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VIA ECFS

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

Re: In the Matter of Section 230 of the Communications Act of 1934, RM – 11862

Dear Ms. Dortch,

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to "clarify" the provisions of Section 230 of the Communications Act of 1934, in accordance with Executive Order 13925, "Preventing Online Censorship" (E.O. 13925).

That Executive Order was long rumored to be in the works, months before its release, because of the reaction by the executive branch to how it perceived social media works and the desire to dictate how it should work. In other words, government expressly wanted to control how business could operate, and what speech was deemed appropriate, especially if that speech was a citizen's critique of government or elected officials, or if a government speaker simply wanted to act as they pleased rather than follow community guidelines for acceptable behavior. Self-governance of a business was to be thrown out so that government could do as it pleased.

As was pointed out immediately upon its release, the Executive Order demonstrated a basic misunderstanding of our U.S. Constitution and the Bill of Rights, flipping our guaranteed protections on their head. The guarantee of freedom of speech specifically protects citizens, and groups of people who have come together for a purpose such as a corporation, from government. It does not protect government from the people. On its face the order was concerned about how to limit speech for people, expand the power of government to control speech and reduce criticism of government.

The Order sought reach these goals by requiring two independent agencies, both this FCC and the Federal Trade Commission, to functionally do the bidding of the executive branch. With increased

scrutiny on users and creating authority to open up trade secret protected algorithms, government control of what citizens could do online would expand dramatically. Each directive would be a lawyer's dream as the order seemed to dramatically expand the jurisprudence for claiming fraud.

Because the Order was merely political theatre rather than sound policy not much could be accomplished without further action which has led the NTIA to file this petition, an attempt to hoodwink the FCC into transforming itself into a sprawling regulatory agency that would become nothing less than the "Federal Computer Commission."

This dubious background is important to understand as now the FCC is called upon to be in the vanguard of the attempt to ignore clear congressional direction and to radically expand government in direct opposition to our guaranteed liberties, using Section 230 as an excuse.

Section 230, in short, provided Congressional instruction to the courts as to when liability should be imposed for certain speech online. The section made manifest personal accountability by holding the speaker themselves, not a platform on which a speaker speaking, accountable for their words. If an online service exercised no control over what was posted on their platform then they were not be liable for what was said. However, Congress also wanted to provide an incentive by creating a safe harbor for those who might operate in good faith to moderate some content, particularly to remove unlawful or abusive material. As an additional benefit this approach also stopped lawyers from bringing lawsuits against deeper pockets merely for their personal gain.

From the simple idea of personal accountability and an incentive for good actors to help clean up dirty corners of the internet, the internet as we understand it today has sprung. Finding no other way to bring this era to an end by pursuing the ends of the Order the NTIA has asserted that the FCC has jurisdiction in this area.

The jurisdictional questions for the FCC have been well covered in other comments provided in this docket but in sum, clearly Congress did not grant the FCC authority to suddenly assume control of internet content as part of its mission. In fact, the evidence shows just the opposite.

As the current Commission has argued innumerable times, Congress needs to act if in fact they intended something not on the plain face of the law. Specifically, if Congress desires to take the radical step of regulating the internet then they can follow the proper path to so doing. After Congressional action the executive branch can follow the proper order of things and sign the legislation granting such authority thereby appropriately demonstrating the express will of government. This is proper governance. Hiding behind an independent agency to do one's bidding is not.

Lacking that Congressional authority, the NTIA wrongly asserts that social media is an information service in an attempt to bring it under the FCC's purview. In today's language one might consider this claim "fake news." Again, as well documented and detailed elsewhere in the filings before you the full intention of Congress, beginning with the author of the language, was to at all turns reject the notion that the FCC did or would have any jurisdiction in this area. Some members of Congress did not agree and actually attempted to expand the authority. Such attempts were expressly rejected.

In addition, the FCC has previously declined to recognize it has authority in the area and has openly made clear it has no expertise to guide it regardless. So, now the FCC would, without any Congressional authority to do so, suddenly have to reverse itself and assert that so-called edge services were within its regulatory control and become precisely what Congress rejected, the Federal Computer Commission.

Perhaps more importantly, almost regardless of the jurisdictional legal question, is if the FCC had the authority but was not directed to use it by Congress whether it should. The clear answer here is no for a variety of reasons.

The first is apparent on its face, that the intent of the Order in trying to rope in the FCC is to place the FCC in role as an arbiter of facts. No regulatory agency will be as well equipped as the courts to determine facts and reach a final binding result. In this instance acting at the behest of the executive and without direction from Congress further weakens any result which would certainly be appealed to the courts. The best place to have a grievance addresses, and to reach an appropriate result, are the courts.

