

Attachment—Additional Questions for the Record
Subcommittee on Communications and Technology
Hearing on
“Preserving an Open Internet for Consumers, Small Businesses, and Free Speech”
February 7, 2019

Ms. Jessica J. González, Vice President of Strategy & Senior Counsel, Free Press & Free Press
Action Fund

The Honorable Jerry McNerney (D-CA)

- 1. As part of the testimony received by the Committee, assertions were made by Eastern Oregon Telecom that the 2015 Protecting and Promoting the Open Internet Order had a chilling effect on investment.**

a. Do you have a response?

Response: Thank you for your question, Representative McNerney.

According to FCC Form 477 data submitted by Internet Service Providers (“ISPs”), ISPs’ public statements to their investors, and detailed news reports on ISPs’ expenditures and performance, the FCC’s 2015 *Open Internet Order* did not have a chilling effect on investment. I discussed this in detail on pages 12-26 of my written testimony for this hearing.¹

Free Press has long used broadband providers’ own SEC disclosures to show the true impact – or, more aptly, lack of any impact – of FCC Net Neutrality rules on broadband provider investment and deployment. We get it directly from investment reports of publicly traded companies, and deployment reports that broadband providers file on FCC Form 477.

Beyond claiming (falsely) that the *Open Internet Order* had harmed investment, Chairman Pai and his allies predicted that the FCC’s 2017 repeal would increase broadband investment. But now we have new data proving that individual broadband providers’ capital expenditures have not uniformly skyrocketed since the FCC’s repeal vote, even as coupled with massive corporate tax cuts. In fact, many of the largest broadband providers have now reported decreased expenditures in 2018, the year that repeal took effect.

As always, we caution against over-reliance on aggregate investment expenditures, the sheer dollar amount spent by ISPs, or other such blunt metrics easily swayed by temporary changes in either direction at any large firm. Aggregates obscure changes (if any) in investment decisions, cycles,

¹ Jessica J. González, Free Press and Free Press Action Fund, “Preserving an Open Internet for Consumers, Small Businesses, and Free Speech,” before Committee on Energy & Commerce, Subcommittee on Communications & Technology (Feb. 7, 2019) (“González Testimony”), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Gonzalez_Testimony.pdf.

and strategies by all individual firms that make up the total. Those firms' decisions and directions may vary from one another, with broadband providers explaining to their investors the reasons for their individual decisions based on technological upgrade cycles that different companies move through at different times.² As AT&T itself concluded, "there is no reason to expect capital expenditures to increase by the same amount year after year."³

Three additional data points and data sets have come to light since the February 2019 hearing on this topic.

First, Eastern Oregon Telecom's ("EOT") claims at the February 7th hearing did not detail the full extent of its investments under Title II. Most notably, EOT continued investing and improving service under Title II.

EOT testified that during 2015 and 2016, the company "could not get loans from the bank" saying it was "only as we started to hear the commitment from the new FCC to repeal Title II that we started to see the cash open up." Free Press Action has no way of knowing what passed between EOT and its bankers or prospective investors. We can only assume that those specific statements were true, at least in some respect. But here's what we do know now,⁴ based on a review of FCC broadband deployment data self-reported by EOT, and a cursory internet search.

- In March 2015, just a few days after the FCC's historic vote returning to Title II, EOT and Huawei put out a joint press release announcing a new fiber-to-the-premises deployment project that would bring gigabit service to "over 8,000 homes and businesses in Hermiston and the surrounding area." The release announced initial deployment in late 2015, continuing into 2016. A local newspaper report that same day quoted the EOT witness saying that with the new build EOT "expects to invest \$2 million" on the project.
- EOT substantially expanded its cable footprint into previously unserved areas; upgraded 100 percent of its cable lines to higher-capacity DOCSIS 3; and more than tripled the marketed downstream speeds of all of these cable-modem lines from 30 Mbps to 100 Mbps. This upgrade occurred predominantly in 2016 as well – that is, long before Donald Trump's election, and before EOT could have "started to hear the commitment from the [Trump] FCC to repeal Title II."

² See generally, S. Derek Turner, Free Press, "It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era," (May 2017), <https://www.freepress.net/sites/default/files/2018-06/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf> (documenting every single publicly traded ISP investor call transcript prior to and following the 2017 repeal, and finding that none of these companies indicated that Title II Net Neutrality had any impact on their own investment decisions).

³ Comments of AT&T, FCC WT Docket No. 10-133, at 34 (filed July 30, 2010).

⁴ See S. Derek Turner, Free Press "Tale Tales and Title II," (Feb. 15, 2019), <https://www.freepress.net/our-response/expert-analysis/insights-opinions/tall-tales-and-title-ii>. The post links to EOT's joint press release with Huawei, contemporaneous news stories, and additional sources.

