

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Restoring Internet Freedom

)
)
)
)

WC Docket No. 17-108

COMMENTS OF
OPENMEDIA ENGAGEMENT NETWORK
("OPENMEDIA")

30 August 2017



*OpenMedia is a community-based organization that works to
keep the Internet open, affordable, and surveillance-free.*

www.openmedia.org

OpenMedia Engagement Network P.O. Box 21674, 1424 Commercial Dr.
Vancouver, BC, Canada V5L 5G3 // [604-633-2744](tel:604-633-2744)

Cynthia Khoo, External Counsel
regulatory@openmedia.org
1139 College Street
Toronto, ON M6H 1B5
Canada



Introduction

About OpenMedia

OpenMedia is a community-driven organization that works to keep the Internet open, affordable, and surveillance-free. While headquartered in Vancouver, Canada, OpenMedia's global community is nearly 500,000 people strong, including 167,000 supporters in the United States alone. OpenMedia “uses the Internet to save the Internet”, providing a civic engagement platform to educate, engage, and empower citizens to advance digital rights around the world.

OpenMedia's work is founded on three pillars of advocacy, representing the values and rights the organization works to protect and promote in context of the open Internet: Free Expression, Privacy, and Access. Our Access work is particularly relevant to issues that the Federal Communications Commission (FCC) is responsible for, including universal service, open access rules, spectrum policy, broadband and mobile wireless affordability, and net neutrality.

We accomplish our work through empowering everyday Internet users, by educating and engaging them in collaborative online public campaigns, channeling their voices into government processes and legal proceedings such as hearings and consultations, bringing citizens' views to key decision-makers on the issues, and crowdsourcing digital policies that are in the best interest of our shared digital future.

History of OpenMedia's Involvement in Net Neutrality

Since 2009, OpenMedia has been extensively involved in advocating for net neutrality and Internet openness in Canada and Europe as well as in the United States. For example, OpenMedia formed part of a digital rights coalition, “Big Telecom -vs- The World”, that delivered a petition of over 400,000 signatures in support of Title II net neutrality protections to FCC representatives in Sacramento, California, in September 2014.¹ OpenMedia also represented its constituency of hundreds of thousands of Internet users at a roundtable discussion with senior White House officials in 2014,² and empowered Americans throughout the country to write in letters to the editors of their local papers, highlighting the importance of the Internet and Title II net neutrality to their lives and livelihoods.³

In Canada, where our community currently numbers approximately 257,000 people, OpenMedia's mission and advocacy work is reflected in two signature crowdsourced policy reports. Each lay out a set of positive policy recommendations for Canada's digital future when it comes to Internet access, openness, and affordability, and are rooted in the views and contributions of hundreds of thousands of Internet users across Canada. *Casting an Open Net* (May 2011) maps out how prioritizing the need for Internet openness and Internet freedom may guide digital policy when it comes to telecommunications regulation, communications networks and devices, Internet access services, traffic management, and Internet-related competition policy.⁴ *Time for an Upgrade* (March 2013) was similarly produced in consultation and collaboration with engaged citizens across the country, focusing on the mobile wireless

¹ See: <https://openmedia.org/en/openmedia-takes-your-voices-fcc-sacramento>.

² See: <https://openmedia.org/en/here%E2%80%99s-what-happened-when-i-went-white-house>.

³ See, e.g., <http://www.rutlandherald.com/articles/net-neutrality-is-at-stake/>; <http://www.sheboyganpress.com/story/opinion/2015/01/26/letter-keep-internet-open-playing-field/22382803/>; <http://www.thenewsstar.com/story/opinion/readers/2015/01/10/put-roadblock-slow-lane/21480151/>; and <http://www.mercurynews.com/2015/01/08/peninsula-readers-letters-january-9/>.

⁴ See: https://openmedia.org/sites/default/files/OpenNetReport_ENG_Web_0.pdf.

market and setting out user-centric policy recommendations to ensure and increase choice and affordability, innovation, transparency, reliability, and network neutrality in mobile wireless communications.⁵

OpenMedia, representing its community, has been involved in every major net neutrality proceeding before the Canadian Radio-television and Telecommunications Commission (CRTC) since 2009,⁶ beginning with that which led to Canada's first net neutrality law, the Internet Traffic Management Practices (ITMP) Framework,⁷ and most recently in the proceeding that led to the CRTC's landmark decision banning the practice known as zero-rating, a form of anti-competitive price discrimination in Internet data plans.⁸

In the European Union, OpenMedia represented over 33,000 Internet users throughout Europe as part of an open Internet coalition of over 500,000 people at SavetheInternet.eu,⁹ in collaboration with a number of leading European digital rights organizations. This includes groups such as EDRI, La Quadrature du Net, and Digitalcourage, all of whom have signed on to the initial NPRM comments by the international organization Access Now, another coalition member, in this current proceeding.¹⁰ SavetheInternet.eu successfully advocated for strong net neutrality laws from the Body of European Regulators of Electronic Communications (BEREC),¹¹ which were published in August 2016.¹²

As a result of its sustained legal, policy, and advocacy work described above, OpenMedia has observed firsthand in Canada, Europe, and the United States the tangible benefits that strong net neutrality laws bring to Internet users around the world, whether they are users, creators, researchers, consumers, or simply democratically-engaged citizens. OpenMedia has just as clearly observed the direct harm that occurs—to users, consumers, innovators, and everyday citizens—in the absence of such protection for the open Internet, as only Title II classification is now capable of upholding in the United States. The reply comments below will elaborate on these observations, in the hope of demonstrating to the FCC that there can be no open Internet, nor any Internet freedom, without Title II net neutrality laws to safeguard freedom and openness against concentrated power and corporate control over the core mechanism of twenty-first century communications.

