

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

In the Matter of

Restoring Internet Freedom

WC Docket No. 17-108

**JOINT REPLY OF NATIONAL HISPANIC MEDIA
COALITION ET AL.**

On September 18, 2017, the National Hispanic Media Coalition (“NHMC”) and twenty other public interest organizations (collectively, “Movants”) filed a motion requesting that the Federal Communications Commission (“FCC” or “Commission”): (1) incorporate the approximately 50,000 informal consumer complaints, 18,000 carrier responses, 1,500 documents related to the open internet ombudsperson’s interactions with internet users, and 10 spreadsheets containing data for all consumer complaints into the record into the above-captioned proceeding; and (2) set a new pleading cycle for public comment on those documents.¹ On September 28, 2017, the NCTA – The Internet & Television Association (“NCTA”) and USTelecom filed an Opposition to our Motion, erroneously asserting that the Motion is based on false premises.

NCTA and USTelecom first claim that the informal complaint materials are irrelevant to the Commission’s *Internet NPRM*.² They ignore, however, that the very questions raised by the Commission in the *Internet NPRM* demonstrate the relevance of these materials. The *Internet NPRM* specifically asked for evidence of harm to

¹ Joint Motion To Make Informal Open Internet Complaint Documents Part of the Record and To Set a Pleading Cycle for Comment on Them, WC Docket No. 17-108 (filed Sept. 18, 2017) (“Motion”).

² Opposition to Motion Regarding Informal Complaints, WC Docket No. 17-108, at 2 (filed Sept. 28, 2017) (“Opposition”).

consumers “sufficient to support maintaining the Title II telecommunications service classification for broadband Internet Access Service,”³ whether “the original transparency rule, which has been continuously operational since it came into effect following adoption of the *Open Internet Order*, [is] sufficient to protect consumers,”⁴ and whether the internet ombudsperson’s role is “necessary to protect consumers, business, and other organizations’ interests.”⁵ Only recently have any of these materials been publicly available. Therefore, in order for the Movants and the public to respond to the questions posed in the *Internet NPRM*, the Commission must incorporate these materials—which, unbeknownst to the public until after the comment and reply period, have been in the Commission’s possession all along—into the administrative record and provide a new comment cycle.

NCTA and USTelecom next attempt to argue that the informal complaint materials are irrelevant because, based on NCTA’s and USTelecom’s “cursory review,” those materials “have nothing to do with open Internet issues.”⁶ But the issue before the Commission is not whether NCTA or USTelecom believe these materials are relevant; it is whether these materials may contain the evidence the Commission itself asked for in the *Internet NPRM*. Moreover, contrary to NCTA’s and USTelecom’s characterization of these materials, our preliminary review demonstrates that there *is* relevant information in these materials. For example, a community in Winlock, Washington, reached out to the internet ombudsperson seeking advice for the many issues experienced with

³ Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 ¶ 50 (May 23, 2017) (“Internet NPRM”).

⁴ *Id.* ¶ 90.

⁵ *Id.* ¶ 97.

⁶ Opposition at 3.

CenturyLink service, including potential transparency violations under the 2015 *Open Internet Order*.⁷ An active duty service member stationed in Guam complained about experiencing throttling issues that made it difficult to complete school work.⁸ Other comments reveal concerns that a carrier is blocking selected data content on low cost plans,⁹ as well as providing inferior service to rural areas at high cost.¹⁰

The ultimate purpose of the Motion, however, is to provide an opportunity for interested parties to conduct more than just a cursory review of these materials. While it is clear that at least some of the informal complaint materials directly address the questions raised in the *Internet NPRM*, neither Movants nor NCTA or USTelecom—nor apparently the Commission—understand what precise information is contained in or can be derived from the informal consumer complaint materials. Indeed, the Commission, when it posted the materials on its website stated that “[t]hese documents represent information provided by the public that has not been verified by the FCC.”¹¹ By its own admission, the FCC has not taken the time to analyze these materials. That is why it is necessary for the Commission to provide a new pleading cycle to allow for meaningful review and analysis of these materials before it issues any final rule.

⁷ FCC, Response to NHMC FOIA Request, FCC at 165, 326-27 (Aug. 24, 2017) (“Ombudsperson Emails 1 of 2”), <https://www.fcc.gov/sites/default/files/foia-ombudsperson-emails-08242017-577-part-1.pdf>.