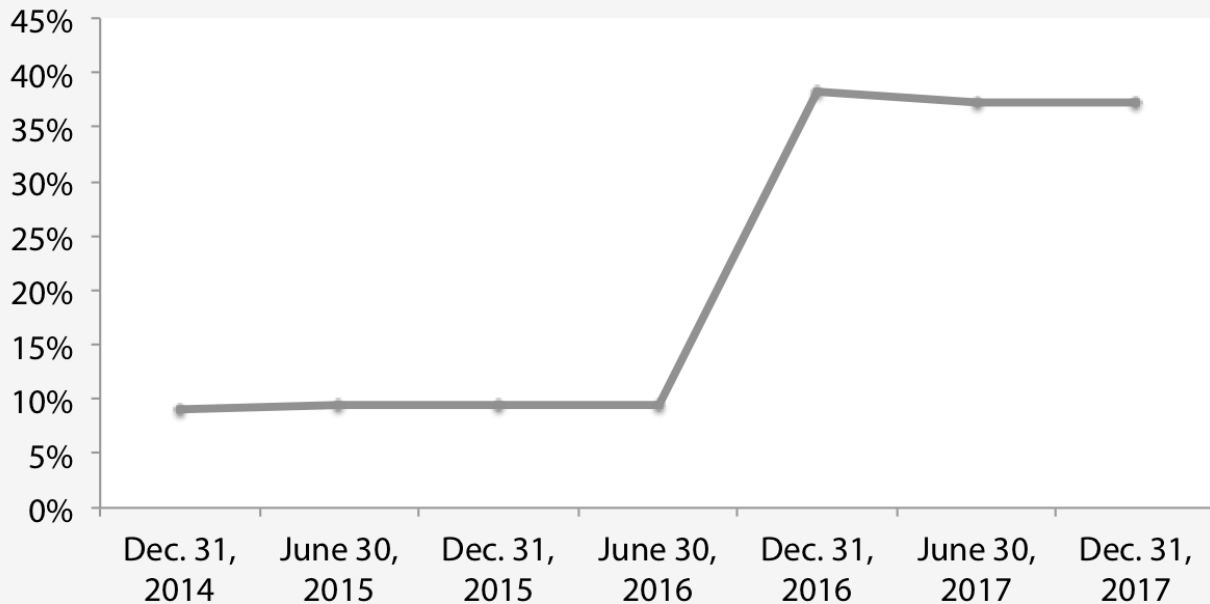
- A substantial number of EOT's deployments and upgrades made during this time were in areas classified as rural or unpopulated blocks as of the 2010 Census. Between the end of 2014 and the end of 2016, EOT expanded its total number of rural blocks served by 24 percent; the number of rural blocks where it offers cable-modem service by 315 percent; and the number of rural blocks where it offers fiber service by 25 percent.

At the subcommittee's legislative hearing on this topic held on March 12, 2019, the ranking member for the full committee suggested that the above facts and others Free Press had presented still did not tell the full story of EOT's investment. We do not at this point have available to us all of the additional submissions EOT may have made prior to that hearing.

However, while Free Press will be glad to review those new explanations when we receive them, it suffices to say for now all of Free Press's analysis of EOT deployment and investment stemmed from publicly available sources: namely EOT's own FCC Form 477 submissions, EOT's press releases, and contemporaneous news articles. And none of the points raised during the course of the March 12th hearing appear to rebut Free Press's analysis.

In fact, the explanation that EOT secured \$2 million in financing prior to 2015 yet still decided to spend it after the FCC's 2015 *Open Internet Order* vote only reinforces the obvious conclusion that the 2015 order did not deter such investment and deployment. So too does the suggestion that EOT's cable-plant upgrades were a cost-effective method for upgrading facilities during the period prior to Chairman Pai's repeal of the rules. That is exactly our point. Cost-effective upgrades remained available to EOT and other broadband providers during the restored Title II-era, and EOT and other ISPs made such upgrades routinely.

Percent of Persons Residing in EOT's Rural Service Territory Where EOT Offers 100 Mbps-Level Broadband



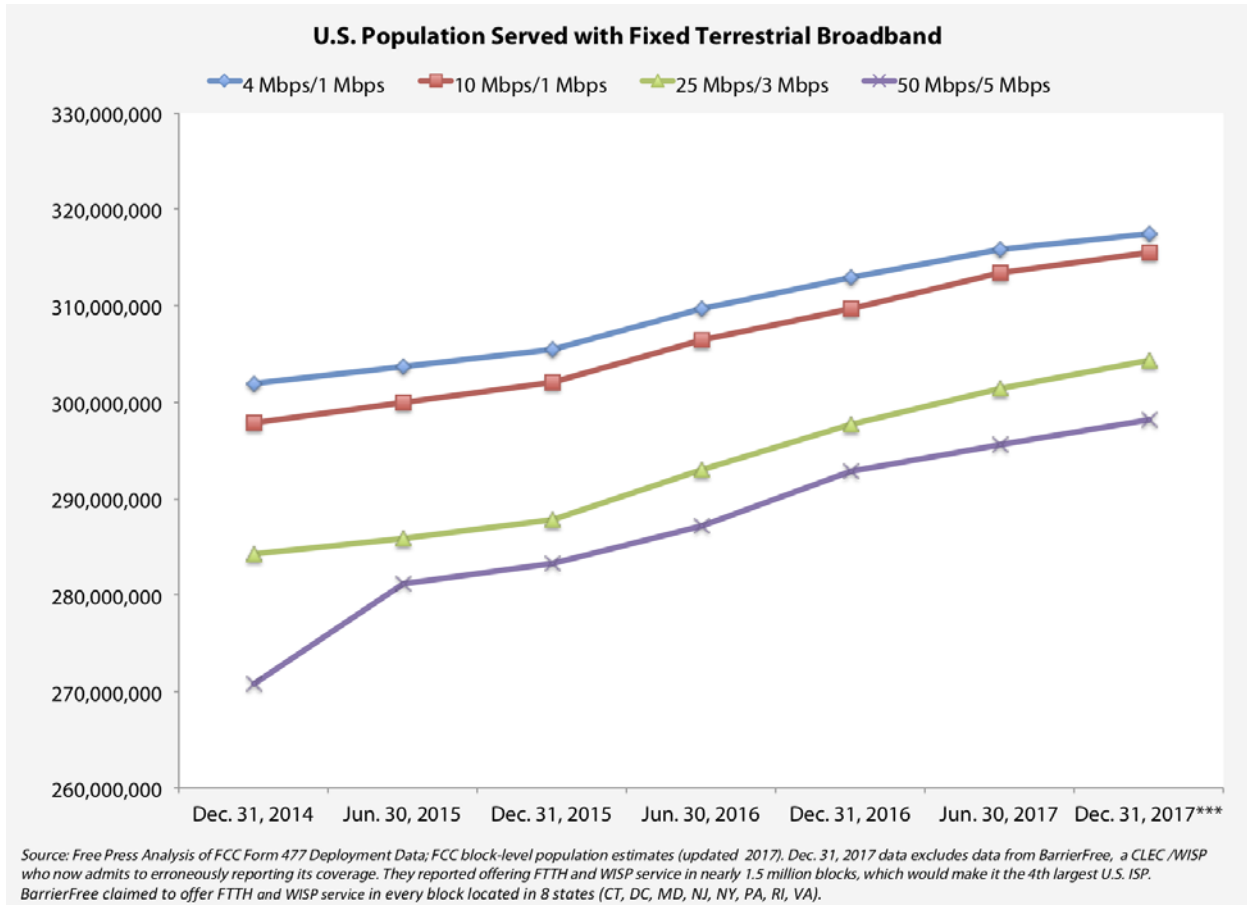
Source: Free Press Analysis of FCC Form 477 Deployment Data; 2010 Census; FCC block-level population estimates (updated 2017).