Overview of Reply Comments

In this submission, OpenMedia will confine its comments to three specific issues: procedural deficiencies harming the integrity of the FCC's proceeding and ultimate determinations; specific examples of harm rising from the lack of strong net neutrality laws, as demonstrated from events in Canada and Europe before many of their current net neutrality laws existed; and specific examples of the benefits that Canadian and European Internet users have enjoyed from strong net neutrality laws similar to what Title II currently provides for in the United States.

⁵ See: https://upgradecanada.ca/sites/openmedia.ca/files/TimeForAnUpgrade_OpenMedia_130419.pdf.

⁶ See: <https://openmedia.org/en/saveournetca-crtc-hearing-report-back-trifecta>.

⁷ See: <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

⁸ <http://crtc.gc.ca/eng/archive/2017/2017-104.htm>

⁹ <https://savetheinternet.eu>

¹⁰ Comments of Access Now (17 July 2017)

¹¹ See: <https://www.theverge.com/2016/8/30/12707590/eu-net-neutrality-rules-final-guidelines-berec>;

¹² http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules; and

http://berec.europa.eu/eng/news_and_publications/whats_new/3958-launch-of-the-berec-net-neutrality-guidelines.

With regard to the substantive and other core issues the Notice of Proposed Rulemaking (NPRM) raises, OpenMedia supports and endorses the initial comments of Free Press, Voices for Internet Freedom Coalition, *et al*, Public Knowledge, Access Now, the Electronic Frontier Foundation, and the Joint Comments of Internet Engineers, Pioneers, and Technologists. OpenMedia would give particular emphasis to the comments of Free Press and the Joint Comments of Internet Engineers, Pioneers, and Technologists, which elaborate on the NPRM's (and its authors') demonstrable distortions and misunderstanding, willful or otherwise, of the legal history of Title II and regulatory telecommunications issues in the United States, as well as of basic facts and definitions underlying how the Internet itself works on a technical level.

OpenMedia is unsure which is more alarming, given that the FCC is expected to have and apply particular expertise in both these areas. The deficiencies in understanding that the NPRM's statement reflects give rise to serious questions as to the competency, impartiality, and/or the integrity with which the FCC is approaching this proceeding, and the determinations to be made as a result of this particular NPRM. In this respect, OpenMedia would urge the FCC to take all reasonable steps, before making any determinations, to publicly address and resolve the numerous substantive issues that the above comments raise regarding the Commission's understanding of this proceeding's central issues and their underlying legal, factual, and technical bases.

OpenMedia would also direct particular attention to the comments of the Voices for Internet Freedom Coalition, *et al*, for its delineation of the disproportionate negative impact that eliminating Title II classification would have on communities of colour, low-income people and families, and other historically marginalized or vulnerable populations; and for the evidentiary issues their comments raise, which OpenMedia elaborates upon in the next section below.

The remainder of this submission is divided into three parts.

Part I will detail significant concerns that OpenMedia has with key procedural aspects of this proceeding, and what appear to be severe procedural deficiencies that the Commission—and Chairman Pai in particular—has, disturbingly, steadfastly refused to address, let alone remedy. These include:

- a) the Commission's demonstrated reluctance to release over 47,000 consumer complaints under the Open Internet Order onto the record, and its treatment of the *Freedom of Information Act* (FOIA) request by the National Hispanic Media Coalition (NHMC);
- b) the Commission's expressed lack of concern with evidence of a large number of fraudulent comments filed through the Commission's Electronic Comment Filing System (ECFS); and
- c) the FCC's own casting of doubt upon and harming public confidence in its own proceeding, through erroneous and ill-timed reports of an alleged distributed denial-of-service (DDoS) attack on the ECFS, the same night that television host John Oliver directed his millions of viewers to submit comments in support of Title II to this proceeding, through the ECFS.

Part II will give the Commission specific examples of harm to consumers that arise in the absence of net neutrality laws such as Title II classification currently guarantees, based on OpenMedia's experience in Canada and the European Union.

Part III, conversely, will provide specific examples, from Canada and Europe, of how Internet users around the world have benefited from the implementation of strong and enforceable net neutrality laws, such as those already currently in place under the 2015 Open Internet Order.

