

November 6, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Meetings, *Restoring Internet Freedom*, WC Docket No. 17-108

Dear Ms. Dortch:

On November 2, 2017, Geoffrey A. Manne of the International Center for Law & Economics (ICLE), Justin (Gus) Hurwitz of the University of Nebraska College of Law and ICLE, and Kristian Stout of ICLE held meetings with the following parties in order to offer our expert opinions on a number of issues relevant to the above referenced docket:

Chairman Ajit Pai and Jay Schwarz, Wireline Adviser to Chairman Pai;

Commissioner Michael O’Rielly and Amy Bender, Wireline Adviser to Commissioner O’Rielly;

Commissioner Brendan Carr and Jamie Susskind, Chief of Staff and Legal Adviser to Commissioner Carr;

Travis Litman, Senior Legal Adviser to Commissioner Rosenworcel; and

Claude Aiken, Legal Advisor to Commissioner Clyburn

A summary of our discussions follows.

We discussed the details of two major themes that were present in our comments¹ submitted in the above referenced docket: the lack of analytical rigor in the 2015 Open

¹ Policy Comments of the International Center for Law & Economics, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (filed Aug. 31, 2017), available at http://laweconcenter.org/images/articles/icle-comments_policy_rif_nprm-final.pdf; Privacy Comments of the International Center for Law & Economics, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (filed Aug. 30, 2017), available at http://laweconcenter.org/images/articles/icle-comments_privacy_rif_nprm_final.pdf.

Internet Order (2015 OIO) and the ways the Commission can correct this problem going forward; and the question of whether and how the forthcoming Order might preempt state “Open Internet” regulation, and privacy regulation, in particular.

Introducing Analytical Rigor to the Commission’s Rulemaking Process

We stressed that we believe that Congress is the proper place for the enactment of fundamentally new telecommunications policy, and that the Commission should base its regulatory decisions interpreting Congressional directives on carefully considered empirical research and economic modeling. We noted that the 2015 OIO was, first, a change in policy improperly initiated by the Commission rather than by Congress. Moreover, even if some form of open Internet rules were properly adopted by the Commission, the process by which it enacted the 2015 OIO, in particular, demonstrated scant attention to empirical evidence, and even less attention to a large body of empirical and theoretical work by academics. The 2015 OIO, in short, was not supported by reasoned analysis.

In particular, the analysis offered in support of the 2015 OIO ignores or dismisses crucial economics literature, sometimes completely mischaracterizing entire fields of study as a result. It also cherry picks from among the comments in the docket, ignoring or dismissing without analysis fundamental issues raised by many commenters. Tim Brennan, chief economist of the FCC during the 2015 OIO’s drafting, aptly noted that “[e]conomics was in the Open Internet Order, but a fair amount of the economics was wrong, unsupported, or irrelevant.”²

For example — and as we detailed in our *ex parte* meetings — the much-touted theory of the “virtuous circle” that forms the very core of the FCC’s theory, connecting its rules to its claimed authority under Section 706, is insufficiently justified in the Order itself. What the economic literature makes clear is that while, under certain conditions, favoring edge providers over broadband providers may increase the likelihood of broadband investment and deployment and generate a net improvement in social welfare, the effects of such a policy could just as easily run in the opposite direction.³ In fact, given the prevalence of heterogeneity among edge providers, it is somewhat *more* likely that regulations like those

² Tim Brennan, *Is the Open Internet Order an “Economics-Free Zone”?*, FREE STATE FOUND. PERSPECTIVES 11-22 (Jun. 28, 2016), available at <http://freestatefoundation.org/images/Is the Open Internet Order an Economics Free Zone 062816.pdf>.

³ See, e.g., Michelle Connolly, et al., *The Digital Divide and Other Economic Considerations for Network Neutrality*, 50 REV. INDUSTR. ORG. 537, 548 (2017).

in the 2015 OIO will do harm rather than good.⁴ As former FCC chief economist, Michelle Connolly, put it:

A key thing to highlight is that both content creators and consumers are heterogeneous groups. Different consumers will find different content valuable. Different content providers will find different quality of service or different speeds valuable. So more content does not necessarily mean more utility for consumers. Moreover, blanket subsidization to all potential edge providers diminishes the role of the market in determining the optimal allocation of bandwidth across different content and services.⁵

Most likely, of course, the truth is simply far more complicated than the simplistic relationship contained within the “virtuous circle,” with investment in multiple sides of the ecosystem having differential and interlinked effects. The fact is, there is no good evidence that myopically regulating “in favor” of content providers over infrastructure owners is beneficial even to content providers themselves, let alone to consumers. In particular, the notion inherent in the virtuous cycle that preventing ISPs from charging content providers (whether at different rates or even at all) will benefit consumers and incentivize broadband deployment is tenuous, at best. But none of the nuances of such an analysis were present in the 2015 OIO. In fact, the 2015 OIO simply ignored any evidence that contradicted its assertion. As Tim Brennan noted:

