed past its peak. Comcast's network expenditures (*i.e.*, the capital spent on line extensions, upgrades/rebuilds, and scalable infrastructure) during the second quarter of 2017 were higher than in any other quarter in the company's history. Comcast's network investments were up 23 percent during the first half of 2017 compared to 2016, and were nearly double the amount spent during the first half of 2014. This increase in network investment and decline in set-top box spending, combined with increasing revenues, is resulting in Comcast's capital intensity remaining near its target of 15 percent.[61] The topic of Title II did not come up on Comcast's second quarter 2017 call.[62]

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[61] *See* Comments of Michael J. Cavanagh, Comcast Corporation, Senior EVP & CFO, Q2 2017 Comcast Corp Earnings Call (July 27, 2017) ("At Cable Communications, capital expenditures increased 4 percent to $2 billion for the quarter, resulting in capital intensity of 14.9 percent. For the full year, we continue to expect capital intensity to remain flat to 2016 at approximately 15 percent of total Cable Communications revenue. For the quarter, the increase in spending reflects a higher level of investment in scalable infrastructure to increase network capacity and increase investment in line extensions, partially offset by decreased spending on customer premise equipment. . . . For the six months ended June 30, 2017,[. . .] Cable Communications' capital expenditures increased 8.1 percent to $3.7 billion and represented 14.4 percent of Cable revenue compared to 14.0 percent in 2016.") (emphasis added).

[62] On Comcast's April 2017 First Quarter call, CEO Brian Roberts was asked directly "can you quantify any sort of investment opportunity you might see that [ ] would open up [if the 2015 order were reversed]?" His answer ignored the question, opting for a word salad of generalities with zero suggestion that repeal would impact Comcast's investments. "I think on your regulatory question, we're encouraged that the FCC made the announcement yesterday and is

Similarly there were no mentions of the instant proceeding or Title II on Charter's most recent quarterly investor call or on its First Quarter 2017 call. The company's year-over-year total investments were flat, but it indicated they would begin to rise as it restarts upgrades to Time Warner Cable's systems after pausing them to complete post-merger integrations. Nowhere has Charter ever even hinted that its own capital expenditure trajectory was in any way impacted by Commission policy, and it affirmed this on its most recent call. Indeed, Charter's CFO indicated that its biggest barrier to spending more capital is its ability to actually do the work.[63]

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beginning a process to revisit whether Title II is really the right regime. We've said for a long time that we think it's – it puts a damper on ability to invest and react to change. And we steward a lot of capital every year. And so having the right kind of consumer protections and net neutrality, which we've said we support and want, but not in a regulatory regime designed for a different era that doesn't apply to the business. And so the beginning of that conversation is heartening, and I think it will allow for, hopefully, an end result that balances the need for consumers and our commitment legally enforceable for those consumers to know that they can surf an open and free Internet, but not do so in a way that has real dark clouds for our investment community." *See* Comments of Brian L. Roberts, Comcast Corporation, Chairman & CEO, Q1 2017 Comcast Corp Earnings Call (Apr. 27, 2017).

[63] *See, e.g.*, Comments of Christopher L. Winfrey, Charter Communications Inc., CFO, Q2 2017 Charter Communications Inc. Earnings Call (July 27, 2017) ("And from an overall CapEx for this year, relatively flat year-over-year. We've approved a fair amount of capital and we hope that we can spend it. We're not limited by budget per se, but more about what can practically be done. I think if we're successful, you'll see a higher level of spend in Q3 and Q4, but it makes it a little bit difficult to forecast because it's simply a function of how much you can get done. I would argue the faster you can get it done and behind you, the better it will be."; *see also* Charter Communications Inc. 10-Q (July 27, 2017) ("The actual amount of our capital expenditures in 2017 will depend on a number of factors, including the pace of transition planning to service a larger customer base as a result of the Transactions, our all-digital transition in the Legacy TWC and Legacy Bright House markets and growth rates of both our residential and commercial businesses."); Comments of Christopher L. Winfrey, Charter Communications Inc., CFO, Q1 2017 Charter Communications Inc. Earnings Call (May 2, 2017) ("Everything I said about CapEx last quarter still remains the case. And we're a little bit behind in terms of where we'd like to be on the spending on CapEx just because of timing-related issues. In a weird sense, it's going to be tough to hit the plan that we have for CapEx this year, but our intent is still to be able to be in a position to spend more than we did last year. I don't think, from a capital intensity, it'll be that different from where it was last year just because of revenue growth. But nothing has changed. And since we want to spend the capital so we can grow faster quicker, our goal is to spend as much as we can this year." (emphases added)).