I. FCC Proceeding Has Shown Significant Procedural Deficiencies

The FCC has demonstrated an unacceptable level of neglect in upholding the strict integrity of process and integrity of the record that the public and indeed other sections of government would expect of a regulatory body such as the FCC, particularly for a proceeding as contentious, widely scoped, high-profile, and consequential as the current one. The Commission has plainly expressed a lack of any concern whatsoever with major irregularities such as, for example, evidence that a large proportion of the comments filed through the ECFS were fraudulent.

This is particularly concerning given Chairman Pai's longtime and staunch opposition to net neutrality, Title II classification, and the Open Internet Order, and in light of his seeming predisposition towards a particular outcome even before the proceeding began.¹³ If the majority of individuals' comments on record support Title II net neutrality, as they so far seem to do,¹⁴ the Commission's own negligence in upholding integrity of process could also provide it with an excuse to completely disregard the element of broad public support (or lack thereof) for any decision it made opting to do away with Title II and thus with genuine net neutrality protections—despite the fact that “73 percent of Republicans, 80 percent of Democrats, and 76 percent of Independents want to keep the FCC's Open Internet rules.”¹⁵

In this section, OpenMedia highlights three issues that particularly warrant investigation and further action that the FCC should take before issuing any decision that eliminates or in any way undermines the current open Internet protections that consumers enjoy under Title II classification of Internet service providers. The three issues are: the 47,000 consumer complaints filed under the Open Internet Order, still predominantly in the FCC's sole possession; evidence of a high number of fraudulent comments submitted to the proceeding, from automated bots using stolen identities; and the FCC's highly dubious and compromising claims regarding an ill-timed DDoS attack on its comment filing system.

A. **FCC Must Release All 47,000 Open Internet Order Complaints and Issue New Comment Period to Allow for Full Examination and Analysis on the Record**

The FCC must release onto the public docket all 47,000 complaints that consumers have submitted concerning net neutrality violations under the Open Internet Order, and open a new comment period to allow for full examination and analysis of the 47,000 complaints. To do anything less would represent an abdication of the Commission's rulemaking responsibility, given the sheer volume of evidence and its fundamental relevance to issues at the core of this proceeding.

The procedural history¹⁶ of the FCC's actions with respect to these more than 47,000 complaints, which NHMC has brought to light and pursued through multiple FOIA requests and follow-up inquiries, demonstrates a completely improper reluctance on the part of FCC—as a purportedly impartial, evidence-based regulator—to disclose materially relevant evidence which the FCC alone possessed.

Although NHMC filed its original FOIA request on May 1, 2017, the FCC did not respond until June 21, 2017, providing materials related to a fractional 1,000 out of the more than 47,000 total complaints—a

¹³ See: <https://www.fcc.gov/news-events/events/2017/04/chairman-pai-speech-future-internet-regulation>.

¹⁴ See: <https://www.techdirt.com/articles/20170516/06570237379/time-fcc-to-actually-listen-vast-majority-fcc-commenters-support-net-neutrality.shtml>.

¹⁵ See: https://www.scribd.com/document/353285485/Freedman-Consulting-Net-Neutrality-Poll?secret_password=J84hiXXK5cXuvj7LAfFc.

¹⁶ See: www.nhmc.org/foia-release/.

mere sample size, approximately 2 per cent of the total evidence. The NHMC then applied for a Motion for Extension of Time on July 7, 2017, citing potential violations of the Administrative Procedure Act given the critical nature of the withheld evidence to any determinations that may result from this proceeding.¹⁷ The FCC, however, waited until the first comments deadline itself to deny the motion,¹⁸ offering to release only an additional 2,000 complaints, with related documents and spreadsheets, *after* the final deadline for comments. This meant that there would be no chance to place even this tiny subset of complaints on the record, or provide an analysis of them in time to inform the record and FCC's ultimate decisions.

Recognizing the severity of this procedural breach on the Commission's part, over a dozen civil rights, media, technology, library, arts, and consumer advocacy organizations signed an open letter addressed to the FCC, calling on the Commission to "make publicly available all documents requested by the National Hispanic Media Coalition (NHMC) in its May 1, 2017 Freedom of Information Act (FOIA) request" and "release this critical evidence for public review and comment and allow the public time to fully assess the behavior of Internet Service Providers (ISPs) since June 2015 when the Open Internet Order went into effect".¹⁹ The issue also garnered considerable media attention.²⁰

As the letter indicates, disclosing the entirety of the evidence in the FCC's possession was and remains necessary as the NPRM directly implicates such documents, and the public must be allowed to review, analyze, and provide comment on the documents before the FCC takes any steps to repeal or undermine the Open Internet Order. Moreover, the FCC's continued withholding of such critical and voluminous evidence may violate the Commission's duty to examine relevant data and refrain from making decisions based on known inadequate data or data known only to the Commission itself, according to the Administrative Procedure Act.²¹

The documents that the Commission has released to NHMC so far only confirm that they are imminently relevant to issues at the core of this proceeding. Main categories of complaints include blocking, data caps, throttling, inconsistent speed, less than advertised, interference, jamming, privacy, Internet billing, and others combined simply under "Open Internet".²²

