Before the

Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS BY DATA FOUNDRY, INC., GOLDEN FROG GMBH AND GIGANEWS, INC.

I. Summary of Reply.

These Reply Comments also include Giganews, Inc. (GN) which adopts the prior Data Foundry/Golden Frog (DF/GF) comments. Giganews, Inc is a Usenet/newsgroup[1] service provider. Founded in 1994, Giganews service is available to individual users through a subscription model and as an outsourced service to internet service providers. Giganews currently offers service to over 10 million broadband users in 180 countries. The Giganews website offers content, documentation and support in 10 languages.

DF/GF covered several topics in their initial comments.[2] We will analyze and respond to other commentors' presentations for only a subset of the issues covered in the initial filing. Specifically, DF/GF/GN will address:

1. The proper answer is Open Access (DF/GF Initial Comments Part III);
2. The Incumbents will break their promises to increase investment in return for reduced regulation just like they did before (DF/GF Initial Comments Part III.G); and
3. The Incumbents denial of past abuses belies their promise to not abuse again. (DF/GF Initial Comments Part VII).

The "open Internet" problem was caused because the Commission allowed the major incumbents to close their networks and deny access to transmission on reasonable terms in a series of decisions that eliminated *Computer Inquiry* obligations and §251/252 requirements. The

[1] For a description of "Usenet" see https://en.wikipedia.org/wiki/Usenet.

[2] Initial Comments of Data Foundry and Golden Frog, July 17, 2017, available at https://ecfsapi.fcc.gov/file/10717117909818/2017%20DF-GF%20Open%20Internet%20Comments%20FINAL.pdf.

solution is to eliminate the cause and re-inject intra-modal competition. The worst thing the Commission could do is to double down by further deregulation of transmission *and* Internet Access.

The incumbents promise to invest more and do no evil if everything is voluntary. The Commission fell for this folly once before. History shows us it was a disastrous failure and led directly to why we are here today. The promise to invest will be broken, again. The latest commitment to openness is as empty and untrustworthy as it was before. Past abuses have been clearly documented by prior Commissions and reaffirmed in this proceeding by several commenters. These past abuses will occur again if the Commission removes Title II oversight – through Open Access to transmission or at least the current rules for Internet Access.

II. The proper answer is Open Access.

The DF/GF initial comments explained (DF/GF Initial Comments Part III) that "net neutrality" rules are only necessary because the underlying transmission network has been closed off to competitive access. There are significant barriers to entry for several reasons. The largest barrier is the cost to build the infrastructure but there are other significant costs and barriers related to rights for content.[3] There is not going to be robust facilities-based competition in most areas because it rarely makes economic sense for a provider to overbuild established providers in an effort to serve the mass market. The only way to have mass-market competition, therefore, is to require that the current providers allow new entrants to obtain local transmission links at wholesale and then provide their own Internet Access product. The return of intra-modal competition would eliminate the need for regulation of Internet Access.

This does admittedly entail common carrier regulation of transmission, but that is what the Commission was created to do. *Computer Inquiry* and the 1996 amendments both focused on

[3] Incompas Initial Comments pp. 25-32.

the underlying transmission network and ensured it was open and accessible on reasonable terms. Both recognized that transmission is telecommunications and is common carrier, but services provided "over common carrier facilities" or "via telecommunications" do not have to be regulated telecommunications service. In order to have a competitive enhanced/information market, however, you must first insist on fully open and accessible access to the underlying transmission.[4] As noted by Incompas, the open networks concept is hard-wired into the definitions and the rest of the Act.[5] Incompas – like DF/GN and others – helps the Commission refresh its recollection of the derivation of open network principles through FCC policies beginning with the *Computer Inquiry*, by pointing out that the *NPRM* horribly mischaracterizes history and precedent.[6]

Public Knowledge/Common Cause largely agree with DF/GN's recitation of the regulatory history related to underlying transmission and Internet Access[7] and the lack of robust

[4] *See, e.g.,* To FCC: Try functional separation of Internet, Henry Goldberg, The Hill (June 23, 2014), available at http://thehill.com/blogs/congress-blog/technology/210085-to-fcc-try-functional-separation-of-internet.

[5] Incompas Initial Comments p. 51 ("Congress clearly understood that an information service needed the physical infrastructure of a telecommunications service to be distributed; by definition, an information service is one provided 'via telecommunications.' As Congress largely was codifying the logic of the *Computer Inquiries*, this statutory definition makes sense.")