Altice USA (the company formed from Altice's acquisition of former Cablevision and Suddenlink systems) is moving ahead with its plan to deploy full fiber-to-the-home across the bulk of its footprint. Investors on Wall Street are wary of such a plan, because they don't like it when companies invest, preferring that firms return profits to shareholders in the form of stock buybacks or dividends. In its pre-IPO SEC filing, Altice USA attempted to soothe this concern by noting that it believes its capital intensity "is one of the lowest among our U.S. industry peers, even as we increased our investments in network and service capabilities."[64] Other U.S. cable company ISPs reported similar results. Some explained lower capital spending as simply a result of project completion (such as Mediacom,[65] which is on the verge of offering Gigabit service to its entire customer base, or CableOne,[66] which already was fully gigabit capable and now plans to upgrade recently-acquired NewWave systems to this level).

ILEC ISPs also reported status quo for gradual network expansion, with the ILECs that offer wireless service largely speaking about plans to prepare their networks for 5G. There was

[64] Altice USA Amended S-1, at 7 (2017).

[65] *See* Mediacom Q2 2017 10-Q ("As consumers' bandwidth requirements have dramatically risen in recent years, we have dedicated increasing levels of capital expenditures to allow for faster speeds and greater levels of consumption. Through 'Project Gigabit,' we have installed the necessary equipment to transition substantially all our homes passed to the DOCSIS 3.1 platform, which has allowed us to introduce packages offering speeds of up to 1 gigabit per second ('Gbps') across substantially all of our markets in 2017. We expect to continue to grow HSD revenues as we further take market share and our HSD customers choose higher speed tiers.").

[66] *See* Comments of Julia M. Laulis, Cable ONE, Inc., CEO, President and Director, Q2 2017 Cable ONE, Inc. Earnings Call (Aug 8, 2017) ("Our GigaONE rollout is nearing its completion for our legacy Cable ONE footprint. At the end of the second quarter, 90 percent of our legacy homes passed had access to our 1 gigabit service via GigaONE. [. . .] as we mentioned again at closing of NewWave, they have excellent plant and excellent capacity, but there are some things we need to do, as Julie already mentioned. We like to get them to be 32-channel bonded just like us. We'd also like them to be all digital just like us. So there will probably be a little upward pressure on capital. That's why I mentioned that you will probably see us trending up into the upper teens. Right at the moment, we're probably around 17 percent of revenues in terms of caps. But there'll be a little bit of work to be done to make them look like Cable ONE, but it'll take a little bit of time.").

no mention of Title II on Verizon's Second Quarter investor call, where it reported capital investments up 4.4 percent from the prior-year period. Verizon stated on the call that it is "continually investing in our network to extend our leadership in 4G capacity growth with densification using small cells, which includes expanding our fiber capabilities."[67] And AT&T, the nation's largest wired and wireless ISP and MVPD, also did not face any questions about Title II and did not raise the issue in its Q2 2017 investor call. It did remind investors that prior wireline upgrades are now paying off, as customers subscribe to faster and more expensive speed tiers.[68] A few days later, AT&T's CFO again told investors how the company is making network upgrades on a more capital-efficient basis thanks to advances in virtualization technology.[69]

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[67] *See* Comments of Matt Ellis, Verizon Communications Inc., CFO and EVP, Q2 2017 Verizon Communications, Inc. Earnings Call (July 27, 2017).