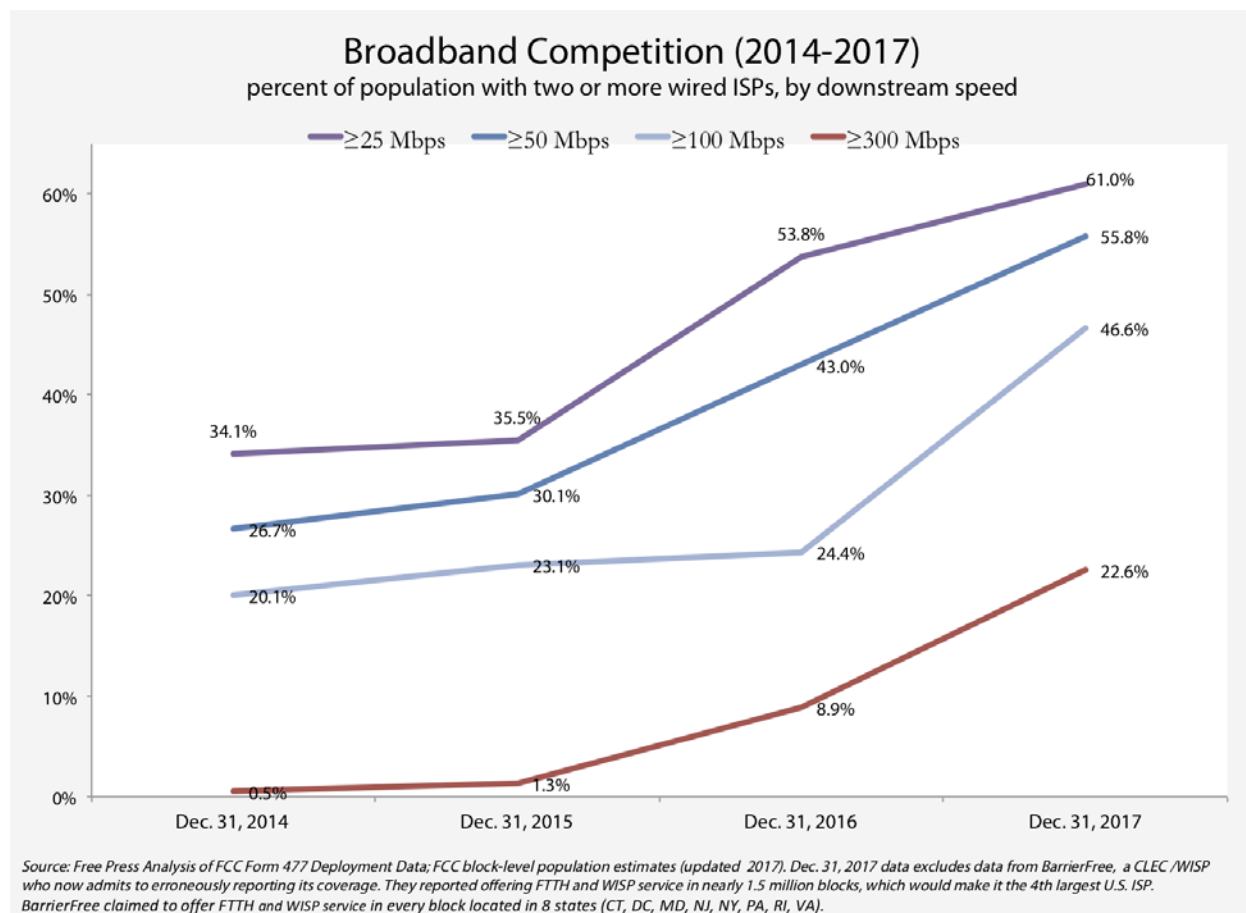
Second, the FCC's broadband data for 2017, the Pai FCC's first year, shows increases at the same pace as before and after the 2015 Title II Net Neutrality vote. As my testimony demonstrated, there is irrefutable evidence that broadband deployment, coverage, speed, and competition progressed unhindered by restoration of Title II and adoption of strong rules.

We are now able to analyze FCC Form 477 data for year-end 2017 as well, which of course reflects only a few weeks time after the Pai FCC actually voted in December of that year on the repeal. But to assume EOT's premise, broadband providers knew for all of 2017 that the newly installed FCC chairman was likely to make good on his promise of repealing the rules and running away from Title II. Did broadband investments leap in anticipation of that repeal?