Second, this seems a curious time to massively expand the authority and policing power of the FCC. Is that the legacy this FCC would like to have?

As the nation discusses, debates and brings more attention to the use of police power, few moves could be more counter to the social temperature than to create new policing powers. In fact, the expansion here plays precisely to the point being made by the peaceful protestors on the streets, that policing power, a massive authority, has gone too far without adequate oversight. In this case, the FCC would be creating its own power that has been repeatedly, in various settings, expressly denied to it. Government abuse of the people could hardly be any more apparent than this.

The most obvious apparatus outside of the court system for these new powers to work would be empowering companies to determine what speech is allowed as dictated by government with oversight by the FCC. Ironically this places companies back in the role they are claimed to be in by some politicians, except then they would be subject to government dictates rather than their own company's beliefs, desires and rules. The desire to force companies to act as a policing force is unnerving. Again, the courts are best suited for the settlement of complaints to avoid this reality.

Next, once this new authority is wielded one thing is obvious, future commissions will wield it as well to their own ends. A massively sprawling FCC that controlled the nation's computers and online experience would be dangerous in the best of times and devastating to our freedoms at all times.

The parallels to the Title II debate are clear. Just as the Title II supporters missed the point so do those who advocate for section 230 to be eliminated, hindered or to have the FCC expand its regulatory apparatus. A point that has been made to this and previous commissions, innovation and the internet is an ecosystem and this sort of heavy-handed approach will negatively impact the entirety of it.

Platforms such as social networks, search engines, operating systems, web-based email, browsers, mobile apps, e-commerce and more are proliferating. These platforms are simply layers, that create a

"stack" as new products or services are built upon them. The relationship between these various layers of the ecosystem, including service providers, is tightly woven in part because of the vertical integration but also because of contracts and interdependencies. Upsetting or isolating one part of the stack does not necessarily lead to linear and predictable results. In fact, observation informs us that the opposite is typically true. Innovation in the internet and communications space moves rapidly but unevenly. Technology and innovation experts have only the most-slender of chances to understand where invention and innovation is headed next. Humility is the correct approach for prognosticators. But most harmful is regulatory hubris which regularly leads to any number of unintended consequences and is damaging pollution to this ecosystem. Desperate attempts to try to bring government desired order to what is not orderly are doomed to failure or only succeed in suffocating innovation.

When the internet ecosystem is under attack the entire ecosystem needs to respond, not be artificially divided by arbitrary government intervention since a change to any part of the ecosystem has an impact on all parts of the ecosystem. The well-being of the internet, at least as it exists in the U.S., is dependent on all parts being healthy and free from interference. True success in the digital world is achievable when all parties understand that they cannot stand on their own, that in fact an economically thriving digital ecosystem requires cooperation with an eye towards what is best for the broader whole. The distributed nature of the internet is a fundamental part of its design, and no one entity, no one cluster of entities, can be an island. Stakeholder cooperation, including a FCC that truly understands this dynamic, is imperative for the success of all.

Errant two-dimensional thinking leads to the wrong conclusion that there are "areas" of the ecosystem that can be altered without massively effecting the entire environment. For example, there are no such things as "edge providers." They operate like nearly all other parts of the ecosystem with new layers building upon them and various operators interconnecting with them. A designation as an "edge provider" is more akin to a marketing pitch than to a technological truth. Trying to isolate such entities for heavy regulation will negatively impact the entire space. The same is true if trying to isolate service providers for government control. Those interacting with the ecosystem will find it hard to leave, or switch, from any particular area to another be it service provider, social media, operating system, etc. This is not a negative. Consumers choose where they are most comfortable and make their place there. Government intervention merely limits those options, or preferences one part of the ecosystem over another, and is inherently harmful to consumers.

Inhabiting, using and benefiting from the ecosystem are those who often used to be called "netizens," and later, for those who do not remember a time without the internet "digital natives." The "netizens" used to be proud of the unregulated nature of the internet. Proud of a certain wild west element that promised the interesting, the cool and the cutting edge. Then, politicians regularly came to Washington, D.C. to proclaim – "Hands Off!" That was not very long ago, but something has happened.

These days, some pursuing their own visions instead of safeguarding freedom for the netizens, have tried to persuade people to believe that people now live in a state of constant fear of threats, confusion, misdirection and cannot function fully unless government firmly grasps the internet and holds it tight. These sorts of distortions of the truth trap the ecosystem, and many of those who can gain the most from using it, in a make-believe dystopian fantasy narrative. In truth, liberty frees those in the internet

ecosystem just as it does elsewhere, allowing them to pursue their lives, creating an online experience that they desire, not what is dreamt up for them in D.C. Netizens deserve an open internet ecosystem. The internet is not made more open via grater government control of speech and expression.