[68] *See* Comments of John Joseph Stephens, AT&T Inc., Senior EVP & CFO, Q2 2017 AT&T Inc. Earnings Call (July 25, 2017) ("Total broadband grew for the third straight quarter, overcoming what is normally a seasonally slow second quarter. The strategy to simplify pricing, cross-sell broadband with TV and wireless service and expand our fiber footprint has been paying off. We're far down the road on completing our legacy DSL conversions to IP broadband. That conversion, combined with extending fiber to more than 5.5 million customer locations, is strengthening our broadband position. In fact, the number of broadband subscribers on speed 18 megs or higher has increased by nearly 1.6 million in the past year.").

[69] *See* Comments of John Joseph Stephens, AT&T Inc., Senior EVP & CFO, at the Oppenheimer Technology, Internet & Communications Conference (Aug. 8, 2017) ("That's what we're doing with our core network, that's what we're doing with our products. We're taking everything we can, a 2G box to a 3G box to a 4G box is now just a software upgrade for new technologies as opposed to a change-out of the boxes. When you do that, you make CapEx more efficient and you make, if you will, truck rolls and operating cost expense more efficient. We've done this for some years now, the plan has been in place. At the end of last year, we were at 34 percent of our network functions that were virtualized that have been turned into software activities. We're at 40 percent at the end of June. We expect to be at 55 percent by the end of this year and 75 percent by 2020. . . . So we are reinvesting those savings on the CapEx side to continue this efficiency. And when we get it to that 75 percent level, we believe we will see this real CapEx efficiency as well as continued cash operating expense efficiency. . . . But broadband and the investments we've made in fiber continue to improve our position there, where we have about 1 million DSL-type customers left out of about 15 million. When I started this job a few years ago, those numbers were inversed. So we're through, just like we're through most of the feature phone conversion, we are now through virtually all of the broadband conversion. We still have some left and we'll keep going.").

These sentiments expressed by the country's largest ISPs were mirrored by smaller publicly-traded carriers on their recent investment calls. For example, Otelco told investors that it "continues to make significant progress in implementing its strategic goals of driving fiber connectivity deeper into our network to provide advanced service to our customers."[70] TDS/US Cellular said it "continue[s] to invest in our network to meet the growing demand of our customers."[71] Consolidated Communications, which recently acquired Fairpoint, told investors "96 percent of Consolidated's broadband capable homes can subscribe to a 20 meg or higher plan and 42 percent . . . can get 100 meg or more. Increasing speeds is a key priority for us."[72]

We could go on and on, but given the breadth of the record and the Chairman's intransigence and disdain for such facts, we question the value. It's clear to any honest observer that Title II has not negatively impacted broadband deployment, in any facet.

III. The Commission's Pre-Determination of the Outcome in This Proceeding Violates the Administrative Procedure Act and Judicial Interpretations of that Act Designed to Prevent Pre-Judgment of the Outcome Before a Record Has Been Compiled.

As indicated in Part II above, it seems – regrettably, to say the least – that Chairman Pai had made up his mind before he even opened this new docket. In addition to the ample policy successes of and sound legal arguments for the Title II framework, there is ample success of the economic success that Pai claims he needs to see. Despite the record evidence demonstrating the folly of casting aside the current rules, this proceeding has been intended to do just that from the start – and thus littered with flaws that ought to doom the *Notice*'s endeavor.

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[70] *See* Comments of Robert J. Souza, Otelco Inc., CEO, President and Director, Q2 2017 Otelco Inc. Earnings Call (Aug. 2, 2017).
[71] *See* Comments of Kenneth R. Meyers, United States Cellular Corporation, CEO, President and Director, Director of TDS, Q2 2017 United States Cellular Corp and Telephone and Data Systems Inc. Earnings Call (Aug. 4, 2017)
[72] *See* Comments of C. Robert Udell, Consolidated Communications Holdings, Inc., CEO, President and Director, Q2 2017 Consolidated Communications Holdings, Inc. (Aug. 3, 2017).