The FCC claims that[, through] a “virtuous circle[,]” preventing broadband providers from charging content suppliers for delivery will lead to more content suppliers, driving up demand for broadband. But the circle can work in reverse — charging content suppliers for delivery creates incentives to attract subscribers by cutting retail rates. The FCC didn’t use its best supporting evidence — that broadband providers had already largely adopted net neutrality — as that would have undermined the necessity of regulation.⁶

The former point — that the theory itself was at best unsupported or at worst incomplete — is problematic enough. But the latter point — that the FCC intentionally withheld “its best supporting evidence” because doing so would have undermined its desired result — is not only a matter of poorly supported economics; it is a troubling matter of apparent manipulation of the evidentiary record.

⁴ See, e.g., Benjamin E. Hermalin and Michael L. Katz, *The Economics of Product-Line Restrictions with an Application to the Network Neutrality Debate*, 19 INFO. ECON. & POL’Y 215, 215-48 (2007).

⁵ Hal Singer et al., *Bringing Economics Back Into The Net Neutrality Debate*, FORBES.COM (Jul. 12, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/07/12/bringing-economics-back-into-the-net-neutralitydebate/#370e80d369da>.

⁶ Brennan, *supra* note 2.

With respect to the 2015 OIO's ban on paid prioritization, there is ample evidence from analogous industries, as well as a substantial theoretical and empirical economics literature, to support the idea that discrimination of the sort banned by the 2015 OIO at the very least *can* be beneficial (thus undermining the imposition of a *per se* ban),⁷ and, in fact, is very frequently beneficial (thus undermining the asserted need even to adopt a presumption against it).⁸ There is even abundant literature from *this* industry making these points.⁹ “What the theoretical literature and empirical evidence demonstrates [] is that vertical contracts, including those captured by the [2015 OIO], are not always anticompetitive and in most cases are procompetitive.”¹⁰

That quite literally *none* of this literature was even cited, let alone assessed, in the 2015 OIO is a testament to the poverty of its reasoning.

Preemption of State Regulation of Broadband Service

We also discussed our strong concern that, following the adoption of an Order in this proceeding, a number of states may enact their own laws or regulations aimed at regulating broadband service, particularly with respect to privacy. The resulting threat of a patchwork of conflicting state regulations, many of which would be unlikely to further the public

⁷ See, e.g., OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007); Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988); Howard Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

⁸ Note, this does not mean it might not be appropriate to adopt a rebuttable, although strong, presumption in its favor, of course — which would be appropriately consistent with the treatment of such vertical conduct under the antitrust laws. See, e.g., Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, HANDBOOK OF ANTITRUST ECONOMICS, 391 (Paolo Buccirossi ed., 2008); James C. Cooper, Luke M. Froeb, Daniel O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Daniel O'Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems*, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40 (2008).

⁹ See, e.g., Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012); Robert W. Crandall, et al., *Vertical Separation of Telecommunications Networks: Evidence from Five Countries*, 62 FED. COMM'NS. LAW J. 493 (2010); Marc Bourreau, Frago Kourandi, & Tommaso Valletti, *Net Neutrality with Competing Internet Platforms*, 63 J. INDUS. ECON. 30 (2015); Gerald R. Faulhaber, *Economics of Net Neutrality: A Review*, 3 COMM. & CONVERGENCE REV. 53 (2011).

¹⁰ Joshua D. Wright, *Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues*, Remarks delivered at the Information Economy Project's Conference on US Broadband Markets (2013), available at <http://bit.ly/2gNkYnj>.

interest,¹¹ is a serious one. Amplifying a concern raised in our Comments,¹² we urged the Commissioners and their staff to ensure that the rules adopted in this proceeding appropriately preempt such state regulation.

Under federal law, state regulations may be preempted expressly or implicitly to the extent that they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹³ This authority to preempt state law extends beyond Congress to federal agencies acting within the scope of their authority.¹⁴ Like a decision by Congress or a federal agency to adopt particular regulations, a decision *not* to regulate in a particular way also has preemptive effect.¹⁵

To begin with, the Commission should revert to longstanding FCC policy and declare that BIAS is an interstate information service. As noted above, the 2015 Order utterly failed to justify its misguided attempt to reclassify broadband services under Title II, and reasserting a Title I classification here would simply be a matter of correcting the Commission’s (brief) mistaken detour to the contrary in the 2015 OIO.