[6] Incompas Initial Comments pp. 41-63.

[7] Public Knowledge/Common Cause Initial Comments pp. 58-61, 79-80 ("the NPRM conveniently omits a critical portion of this history: that from 1980 to 2005, "facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings . . . to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II." This open access regime was essential in the early emergence of online services such as dial-up ISPs, which guaranteed them access to the phone lines they needed to provide service." The NPRM also ignores how this regime was applied to DSL service in particular, which required facilities-based wireline providers to offer unbundled transmission capacity to other ISPs. … independent ISPs have essentially disappeared in today's broadband marketplace, such that 'a broadband subscriber today essentially equates her last-mile transmission provider . . . with her ISP.' … Past FCCs unfortunately chose to regulate [] access providers as though they were not access providers. This policy choice ensured that the retail broadband market would be uncompetitive. … [T]he NPRM yet again overlooks open access rules that were at the heart of the *Computer II* regime. Without such rules, it is highly unlikely that independent ISPs would have emerged in the first place, and yet it was the distinction between ISPs and facilities-based network providers that drove the practical distinctions between 'enhanced' and 'basic' service providers. … The current FCC should heed the lessons of history by recognizing that open access networks that allow users to access the services of their choice best foster innovation and the public interest.")

intra-modal and inter-modal competition.[8] They assert that "[t]he current FCC should heed the lessons of history by recognizing that open access networks that allow users to access the services of their choice best foster innovation and the public interest."[9]

III. The Incumbents will break their promises to increase investment in return for reduced regulation just like they did before.

The large providers predictably once again promise a blossoming of investment if only the Commission lets them exploit their market power. It worked in the early 2000s, so why not try again? To pick just a few, AT&T,[10] Comcast[11] and Verizon[12] dusted off their golden oldies from that period and once again sing from the cartel songsheet in perfect harmony. There is nice rhyme and soothing rhythm but the arguments wholly lack true reason. The large providers' proof by vigorous assertion and appeals to authority cannot prevail, especially given their past broken pacts.

DF/GF Initial Comments Part III.G showed that prior incumbent promises to increase investment and maintain "voluntary" or "commercial" arrangements for open access to transmission in return for lighter regulation were broken in magnificent fashion. Indeed, it was the abject failure of this compact that led to the current situation. Other commentors agree.

CCIA provides an exhaustive analysis that directly rebuts the incumbents' arguments and the NPRM's uncritical tentative acceptance of them.[13] Along the way, CCIA *also* directly proves DF/GN's point that investment peaked *before* the Commission began to close off the network and deregulate both transmission and Internet Access in the early 2000s and instead of radically

[8] Public Knowledge/Common Cause Initial Comments pp. 64-72, 76-80.
[9] Public Knowledge/Common Cause Initial Comments p. 80.
[10] AT&T Initial Comments pp. 53-55.
[11] Comcast Initial Comments pp. 8-9, 25-34.
[12] Verizon Initial Comments pp. 2-15.
[13] CCIA Initial Comments pp. 11-31.

increasing as promised it actually fell by a considerable amount.[14] As CCIA persuasively points out:

> Neither this Commission nor Title I proponents have addressed why U.S. broadband provider capex collapsed after 2002, which was coincidentally when the Commission classified broadband over cable systems under Title I in the *Cable Modem Order*. Similarly, neither the Commission nor Title I proponents have explained why despite the *Cable Modem Order's* leading to a series of Title I decisions, BIAP capex hovered around $70 billion from 2006 to 2012 and dropped to $64 billion in 2009. Following the logic of Singer, Ford, USTelecom, and the current Commission, if Title I is the key to BIAP capex, it is curious that since the *Cable Modem Order*, BIAP capex has never been even close to its $110 billion heights in 2000 and 2001."[15]

Public Knowledge/Common Cause also provide compelling evidence regarding historical and current investment and the relationship, if any, to Title I versus Title II regulation.[16] So does the Center for Democracy and Technology.[17]

IV. The Incumbents denial of past abuses belies their promise to not abuse again.

DF/GF Initial Comments Part VII summarized past Commission findings of abuses and presented more instances from our own experience. The large providers, of course, deny the obvious and engage in prevarication if not outright dishonesty.[18] Their assertions are belied by the facts and evidence.