In addition to the procedural flaws we catalogued in our initial comments,[73] Chairman Pai's myopic focus on the broadband investment as the sole metric by which to judge the *Open Internet Order* is wholly unsupported by statute. Yet even if boosting raw investment dollars, on an aggregate basis no less, were a statutory objective in the first place, then the Chairman had made up his mind on the question of investment prior to opening the proceeding. And to do so he has ignored all contrary evidence, and even attacked Free Press by name, despite the fact that we are not merely a party to this proceeding but a party proffering that very economic evidence he supposedly wants to see.[74] (Though we offer it, of course and as explained above, as little more than a compendium of the broadband industry's own investment figures on an industry-wide and company-specific basis.)

This all means that prior to and during this proceeding, the Chairman has had an unalterably closed mind that impermissibly affected the Commission's obligations under the APA. Since the initial comment period, additional evidence has come to light regarding the Chairman's closed thinking. Not only did the public not have an opportunity to properly participate in the rulemaking process, because the proposed rule is a foregone conclusion devised by a closed mind, but it was denied critical information necessary to exercise its right to comment. The Commission was, at best, woefully unprepared to conduct this rulemaking, as evidenced by its shoddy *Notice* and its mishandling of the commenting process; or, at worst, impermissibly manipulating the rulemaking process to satisfy the desires of one or two decision-makers.

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[73] *See* Free Press Comments at 8.

[74] *See* Remarks of FCC Chairman Ajit Pai at the Newseum, "The Future of Internet Freedom" (Apr. 26, 2017) ("Consider, for example, the leading special interest in favor of Title II: a spectacularly misnamed Beltway lobbying group called Free Press.") ("Pai Newseum Remarks").

Such bias in the rulemaking process, while largely permissible in some sense, is ultimately limited by the law.[75] "A decisionmaker need not be disqualified simply because [he or she] has taken a position, even in public, on a policy issue related to a dispute."[76] However, "there is no doubt that the purpose of [a rulemaking proceeding] would be frustrated if a Commission member had reached an irrevocable decision on whether a rule should be issued prior to the Commission's final action."[77] In devising the standard for what is a permissible or impermissible bias, the D.C. Circuit grappled with the political nature of the quasi-legislative function of rulemaking. Congress delegated rulemaking authority to agencies so as to allow them "to gather information and views that might be irrelevant to the narrowly focused concerns of adjudication."[78] And so, "utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticisms, advice and data that is ordinarily less likely to be forthcoming in adjudication.[79] The "showing should focus on the agency member's prejudgment, if any, rather than a failure to weigh the issues fairly."[80] Weighting of the "facts properly is to be examined only in determining if his decision was arbitrary or capricious."[81] Thus, a decision-maker in a rulemaking may be "disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."[82]

Chairman Pai's stated and obvious bias in the proceeding contravenes Congress's vision for its delegation of legislative authority. This is what separates his conduct from an otherwise

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[75] *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (1979).
[76] *Id.*
[77] *Id*.
[78] *Id.* at 1166–67 (D.C. Cir. 1979).
[79] *Id*.
[80] *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564–65 (D.C. Cir. 1991).
[81] *Id.* at 1565.
[82] *Ass'n of Nat'l Advertisers, Inc.*, 627 F.2d at 1170.

permissible bias. The Chairman's bias crossed the line when it affected the procedural aspects of the proceeding and ignored the Commission's APA obligations. Congress provided that the rulemaking process should open the agency's policy innovation to criticisms, advice and data. However, the public cannot effectively criticize what it does not know. The Commission made a "predictive judgment" in the *Notice* regarding investment,[83] based on unexamined assumptions, inferences, and conclusions. The Chairman cites the need for so-called economic analysis and then shows no qualms about ignoring such analysis when its results contradict aim to overturn these rules.

Just the Chairman's public statements on Twitter reveal a closed mind on a crucial, and inexplicably disputed, fact in this proceeding:

- "The FCC's Internet regulations have harmed investment in broadband networks among companies big & small. Consumers lose out w/ worse access."[84]
- ".@WSJ: "In the first year of new #FCC rules, broadband spending declines.""[85]
- "My remarks @AEI with @jameskglassman, @halsinger on decline in broadband investment and @FCC's #netneutrality order: http://go.usa.gov/3MpYz"[86]
- Me in Feb: Net regs will lower broadband investment. https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A5.pdf … @HalSinger in Aug: less investment YoY.[87]
- "Major broadband providers' capex down 12% in 1st half of '15 compared to '14; rare decline in digital age. #TitleII"[88]
- "President Obama's plan to regulate the Internet is harming small business and impeding rural broadband deployment. http://go.usa.gov/3KeXx"[89]