No one should mistake that there is anything but near unanimous belief amongst all political tribes that an open internet should exist. No advocacy group, political party, industry or consumer group is advocating for consumer harm. Only a small, loud, agenda driven cabal of populists and opportunists argues for government restriction and control. Inarguably, the best way to preserve an open internet is precisely how an open internet has been preserved for this long, that is via the free market. That is how consumers will continue to be protected, how consumers will continuously benefit from the innovation, investment and creation that follows, and how consumer experiences with content, technology, and information can be consumer driven not government determined.

Here is the goal then: less regulations so that more innovation will lead to greater consumer choice, the demand which will then drive the need for more supply, provided via greater investment, leading to even greater consumer choice. It IS an ecosystem and one thing does beget the next.

Some have argued too that the Order seeks to create a new "Fairness Doctrine" for the internet and that seems likely. The Doctrine was a decades-long government policy that forced "viewpoint neutrality" by broadcasters. It was repealed more than 35 years ago. Back then the excuse was "spectrum scarcity," that there were so few radio or television channels that some points of view had to be guaranteed to be broadcast regardless of whether the Doctrine trampled freedom of speech or the option not to speak.

That similar complaints are made today is almost laughable if some were not trying to sacrifice our rights to make the world as they prefer. The last few decades, because of the internet and its various platforms, has been an era of unprecedented video and audio content choices. Media today is ably demonstrating a creative, functioning market, frenetic with new options and new choices. Content companies attempt to anticipate what consumers want, and respond quickly to consumer choice. And those with less populist tastes have many more targeted channels at their disposal.

Precisely at this time when more people want to be heard this new fairness doctrine disaster is unwarranted. Repression is not the right choice. Consumers, and yes even politicians, have innumerable choices for expression and do not need to upend our guaranteed liberties so that they can be protected from citizens or force others to promote or host their content.

Perhaps the most important consideration is that the FCC currently has very important work to continue rather than be distracted by a major organizational shift and expansion.

To say the least, the FCC needs to continue its focus on opening up more spectrum for 5G and Wi-Fi use, and the growing needs of the country make clear that the job is far from over. A plan for making available further desirable spectrum needs to be made clear. The "spectrum pipeline" must be continuously filled with both unlicensed and licensed spectrum to meet the ever-increasing demand by consumers. Thoughtful leadership now and in the future is necessary to provide the materials for the 5G

experience in our homes and businesses, as well as in urban and rural communities alike, to grow and continue.

Another example is the needed attention to addressing the need for more rural broadband. With robust investment in broadband since 1996 of nearly $2 trillion by internet service providers more than 94% of the U.S. population has access to broadband. Even with that investment, there are still some without access.

As George Ford of the Phoenix Center has explained, a little more than 3% of those who do not have internet access at home do not have it because it is not available. The challenge might seem small, as compared to 60% who say they have no need or desire to have access, but is important to those who want access. The obstacle is that most of those without access live in hard to reach areas, areas where there is little to no business case to be made for broadband. The solution to increase connectivity for many of the unserved is fairly obvious.

The challenge can be overcome in a relatively cost-effective way by potential broadband users through attaching broadband cables to utility poles. The costs are currently being driven up by those who force a new company that wants access to a pole already at the end of its useful life, to bear the entire cost of replacement.

The FCC needs to step into a space where it is already regulating and clarify the situation. Specifically, at the least, replacement or upgrade costs should be fairly distributed between pole owners and those who seek to attach new equipment.

In general, the FCC should continue the leadership in broadband it has demonstrated during the pandemic, by continuing to focus on the challenges of increasing access to broadband. The highlighted two issues here are just a small part of what the FCC has on its to do list already. The Commission is doing a good job and for the benefit of future innovation the focus must be on the critical issues of spectrum and broadband.

Discussions about clarifying or updating Section 230 to reflect that the internet has changed since 1996 seem entirely reasonable. Nothing here should suggest otherwise. Those conversations, and certainly any changes, are the domain of Congress not the FCC, nor any other agency, independent or otherwise.

The FCC certainly does not want to risk taking its eye off the broadband ball, or placing at risk its current reputation, by taking up a political charge to regulate the internet and moderate what speech is allowed by the government. The legacy of this FCC should be of more broadband to more people more often, not the creation of the Federal Computer Commission.

Respectfully,

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Executive Director
Innovation Economy Institute