Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Barry J. Ohlson
Jennifer L. Prime
COX ENTERPRISES, INC.
975 F Street, NW, Suite 300
Washington, DC 20004

Jennifer W. Hightower
Joiava Philpott
Alysia M. Long
COX COMMUNICATIONS, INC.
1400 Lake Hearn Drive
Atlanta, GA 30319

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TABLE OF CONTENTS

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	)	
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	)	
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Cox Communications, Inc. ("Cox") hereby files this reply to the opening comments submitted in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

As with previous proceedings concerning Internet openness, the NPRM has generated extraordinary interest from a wide array of stakeholders. Consistent with the NPRM's proposals, the opening comments confirm that the best path forward is to restore the longstanding information service classification for broadband Internet access service ("BIAS"). That classification, and the associated light-touch regulatory framework, which long enjoyed bipartisan support before the radical change of course in the *Title II Order*, helped foster the extraordinary dynamism that gave rise to the burgeoning Internet ecosystem. Returning to a Title I approach will keep the Internet open and free without jeopardizing continued investment and innovation.

Cox's opening comments describe how the company delivers Internet connectivity in a manner that inextricably combines information-processing capabilities with transmission, and

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[1] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 ¶ 1 (2017) ("*NPRM*").

thus falls squarely within the statutory definition of an "information service." Other BIAS providers and additional parties likewise demonstrate that BIAS is best considered an information service because it offers end users *all* of the information-processing capabilities listed in the statutory definition of that term, rather than offering only a transparent transmission pathway. And the record further confirms that the complex computer-mediated functions BIAS enables make the Act's definition of "telecommunications service" a poor fit, because end users typically have no knowledge of the "points" among which information is transmitted, much less the ability to "specify" such locations.

The opening comments also provide powerful evidence confirming that Title II is antithetical to Congress's and the Commission's paramount interests in encouraging continued broadband investment, deployment, and service enhancements. By contrast, a light-touch Title I regime will eliminate the drag on investment caused by the imposition—and uncertain application—of common carrier mandates designed for telephone monopolies. Just as Cox has been forced to recalibrate its decision-making process for broadband investments and new service initiatives, other service providers and economists demonstrate that Title II already has been destructive to the economy and threatens even greater harms if left in place. While proponents of Title II regulation essentially posit that the sky will fall if the Commission restores the information service classification, there is no basis for such fear-mongering. To the contrary, the Internet ecosystem not only survived but long thrived—indeed, to an unprecedented and remarkable degree—under a Title I framework, and there is no evidence that common carrier regulation (much of which has nothing to do with open Internet issues) is remotely necessary or beneficial in the broadband arena.

Notwithstanding the absence of market failure or any actual threat to consumers posed by BIAS provider practices, a wide range of commenters join Cox in supporting legislation to memorialize consensus open Internet principles, in the interest of ending the perennial classification debates (and subsequent appeals) and creating much-needed regulatory certainty. Moreover, numerous parties recognize that, even without congressional action, the Federal Trade Commission can effectively hold BIAS providers to their public commitments to remain transparent and to refrain from blocking, throttling, or anticompetitive paid prioritization, and Section 706 of the Telecommunications Act of 1996 provides an option for the Commission to reinstate appropriately tailored bright line rules if such a need arises. Particularly in light of these options for addressing any harmful conduct that might emerge, there is no sound justification for maintaining heavy-handed common carrier regulation.

DISCUSSION

I. THE OPENING COMMENTS CONFIRM THAT THE COMMISSION SHOULD RESTORE THE INFORMATION-SERVICE CLASSIFICATION FOR BIAS

The opening comments strongly support the Commission's proposal to restore the classification of BIAS as an information service. In particular, the record confirms that BIAS providers offer each and every information-processing capability included in the statutory definition of "information service," rather than offering a mere "dumb pipe" for accessing third-party content and services, as Title II proponents maintain. And the relevant policy considerations reinforce the appropriateness of embracing the light-touch approach associated with Title I, and eliminating the chilling effects caused by the uncertain application of common carrier mandates under Title II.