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[83] *See, e.g.*, *Notice* ¶ 46.
[84] Ajit Pai (@AjitPaiFCC), Twitter (Apr. 26, 2017, 8:52 PM), https://twitter.com/AjitPaiFCC/status/857397052485062657.
[85] Ajit Pai (@AjitPaiFCC), Twitter (Mar. 3, 2017, 4:19 PM), https://twitter.com/AjitPaiFCC/status/705502853075439621.
[86] Ajit Pai (@AjitPaiFCC), Twitter (Sept. 9, 2015, 3:54 PM), https://twitter.com/AjitPaiFCC/status/641701250237616128.
[87] Ajit Pai (@AjitPaiFCC), Twitter (Sept. 9, 2015, 1:35 PM), https://twitter.com/AjitPaiFCC/status/641666366311899136.
[88] Ajit Pai (@AjitPaiFCC), Twitter (Sept. 9, 2015, 1:28 PM), https://twitter.com/AjitPaiFCC/status/641664581102911488.
[89] Ajit Pai (@AjitPaiFCC), Twitter (May 7, 2015, 2:43 PM), https://twitter.com/AjitPaiFCC/status/596384777516650496.

The April 26th tweet in particular is notable for the fact that it is a conclusory statement about an open question posed in the *Notice*, posted the same day that the draft *Notice* was first distributed.

The Chairman also has lamented the alleged lack of economic analysis in prior Commission proceedings[90] but then made assumptions about broadband deployment without applying any sort of appropriate analysis. The *Notice* emphasizes the importance of bringing economic analysis to the fore and then poses requests for more information as thinly veiled conclusory statements and rhetorical questions.[91] The *Notice* requests information on whether its analysis of the current state of broadband infrastructure investment is correct, but also concludes that it "we aim[s] to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015."[92]

As shown in Part II above, Pai's conclusion on investment decline is a poorly constructed work of fiction. Yet this underlying assumption has been crystalized in the mind of the Chairman, and he has foreclosed any avenues to remedy his flawed assumption. With the inquiry framed in this way, interested parties cannot meaningfully comment or dispute the facts in question. In another rhetorical ploy, the Chairman continually places an ever-higher burden on

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[90] *See* Ajit Pai, Chairman, Remarks Of FCC Chairman Ajit Pai At The Hudson Institute, "The Importance Of Economic Analysis At The FCC" (April 5, 2017) ("But despite this rich legacy, staff economists are not guaranteed a seat at the policy-making table. Increasingly during FCC proceedings, their views have become an afterthought, not an initial thought. Now is the time to restore the place of economic analysis at the FCC. Today, I'll make the case for why and how we should do so."), https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy.

[91] *See Notice* (Dissenting Statement of Commissioner Mignon L. Clyburn) ("there is no cogent economic analysis to be found in this item. There is no discussion of consumer welfare, of two-sided markets, of market power, or any other standard economic concept that an item dealing with the regulatory structure of an entire industry would contain.").

[92] *Notice* ¶ 5 (emphasis added).

the public to rebut his conclusions about investment. As the Chairman betrayed in his July 25th congressional testimony we quoted in Part II above, the burden of proof keeps getting higher:

> Representative Doyle: "Chairman Pai, the same question for you. What kind of comment would cause you to change your mind and not go forward?"
>
> Chairman Pai: "I think, . . . if there is an economic analysis that shows credibly that infrastructure investment is increased dramatically, if -- in response to some of our inquiries that we hear from people in the internet, I guess from startups to consumers, that there is credible evidence of these evidence, or the sine qua non of an open internet, and that, without them, there is no way that they would be able to thrive, that the America's overall l internet economy would suffer. That is some of the evidence that we take seriously."[93]