⁸ *Id.* at 95-96, 106-108.

⁹ *See, e.g.*, FCC, Response to NHMC FOIA Request, FCC at 166-67, 177-87 (Aug. 24, 2017) (“Ombudsperson Emails 2 of 2”), <https://www.fcc.gov/sites/default/files/foia-ombudsperson-emails-08242017-577-part-2.pdf>.

¹⁰ *See* Ombudsperson Emails 1 of 2 at 116-120. (“They claim we are rural and not worth the investment.”).

¹¹ *See* FCC, Response to NHMC FOIA Request (Sept. 14, 2017), <https://www.fcc.gov/response-nhmc-foia-request>.

NCTA and USTelecom also argue that the Commission should conclude that the entirety body of information contained in the informal complaint materials is irrelevant because the Commission never initiated an enforcement action against any Internet providers in response to those complaints.¹² NCTA and USTelecom say they do not know whether any of these complaints spurred formal investigations. Yet, on October 19, 2016, the FCC's Enforcement Bureau entered into a Consent Decree with T-Mobile after investigating whether T-Mobile had violated the Transparency Rule for failing to "provid[e] accurate and sufficient disclosures regarding the de-prioritization policy it appl[ied]...to 'unlimited' data plan customers."¹³ During this investigation, "the Commission received hundreds of complaints from subscribers."¹⁴ This is a clear example of an investigation into that was spurred by consumer complaints.¹⁵ It is further unknown how many more investigations were initiated as a result of consumer complaints, since that information is confidential.

NCTA and USTelecom next contend that there is no need for the Commission to incorporate the informal complaint materials into the *Internet NPRM* proceeding or to establish a pleading cycle to allow for public comment because Movants are free to incorporate the materials into the record via the post-reply *ex parte* process.¹⁶ The basis for this argument is the NCTA's and USTelecom's own belief that the post-reply *ex parte*

¹² Opposition at 4.

¹³ *In the Matter of T-Mobile USA, Inc.*, 31 F.C.C. Rcd. 11410, 11410-11 (F.C.C. 2016).

¹⁴ *Id.* at 11411.

¹⁵ *See also, In the Matter of AT&T Mobility, LLC.*, 30 F.C.C. Rcd. 6613, 6613 (F.C.C. 2015), where the Commission received thousands of consumer complaints from AT&T customers about intentionally reduced speeds for unlimited data plans, resulting in a Notice of Apparent Liability.

¹⁶ Opposition at 5-7.

process “*most likely* will continue for several months.”¹⁷ However, NCTA and USTelecom do not, and cannot, know or guarantee the actual length of time that the post-reply *ex parte* process will last.¹⁸ A new pleading cycle is necessary to ensure that the public will have an adequate opportunity to meaningfully review the informal complaint materials and provide comment.¹⁹

For any rule to be based upon “substantial evidence,” the Commission must take into account evidence directly relevant to the proposed rulemaking at issue. The contents of the informal consumer complaints and related documents—whether or not they ultimately bear out the need for the 2015 *Open Internet Order*—are directly relevant to the proceeding at issue. The Commission cannot adequately understand the impact of the 2015 *Open Internet Order* without a full and rigorous analysis of these highly relevant consumer complaints. Failure to establish a new pleading cycle would raise serious questions about the completeness of the Restoring Internet Freedom docket and compliance with the Administrative Procedure Act. We therefore reiterate our request that the Commission (1) incorporate the informal consumer complaints and other related documents that were the subject of NHMC’s May 2017 FOIA requests into the record in the above-captioned proceeding, and (2) set a new pleading cycle for public comment on those documents.

¹⁷ Opposition at 6 (emphasis added).

¹⁸ We note that there are trade press reports that the Commission could issue a report and order in this docket as early as next month. *See, e.g.,* Howard Buskirk & David Daut, *Pai Seen Possibly Moving Up Vote on Title II Net Neutrality, After Confirmation Vote*, Communications Daily, Oct. 2, 2017, at 1.

¹⁹ In addition, Opponent’s reference (at 7) to *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) is inapposite. That case involved the question of whether or not the final regulation issue was a logical outgrowth of the original proposal where the agency provided notice of its new approach two weeks before issuing the rule. It did not involve the promulgation of a rule based on inadequate information or the prevention of directly relevant information from being admitted into the administrative record. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

Respectfully submitted,

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