As of August 30, 2017—the current deadline for final comments before the NPRM proceeding closes—the Commission has disclosed approximately 20,000 pages of consumer complaints, carrier responses, ombudsperson emails, and spreadsheets to the NHMC. This remains far from adequate, however, as the FCC released much of this to NHMC less than one week before the final deadline, with the majority of it provided *the day before* the final deadline. This provided little to no opportunity for review and analysis, and is moreover still a fraction of the total amount of evidence relating to the total 47,000 consumer

¹⁷ See: <http://www.nhmc.org/release-national-hispanic-media-coalition-pressure-fcc-delay-proceeding-disclose-critical-consumer-complaint-information-dismantling-net-neutrality>; and <http://www.nhmc.org/wp-content/uploads/2017/07/NHMC-Motion-for-Extension-of-Time-17-108.pdf>.

¹⁸ See: https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0717/DA-17-686A1.pdf.

¹⁹ See: <https://ecfsapi.fcc.gov/file/10822176229704/NHMC%20FOIA%20Coalition%20Support%20Letter%20Final.pdf>.

²⁰ See: <https://www.techdirt.com/articles/20170822/11403338060/eff-others-think-it-would-be-cool-if-fcc-stopped-hiding-47000-net-neutrality-complaints.shtml>; <https://arstechnica.com/tech-policy/2017/07/fcc-refuses-to-release-text-of-more-than-40000-net-neutrality-complaints>; <https://arstechnica.com/tech-policy/2017/08/dont-kill-net-neutrality-before-making-complaints-public-groups-tell-fcc/>; <https://www.wired.com/story/fcc-pledges-openness-just-dont-ask-to-see-complaints>; and <http://thehill.com/policy/technology/341009-group-asks-fcc-to-delay-net-neutrality-repeal-proceeding>.

²¹ *Ibid.*

²² See: <http://www.nhmc.org/consumer-complaints/>.

complaints in the FCC's possession. In addition, the FCC only released these materials to the NHMC alone, and it was the NHMC who released them to the public.²³

As of writing, there is still no indication that the FCC will either release documents to the public or provide for further comments on the documents that it has released to NHMC.

According to NHMC, even the comparatively few documents that have already been released demonstrate the clear probative value that the 47,000 complaints would have to this NPRM:

The documents, recently released under a FOIA request filed by NHMC in May, show that consumers turned to the FCC for help remedying the open internet violations that they experienced. [...]

The newly-released documents from the FCC further highlight that customers experienced throttling of services and blocking of websites, and were unsuccessful in having the issues resolved through their ISP's customer service mechanisms. The FCC ombudsperson played a critical role in helping consumers file service complaints and provided support when consumers turned to the FCC as a last resort measure.

This small glimpse into the universe of consumer complaints show that the FCC blatantly ignored the evidence that the agency had in its possession throughout its push to scrap the vital consumer protections established by the Open Internet Order. Now, we can clearly see the effectiveness of open internet protections on the books—consumers were able to voice the harms they experienced and seek help to remedy them.²⁴

The NPRM directly questions the efficacy, usefulness, and purpose of provisions under the Open Internet Order, particularly in the context of consumer impact and consumer protection. Given that, it seems clear that no legitimate decision to repeal or undermine the Open Internet Order may be made without, at the very least, the FCC first releasing all 47,000 complaints and related documents onto the public record of this proceeding, and providing for a new comment period to allow for public scrutiny and full review and analysis.

B. FCC Must Investigate Evidence of Fraudulent Comments and Stolen Identities

The FCC must investigate hundreds of thousands of comments that evidence suggests have been fraudulently submitted through the ECFS, without the knowledge or consent of individuals whose names and contact information were attached to such comments. As of writing, an unprecedented 18 million comments have made their way onto the docket of this proceeding, demonstrating the importance of the issues in question, namely, the future of Internet openness and net neutrality in the United States.

However, evidence suggests that a large number of these comments may be fraudulent, and were not in fact submitted by any individuals or with their knowledge.²⁵ These comments appear to have been submitted via bot mechanisms through the FCC's ECSF API—which itself is not the problem, given that many groups on multiple sides of the issue have submitted legitimate comments in this manner. The issue is that the comments suspected of being fraudulent have used the names and contact information

²³ See: <http://www.nhmc.org/foia-release/>; <http://www.nhmc.org/consumer-complaints/>; <http://www.nhmc.org/carrier-responses/>; <http://www.nhmc.org/ombudsperson-emails/>; and <http://www.nhmc.org/complaint-data/>.

²⁴ See: <http://www.nhmc.org/foia-release/>.

