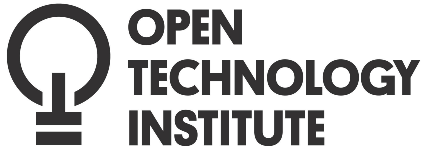

Written Testimony of

Sarah Morris, Open Internet Director
New America's Open Technology Institute

Respectfully submitted to the

House Committee on Energy and Commerce,
Subcommittee on Communications and Technology

In advance of

Legislative Hearing on Four Communications Bills

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Summary

The following testimony focuses on one bill among the four bills being considered in the Subcommittee on Communications and Technology's "Legislative Hearing on Four Communications Bills 2018." While New America's Open Technology Institute (OTI) appreciates the concerns raised implicitly in H.R. 3787 ("Small Entity Regulatory Relief Opportunity Act of 2017" or SERRO), I submit this testimony to address concerns with the necessity and scope of the proposed bill.

SERRO would take a multifaceted approach to expanding access to waivers from a variety of potential Federal Communications Commission (Commission) regulations by 1) directing the Commission to review and streamline waiver processes for "small entities"; 2) creating an automatic one-year waiver for all small entities from all Commission regulations, subject to limited exceptions; and 3) requiring a triennial review of agency actions' impact on small entities.

OTI's concerns are four-fold. First, it is not clear that an immediate problem exists that this bill would effectively solve. Indeed, under the current heavily deregulated landscape in the communications sector, the proposed bill seems particularly unnecessary. Second, numerous avenues for waivers and exemptions already exist at the Commission. Third, the definition of "small entities" in the bill is unclear. Finally, a triennial review process would create a high degree of confusion and possible legal uncertainty at the Commission.

I. Introduction

Thank you for the opportunity to testify today at this Legislative Hearing on Four Communications Bills. I represent New America's Open Technology Institute (OTI), where I am the Director of Open Internet Policy.

New America is a nonpartisan, nonprofit, civic enterprise dedicated to the renewal of American politics, prosperity, and purpose in the digital age through big ideas, technological innovation, next generation politics, and creative engagement with broad audiences.

OTI is a program at New America that works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. OTI promotes universal access to communications technologies that are both open and secure, using a multidisciplinary approach that brings together advocates, researchers, organizers, and innovators. Our primary focus areas include surveillance and security, net neutrality, broadband access and adoption, and consumer privacy.

My testimony will focus on concerns related to one of the four bills under consideration today: H.R. 3787, or the Small Entity Regulatory Relief Act of 2017 (SERRO). This testimony will: 1) query the significance of those burdens relative to the need for regulation; 2) explain that the Federal Communications Commission (Commission) already has mechanisms in place for assessing compliance burdens against the need for regulation; 3) outline specific concerns related to relying on a market percentage definition for small entities; and 4)

review the history of the media ownership quadrennial review requirement and the future it may portend for the modified triennial review process proposed in this bill.

II. The Small Entity Regulatory Relief Opportunity Act of 2017 appears to be a solution in search of a problem.

Without any legislative findings in the bill, and with a highly deregulatory landscape at the Commission as a present backdrop, it is unclear precisely what problem H.R. 3787 is seeking to address.

The point of consumer protection laws, from telecommunications to food service to healthcare, is to protect all consumers from harmful practices—not just customers of the biggest entities. All consumers are entitled to the protections of federal telecommunications laws. The Commission's mandate under the Communications Act is:

> "[…] to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications […]"[1]

Regulatory approaches that apply differently to different entities based on a definition that is premised on market share would cut against this mandate, rather than advance it.

[1] 47 U.S.C. §151.

In addition, the bill does not articulate a particular sector or sectors of entities within the Commission's purview to which it would apply.[2] Presumably then, any subset of sectors, from internet service providers, to cable television operators, to phone providers would be covered under the broad reach of the bill. Without comprehensive and sector-specific evidence about the relative burdens imposed by the various laws and regulatory frameworks applicable to each of these sectors, it seems impossible for Members of Congress to adequately weigh the relative burdens against the necessity or benefits of the entire world of possible regulation.

Finally, to the extent that there are yet unidentified burdens that might warrant some waivers in certain circumstances, it is unclear why an expedited waiver application process, a near-blanket waiver of all future regulations for a period of one year, and an expanded triennial review of the applicability of all regulations to small entities, would be necessary. Indeed, the current Commission has taken an unabashedly deregulatory stance on major communications issues from consumer privacy to internet openness, and the Commission (or Congress, in the case of broadband privacy) has successfully and systematically walked back several of the reforms enacted under the previous Commission.

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[2] The bill's definition of "small entity" contemplates the provision of a subscription service, but provides little other guidance. "(2) With respect to a regulation applicable to a particular subscription service, the entity provides such subscription service to 2 percent or fewer of the consumers receiving such subscription service in the United States."

In this context, the proposals in this bill would merely gild the deregulatory lily, while upending longstanding processes at the Commission without clear analysis as to the ultimate effects on consumers.

III. The Federal Communications Commission already has effective mechanisms in place to avoid or address undue regulatory burdens.

As the section immediately above suggests, the Commission already provides numerous avenues of recourse for a small business that believes an existing or proposed regulation is unduly burdensome.

The most obvious and fundamental opportunity to discuss burdens on small businesses is to engage with the Commission during the notice-and-comment period that is statutorily required before new rules or regulations are created. At that point, the Commission has opportunities to hear from multiple perspectives on the party's assertion of burdens, and can appropriately weigh those burdens with the need for the regulations in question.

