Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF
MEDIAFREEDOM

I. Introduction

MediaFreedom[1] commends the FCC's Restoring Internet Freedom NPRM, which we hope leads to the elimination of the Open Internet Order's ("OIO") regulatory overreach, especially as it pertains to the re-classification of ISPs as common carriers. We hope also that the resulting rules axe in their entirety, or greatly relax, the agency's present Net Neutrality regulations on throttling, blocking and paid priority. MediaFreedom has long-argued that agency-mandated Net Neutrality rules were never needed. Not only are they inapt for today's converged marketplace, they unconstitutionally abridge the speech and association rights of all players on the Internet. The FCC would do well to rid the Internet ecosystem of these pernicious proscriptions. To this end, we would like to offer the following points:

II. Repeal Title II Reclassification of ISPs

Repealing Title II reclassification of ISPs is the right thing to do, and must proceed with all due speed. 19th Century railroad regulations, upon which these rules are built, are at odds with today's vibrant communications marketplace. In a practical sense, their confiscatory nature means policymakers, through prophylactic law, want fewer players to invest and innovate in core infrastructure. Such a policy stands in stark contrast to the Telecommunications Act of 1996, which instructs the FCC "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information

1 MediaFreedom.org is a market-oriented, IRS 501(c)(3) non-profit organization, operating as a watchdog of the so-called digital watchdogs by providing counterpoint to their advocacy in the Congress, the executive branch, the courts, in the states / localities and elsewhere. MediaFreedom.org is supported in part by communications industry and foundation contributions.

technologies and services to all Americans..." Ultimately, Title II harms consumers by making it more difficult for communications providers to bring new services to all Americans. Quite simply, steam-engine law has no place guiding today's communications landscape.

III. Allow Paid Priority and Other Forms of Reasonable Service Differentiation

Earlier this year a Silicon Valley industry group claimed that the Internet industry is "uniform in its belief" that the present Net Neutrality laws should be kept intact, especially the ban on paid priority.[2] This statement is patently false. Of course, the largest Silicon Valley players whom that association represents like the rules because they both subsidize the transmission of "their" content to consumers, as well as erect significant legal hurdles that protect their products and services from disruptive competition. But, contrary to the assertions of that association, small start-ups want the flexibility to partner with ISPs in paid priority arrangements (or other forms of service differentiation) in order to get a leg up, or at least stay competitive with, their larger, well-heeled competitors. To their chagrin, however, this has been banned by the OIO.

The concern over paid priority is particularly striking and odd. The use of reasonable differentiation in the marketplace, such as that seen in paid priority, reflects the history of American commerce; it is employed to deliver immense consumer benefit in every sector of our economy, including the old POTS world under Title II. By placing this pro-competitive tool off-limits, the prior Commission's OIO breaks not only with long-held FCC precedent, it parts company with free enterprise principles which have been proven to sustain sound economic growth and broad-based prosperity for all Americans.

Added to this, a ban on paid priority is a prior restraint, unreasonably interfering with the free speech and association rights of ISPs and their potential partners. It stops these arrangements in their tracks, preposterously claiming that paid priority speech partnerships are so dangerous and harmful to

2 *See* Letter of the Internet Association, Re: Notice of Ex Parte Presentation, GN Docket No. 14-28; WC Docket No. 16-106; GC Docket No. 02-278 (April 11, 2017), *available at* https://ecfsapi.fcc.gov/file/10411175303408/Internet%20Association%20Ex%20Parte%2004-11-17.pdf.

the public that they have to be outlawed – like a contract of adhesion, or for illegal criminal acts. As a result, the OIO's ban on paid priority stands the First Amendment on its head, wrongfully placing the Commission in the position of uber-censor and licensor of ISPs and their communications partners (that task aided further by the OIO's harmful catch-all "Internet Conduct Standard"), shaping and controlling the content Americans receive from their providers. It boxes modern converged / vertically integrated communications companies into the role of "trucker" only, inflexibly thwarting them from offering anything more than a high-tech shipping service for others. Absent exceptional circumstances, we do not understand the First Amendment (or the Communications Act, or antitrust law) to allow for such a rigid, absolute ban.

Activist groups like to exclaim, "We don't want to see the Internet, the greatest platform for collective action in human history, be turned into a cable box."[3] If the marketplace were indeed "broken," and only a single monopoly ISP existed, their cries might carry some weight. But the market is not "broken"; competitive, dynamic ISP options abound and are growing (though, by some measures, less robustly post Title II OIO).[4] Consequently, communications companies, guided by the marketplace, are the only ones who should be empowered to make these communications / speech decisions, not Uncle Sam or his unelected proxies. If ISPs want to be "cable boxes," then so be it. That is for them to decide and no one else.