²⁵ See: <https://www.theverge.com/2017/5/10/15610744/anti-net-neutrality-fake-comments-identities>; <http://kdvr.com/2017/05/14/7000-coloradans-names-addresses-used-to-post-fake-comments-about-government-decision>; and <http://www.zdnet.com/article/a-bot-is-flooding-the-fccs-website-with-fake-anti-net-neutrality-comments/>.

of individuals without their knowledge or consent, using information likely obtained through voter registration records or prior data breaches, and in some cases even the names and contact information of deceased individuals.²⁶ The non-profit digital rights advocacy organization Fight for the Future (FFTF) set up a platform through which individuals could attempt to discover if their names and information had been used for such comments.²⁷

Even more concerning has been the FCC's apparent lack of concern with this blatant tampering with and contamination of the record, as documented in multiple news sources after a press conference in which reporters questioned Chairman Pai on the issue.²⁸ The Commission has been markedly noncommittal about investigating or attempting to confirm the veracity, or lack thereof, of suspicious comments, as well as seemingly impervious to the rights of citizens whose identities have been stolen for the purpose of submitting comments they did not know of, did not agree to, and in some cases actively oppose the contents of.²⁹ Two well-known technology policy journalists whose names had been used without their consent engaged directly with the Commission, and received dissatisfying responses.³⁰

This state of affairs harms the integrity of and public trust in the FCC's proceeding in two ways.

First, the vast majority of the seemingly fraudulent comments state reflect virulent opposition to current net neutrality laws and the Open Internet Order. This contributes to an inaccurate record, given that Title II net neutrality laws in fact enjoy popular bipartisan support, according to a recent poll:

Americans of all political parties overwhelmingly support the values of net neutrality and want to preserve existing net neutrality protections . A strong majority (77 percent) of Americans support keeping the existing net neutrality rules in place. This view crosses party lines, as 73 percent of Republicans, 80 percent of Democrats, and 76 percent of Independents want to keep the FCC's Open Internet rules. 81 percent of Americans agree that ISPs should not be able to block or throttle websites or charge extra for preferred access to consumers.³¹

²⁶ See: <https://arstechnica.com/information-technology/2017/05/identity-theft-victims-ask-fcc-to-clean-up-fake-anti-net-neutrality-comments/>; <https://www.techdirt.com/articles/20170531/05515737481/consumers-who-had-their-identities-stolen-spam-bot-demand-fcc-investigate-bogus-net-neutrality-comments.shtml>; <http://www.bbc.com/news/technology-40057855>; and https://motherboard.vice.com/en_us/article/evg3xw/dead-people-are-posting-anti-net-neutrality-comments-to-the-fcc-website.

²⁷ <https://www.comcastroturf.com/>

²⁸ See: <https://arstechnica.com/tech-policy/2017/07/ajit-pai-not-concerned-about-number-of-pro-net-neutrality-comments/>; <https://assets.documentcloud.org/documents/3891550/FCC.pdf>; <https://consumerist.com/2017/07/11/fcc-has-no-interest-in-figuring-out-who-filed-fake-anti-neutrality-comments-in-your-name/>; and <https://www.techdirt.com/articles/20170710/10071737756/fcc-insists-it-cant-stop-impostors-lying-about-my-views-net-neutrality.shtml> <http://www.vocativ.com/431065/fcc-ajit-pai-net-neutrality-bots/>.

²⁹ *Ibid.*

³⁰ See, e.g. "While the FCC claims it faces "limits" on its ability to modify or delete comments, I've spoken to several former FCC staffers and one telecom industry lawyer unfamiliar with any such restrictions, especially when it applies to outright and obviously-fraudulent comments. A request to the FCC for a specific definition of these legal limits -- and a request for the IP address in question -- have yet to be responded to. The other problem is that the FCC is basically saying it doesn't care about any of this, informing users that have had their identities used to root against their own best self interests that they should just re-file new comments." At: <https://www.techdirt.com/articles/20170710/10071737756/fcc-insists-it-cant-stop-impostors-lying-about-my-views-net-neutrality.shtml>.

³¹ See: https://www.scribd.com/document/353285485/Freedman-Consulting-Net-Neutrality-Poll?secret_password=J84hiXXK5cXuvj7LAFc; <https://www.techdirt.com/articles/20170607/04564337536/mozilla-poll-again-shows-net-neutrality-has-broad-bipartisan-support.shtml>; and https://motherboard.vice.com/en_us/article/7x9kyg/most-americans-support-the-net-neutrality-rules-that-trumps-fcc-wants-to-kill.

One analysis confirmed that the comments on the record of this proceeding reflect overwhelming support when comments suspected of being fraudulent are removed:

Excluding the spammed comment, an estimated 97% of the nearly 700,000 remaining filings supported the FCC's 2015 net neutrality rules, which forbid Internet service providers from blocking, slowing, or otherwise discriminating against web sites and online services. Even including the spammed comment, 59% of all 1.1 million comments still favored net neutrality, Fossett said on his blog.³²

Second, that such a large portion of comments are now known or strongly suspected to be fraudulent undermines the integrity of *all* comments on the record and may delegitimize valid public input, particularly comments that real individuals did knowingly and willingly submit through an online automated mechanism. Given this, there is little surprise that there are bipartisan calls for the FCC to investigate the issue.³³ It is disturbing that the Commission has shown no interest in doing this, particularly given that even individuals outside of the FCC have found ways to investigate, with illuminating results.³⁴