In short, no. Improvements in wired broadband coverage, speeds, and choices continued on the same trajectory seen from the end of 2014, before the FCC adopted the *Open Internet Order*, through the time that order remained in place and seemed in no jeopardy before the 2016 election. The fact that these continuing upgrades have not yet ensured broadband fast enough or ubiquitous in every rural market, or within each local market, is no reason to believe that the repeal of the rules could or would change the trajectories we see holding steady before, during, and after Title II's return.

Two sample charts, updated with 2017 data, illustrate the steady (if by no means sufficient in every congressional district) pace of broadband improvements during this period, unaltered by continued debate over how to preserve Net Neutrality.





Third, many large broadband providers decreased their investments in 2017 and 2018, even after the 2017 Net Neutrality Repeal vote.

In my written testimony, I noted that many major ISPs had begun reporting their 2018 revenues and investment numbers.⁵ At that point, Verizon already had reported an investment decrease for 2018 when compared to 2017. So had AT&T, which announced that instead of the tax-cut fueled job growth the company had promised it would instead be laying off workers.⁶ And Comcast reported that capital expenditures for 2018 likewise decreased, after double-digit growth in the years when Title II was in place.

Now that numbers are in for almost all publicly traded broadband providers, we can update our tally of investment changes across all of these ISPs. As always, we caution against reading too much into aggregate totals, and focus more on individual companies' changes.

⁵ Timothy Karr, "Pai is No Jedi," Free Press (Jan. 31, 2019), <https://www.freepress.net/our-response/expert-analysis/explainers/pai-no-jedi>.

⁶ Jon Brodtkin, "Report: AT&T plans layoffs despite claiming tax cut would create 7,000 jobs," *Ars Technica* (Jan. 9, 2019), <https://arstechnica.com/information-technology/2019/01/att-reportedly-plans-layoffs-despite-tax-cut-and-fcc-deregulation/>.

We see now even more clearly that the Net Neutrality repeal, coupled with giant corporate tax cuts, didn't even move the needle in a positive direction – despite a series of Commission and broadband provider claims that explosive growth was bound to occur as soon as the repeal appeared on the horizon.

With 2018 in the books, and a year-plus elapsed after the Title II repeal vote, several individual broadband providers are spending less than they did prior to that repeal and other favorable regulatory changes they've obtained from this administration. In fact, many are spending markedly less since Chairman Pai's confirmation than they did in the two years prior to that, when Title II was in place.

On an inflation-adjusted basis, Verizon saw a 6.4% decline for the most recent two-year period, while Comcast's growth slowed to 3% compared to 23.7% growth in 2015-2016. Even allowing for accounting complications introduced by the AT&T/DIRECTV merger, and other changes affecting accounting for Sprint's expenditures on leased handsets, **the inflation-adjusted aggregate investment total for this collection of publicly traded broadband providers increased by at least 3.6% in 2015-2016, but dropped by 0.3% in the two years thus far of the Pai era.**⁷

⁷ See Matthew F. Wood, Free Press and Free Press Action Fund, "Legislating to Safeguard the Free and Open Internet" before Committee on Energy & Commerce, Subcommittee on Communications & Technology at 30 (Mar. 12, 2019), <https://docs.house.gov/meetings/IF/IF16/20190312/109059/HHRG-116-IF16-Wstate-WoodM-20190312.pdf> ("Wood Testimony").

Attachment—Additional Questions for the Record

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The Honorable Ben Ray Lujan (D-NM)

- 1. We use the Internet to learn, to stay informed, and to keep in touch with those we love. We also use it to shop, to connect businesses with customers, and to consult with our doctors.**

But when it comes to broadband access, far too many New Mexicans have been left behind. According to data recently released by the U.S. Census Bureau, New Mexico ranks 48th in the country when it comes to broadband subscriptions. Only 73 percent of New Mexico homes had a broadband subscription. In addition, the FCC’s own numbers suggest that 80 percent of New Mexicans living in tribal communities and almost 60 percent living in rural communities lack access to high-speed, fixed broadband.

We know this matters. Now, when Chairman Pai announced that he was repealing the 2015 Open Internet Order, he said “many more Americans, especially low-income rural and urban Americans, will get high-speed Internet access for the first time. And more Americans generally will benefit from faster and better broadband.”

Ms. Gonzalez, your testimony has a thoughtful discussion of this issue.

- a. Does the 2015 repeal of the Open Internet Order mean more and better broadband for New Mexicans? And if not, what should we be doing to expand access?**

Response: Representative Lujan, thank you for your question. The simple answer is no, the Pai FCC’s 2017 repeal of the Wheeler FCC’s 2015 *Open Internet Order* has not meant more or better broadband for New Mexicans. Chairman Pai’s entire premise is flawed, for several reasons. First, broadband deployment in New Mexico and elsewhere did not suffer during the time when the 2015 rules were in place; so the claim that “many more” people would get more broadband as a result of their repeal is misleading at best, in that it assumes the need for turnaround rather than the need for continuation of a positive trend. Broadband deployment, coverage, and speeds remained on the increase.

Second, as discussed in my testimony and then more fully during the subsequent March 12th legislative hearing in this subcommittee, that upward trajectory did not change markedly as a result of Chairman Pai’s repeal. If anything, broadband deployment and investment by the largest ISPs have been more of a mixed-bag since the repeal than they were before the repeal, because of where individual ISPs are in their upgrade and spending cycles.