A. The Record Demonstrates That BIAS Is Most Appropriately Classified as an Information Service Based on the Capabilities Offered to Consumers

Cox's opening comments explain that the essence of BIAS is providing connectivity to the Internet so that subscribers can "acquir[e]" and "retriev[e]" information from websites, "stor[e]" information in the cloud, "generate[]" and "mak[e] available" information by creating and uploading content on the web, and "transform[]," "process[]," and "utiliz[e]" as they interact with information online.[2] Other commenters likewise recognize that this core "'capability' of interacting with stored data" makes BIAS a prototypical information service.[3] Far from providing only a transparent telecommunications pathway, "the whole point of Internet access is to offer the 'capability' to obtain and manipulate the information stored on the millions of interconnected computers that constitute the Internet."[4] Whereas phone service—the archetype of a "telecommunications service"—merely transmits voice signals from one point to another, connectivity to the Internet provides consumers with robust and dynamic information-processing capabilities that allow them to create, acquire, share, and utilize information in myriad ways.

A recent survey conducted by Market Strategies International ("MSI") indicates that consumers have the same understanding of BIAS—they expect service providers to offer the capabilities to acquire information from websites; to generate, make available, and store

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2 Comments of Cox Communications, Inc., WC Docket No. 17-108, at 9 (filed Jul. 17, 2017) ("Cox Comments"); 47 U.S.C. § 153(24) (defining "information service" as the offering of these capabilities via telecommunications).

3 Comments of AT&T Services, Inc., WC Docket No. 17-108, at 68 (filed Jul. 17, 2017) ("AT&T Comments").

4 *Id.* at 68-69. *See also* Comments of Comcast Corp., WC Docket No. 17-108, at 12-13 (filed Jul. 17, 2017) ("Comcast Comments"); Comments of Charter Communications, Inc., WC Docket No. 17-108, at 13-14 (filed Jul. 17, 2017) ("Charter Comments"); Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 13-14 (filed Jul. 17, 2017) ("NCTA Comments"); Comments of Verizon, WC Docket No. 17-108, at 35-36 (filed Jul. 17, 2017) ("Verizon Comments").

information on the Internet; to retrieve information from the web; and otherwise to process, transform, and utilize information online.[5] While consumers also place significant weight on obtaining a reliable and fast Internet connection, they view those attributes as a means of enabling these capabilities to interact with information online, not as ends in and of themselves.[6]

Parties supporting retention of Title II regulation argue that BIAS providers do not *themselves* offer the requisite information-related capabilities, but instead only provide access to third-party edge services.[7] As the foregoing discussion shows, that is not the case. While edge providers of course *also* provide information-service capabilities, the Supreme Court recognized in *Brand X* that BIAS "provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications."[8] And that remains equally true today, as BIAS providers, technology experts, and others confirm that BIAS providers' core offering remains connectivity that enables consumers to acquire, retrieve, store, generate (etc.) information on the Internet via telecommunications.[9] The fact that BIAS providers do not

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5 *See* Market Strategies International, *Broadband Internet Service Use*, at 4-5 ("MSI Survey Report"), submitted as Attachment A to Ex Parte Letter of USTelecom and NCTA, WC Docket No. 17-108 (Aug. 28, 2017).

6 *Id.* at 5.

7 *See, e.g.*, Comments of Public Knowledge and Common Cause, WC Docket No. 17-108, at 26 (filed Jul. 17, 2017) ("Public Knowledge Comments"); Comments of Free Press, WC Docket No. 17-108, at 41-45 (filed Jul. 17, 2017) ("Free Press Comments"); Joint Comments of Internet Engineers, Pioneers, and Technologists, WC Docket No. 17-108, at 17-18 (filed Jul. 17, 2017) ("Joint Engineer Comments").

8 *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 987 (2005).

9 *See, e.g.*, Comcast Comments at 12-24; AT&T Comments at 59-90; Verizon Comments at 35-42; Comments of Richard Bennett, WC Docket No. 17-108, at 11 (filed Jul. 17, 2017) ("Bennett Comments"); Comments of Sandvine, WC Docket No. 17-108, at 2-6 (filed Jul. 17, 2017) ("Sandvine Comments").

unilaterally enable consumers to perform these functions[10]—but rather make them possible in conjunction with edge providers' services—has no significance under the statutory definition, as BIAS providers' offering of connectivity to edge services plainly consists of the statutorily enumerated "capabilities" that enable interaction with stored information.