Approximately two dozen individuals, whose names and information have been used without their consent in fraudulent comments in this proceeding, have signed an open letter coordinated and hosted by Fight for the Future, calling upon the Commission to do the following:

- Notify all who have been impacted by this attack
- Remove all of the fraudulent comments, including the ones made in our names, from the public docket immediately
- Publicly disclose any information the FCC may have about the group or person behind the 450,000+ fake comments
- Call for an investigation by the appropriate authorities into possible violations of 18 U.S.C. § 1001 ("making false statements") and other relevant laws.³⁵

OpenMedia supports and reiterates calls for the FCC to investigate the extent, mechanism, and source of all of the fraudulent comments as described above and documented publicly online. The FCC should make public its methods of investigation and findings, as well as set out what it intends to do about such comments. Our call for investigation is supported by approximately 1500 members of our U.S. community members, who have written letters to the editors of their respective local newspapers calling for the same.³⁶

C. FCC Must Investigate and Resolve Claims Regarding Alleged DDoS Attacks

On May 7, 2017, well-known late night television host John Oliver directed his millions of viewers to submit comments in support of Title II to this proceeding through the ECFS. The next day, the FCC issued a public statement claiming that there had been an alleged DDoS attack on its comment filing system, that would have coincided with the time John Oliver's viewers would have been submitting their comments (or would have attempted to).

³² See: <http://fortune.com/2017/05/15/net-neutrality-comments-fcc-spam/>.

³³ See: <https://www.politicopro.com/technology/story/2017/08/fake-comment-concerns-rise-as-fccs-net-neutrality-docket-reaches-18-million-160553>.

³⁴ See, in particular: <https://medium.com/@csinchok/an-analysis-of-the-anti-title-ii-bots-463f184829bc>; and <http://jeffreyyossett.com/2017/05/13/fcc-filings.html>.

³⁵ See: <https://www.fightforthefuture.org/news/2017-05-25-letter-to-the-fcc-from-people-whose-names-and/>; and https://www.washingtonpost.com/news/the-switch/wp/2017/05/25/somebody-impersonated-these-people-to-criticize-the-fccs-net-neutrality-rules-now-the-victims-are-demanding-answers/?utm_term=.cc7dd9f07f33.

³⁶ See, e.g., <http://registerguard.com/rg/opinion/35839353-78/keep-the-internet-the-peoples-net.html.csp>.

Since that initial claim, numerous follow up reports, inquiries, informal investigations, letters, and calls for formal investigation and disclosure of FCC logs have arisen from multiple journalists, digital rights advocacy groups, consumer advocacy groups, members of the Senate, and the general public. By many accounts, the FCC's claims have come under suspicion for various reasons, and some evidence suggests that the FCC's original claim may have been an attempt to cover up the fact that its technical systems were again unprepared for the by now foreseeable flood of comments—moreover comments that would have been in support of keeping Title II and the Open Internet Order.³⁷

Similar to the withholding of the 47,000 consumer complaints of open Internet violations, and with the FCC's seeming lack of concern with the fraudulent comments using stolen or deceased identities, the FCC's behaviour and responses in this situation with the alleged DDoS attacks have been dissatisfactory and unfitting of a purportedly impartial and responsible regulator. The FCC must take clear action to demonstrate accountability on this issue, including acquiescing to FOIA requests, releasing logs to independent analysts, and addressing conflicting reports from security experts, before making any determinations towards undermining or eliminating Title II classification or the Open Internet Order. Without taking such steps, the FCC will only further compromise its integrity of process, and thus of its ultimate determinations in this proceeding.

II. Specific Harm to Consumers from Lack of Strong Net Neutrality Laws

Internet users in Canada have experienced multiple examples of harm due to net neutrality violations on the part of Internet service providers. For example, one of Canada's top three largest providers, TELUS, was found to have blocked all of its Internet subscribers' access to the website of its employees' union during a labour dispute.³⁸

In June 2012, the CRTC found that another of Canada's top three largest providers, Rogers, was throttling peer-to-peer traffic on its networks, and had to take enforcement action.³⁹