Third, when it comes to what we should be doing about it, the Pai FCC's repeal actually made the job harder. In fact, as my colleague, Matthew Wood, described in detail in his March 12th testimony before this subcommittee, when the Pai FCC repealed the *Open Internet Order*, it removed some of its own power under Title II of the Communications Act to ensure speedy, affordable and equitable deployment of broadband services to poor and rural people. For instance, since the Pai FCC Net Neutrality repeal, we are missing the following tools to spur broadband affordability, deployment and adoption:

- Section 202(a), which prohibits “unjust or unreasonable discrimination” in charges, practices, or services, or “any undue or unreasonable preference or advantage to any particular person, class of persons, or locality.”
- Section 201(b), which requires all “charges, practices, classifications, and regulations for and in connection with” specified communication services to “be just and reasonable,” or else declares them unlawful.
- Section 254, which allows the Universal Service Fund, including the Lifeline program, rural health fund, and the high-cost fund that subsidizes deployment in rural areas, to be used expressly for broadband internet access service when that service is properly classified as a telecommunications service.
- Section 224, which ensures that broadband providers have a process to access infrastructure and rights-of-way, to clear the way for build out.⁸

Investment under the 2015 Net Neutrality Rules. As I discussed in my written testimony, all available data strongly indicates that the FCC's 2015 actions had no impact on the broadband market's status quo deployment trajectory. Nor should it ever have been expected to make such an impact. This is a highly-profitable, highly concentrated industry, and there's no realistic reason to expect the mere affirmation of the FCC's narrow regulatory authority over ISPs would cause any pullback in investment. Any ISP that did so would have been leaving money on the table.

The subsequent company-level investment and deployment data bear this out. ISPs continued to invest. Cable company ISPs continued their rollouts of the newer generations of the DOCSIS technology they use to provide high-speed data services such as broadband internet access. Many telephone company ISPs continued to deploy faster speeds, using a mix of technologies, with fiber-to-the-home (“FTTH”) deployments sharply increasing as those legacy telephone companies felt pressure to compete with the ever-faster services offered by legacy cable company ISPs. And mobile wireless carriers, which had all largely completed their 4G LTE deployments during 2014, filled out their capacities with lower-cost stepwise enhancements such as Multiple Input/Multiple Output antennas.

The same general nationwide trend of steady (if not sufficient) improvement in broadband coverage, speed, and choice is also observed in New Mexico:

⁸ See Wood Testimony at 12-22.

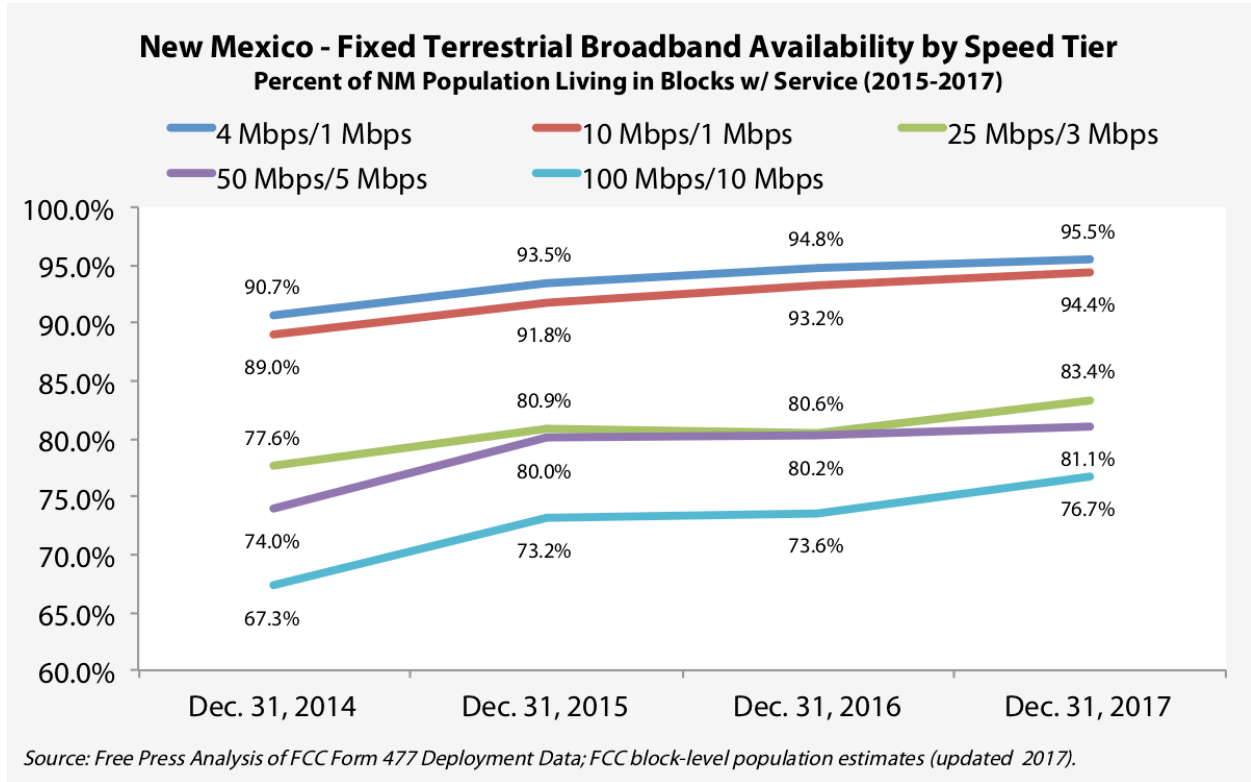
- During the period Title II classification and the Open Internet Rules were in effect (2015-2017), the number of New Mexicans living in an area with one or more fixed terrestrial ISPs offering service that meets the FCC's minimum standard (25 megabits per second downstream/3 megabits per second upstream) increased by 8 percent. This was slightly above the national growth rate in this category, which was 7.1 percent (see additional tables below for full New Mexico data).
 - The proportion of persons residing in New Mexico served by one or more fixed terrestrial ISPs offering the FCC-minimum speeds stood at 77.6 percent prior to the FCC's February 2015 Title II reclassification vote and adoption of the Open Internet Rules. By the end of 2017, when the Pai FCC took action to reverse the 2015 vote, this proportion had risen to 83.4 percent. New Mexico's broadband availability remains below the national level, which was 89.4 percent at the end of 2014 and 93.5 percent at the end of 2017. This difference is in part due to the fact that New Mexico's population is more rural than the nation as a whole (according to the 2010 Census, 22.6 percent of New Mexico's population resided in non-urban areas, compared to 19.3 percent for the total U.S. population).
- New Mexico's rural residents saw substantial increases in broadband availability, even as it remained well below full deployment. The proportion of persons residing in rural New Mexico Census Blocks (as designated in the 2010 Census) served by one or more fixed terrestrial ISPs offering the FCC-minimum speeds stood at 35.4 percent prior to the FCC's February 2015 vote. By the end of 2017, as the Pai FCC took action to reverse the 2015 vote, this proportion had risen to 47.6 percent of New Mexico's rural population.
 - New Mexico's rural areas, like rural areas in many other states, are economically challenging for ISPs to adequately serve. Thus, the carriers serving the people of these rural areas are particularly dependent upon money distributed from the FCC's Universal Service High Cost Fund. The FCC initially subsidized rural networks offering 4 megabits per second downstream/1 megabit per second upstream. At the end of 2014, this minimum threshold for rural subsidies was increased to 10 megabits per second downstream/1 megabit per second upstream. The FCC's complicated processes also resulted in fund availability differing depending on a carrier's particular regulatory status (*e.g.*, rate-of-return vs. price cap). These policies had (and continue to have) a demonstrable positive impact on broadband availability in New Mexico's rural areas. In part because of the FCC's subsidies, New Mexico's rural inhabitants saw substantial improvements in broadband availability with the Title II classification in place. At the end of 2014, 63.5 percent of rural New Mexicans lived in a block served by one or more terrestrial providers offering the 10/1 Mbps USF-minimum standard speed. By the end of 2017 this had increased to 79.3 percent of the state's rural inhabitants.
- As was the case at the national level, during the Title II-era New Mexicans saw their telephone company ISPs deploy faster speeds in order to maintain competitiveness with cable company ISPs. This resulted in a growing proportion of the population with a choice of ISPs at faster transmission speeds. For example, at the end of 2014 only 31.9 percent of New Mexicans could choose between two or more wired ISPs offering downstream speeds