The *Notice* declared that the Commission would place a heavy reliance on economic analysis to form its views on the final rule, and thus there exists a clear requirement that the Commission apply its expertise in conducting such an analysis.[94] However, the evidence cited by the Chairman suggests no such economic analysis has taken place. In his congressional testimony he cited only anecdotal evidence while admitting the need "to test the veracity of those propositions."[95] Yet, the Commission only appointed a new Chief Economist on July 5, after both the draft and final versions of the current *Notice* appeared, and therefore long after that *Notice* made its conclusory statements on broadband investment.[96]

Furthermore, while the Chairman's travel to collect those anecdotes could present him with an opportunity to hear from all interested stakeholders, his tales of investment woe raise two

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[93] *See* Pai Oversight Hearing Testimony.
[94] *Notice* ¶ 105.
[95] Pai Oversight Hearing Testimony ("I have heard for myself, among smaller providers, that these rules have impacted infrastructure investment. I visited for myself a municipal broadband provider in small-town Iowa. I held a roundtable just a couple weeks ago in Hagerstown, Maryland, where Antietam Cable told me that they explicitly pulled back on one phase of their gigabit broadband deployment precisely because of these rules. Now, we want to test the veracity of those propositions, which is precisely why we have opened a notice of proposed rulemaking so we can figure out what the facts are.").
[96] Press Release, "Chairman Pai Appoints Ellig Chief Economist" (July 5, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-345657A1.pdf.

concerns. First, the Chairman lamented the dearth of economic analysis at the Commission and yet proceeded to cite – as his only evidence for an alleged multi-billion dollar decline in investment – an unscientific sampling of a dozen ISPs, based on meetings where businesses reportedly "suggested these Title II regulations do, in fact, represent a significant risk" while offering no data to support this claim.[97] He also cited conversations with local ISPs and their decisions, again without supporting data, to refrain from making certain investments. Unless the Chairman conducts a methodologically sound survey of these ISPs, it seems all too obvious that he's at best cherry-picked information that furthers his stated aims, and at worst ignored the bulk of the evidence that counters his conclusions.

Evidence of his closed mind on what he considers the central question of the rulemaking abounds. The day prior to the release of the draft *Notice*, the Chairman declared in no uncertain terms:

> Sure enough, infrastructure investment declined. Among our nation's 12 largest Internet service providers, domestic broadband capital expenditures decreased by 5.6% percent, or $3.6 billion, between 2014 and 2016, the first two years of the Title II era.[98]

Despite the language of the question in the *Notice*, it is clear that the Chairman had already found his answer to the broadband capital expenditure question – before he'd even posed the question, formally speaking. And as we made clear in our initial comments, the Chairman's concluding remarks that day resolve any ambiguities about his intention in this proceeding:

> At the FCC's next meeting on May 18, we will take a significant step towards making that prediction a reality. And later this year, I am confident that we will finish the job. Make no mistake about it: this is a fight that we intend to wage and it is a fight that we are going to win.[99]

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[97] *See* Pai Oversight Hearing Testimony.

[98] See Pai Newseum Remarks.

[99] *Id*.

If these were "mere" statements, they would not reach the level of a fatal impropriety. However, taken together with the framing of the *Notice* and his congressional testimony, they go to show that the Chairman made up his mind that investment has declined and foreclosed the ability of the public to rebut his pre-judged conclusion. The Commission concludes in the *Notice* that the evidence indicates a decline in investment and thus (implausibly) undermines the classification decision and the rules based on it. The *Notice* reaches that conclusion even as the Chairman pretends that these are untested propositions in Congress.[100]

These defects reveal the extent to which the Chairman's bias has affected the proceeding. The Commission has not yet responded to our Information Quality Act concerns in our comments, nor removed the offending material.[101] The Commission continues to carelessly disseminate poor quality information to support the Chairman's publicly stated bias. As this information buttresses the Commission's central justification for the proposed rules, the Chairman has commandeered the rulemaking process to amplify his factual and legal biases.