The large providers want the Commission to believe their denials and promises instead of the plain, obvious truth, even though they also clearly reveal their desire to violate Open Internet principles. Sprint, for example, "optimize[s] the video viewing experience" *by throttling*.[19]

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[14] CCIA Initial Comments pp. 16-17 ("The Real Capex Story is that Despite the Cable Modem Order and Other Title I Decisions Since 2002, BIAP Capex Has Never Been Even Close to the $110 Billion Heights in 2000 and 2001.")

[15] CCIA Initial Comments pp. 16-17.

[16] Public Knowledge/Common Cause Initial Comments pp. 64-72,

[17] CDT Initial Comments pp. 1-4.

[18] *E.g.*, AT&T Initial Comments pp. 12-36; Comcast Initial Comments pp. 50-66; Verizon Initial Comments pp. 5-25.

[19] Sprint Initial Comments pp. 12-13.

Verizon has announced it will do the same thing for its "unlimited" data plan.[20] Today's throttling based on application or content type will be tomorrow's outright blocking.

Other parties also made this point. Public Knowledge/Common Cause demonstrate that the large providers have the incentive and ability to act inconsistently with their promises and have indeed done so in the past.[21] Incompas recites the history of serial abuse the *NPRM* tries to wish away.[22] There can be no doubt that the large providers will return to their abusing ways if not constrained by strong, binding rules to protect the open Internet.

V. CONCLUSION

The Commission does a disservice to the public by confusing and conflating terms and concepts that are easily misinterpreted by normal consumers. We need to be very clear that regulating Internet access is not the same thing as regulating the Internet itself. The ability to **access** something is not the same as obtaining that same thing. There are good reasons to regulate the transmission used to supply Internet access, or Internet access itself.

The most effective way for the Commission to protect and promote the open Internet for mass market users is to implement Open Access by focusing on the part of Internet access that is clearly "telecommunications" – the broadband transmission component – and rule that the transmission component is and should remain a Title II common carrier telecommunications service that must be made available on a standalone basis and with just, reasonable and nondiscriminatory terms. The Commission should return to the basic Open Access principles that drove *Computer Inquiry* and made the Internet possible in the first place. If standalone local broadband transmission is available to any market entrant that desires to provide mass-market

[20] Verizon's good unlimited data plan is now three bad unlimited plans, Cheapest plan limits video to 480p, and there's no way to watch 1080p on a phone anymore, Chris Welch, The Verge, Aug 22, 2017, available at https://www.theverge.com/2017/8/22/16181362/verizon-new-unlimited-data-plan-video-throttling-net-neutrality.

[21] Public Knowledge/Common Cause Initial Comments pp. 105-114.

[22] Incompas Initial Comments pp. 76-83.

retail Internet access then widespread mass-market competition for bundled Internet access service can re-emerge and the Commission will not need to regulate mass-market broadband Internet access regardless of its legal classification.

The *NPRM's* proposal to reclassify and fully deregulate broadband Internet service cannot be adopted if the underlying broadband transmission is not available on a common carrier basis. The large providers would love to have no common carrier obligations for the transmission component or bundled Internet access, but they cannot be allowed to close off their transmission networks from competitive access and then also be free to totally control the Internet access market without meaningful regulatory oversight.

The 2010 and 2015 "Net Neutrality" rules attempted to alleviate the effects of an uncompetitive last mile by regulating broadband access, but Open Access strikes at the heart of the problem by opening up the network to robust mass-market competition. Open Access would bring competition back to the mass-market Internet access market. Consumer choice would be the primary safeguard against abusive and discriminatory practices.

Open Access would deter abuse through vibrant competition. For 40 years, the Commission's Open Access rules were the foundation of the information services market and they succeeded in fostering competition, preventing abuses, and incentivizing network investment. These are the results that the Commission seeks in this proceeding and it can best achieve them by bringing back Open Access. But if the Commission chooses to ignore history and continue its course of closing off the dominant providers' local transmission networks from competitive access to underlying transmission, then it must retain the current rules and stick to the current Title II classification for broadband Internet access.

The *NPRM's* claim that past abuses are of no consequence and largely illusory is simply false. If the rules are withdrawn the incumbents will do it again. The Commission must acknowledge that the dominant providers have the incentive and ability to abuse their market power and it must – once again – find that they have abused and will abuse again if there are not strong Title II-based rules protecting competition and consumers.

VI. SIGNATURE OF COUNSEL

Respectfully Submitted

/s/_____

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