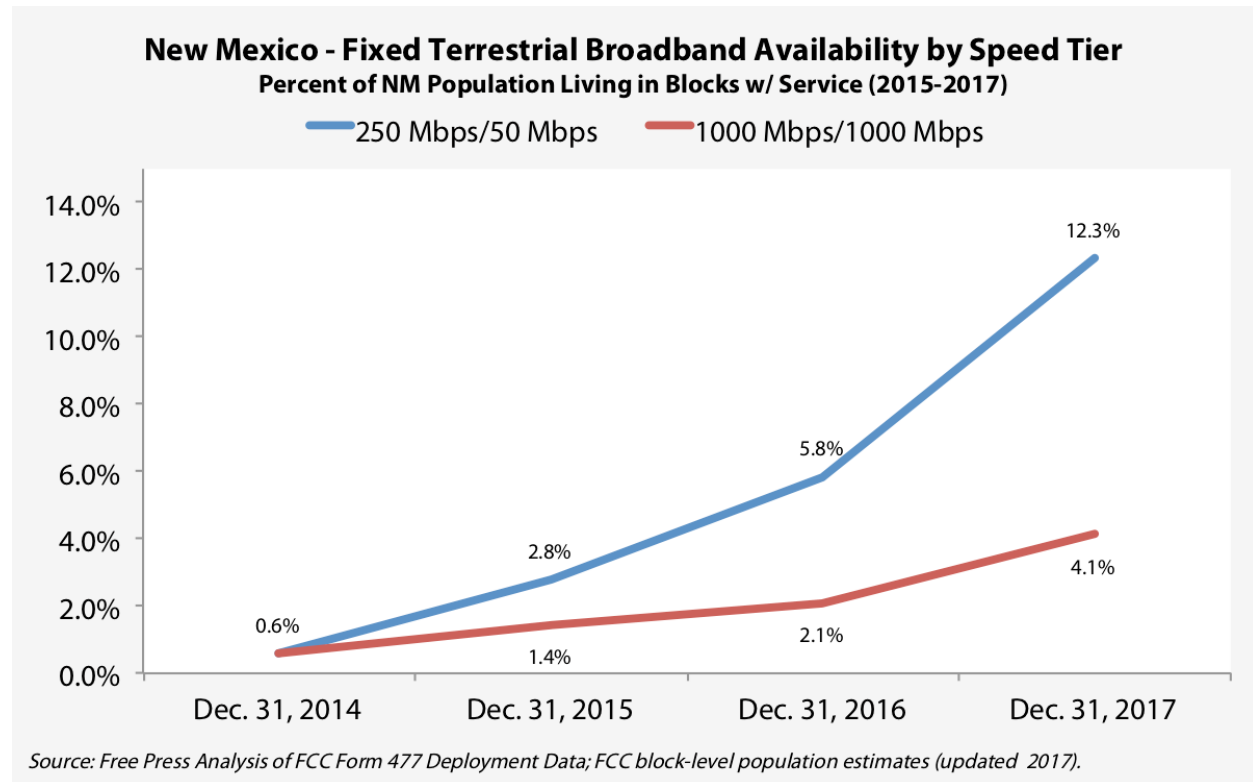
exceeding 50 Mbps. By the end of 2017, this had increased to 45.6 percent of the state's inhabitants. Of course, though duopoly is preferable to monopoly, the level of broadband competition in New Mexico and the rest of the nation is substandard. This is in part why the regulatory backstops against unreasonable practices codified in Sections 201 and 202 of the Communications Act are necessary to maintain.