At the same time, the Commission should *explicitly* state that, as a consequence of this classification, broadband services may not be subject to certain forms of state regulations, including conduct regulations that prescribe how ISPs can use their networks. This position would also be consistent with the FCC’s treatment of interstate information services in the past.¹⁶

The FCC has an established history of preempting state regulation in order to ensure that state regulation of *interstate* information services, including Internet access, does not impose state-level constraints the effect of which is to frustrate the federal policy in favor of

¹¹ See, e.g., Pete Sepp, *Backers of Heavy-Handed Internet Rules Are All Thumbs*, WASHINGTON EXAMINER (Sep. 20, 2017), <http://www.washingtonexaminer.com/backers-of-heavy-handed-internet-rules-are-all-thumbs/article/2634936> (“[L]eft-leaning local governments are repackaging efforts to burden their taxpayers with ... new regulations that could hamper the rollout of more networks. Given the uneven fiscal track record of local government-sponsored Internet, these developments could signal new obstacles to a vibrant national network.”).

¹² ICLE Privacy Comments, *supra* note 1, at 5 (“[T]he FCC should also make explicitly clear that, because BIAS is an interstate information service, state rules and regulations for BIAS that are inconsistent with federal policy governing the regulation of ISPs ... are preempted. This would not mean that generally-applicable consumer protections ... would not apply; rather, it would mean only that states could not impose ISP-specific requirements in an attempt to undo or otherwise circumvent federal law and policy.”).

¹³ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (citations and quotation omitted).

¹⁴ See *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

¹⁵ See *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

¹⁶ See, e.g., *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶¶ 22-32 (2004), *aff’d sub nom. Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (hereinafter, “Vonage Preemption Order”).

promoting broadband deployment and adoption. Substantively, the Commission also has a history of ensuring that broadband services are subject to a federal policy that these services “should remain free of regulation.”¹⁷

As we stressed in our meetings, the FCC’s recent *amicus* brief in *Charter v. Lange* thoroughly canvases the relevant law and policy regarding such preemption, and provides a clear basis for preemption of “Open Internet” regulation by the states.¹⁸

To begin with, as the 8th Circuit *amicus* brief succinctly and accurately states:

With respect to interstate communications, federal law broadly preempts all state communications regulation. State regulation of interstate communications is expressly preempted because, in dividing regulatory authority over communications services between the federal and state governments, the Communications Act confers the federal government with exclusive jurisdiction over “all interstate and foreign communication” and “all persons engaged ... in such communication.” Thus, for interstate communications, Congress has “occup[ie]d the field” of communications regulation to the exclusion of state law.¹⁹

FCC preemption of state regulation of broadband services is further justified under the federal policy of non-regulation for information services. As the 8th Circuit *amicus* brief notes, “[u]nder the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation.”²⁰

By re-asserting the Commission’s longstanding interpretation of BIAS as an interstate information service, the Order could (and should) specifically preclude states from adopting “traditional public-utility regulation or other common-carriage requirements, like those found in Title II of the Communications Act, unless those requirements are independently authorized by some other provision of federal law.”²¹ Likewise, Section 230

¹⁷ See *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3316 ¶ 16 (2004) (hereinafter, “Pulver Ruling”); see also *id.*

¹⁸ Brief of the Federal Communications Commission as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Charter, et al. v. Lange, et al.*, No. 17-2290 (8th Cir. Oct. 27, 2017) (hereinafter, “8th Circuit *amicus* brief”).

¹⁹ *Id.* at 7 (quoting 47 U.S.C. § 152(a) and *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–92 (2d Cir. 1968)).

²⁰ *Id.* at 10.

²¹ *Id.* at 11. As the 8th Circuit *amicus* brief notes, 47 U.S.C. § 153(51) precludes common-carriage-like regulation of information services.

of the Communications Act makes clear that “‘federal authority [is] preeminent in the area of information services’ and ... information services ‘should remain free of regulation.’”²²

Importantly, this deregulatory federal policy does not mean that broadband networks would be free of all regulation, including at the state level. In addition to the continued operation of federal antitrust and consumer protection laws, “[t]he federal policy of nonregulation ‘refers primarily to economic, public utility-type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws.’”²³ Among other things, case-by-case enforcement of state consumer protection acts would not necessarily be preempted, thus ensuring that states retain the ability to protect their citizens against potentially deceptive or unfair conduct in a manner consistent with the FTC’s approach under the FTC Act.