In addition to this fundamental capability of enabling consumers to interact with stored information, BIAS providers also offer a suite of integrated functions including email, DNS, caching, security tools, parental controls, and online storage, all of which entail various types of information-processing. Cox's opening comments describe how Cox harnesses these information-processing functions to improve the customer experience, and how Cox's marketing focuses on these enhanced capabilities, rather than presenting BIAS as a pure transmission service.[11] Other commenters likewise explain how BIAS includes DNS, caching, dynamic routing, and other integrated features that offer the information-related capabilities included in the definition of "information service."[12] The MSI survey confirms both that most consumers are aware of these integrated features and that many make use of them.[13] Proponents of Title II regulation seek to characterize all these features as mere "telecommunications management"—and thus carved out of the definition of information service—but that argument fails because these capabilities are offered for the benefit of *retail subscribers*, not for the BIAS provider's

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10 *See* Joint Engineer Comments at 19 (asserting that BIAS is a telecommunications service because "[n]o BIAS provider offers the capabilities listed, like posting on social media, reading a newspaper's website, storing a grocery list, translating text into a foreign language, *by itself*" (emphasis added)).

11 *See* Cox Comments at 11.

12 *See, e.g.*, AT&T Comments at 73-82; Sandvine Comments at 2-6; Bennett Comments at 10-23.

13 MSI Survey Report at 6.

own network-management purposes.[14] Indeed, the fact that third parties offer consumers email, DNS, virus protection, and the like confirms their status as information-service capabilities, given that no third party can plausibly claim to be offering such features as a means of managing the BIAS provider's network.

Finally, even assuming a "telecommunications service" classification is permissible under the Act—just as *Brand X* definitively confirms that an "information service" classification is permissible[15]—the definition of "telecommunications service" is at best a poor fit for BIAS. While it is no doubt true that Internet users direct content to be sent and received over their BIAS connection, they cannot transmit information "between or among points specified by the user" as necessary for classification as a telecommunications service.[16] As AT&T explains, "[e]ven if a user identifies particular information (such as a web file) that she wants to retrieve or a particular website she wants to access, she will not know, much less specify, the location of the server on which that information or website content is stored and from which it will be retrieved by her ISP."[17] While telephone callers may not know the location associated with a toll-free number or mobile device, this comparison fails because the routing of data packets is fundamentally different from circuit-switched telephony. The former entails generating, acquiring, storing, transforming, processing, retrieving, utilizing, and making available information in various

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14 *See* AT&T Comments at 76-77 (explaining that, as with the identically worded exemption from the definition of "information service" in the Modification of Final Judgment, the narrow "telecommunications management" exception does not include any consumer-oriented functionalities); *see also* Comcast Comments at 19-20; Declaration of Peter Rysavy ("Rysavy Declaration") at 8, attached to Comments of CTIA, WC Docket No. 17-108 (filed Jul. 17, 2017) ("CTIA Comments").

15 *Brand X*, 545 U.S. at 986.

16 47 U.S.C. § 153(50).

17 AT&T Comments at 76.

different respects—e.g., through "examination and processing of the packet at every router the packet traverses," and because "the router may also enforce different policies, such as QoS, implemented through protocols such as Differentiated Services"[18]—whereas circuit-switched networks perform none of those functions.[19]

In short, consistent with the Supreme Court's analysis in *Brand X*, it remains eminently reasonable today for the Commission to conclude that BIAS offers consumers an inextricable combination of information-processing and transmission, and therefore is an information service.[20]

B. Restoring the Information Service Classification for BIAS Also Will Best Promote the Commission's Goals of Promoting Investment and Innovation

The record also confirms that restoring the information-service classification for BIAS represents the best option from a policy perspective, as a light-touch Title I framework will eliminate the drag on investment and innovation caused by the imposition of common carrier regulation. As Cox explained in its opening comments, the imposition of ill-fitting Title II mandates, particularly given the substantial uncertainty as to how they would be applied in the broadband arena, has forced the company to "recalibrate its investment strategy for broadband based on concerns that capital outlays could be jeopardized by the overly expansive and uncertain regulatory framework imposed by [the *Title II Order*]."[21] Other commenters document similar chilling effects. For example, Comcast was forced to delay its launch of an IP version of its cable service based on a lengthy Commission investigation under the general conduct

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18 Rysavy Declaration at 5-6.