³⁷ See: <https://www.fightforthefuture.org/news/2017-06-26-fccs-response-to-inquiries-about-alleged-ddos/>; <http://tumblr.fightforthefuture.org/post/163913891863/breaking-former-fcc-security-employee-destroys>; <http://www.zdnet.com/article/cio-diary-lessons-from-the-fcc-bot-swarm/>; <https://arstechnica.com/information-technology/2017/07/fcc-has-no-documentation-of-ddos-attack-that-hit-net-neutrality-comments/>; <https://www.wyden.senate.gov/download/?id=AE80F574-81AE-4877-B9D4-4EC860BE6103&download=1>; <https://www.cyberscoop.com/recent-flood-traffic-fccs-website-actually-ddos-attack/>; <https://www.fightforthefuture.org/news/2017-05-09-the-evidence-suggests-that-the-fcc-is-likely/>; <http://www.wetmachine.com/tales-of-the-sausage-factory/will-pai-pull-a-putin-and-hack-the-fcc-process-or-will-he-get-over-himself-and-start-acting-like-the-chairman/>; <https://gizmodo.com/fcc-now-says-there-is-no-documented-analysis-of-the-cyb-1797073113>; <https://arstechnica.com/information-technology/2017/05/examining-the-fcc-claim-that-ddos-attacks-hit-net-neutrality-comment-system/>; https://www.schatz.senate.gov/imo/media/doc/FBI%20DDOS%20Letter_Signed.pdf; <https://arstechnica.com/information-technology/2017/07/fcc-has-no-documentation-of-ddos-attack-that-hit-net-neutrality-comments/>; https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/GAO.CG_2017.07.06.%20Letter%20to%20GAO%20re%20cybersecurity%20prepardness%20and%20public%20comments.CAT_.OI_.pdf; <https://www.engadget.com/2017/07/11/senators-warn-the-fcc-to-be-ready-for-net-neutrality-comments/>; <https://gizmodo.com/fcc-now-says-there-is-no-documented-analysis-of-the-cyb-1797073113>; and <https://www.techdirt.com/articles/20170720/06130737828/fcc-wont-release-data-to-support-claim-ddos-attack-not-john-oliver-brought-down-agencys-website.shtml>.

³⁸ See: <https://theyee.ca/News/2005/08/04/TelusCensor/> / <http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166> //.

³⁹ See: <http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166>.

More recently, the CRTC found a third of Canada's three largest Internet service providers, Bell Mobility, in addition to a fourth provider, Videotron, violated net neutrality principles under the *Telecommunications Act*, by zero-rating certain video streaming services on mobile data plans, such that Bell Mobility subscribers, for example, would be charged up to 800 per cent more money to stream third-party content such as Netflix than to stream content from Bell Media.⁴⁰

Even after Canada had implemented its ITMP Framework in 2009, net neutrality violations continued to occur with regularity, as documented by Professor Michael Geist, Canada Research Chair in Internet and E-Commerce Law:

Rogers Communications has been the target of nearly half of all cases opened in response to net neutrality complaints. In recent months, there have been multiple complaints arising from bandwidth throttling of World of Warcraft, a popular multi-player online game. ...

In November 2010, Bell Canada was hit with a complaint over throttling download speeds from Hotfile.com, an online locker service that lets users store and access music and other files from any computer. Bell admitted its deep-packet inspection technology was mistakenly treating downloads from the site as peer-to-peer activity and slowing connection speeds. ...

In January 2010, ExaTEL, an Ontario-based Internet phone company, filed a complaint against Barrett Xplore, a satellite Internet provider. ExaTEL alleged that Barrett Xplore was degrading Internet telephony traffic, creating an unfair advantage for its own phone service. ...

In March 2010, a complaint was filed against Cogeco, a cable provider with a traffic shaping policy that continuously limited bandwidth for peer-to-peer applications on a 24/7 basis. Given the CRTC's requirement that traffic management limits be linked to actual network congestion, the Cogeco policy raised red flags.⁴¹

The above demonstrates that it is not enough to simply have strong net neutrality laws in place—there must also be strong enforcement to uphold them. Title II classification of Internet service providers currently provides the FCC with the necessary authority to impose and uphold strong net neutrality laws, to the benefit of consumers and the broader Internet ecosystem alike.

III. Specific Benefits to Consumers from Strong Net Neutrality Laws

In jurisdictions where regulators have implemented strong net neutrality laws, such as in Canada and in the European Union, consumers have quickly benefited from the impact of such laws. For example, in April 2017, the CRTC ruled that the mobile wireless service provider Videotron had violated net neutrality rules, through a zero-rating program known as Unlimited Music. This was due to the program zero-rating music streaming data for only Videotron's premium plan subscribers, and only for music streaming partners who met certain technical and other unclear criteria. The CRTC found that Videotron violated provisions against unjust and undue discrimination in the *Telecommunications Act*, as well as had violated the newly issued Differential Pricing Practices Framework (another term the CRTC used for zero-rating). Consequently, the CRTC ordered Videotron to shut down Unlimited Music.⁴²

⁴⁰ See: <http://www.crtc.gc.ca/eng/archive/2015/2015-26.htm>.

⁴¹ See: <http://www.michaelgeist.ca/2011/07/net-neutrality-enforcement-fail/>.

⁴² Telecom Decision CRTC 2017-105, *Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program* (20 April 2017)

As a result, however, Videotron ended up offering affected subscribers a free, permanent mobile data add-on, equivalent to the amount of data "calculated according to the month in which the usage of Unlimited Music was at its highest over the past year."⁴³ Videotron was providing users with the same amount of data it would have been able and willing to with its Unlimited Music program. Now, however, consumers could use this data to access *any* application, service, or content of the subscriber's choice at any given time. This is what genuinely "restoring Internet freedom" looks like. What the FCC proposes to do in the current NPRM is quite the opposite.