- As mentioned above, New Mexico's cable company ISPs deployed substantial capacity enhancements while under Title II authority. The average available cable company ISP downstream speed in New Mexico was 102.9 Mbps at the end of 2014, increasing more than 8-fold by the end of 2017 to 888.7 Mbps. (These values represent the maximum available cable company ISP speed in New Mexico blocks where such ISPs offered service, weighted by the population of each block.)
 - This sharp increase in cable ISP capacities is entirely due to the rapid deployment of the latest cable modem standard, DOCSIS 3.1, which now covers more than half of all New Mexicans.
- It costs much less money to upgrade a cable ISP system than it does to upgrade a telephone company ISP system. Despite this, New Mexico's telephone company ISPs continued to enhance their networks in the Title II era. The average available xDSL downstream speed in New Mexico was 51.1 Mbps at the end of 2014, increasing to 59.6 Mbps at the end of 2017. The average available fiber-to-the-home downstream speed in New Mexico was 124.2 Mbps at the end of 2014, increasing to 559.9 Mbps at the end of 2017. (These values represent the maximum available xDSL and FTTH speeds in New Mexico blocks where these technologies were offered, weighted by the population of each block.) Though FTTH availability in New Mexico is limited (available to 8.7 percent of the state's residents), FTTH deployment more than doubled during the Title II era (from 3.9 percent of the state's residents at the end of 2014, to 8.7 percent at the end of 2017).
- Comcast and CenturyLink are New Mexico's dominant ISPs. Comcast offers broadband service to 56 percent of New Mexicans. CenturyLink offers internet access service to 78 percent of New Mexicans, with two-thirds of its lines in New Mexico capable of delivering transmission speeds at or above the FCC's 25/3 Mbps standard. Both Comcast and CenturyLink made substantial enhancements to their New Mexico infrastructures during the period Title II was in place.
 - Prior to the FCC's February 2015 vote, Comcast had already upgraded 100 percent of its New Mexico systems to the DOCSIS 3.0 standard, with maximum offered downstream speeds of 100 Mbps. But during the Title II-era, Comcast upgraded 95 percent of its New Mexico lines to the DOCSIS 3.1 standard, and now offers near-gigabit downstream speeds to more than half of all New Mexicans.
 - Despite the expenditures and financing needed to consummate a large merger with Level 3 late during this time period, CenturyLink also upgraded its New Mexico broadband networks during the Title II-era. At the end of 2014, CenturyLink offered FTTH to just 1,904 persons residing in New Mexico. But by the end of 2017 this FTTH availability from CenturyLink had increased substantially to 27,523 New Mexicans. At the end of 2014, just under 700,000 New Mexicans lived

in an area where CenturyLink offered downstream speeds at or above 50 Mbps. By the end of 2017, this had increased to nearly 914,000 New Mexicans.

Select New Mexico FCC Form 477 Broadband Deployment Data





Moreover, though there were significant and continual improvements during the Title II-period, New Mexicans are not alone in still wanting for better broadband options. New Mexicans, like most others in the U.S., tend to face at best a duopoly market for wired broadband, where the backstop Title II protections against unreasonable practices are essential. As of the end of 2017 (the latest year for which broadband deployment data was available) we see at the national level:

- 31.4% of people in the U.S. had just one choice for a broadband provider offering downstream speeds of 25 megabits per second. Another 7.6% had no wired options at that speed.
- At higher speeds, such as a relatively modest in modern times 50 Mbps, the number goes to 44.2% of the population with just one option or no options.
- At 300 Mbps downstream, it's a large majority of people (53.3%) that have only one wired option, while another quarter of the population (24.1%) has none.⁹

In sum, the Pai FCC's Net Neutrality repeal is, if anything, a step in the wrong direction for connecting more New Mexicans to broadband, and restoration of those rules through the Save the Internet Act is critically important. However, even more can be done. Late last year, Free Press Action released its *Priorities for a New Year and a New Congress*,¹⁰ which lays out a number of

⁹ See *id.* at 10-11.

¹⁰ Free Press and Free Press Action, *Priorities for a New Year and a New Congress*, https://www.freepress.net/sites/default/files/2018-11/fp_fpac_2019_policy_priorities.pdf.

policy recommendations to help make internet access ubiquitous and more affordable across all U.S. states and territories. Our recommendations include:

Restoring Net Neutrality and the FCC's mandate to promote universal broadband.

The Save the Internet Act restores Title II's affordability, competition, deployment and privacy measures as well.

- **Promoting affordable internet with Lifeline and tax credits.** Closing the digital divide isn't just a matter of building more broadband. While internet access is technically available to many low-income families, too often it comes with terms and prices they can't afford. And our research shows people of color face a digital divide not tied solely to income disparities but traceable to systemic discrimination.
 - The FCC should abandon its cruel attack on the Lifeline program, which subsidizes phone and internet access for low-income people, and adhere to the common-sense reforms already adopted to strengthen and expand this program.
 - Congress should create a broadband-affordability fund granting a \$150 annual tax credit for internet access to households with incomes below \$35,000 a year.
- **Promoting competition on existing networks through resale of wired broadband.** Wireless is typically more affordable than wired internet because people have more choices. These include prepaid services that don't require discriminatory credit checks, offered by resellers that buy wholesale from big carriers like AT&T and Sprint. The lack of wired resale options is a market failure, and one we need to confront.
- **Preserving existing choices by rejecting the harmful T-Mobile/Sprint merger.** Combining two of the four nationwide wireless carriers would drive up prices for everyone and be especially disastrous for value-seeking customers in communities of color and low-income populations. Competition among T-Mobile, Sprint and their affiliates helps the whole wireless market. The DOJ and the FCC should reject this merger.