19 *See* Bennett Comments at 18-20.

20 *Brand X*, 545 U.S. at 986-89.

21 Cox Comments at 16.

standard, notwithstanding that the cable offering was not even subject to the open Internet rules.[22] Charter similarly "put on hold a project to build out its out-of-home WiFi network" and "delay[ed] and then move[d] more slowly with plans to launch a wireless service."[23] Associations representing smaller cable operators and wireless broadband providers likewise report that the amorphous general conduct standard has deterred risk-taking and prompted companies to forgo pro-consumer initiatives.[24] In addition to these adverse impacts on BIAS providers, others including equipment manufacturers and software developers likewise indicate that the *Title II Order* has impeded investment and innovation.[25]

Beyond this anecdotal evidence of harm, several economists submitted detailed studies analyzing the chilling effects of Title II regulation as well as empirical data confirming that the *Title II Order* already has slowed broadband investment by billions of dollars a year. As Dr. Bruce Owen observed: "It is difficult to imagine a more effective way to decrease infrastructure investment funding than the uncertain prospect of a new, undefined regulatory expropriation."[26] While proponents of common carrier regulation claim that the *Title II Order*, by granting

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22 Comcast Comments at 37.

23 Charter Comments at 11.

24 *See* Comments of the Wireless Internet Service Providers Association, WC Docket No. 17-108, at 11-16 (filed Jul. 17, 2017) ("WISPA Comments"); Comments of the American Cable Association, WC Docket No. 17-108, Exhibits A-E (filed Jul. 17, 2017) ("ACA Comments").

25 *See, e.g.*, Comments of Ericsson, WC Docket No. 17-108, at 7 (filed Jul. 17, 2017) ("Ericsson Comments") (describing how regulatory uncertainty under the *Title II Order* has impeded its ability to collaborate with ISPs on various network technology initiatives); Comments of ACT – The App Association, WC Docket No. 17-108, at 3 (filed Jul. 17, 2017) ("ACT Comments") (explaining that the *Title II Order* "introduced significant legal uncertainties for service providers, as well as the edge providers that utilize free data plans to grow and support jobs").

26 Bruce M. Owen, "Internet Service Providers as Common Carriers: Economic Policy Issues," at 6-7, attached as Appendix A to NCTA Comments ("Owen Study").

forbearance from various provisions, maintained a "light touch" regulatory approach,[27] that characterization cannot withstand scrutiny given the Commission's *refusal* to forbear from Sections 201 and 202 of the Act—which contain the statute's most wide-ranging and vague obligations—and its decision to up the ante, by creating from whole cloth, the boundless general conduct standard. As a wide array of economists conclude, the upshot is an ever-present threat of "wide-ranging investigations using ad hoc criteria that directly affects future investment and innovation."[28]

Unsurprisingly, the preliminary empirical data regarding the real-world effects of the *Title II Order* confirm that it has indeed reduced the rate of investment substantially. According to one estimate, the injection of common carrier regulation into the dynamic broadband arena has led to *$5.6 billion* in foregone broadband investment since 2015.[29] While some commenters

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27 *See, e.g.*, Free Press Comments at 127-44; Public Knowledge Comments at 63-73.

28 Christian M. Dippon, PhD, "Public Interest Repercussions in Repealing Utility-Style Title II Regulation and Reapplying Light-Touch Regulation to Internet Services," at iii, attached as Appendix C to Comcast Comments ("Dippon White Paper"); *see also* Declaration of Mark A. Israel *et al.*, at 49-50, attached to AT&T Comments ("Israel Study") ("Because the Title II Order and Internet Conduct Standard introduce so much regulatory uncertainty for broadband Internet service providers, they reduce incentives for firms to make investments, especially irreversible (or sunk) investments that will not be recoupable if the investment fails to deliver sufficient returns."); Dennis W. Carlton and Bryan Keating, "An Economic Framework for Evaluating the Effects of Regulation on Investment and Innovation in Internet-Related Services," at 11, attached to Comments of CALinnovates, WC Docket No. 17-108 (filed Jul. 16, 2017) ("Carlton/Keating Study") (explaining that, in light of the need for BIAS providers and others to "invest continually and adapt to ever-changing consumer demand … regulation can have detrimental effects on investment and innovation due to uncertainty regarding firms' ability to recoup investment over the long run … [and] can have the effect of lowering the expected rate of return").