In addition, as the bill itself acknowledges, the Commission's rules already allow the Commission to "waive specific requirements of the rules on its own motion or upon request."[3]

Indeed, the storied history of the 2015 Open Internet Order[4] provides a useful case study in the ways in which the above two processes may play out in practice, even under a Commission that was decidedly not "deregulatory" in its

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[3] 47 C.F.R. 1.925 (a), *see also* 47 C.F.R. 1.3 (general waiver rule), and 47 C.F.R. 76.7 (cable-specific waivers).

[4] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*2015 Open Internet Order*).

approach. In February 2015, the Commission approved the Open Internet Order, which included new rules that required Internet Service Providers to be more transparent with their customers. The Order included a provision that exempted small providers from complying with these transparency rules for one year. The Commission determined that this exemption was warranted based on the public feedback it received during the notice-and-comment process. The Commission released a Public Notice later that year seeking comment on whether to extend the exemption beyond one year.[5] After considering the comments in that proceeding, the Commission extended the exemption for an additional year.[6] In February 2017, the Commission extended the waiver once again—this time for an additional *five* years—and broadened the scope of the exemption to include larger companies with 250,000 subscribers or fewer.[7]

This case study demonstrates the relative ease with which a small entity obtained a 7-year exemption from a new regulation. The fact that this waiver was granted and extended under both Chairman Wheeler and Chairman Pai demonstrates bipartisan consensus that the concerns of small entities are a priority at the Commission. Small internet service providers were able to receive a waiver based on their participation in the underlying proceeding; that waiver

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[5] *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Public Notice, 30 FCC Rcd 6409 (2015) (Public Notice).

[6] *Protecting and Promoting the Open Internet,* GN Docket No. 14-28, Report and Order (Dec. 15, 2015), https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1215/DA-15-1425A1.pdf at 6.

[7] *Statement of Chairman Ajit Pai On Voting to Protect Small Businesses from Needless Regulation* (Jan. 27, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0127/DOC-343229A1.pdf.

was ultimately extended; and the Order was more broadly repealed, essentially in total, after just two years (during which the waiver only briefly lapsed).

IV. The vague definition of "small entity" would add bureaucratic costs and uncertainty to the rulemaking process.

The bill's definition of "small entity" creates confusion and could result in exemptions being applied to entities that are much bigger than what many would consider to be a "small" business. Section (c)(2) defines small entities as a "subscription service" that "provides such subscription service to 2 percent or fewer of the consumers receiving such subscription service in the United States." The lack of any legislative findings makes it difficult to understand what, if any, justification exists for this two-percent threshold.

Moreover, this language does not adequately define the market. The term "subscription service" is not defined, which creates significant uncertainty about which entities are covered by the bill. The Commission cannot identify an entity's market share if the market itself is not clearly defined. In absence of that clarity, the Commission would be forced to adjudicate fights over market definition for every rulemaking simply to determine which entities are covered by the bill. Based on the experience of the antitrust agencies, fights over market definition can be expensive and lengthy.[8] Thus, the bill would add a layer of bureaucratic complexity to virtually every rulemaking at the Commission for no clear benefit.

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[8] *See, e.g.* Louis Kaplow, *Why (Ever) Define Markets?,* Harvard Law Review (Dec. 17, 2010), https://harvardlawreview.org/2010/12/why-ever-define-markets/.

V. Adding new directives to the triennial review process would add complexity and create confusion and additional burdens for the Commission and the public.

Mandatory, recurring review periods can cause significant problems for the Commission and the public. This bill would require the Commission to determine, upon review of every regulation promulgated during the triennial review period and prior to it to determine whether there is good cause to grant relief from that regulation to small entities.[9] This more extensive inquiry under Section 257's current triennial review would cause confusion and additional burdens for the public, and could require extensive agency resources, as the Commission would likely need to engage in additional rulemakings if it determined relief for small entities from certain regulations was warranted.

The quadrennial review of the media ownership rules demonstrates how fraught these types of mandatory reviews can become.[10] Originally a biennial review, which Congress changed to four-year review in 2004,[11] the quadrennial review requires the Commission to review every four years its local media ownership rules, such as its various cross-ownership rules and local ownership limits.[12] This review has kept the media bureau, broadcasters, and the public

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[9] H.R. 3787 Sec. 13 (5)(b)(1).

[10] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

[11] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100 (2004).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Appropriations Act § 629, 118 Stat. at 100. *See* FCC Broadcast Ownership Rules, FCC https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules; 47 CFR §73.3555.

extremely busy since the early 2000s. Each docket has been voluminous. The Commission commissioned studies, and outside parties submitted studies, comments, and other data to support their arguments. There have been at least five court cases in the Third Circuit based on the 2002 biennial review and the 2006, 2010, and 2014 quadrennial reviews (two of which are currently held in abeyance pending further Commission action).[13] Each case with a decision on the merits remanded some portion of the Commission's order back for further review. Some of the early proceedings are still open pending resolution of issues from the relevant court case. To expect that a similar process, except more frequent and covering every Commission rule, would be smoother is unrealistic.

VI. Conclusion

For the reasons explained above, I urge this subcommittee to vote against H.R. 3787 and to encourage small entities to take advantage of the numerous avenues currently available at the Federal Communication Commission to avoid overly burdensome regulations.

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[13] Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) ("Prometheus I"); Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) ("Prometheus II"); Prometheus Radio Project v. FCC, 824 F.3d 33 (3d Cir. 2016) ("Prometheus III"); Prometheus Radio Project v. FCC, Dkt. 17-1107 (3d Cir. 2017) ("Prometheus IV"); Prometheus Radio Project v. FCC, Dkt. 18-1092 (3d Cir. 2018) ("Prometheus V"); In re Prometheus Radio Project and Media Mobilizing Project, Dkt. 18-1167 (3d Cir. 2018).