2. I am of the strong opinion that process matters. Process is how we make good policy.

There were a series of process abuses during the repeal of the 2015 net neutrality rules. It seems like the prudent thing would have been to stop, investigate, and not race forward to a conclusion without understanding what happened.

Instead, we saw 9.5 million identities were stolen to submit comments, and the FCC did not include some net neutrality complaints in the docket.

A recent study found that an overwhelming amount – 99.7% -- of unique comments that were left on the FCC's website ahead of its decision to repeal net neutrality last year were in favor of keeping the protections. The study showed that, in the Third District of New Mexico, there were 1,702 unique comments submitted to the FCC in the 2017 net neutrality repeal proceedings, which I submitted to the record for this hearing. The FCC washed these opinions away and never did anything about it.

a. Why do you believe the FCC didn't thoroughly investigate this issue?

Response: Representative Lujan, thank you for this question. Fraud in a U.S. government policy-making proceeding is completely unacceptable, and I believe the FCC should have thoroughly investigated alleged fraud on the record at the time this came to its attention. In fact, minority commissioners Jessica Rosenworcel and Mignon Clyburn called for such an investigation and called into question these serious process fouls, among others.

For instance, Commissioner Clyburn's dissent to the Pai FCC 2017 repeal highlighted that:

There has been a darker side to all of this over the past few weeks. Threats and intimidation. Personal attacks. Nazis cheering. Russian influence. Fake comments. Those are unacceptable. Some are illegal. They all are to be rejected. But what is also not acceptable, is the FCC's refusal to cooperate with state attorney general investigations, or allow evidence in the record that would undercut a preordained outcome.¹¹

Commissioner Rosenworcel offered a similar rebuke in her dissent:

To date, nearly 24 million comments have been filed in this proceeding. There is no record in the history of this agency that has attracted so many filings. But there's something foul in this record:

Two million comments feature stolen identities.

Half a million comments are from Russian addresses.

Fifty thousand consumer complaints are inexplicably missing from the record.

I think that's a problem. I think our record has been corrupted and our process for public participation lacks integrity. Nineteen state attorneys general agree. They have written us demanding we halt our vote until we investigate and get to the bottom of this mess. Identity theft is a crime under state and federal law—and while it is taking place this agency has turned a blind eye to its victims and callously told our fellow law enforcement officials it will not help.

This is not acceptable. It is a stain on the FCC and this proceeding. This issue is not going away. It needs to be addressed.¹²

¹¹ Order, *Restoring Internet Freedom*, FCC WC Dkt. No. 17-108, Dissenting Statement of Commissioner Mignon L. Clyburn at 2, https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348256A1.pdf.

¹² Order, *Restoring Internet Freedom*, FCC WC Dkt. No. 17-108, Dissenting Statement of Commissioner Jessica Rosenworcel at 3, https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348259A1.pdf.

The 2017 Pai FCC repeal suggested that the Title II framework re-established in 2015 was legally unsound and detrimental to broadband investments. Free Press's testimony before this subcommittee in February and March show that none of those claims were true. Yet another aspect of the repeal that makes it difficult to accept, however, is that it was built on a tainted record. The FCC ignored the facts, the law, and the consequences of its policies, as well as its duty to consider legitimate comments while weeding out obviously fraudulent ones.

At the outset of the proceeding, before he'd sought public comment, Chairman Pai had already made up his mind. Based on his ideological dissent to the 2015 *Open Internet Order*, it's as if his prejudiced and pre-ordained conclusion was based on revenge. Giving a closed-door speech with industry backers to announce his plan, he said this was "a fight that we are going to win."¹³ That's not an open-minded decision-maker.

How else to explain the fatally flawed process the FCC rushed through to repeal the *Open Internet Order*? It could not handle comments first generated in response to its repeal plans, and falsely claimed a cyberattack when really the agency was simply not ready for robust public participation in the docket.¹⁴ It ignored tens of thousands of relevant Net Neutrality complaints submitted under the *Open Internet Order*.¹⁵ And it allowed potentially millions of comments submitted with stolen identities and under false pretenses to remain on the record without so much as a cursory investigation.¹⁶

¹³ Remarks of FCC Chairman Ajit Pai at the Newseum, Washington, DC (Apr. 26, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0427/DOC-344590A1.pdf.

¹⁴ Chris Mills, "FCC Chairman defends lying about fake DDoS attack – even after admitting he knew the truth," *BGR* (Aug. 16, 2018), <https://bgr.com/2018/08/16/fcc-ddos-attack-ajit-pai-congress-testimony/>.

¹⁵ "Release: NHMC Challenges the FCC's Repeal of Net Neutrality Rules in Court" (Feb. 23, 2018), <http://www.nhmc.org/release-nhmc-challenges-fccs-repeal-net-neutrality-rules-court/>.

¹⁶ See, e.g., Dell Cameron & Jason Prechtel, "How an Investigation of Fake FCC Comments Snared a Prominent D.C. Media Firm," *Gizmodo* (Feb. 21, 2019), <https://bit.ly/2NiMQMU>.