It is important to note, moreover, that the CRTC, in making its pro-net neutrality ruling, did not only look at the immediate tangible harm to consumers. It also looked at longer term, intangible harms to Internet openness—and thus eventually consumers, innovators, and the wider Internet ecosystem—as a significant factor in its decision:

Impact on Internet openness and innovation

Because Unlimited Music favours some music services over others and excludes many types of online music services, most notably streaming Canadian radio stations, the Commission considers that it could have a negative impact on Internet openness and consumer choice. For example, while it may seem that certain Canadians are getting access to more data through this program, ISPs rather than Canadians are choosing what content is zero-rated, and this favouring of certain content over other content could have an impact on the amount and choice of content for Canadians. In addition, by making certain content attractive to consumers for its lower price rather than its intrinsic interest and creating barriers to entry for excluded content providers, Unlimited Music makes it more difficult for content providers to launch their services and gain access to customers. Further, a program such as Unlimited Music tends to favour large, established content providers to the detriment of smaller providers and new entrants, including Canadian radio stations streaming over the Internet. Accordingly, Unlimited Music does not meet this criterion.⁴⁴

The Netherlands offers another stark example of how consumers benefit when they are protected by strong net neutrality laws that the regulator effectively enforces. Digital Fuel Monitor, which produces mobile network research and metrics reports by the Finnish consulting firm Rewheel, made the following observations after the Dutch Authority for Consumers and Markets banned zero-rating and upheld net neutrality in mobile wireless networks:

On the 27th January 2015, ACM, the Dutch Authority for Consumers and Markets fined Vodafone Netherlands for violating the Dutch net neutrality law. Vodafone was caught zero-rating HBO GO mobile video streaming. A week earlier KPN, the Dutch incumbent telco and no.1 mobile operator in the Netherlands, announced the launch of an online TV and ondemand video service iTV Online app (practically extending its existing fixed-line IPTV offerings to mobile internet) that allows its customers to watch anytime, anywhere TV on their smartphones or tablets. In the absence of the Dutch net neutrality law that bans zero-rating KPN would have most likely followed suit with other European incumbent telcos and zero-rated the Gigabyte usage of the iTV Online app over its 3G and 4G mobile networks. But after ACM's decision KPN's hands were tied. KPN's open mobile internet volume caps were quite restrictive (the largest allowance was only 5 Gigabytes) and would only allow its customers to watch just few hours of video per month. Moreover, if customers were to exceed their monthly caps they would have incurred excessive out-of-bundle charges. KPN faced a dilemma: launch a video service that customers cannot use or increase the volume caps of its open mobile internet plans. KPN opted for the latter.

⁴³ See: <https://mobilesyrup.com/2017/07/04/unlimited-music-videotron-free-data/>.

⁴⁴ TD CRTC 2017-105, at para 55.

On the 2nd of February **KPN doubled the mobile internet volume caps (data bundles) on its SIM-only smartphone tariff plans, free-of-charge.**⁴⁵

Another study by Digital Fuel Monitor found that network operators who zero-rated video services sold *8 times less data*, for 30 euros, than network operators who did zero-rate data—or in other words, treated data discriminatorily based on content, in violation of net neutrality.⁴⁶

Thus, even from a purely short-term, immediate consumer benefits perspective, and leaving aside far-reaching consequences and knock-on effects to innovation, competition, choice, affordability, and Internet freedom—strong and enforceable net neutrality laws, such as those currently provided for through Title II and the Open Internet Order, must stay.

Conclusion

By this point, it appears that different interpretations abound of terms such as net neutrality, open Internet, and Internet freedom. However, courts have repeatedly demonstrated that in the United States today, these concepts, if they are to maintain any meaning, are *not* open to interpretation to allow for any legal route other than maintaining Title II classification of Internet service providers and the Open Internet Order as it currently stands.

The FCC must, if it is to restore integrity to and public trust in the current proceeding:

- release all 47,000 consumer complaints and related documents under the Open Internet Order;
- provide for a new comment period so that the public may adequately review and analyze said documents, and put such analyses on the record of this proceeding;
- investigate the fraudulent comments using stolen identities or identities of deceased individuals, and publicize the FCC's methods of investigation, findings, and intended actions in response; and
- investigate the FCC's technological and information security systems with respect to the alleged DDoS attack and ECFS adequacy to handle large volumes of comments; investigate the sources of all alleged DDoS attack claims from the FCC, and publicize the findings; submit to FOIA requests regarding this issue; release the FCC's internal logs to independent security analysts; and demonstrate accountability and how the FCC will regain the public trust in this matter.

Finally, in light of the tangible and intangible benefits that net neutrality laws ensure for consumers, and the direct harms that occur in their absence, the FCC must retain Title II and the Open Internet Order.

⁴⁵ See: http://dfmonitor.eu/downloads/Banning_zerorating_leads_to_higher_volume_caps_06022015.pdf (emphasis in original, footnotes omitted).

⁴⁶ See: http://dfmonitor.eu/insights/2016_dec_pro_tightoligopoly/.