To this end, the FCC should eliminate, or significantly relax, its present OIO / Net Neutrality framework. Paid priority, and other forms of reasonable differentiation, must be allowed. The Commission should recognize that the evolution of technology, the existence of vibrant competition, the clear potential for new competition, the presence of active peer group policing and standards-setting, and the wide availability of consumer-oriented tools do a tremendous job of keeping the

3 *See, e.g.,* Alex Howard, "Why we support net neutrality and the open Internet," Sunlight Foundation Blog (July 12, 2017), *available at* https://sunlightfoundation.com/2017/07/12/why-we-support-net-neutrality-and-the-open-internet/.

4 *See, e.g.*, Hal Singer, "*2016 Broadband Capex Survey: Tracking Investment in the Title II Era*," Hal Singer Blog (March 1, 2017), *available at* https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/, ("Of the twelve firms in the survey, eight experienced a decline in domestic broadband capex relative to 2014—the last year in which ISPs were not subject to common carrier regulations. **Across all twelve firms, domestic broadband capex declined by $3.6 billion, a 5.6 percent decline relative to 2014 levels**.").

Internet "open" and growing for all Americans. Where real (not conjectured) consumer harm occurs, the FCC should work to address that, either with its extant authority, or with / aided by the FTC. In all, this "light touch" approach is what built the Internet. The Commission should return to this successful, pro-growth model.

IV. Potential Roadmap to Offer Banned Services outside of Net Neutrality Framework

Should the Commission determine after examining the record that parts of the present Net Neutrality framework must remain – such as its bright-line rules pertaining to throttling, blocking and paid priority – we urge that the FCC employ / promote the guidance of Judges Srinivasan and Tatel as noted in their recent en banc concurrence, which recognizes, in their view, a way for ISPs to offer services like paid priority arrangements outside of the confines of the OIO.[5]

There, they wrote:

> While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: **the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of "editorial intervention."** (Emphasis added)

For illustration purposes, MediaFreedom could see the following broad types of communications offerings which might result:

- An **"Unabridged"** service, allowing any user to connect any (safe) device to access any (lawful) content. There would be no unreasonable throttling, blocking or priority services for this "unfiltered" service. In essence, the "unabridged" offering comports

5 *United States Telecom Association v. Federal Communications Commission and United States of America,* On Petition for Rehearing En Banc, No. 15-1063, (D.C.Cir. May 1, 2017), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/06F8BFD079A89E13852581130053C3F8/$file/15-1063-1673357.pdf.

with the present OIO, and could be priced at $65 per month.

- A **"Curated"** set of services similar in many respects to the Apple model of integrated hardware, software, and entertainment bundles. After proper notice to the customer, end-users could choose from a range of ISP / partner offerings, such as those for the smart home, smart grid, transportation, medical, grocery, agriculture, financial, entertainment, and information service, among other possibilities; and the package would be tightly managed (yes, throttled, blocked and "fast-laned") by the ISP and its partners to maximize the customer experience. This "curated" service would stand outside of the OIO. Its price – which would be largely subsidized by the ISPs and their partners – could start at $25 per month, depending on the options chosen by the customer.

- A **"Curated-Plus"** service, which would be a hybrid (of sorts) between two the "Unabridged" and "Curated" services. After proper notice to the customer, it would provide the partnered bundles noted above, but would also enable a metered, unfiltered Internet experience (e.g., "plus") when chosen by the customer, allowing access to services and information not available in the "curated" only plan. Importantly, this plan would sit outside of the OIO. Prices for this service could start at $45 per month, and would increase "x-$" per gigabyte-accessed via the "plus" part of the offering.

Though MediaFreedom believes that ISPs have a right (even in common carriage) to reasonably throttle, block and offer paid priority services to customers, the Srinivasan-Tatel framework provides an avenue that at once promotes "openness," end-user control, and ISP-partner business model flexibility, among other interests, should the Commission decide to keep all, or parts, of the OIO's bright-line rules.

V. Help Congress Rectify This Chevron Ping-Pong Game

Your work represents an important step in erasing much of the regulatory overreach of the prior Commission. In the long run, however, Congress will have to act to permanently address the harms caused by the OIO / Title II regulations, ending the Chevron-enabled policy ping-pong. We urge that your work go forward, and that with it you help Congress understand its responsibility in putting this nearly two-decade-long "debate" to rest.

VI. Conclusion

It could not be that when Congress updated the Communications Act in 1996 it intended to foster fewer communications partnerships to serve the public's needs. Yet for those who want to partner with ISPs in paid priority to provide their services, the OIO makes them essentially communications outlaws.[6] This typifies the unreasonable, anti-free speech, anti-innovation, anti-consumer changes made by the prior FCC in the OIO, and highlights, in human terms, the need to repeal, or significantly mitigate, Title II Net Neutrality as it applies to the entire ecosystem. To this end, we urge the Commission through this NPRM to do so, bringing us back to the "light touch" regulation that made the 'Net so vibrant, innovative and beneficial to mankind.

Respectfully submitted,

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6 *See, e.g.,* Tweet of @Polisoniccom (June 22, 2017), *available via Twitter* at https://twitter.com/polisoniccom/status/877905053348241408.