29 Theodore R. Bolema, "An Assessment of the FCC's Proposal to Conduct a Cost-Benefit Analysis," at 1, attached to Comments of Free State Foundation, WC Docket No. 17-108 (filed July 17, 2017) ("Free State Foundation Comments"); *see also* John W. Mayo *et al.*, "An Economic Perspective of Title II Regulation of the Internet," at 8, attached to Comments of Georgetown Center for Business and Public Policy, WC Docket No. 17-

assert that broadband investment actually has *increased* since the *Title II Order*,[30] they erroneously examine absolute investment figures, rather than considering what level of investment would have occurred in the absence of Title II—which is the only relevant question as an economic matter. Virtually all economists to have examined that question conclude that broadband investment would have been considerably higher had the Commission not imposed Sections 201/202 and the general conduct standard.[31] Relatedly, economists have shown that such diminished rates of spending in turn have led to a reduction in the growth rate of broadband speeds; indeed, Dr. George Ford estimates that "U.S. broadband speeds would have been about 10% higher" but for the *Title II Order*.[32] Over time, these harms would only compound if Title II were to remain in place.

108, at 8 (filed Jul. 17, 2017) ("Mayo Study") (evaluating impact of Title II on investment based on the application of such regulation to telecommunications networks between 1996 and 2005, which "slowed telephone company investment by roughly $1 billion per year"); *see also* Robert Hahn, "How the Economics Can Inform Telecommunications Policy: The FCC's Proposed Action on Restoring Internet Freedom," at 13, attached as Exhibit B to CTIA Comments ("Hahn Study").

30 *See, e.g.*, Free Press Comments at 127-36.

31 *See, e.g.*, Israel Study at 44; Dippon White Paper at 28-37; Owen Study at 11-14; *see also* George S. Ford, *A Review of the Internet Association's Empirical Study of Network Neutrality and Investment*, PHOENIX CENTER PERSPECTIVES 17-09, at 1 (Jul. 24, 2017), *available at* http://www.phoenix-center.org/perspectives/Perspective17-09Final.pdf (rebutting claims made by Dr. Christopher Hooton, the one economist to submit an empirical study purporting to show that Title II has not adversely impacted investment); *see also* George S. Ford, *A Further Review of the Internet Association's Empirical Study of Network Neutrality and Investment*, PHOENIX CENTER PERSPECTIVES 17-10, at 1 (Aug. 14, 2017), *available at* http://www.phoenix-center.org/perspectives/Perspective17-10Final.pdf (finding that Dr. Hooton's work contains further "errors as severe, if not worse than," those previously identified).

32 George S. Ford, "Broadband Speeds Post-Reclassification: An Empirical Approach," at 1, attached to Comments of Digital Policy Institute, WC Docket No. 17-108 (filed Jul. 17, 2017).

II. RESTORING AN INFORMATION-SERVICE CLASSIFICATION WILL NOT JEOPARDIZE THE OPEN INTERNET

Despite inflicting significant harms, the *Title II Order* has not delivered any meaningful consumer welfare gains, let alone benefits that could justify the substantial costs. The purported benefits of common carrier regulation are illusory because the broadband industry has been fully committed to principles of openness for many years—long before the Commission chose to resort to heavy-handed regulation. Indeed, nearly all of the dramatic growth of both BIAS services *and* edge services since the advent of the Internet—under the "virtuous circle" the Commission has sought to foster—has occurred under a *Title I* framework. And just as Cox explained that its unwavering commitment to the open Internet flows from its interest in meeting customers' needs,[33] other commenters representing the broadband industry uniformly agree, making clear that remaining transparent and refraining from blocking, throttling, and unreasonable discrimination are business imperatives that will guide provider practices regardless of the type of regulation in place.[34]

Title II proponents' suggestion that Internet openness somehow was under siege in 2015, such that the longstanding and remarkably successful Title I regime suddenly had to be abandoned—or that such threats exist today—rest on baseless speculation and unpersuasive claims about supposed abuses in the past. But as various economists point out, BIAS providers do not have an incentive to block, throttle, or otherwise act anticompetitively; to the contrary, any such conduct that harms subscribers would be irrational and self-defeating, as it would drive

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33 Cox Comments at 1.