But it is crucial that the Commission reinforce that state legislation aimed at enacting privacy rules specifically designed to regulate broadband access services (*e.g.*, customer proprietary network information) and inconsistent with Congress’ overall regulatory scheme would be preempted. Privacy rules akin to those enacted in the FCC’s rescinded 2016 Privacy Order, particularly if imposed inconsistently among the states, would clearly “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”²⁴ to adopt a generally deregulatory posture with respect to interstate broadband, to leave the regulation of interstate broadband service to the FCC, and to regulate privacy consistently across the Internet ecosystem under federal and state consumer protection laws. Such state privacy laws would impose upon broadband service providers a privacy regulatory regime explicitly rejected not only by the FCC (assuming it in fact rejects such regulation in the Order, as it should), but also by Congress. Adoption of such rules in the face of that rejection would properly be preempted.²⁵

Such rules can have a very real and negative effect on ISPs’ provision of BIAS to the detriment of their customers and the economy. A patchwork of state privacy laws that mandate various, and inevitably contradictory, technical or operational requirements

²² *Id.* at 12 (quoting Pulver Ruling, 19 FCC Rcd. at 3316 ¶ 16 and citing 47 U.S.C. § 230(b)(2), (f)(2) (It is federal policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services ... unfettered by Federal or State regulation.”)).

²³ *Id.* at 10 n. 1 (quoting Vonage Preemption Order, 19 FCC Rcd. at 22417 n.78 and 22405 ¶ 1). *See also* Statement of Commissioner Kathleen Q. Abernathy, Vonage Preemption Order, 19 FCC Rcd. at 22439 (“As necessary as preemption may be, I want to underscore my view that our assertion of exclusive federal jurisdiction still permits states to play an important role in facilitating the rollout of IP-enabled services. To begin with, as the Order makes clear, states will continue to enforce generally applicable consumer protection laws, such as provisions barring fraud and deceptive trade practices.”).

²⁴ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. at 373.

²⁵ *See Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

regarding the provision of BIAS would frustrate congressional and FCC intent to have a single uniform regulatory framework for ISPs and other entities in the Internet ecosystem.

This is not an idle concern. Many states have already shown an interest in stepping in to fill the perceived void left when Congress adopted its joint resolution rescinding the *2016 Privacy Order*.²⁶ Some states have even attempted to adopt rules mirroring the very FCC rules already rejected by Congress. These attempts at state privacy legislation unique to ISPs would create a patchwork of regulation that would frustrate the Commission's efforts in this proceeding to effect congressional intent by reasserting a regulatory state of affairs under which "every online company's privacy practices [would be policed] consistently" by the FTC as the expert agency in this area.²⁷

Moreover, the privacy laws that states have already proposed vary significantly — from those that seek to adopt the FCC's rescinded rules to others that propose new and sometimes more onerous requirements for ISPs.²⁸ As Commissioner Clyburn has acknowledged, such variations in privacy protections is problematic. Thus she noted in testimony before the House Energy and Commerce Subcommittee on Communications and Technology that "I don't think the American public would be very comforted to know that depending on who they call or who their provider is or whether they go online that they might have different levels of expectations or protections."²⁹

This is not to say that states have no role in privacy regulation. Such an approach would prevent states from adopting *ISP-specific* regulations, but, as noted, it would not prevent states from enforcing laws of general applicability that do not contravene federal policy. Thus, for example, general data breach notification laws would still apply to the extent that an ISP is the victim of an incident that triggers such laws, and state attorneys general would continue to be able to enforce their state consumer protection laws against deceptive privacy policies.

²⁶ See, e.g., Jon Brodtkin, *California May Restore Broadband Privacy Rules Killed by Congress and Trump*, ARS TECHNICA (June 21, 2017), <https://arstechnica.com/tech-policy/2017/06/california-may-restore-broadband-privacy-rules-killed-by-congress-and-trump/>; Aaron Nicodemus, *States Step in to Fill Rescinded FCC Web Privacy Rule Void*, Bloomberg BNA (Apr. 18, 2017), <https://www.bna.com/states-step-fill-n57982086800/>.

²⁷ Restoring Internet Freedom NPRM at ¶ 66.

²⁸ Legislators in Washington, for example, proposed a bill that would enact rules largely tracking those disapproved of by Congress, whereas legislators in Maryland and Minnesota proposed to adopt legislation requiring ISPs to obtain opt-in consent before using the IP address of a customer's *router* for any purpose, including providing BIAS. But without such IP addresses, it is impossible to render BIAS. At the same time, these proposed bills would prohibit providers from refusing BIAS for non-consent, even though it is impossible to provide the service without such information.

²⁹ Oversight and Reauthorization of the Federal Communications Commission: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce, 115th Cong. (Jul. 25, 2017) (statement of Mignon Clyburn, Commissioner, FCC), <https://www.c-span.org/video/?431676-1/fcc-commissioners-testify-oversight-hearing&start=9179> (at 02:31:42).

Respectfully Submitted,

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