Chairman Pai has done more than advocate for a policy: he has targeted individual commenters and dismissed their efforts to rebut Commission's central (albeit improper) justification for its proposed rules. While the *Notice* attempts to articulate an ill-formed reason for discounting our investment analyses challenging this supposed decline in capital expenditures, it does so by parroting an offhand citation in a footnote.[102]

As we have made clear, the Chairman's fixation on a single metric has no statutory justification. The Commission is required to consider all relevant facts. The idea that the

[100] Pai Oversight Hearing Testimony ("Now, we want to test the veracity of those propositions, which is precisely why we have opened a notice of proposed rulemaking so we can figure out what the facts are.").
[101] *See* Free Press Comments at 75-83.
[102] *See Notice* ¶ 45 n. 116.

proceeding must turn solely upon broadband investment seems to have been invented out of whole cloth. That the Chairman has summarily dismissed all but one way that his "mind could be changed" shows how flawed this rulemaking process has been. The Commission has not applied its expertise to the substantive questions the *Notice* poses. The substantive questions it poses do not provide a sufficient basis for the public to meaningfully comment on an issue critical to this proceeding. The Chairman has crossed the threshold from permissible bias to impermissible prejudice.

CONCLUSION

Consumer groups, free speech defenders, and racial justice advocates have made it clear again and again in this proceeding's record, and in related proceedings over the past decade: a free and open internet, protected not only by bright-line rules but the Commission's full authority to prevent unreasonable discrimination, is vital for internet users and for the economy at large. It is crucial for preserving the rights and the ability of ordinary people to speak, connect, communicate, and organize online.

Our advocacy on this issue, and our warnings of what an internet without these rules may look like, are not a product of dystopian fantasy or rhetorical excess. Broadband providers have publicly advocated for editorial discretion over the content their customers may communicate and access.[103] The same companies, only months ago, fought to fatally undermine consumer privacy protections at the FCC. They've advocated for paid prioritization and embraced a "trust us" theory of regulatory oversight. AT&T has telegraphed its intention to continue fighting the *Open Internet Order* in different federal circuit courts hoping to create the very legal uncertainty

[103] *Verizon v. FCC*, 740 F.3d 623 (2014), Joint Brief for Verizon and MetroPCS at 43 (filed July 2, 2012).

it now begs Congress to resolve,[104] even as it professes supposed support for the principles it constantly attacks.

Broadband providers may be intent on smashing beneficial consumer protections and then grabbing as much power for themselves (and profit for their shareholders) as possible. But whether we trust them not to exercise this power does nothing to alleviate the problem of them constantly asking for "freedom" to engage in such practices. That is what repealing Title II and replacing it with watered-down rules or laws would do – leaving broadband internet access users little or no recourse to prevent unreasonable practices and assaults on their communications rights.

The D.C. Circuit's decision in *US Telecom* remains the law. The weight of the evidence on how people view their internet access service; on how the network actually functions; on the rise in broadband investment after the *Open Internet Order*; and on how vital the public believes the open internet is for entrepreneurs, activists and democracy[105] should impress upon the Commission how important it is to keep these protections. Yet, here we are.

While we accept that a presidential election changed the Commission's leadership and its priorities, that does not give this Commission a free-hand for the wholesale reevaluation of the *Open Internet Order* untethered from the law and the facts. Chairman Pai's effort to "win" a political and ideological battle of his own creation has opened up the Commission's process to serious flaws. The Commission's conclusory *Notice*; its cherry-picked investment information;

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[104] *See* AT&T Comments at 7 ("Although [the D.C. Circuit's] analysis may be binding precedent for D.C. Circuit panels, it does not bind the Supreme Court, nor does it bind other courts of appeals on review of future Commission orders.").

[105] *See* Collette Watson, "#InternetIRL Forum Highlights Ways Black Creators Connect, Tell Stories and Take Action," Free Press Blog (June 15, 2017), https://www.freepress.net/blog/2017/06/15/internetirl-forum-highlights-ways-black-creators-connect.

its flawed cost-benefit analysis; its failure to release 47,000 Net Neutrality complaints before deciding that they didn't matter; and its failure to respect the public's right to comment without interference, all betray the Commission's sacrifice of reasoned decision-making.

For the foregoing reasons, the Commission should abandon this proceeding and work to implement the *Open Internet Order*.

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