34 *See, e.g.*, Comcast Comments at 2-3; Charter Comments at 1-2; AT&T Comments at 1; Verizon Comments at 1.

subscribers to rival providers.[35] And commenters' reliance on isolated claims about Madison River, BitTorrent, and the like are not only stale but have been thoroughly discredited in the record.[36] In all events, the fact that proponents of Title II can come up with so few instances of supposed misconduct among hundreds of broadband providers over nearly two decades underscores the *absence* of actual competitive or consumer harm, rather than a problem requiring regulatory intervention.[37]

Notwithstanding the lack of evidence suggesting market failure or another clear basis for regulation, Cox and other BIAS providers have supported maintaining a regulatory backstop to ensure that commitments to openness are enforceable. Cox has argued that congressional action

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35 *See, e.g.*, Israel Study at 27 (explaining that "anti-consumer actions by Internet providers would lead to substantial costs in the form of consumer departures"); Mayo Study at 3 (same); Andres V. Lerner and Janusz A. Ordover, "An Economic Analysis of Title II Regulation of Broadband Internet Access Providers," at 27, attached as Exhibit A to Verizon Comments (identifying survey data confirming that consumers can easily switch providers and do so frequently, with "17.6 percent switching in the prior 12 months, 33.1 percent switching in the prior 2 years, and 49.4 percent switching in the prior 4 years").

36 *See, e.g.*, AT&T Comments at 19-21 (explaining that the "historical record … is not only devoid of any *systematic* market failure requiring a prescriptive regulatory response, but also devoid of any *individual instances* in which ISPs have engaged in conduct that could even logically justify intervention beyond core prohibitions on unjustified blocking and throttling" (emphasis in original), and rebutting claims that BIAS providers have acted anticompetitively).

37 *Cf. Verizon v. FCC*, 740 F.3d 623, 664-65 (D.C. Cir. 2014) ("That the Commission was able to locate only four potential examples of such conduct is, frankly, astonishing. In such a large industry . . . one would think there should be ample examples of just about any type of conduct.") (Silberman, J., dissenting); *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, at 333 (Mar. 12, 2015) ("*Title II Order*") (Dissenting Statement of Commissioner Pai) ("The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.").

plainly represents the best path forward,[38] as legislation alone will end the recurring cycle of Commission proceedings and appellate litigation, especially given that the existing statute does not address open Internet issues—except insofar as it instructs the Commission *not* to regulate the Internet.[39] A diverse array of stakeholders join Cox in supporting bipartisan legislation to codify consensus principles of openness, including not only BIAS providers,[40] but edge providers,[41] equipment manufacturers and software developers,[42] and various other organizations.[43] The few parties that affirmatively oppose legislation rely on the upside-down premise that Congress should defer to the prior Commission's *Title II Order* to set national

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38 *See* Cox Comments at 3.

39 *See* 47 U.S.C. § 230(b)(2) (establishing national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

40 *See, e.g.*, Comcast Comments at 51; NCTA Comments at 6-7.

41 *See, e.g.*, Comments of the Internet Association, WC Docket No. 17-108, at 17 (filed Jul. 17, 2017) (calling for "legislative action codifying the existing net neutrality rules").

42 *See, e.g.*, ACT Comments at 16 (calling for legislation because "[r]apid changes between titles create legal uncertainties that hurt investments and innovation, industry and consumers"); Ericsson Comments at 14 ("Without legislation, the current flux (or even risk of it) creates significant uncertainty about whether any regime currently in place will remain intact, and the prospect of toggling between opposing frameworks risks grinding innovation to a halt."); Comments of Oracle Corporation, WC Docket No. 17-108, at 6 (filed Jul. 17, 2017) ("To achieve a lasting solution to the issues at hand, and to prevent additional shifts in the regulatory framework that quell innovation and investment, Congress should enact legislation that establishes once and for all that broadband internet access is an integrated information service."); Comments of CompTIA, WC Docket No. 17-108, at 1 (filed Jul. 17, 2017) ("CompTIA has continued to support net neutrality legislation, even after the Commission released its 2015 Open Internet Order, to provide the necessary certainty for the industry.").

43 *See, e.g.*, Comments of LGBT Technology Partnership, WC Docket No. 17-108, at 2 (filed Jul. 17, 2017) ("[T]he only way to ensure long-term legal consistency and prevent policy and rule changes based on which way the political pendulum is currently swinging at the FCC is for Congress to reach across the aisle and pass common sense legislation that works for today's dynamic digital networks."); Comments of National Multicultural Organizations, WC Docket No. 17-108, at 6-7 (filed Jul. 17, 2017) (explaining that "a statutory solution has been supported on both sides of the political aisle").

policy,[44] but that cynical proposition ignores the fundamental principle that administrative agencies should effectuate the legislative action of our elected representatives, not the other way around.

Even absent specific legislation, the Federal Trade Commission has confirmed that, once the information-service classification is restored, it will have ample authority to take enforcement actions against BIAS providers that fail to live up to their public commitments to remain transparent and to refrain from blocking, throttling, and anticompetitive paid prioritization.[45] FTC enforcement is readily adaptable, can be applied even-handedly across industry segments, and avoids "overly-prescriptive rules that may quickly become obsolete in a rapidly-changing industry."[46] For these reasons, many parties recognize that FTC oversight and enforcement represents a viable means of safeguarding openness principles as well as digital privacy and data security.[47]

Moreover, if the Commission determines after experience with FTC-backed principles that prescriptive rules are needed to protect Internet openness, the record acknowledges the Commission's ability to adopt appropriately tailored rules under Section 706. That provision, unlike Title II, is "affirmatively intended to encourage broadband deployment" and is therefore a "better authority than Title II" for any regulation of BIAS, especially given that Title II "has

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44 *See, e.g.*, Free Press Comments at 23, 89-90.

45 See Comments of Acting FTC Chairman Maureen Ohlhausen, WC Docket No. 17-108, at 11 (filed Jul. 17, 2017); *see also* Comments of FTC Staff, WC Docket No. 17-108, at 20-21 (filed Jul. 17, 2017) ("FTC Staff Comments").

46 FTC Staff Comments at 21.

47 *See, e.g.*, Comcast Comments at 63-67; Free State Foundation Comments at 38-45; Comments of CenturyLink, WC Docket No. 17-108, at 34 (filed Jul. 17, 2017); Comments of the Information Technology and Innovation Foundation, WC Docket No. 17-108, at 6 (filed Jul. 17, 2017).

created harmful uncertainty that undermines both regulatory consistency and investor confidence, thereby impeding salutary innovation and competition."[48]

While there is broad recognition of the Commission's authority to reinstate bright-line prohibitions against blocking and throttling (and some restrictions on anticompetitive practices), the record includes even greater clarity on the need to eliminate the investment-chilling general conduct standard. Even apart from the fact that it is grounded solely in Title II, commenters recognize that its boundless nature results in substantial harms without commensurate benefits.[49] Indeed, even parties that otherwise favor a significant degree of regulation recognize the flaws inherent in the overly expansive and vague general conduct standard.[50]

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48 WISPA Comments at 24.

49 *See, e.g.*, AT&T Comments at 51-52; Comcast Comments at 68-72; ACT Comments at 3; Bennett Comments at 3; ACA Comments at 63; Comments of Sprint Corporation, WC Docket No. 17-108, at 5-7, (filed Jul. 17, 2017); CTIA Comments at 9-12.

50 *See* Comments of Jon M. Peha, "Light-Touch Regulation by Banning Unreasonable Discrimination," WC Docket No. 17-108, at § 2.1 (filed July 17, 2017); Comments of the Electronic Frontier Foundation, WC Docket No. 17-108, at 28-29 (filed Jul. 17, 2017).

CONCLUSION

As set forth above and in Cox's opening comments, the Commission should restore the classification of BIAS as a Title I information service. That classification best reflects the functions BIAS providers offer consumers and also will most effectively promote the policy objectives at stake. To the extent necessary, there are multiple options available to establish a regulatory backstop to ensure continued adherence to open Internet principles.

Respectfully submitted,

/s/ Barry J. Ohlson
Barry J. Ohlson
Jennifer L. Prime
COX ENTERPRISES, INC.
975 F Street, NW, Suite 300
Washington, DC 20004

/s/ Jennifer W. Hightower
Jennifer W. Hightower
Joiava Philpott
Alysia M. Long
COX COMMUNICATIONS, INC.
1400 Lake Hearn Drive
Atlanta, GA 30319

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