

In the Matter of )  
 )  
Restoring Internet Freedom ) WC Docket No. 17-108  
To: The Commission

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules,<sup>1</sup> hereby replies to certain of the initial comments submitted in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.<sup>2</sup>

<sup>1</sup> See 47 C.F.R. §§ 1.415, 1.419.

<sup>2</sup> See *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (“*NPRM*”).

<sup>3</sup> See Ali Breland, *Net Neutrality Comments Top 20 Million*, The Hill, August 17, 2017.

Given the already voluminous record compiled in this proceeding, WISPA limits these Reply Comments to a focused discussion of these two discrete points.

### **Discussion**

#### **I. RELIEF FROM TITLE II REGULATION WILL REMOVE SUBSTANTIAL BURDENS FROM SMALL INTERNET SERVICE PROVIDERS AND PROMOTE SERVICE TO UNDERSERVED AREAS.**

There is significant support in the record demonstrating that the 2015 regulations adopted under Title II have chilled investment in the provision of new broadband service generally, thereby undermining the important Commission objective of encouraging rapid deployment of broadband Internet infrastructure throughout the country.<sup>4</sup> For example, Charter Communications states that “the Title II regulatory environment undermines the very private investment and buildout of broadband networks the Commission is seeking to encourage.”<sup>5</sup> The R Street Institute<sup>6</sup> describes the predicament of broadband providers more colorfully, stating that “the full morass of laws and regulations in Title II now hang over broadband providers like the Sword of Damocles... discouraging investment and innovation among broadband providers as they seek to improve their service offerings.”<sup>7</sup>

While some commenters dispute the extent to which capital investment has been inhibited for broadband providers generally,<sup>8</sup> including the largest national fixed and mobile wireless broadband providers such as Comcast, AT&T, CenturyLink and Verizon, there is much less dispute regarding the increased regulatory burdens that “one-size-fits-all” Title II regulation

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<sup>4</sup> See 47 C.F.R. § 1302.

<sup>5</sup> Comments of Charter Communications, Inc., WC Docket No. 17-108 (filed July 17, 2017), at 9.

<sup>6</sup> The R Street Institute is a nonprofit, nonpartisan, public policy research organization that seeks to advance real solutions to complex problems; it has offices in Washington, D.C., Florida, Texas, Ohio and California.

<sup>7</sup> Comments of R Street Institute, WC Docket No. 17-108 (filed July 17, 2017), at 6&7, *citing* Daniel Lyons, *A Win for the Internet: The FCC Wants to Repeal Title II Net Neutrality Regulations*, AEI.ORG (APR. 26, 2017), available at <https://goo.gl/yXFhM> (“In this legal regime, Title II hangs as a sword of Damocles over the broadband industry, generating uncertainty, limiting innovation, and likely reducing capital investment in the sector”).

<sup>8</sup> See, e.g., Comments of Free Press, WC Docket No. 17-108 (filed July 17, 2017), at 86, *et seq.*

specifically imposes upon smaller providers, including WISPs. Consistent with WISPA's views,<sup>9</sup> the American Cable Association ("ACA") states that the Title II rules "imposed significant new regulatory compliance costs on smaller ISPs, chilling their incentive and ability to roll out new services and features and improve and expand their broadband networks, forcing them to delay or defer investment plans, and, in turn, harming their customers and communities."<sup>10</sup> ACA sums up this impact as "all cost and no benefit,"<sup>11</sup> a sentiment echoed by the Small Business & Entrepreneurship Council, which similarly characterizes the rules as "all pain and no gain," noting that with more resources necessarily "being directed to regulatory compliance and lawyers," small providers have less funds "available to reinvest back into their networks to improve and expand service for customers."<sup>12</sup>

Nor are these concerns limited to small ISPs themselves. The heavy burden that has been placed on smaller providers is also recognized in comments filed by larger industry players that provide technology to large and small companies alike, and by academic observers that have studied the impact of the rules. Cisco Systems, Inc., for example, laments the fact that the "Title II Order has... disproportionately negatively impacted many small ISPs bringing competition to many underserved Americans..., and that "[r]ules curtailing the ability of small and rural competitors to bring broadband to underserved American populations can hardly be said to be pro-competition or pro-consumer."<sup>13</sup> The Free State Foundation filed comments that included an attached article by their Senior Fellow Theodore Bolema urging the Commission to "consider

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<sup>9</sup> See Comments of WISPA, WC Docket No. 17-108 (filed July 17, 2017) ("WISPA Comments").

<sup>10</sup> Comments of ACA ("ACA Comments"), WC Docket No. 17-108 (filed July 17, 2017), at 3.

<sup>11</sup> *Id.*

<sup>12</sup> Comments of Small Business & Entrepreneurship Council, WC Docket No. 17-108 (filed July 17, 2017), at 4.

<sup>13</sup> Comments of Cisco Systems, Inc. ("Cisco Comments"), WC Docket No. 17-108 (filed July 17, 2017), at 8& 9.

how the burden of the *Open Internet Order* likely falls more heavily on small businesses, a source of important innovation in the economy.”<sup>14</sup>

To the extent that a few commenters challenge the plight of small ISPs, they do so largely by citing the same slim anecdotal evidence – a one-page letter, which was filed on behalf of a handful of small providers just three weeks before the initial comments were due, as support for the generalized notion that smaller providers have not been especially disadvantaged by Title II regulation.<sup>15</sup> The letter itself, however, offers only an opinion that Title II has not been harmful as generalized support for maintaining the current rules. Absent from either the letter itself or any of the comments citing it is any significant empirical evidence or sworn testimony that would support its claims. For example, the Electronic Frontier Foundation’s Comments limit discussion of small providers to a simple statement that the “*NPRM* incorrectly suggests that regulations in the *2015 Open Internet Order* are too burdensome for small ISPs, forcing them out of the market and reducing overall competition” before declaring simply that “[d]ozens of ISPs say otherwise.”<sup>16</sup> The letter is similarly trotted out as a talisman by a few other commenters as if the opinion of some small service providers is all that is needed to prove the point, and the credibility of that position should be inferred from the letter’s mere existence.<sup>17</sup> The only data cited by these commenters that is alleged to support these views, however, is from a June article that appeared in the *San Francisco Chronicle* entitled “Bay Area Internet Providers Thriving in

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<sup>14</sup> Comments of the Free State Foundation (“Free State Comments”), WC Docket No. 17-108, Appendix A, Theodore R. Bolema, “An Assessment of the FCC’s Proposal to Conduct a Cost-Benefit Analysis,” dated July 14, 2017 (filed July 17, 2017), at 18.

<sup>15</sup> See Letter from A Better Wireless, NISP, LLC, *et al.* to FCC Chairman Ajit Pai, WC Docket No. 17-108, filed June 27, 2017.

<sup>16</sup> Comments of the Electronic Frontier Foundation, WC Docket No. 17-108 (filed July 17, 2017), at 9.

<sup>17</sup> See Comments of the Computer & Communications Industry Association (“CCIA Comments”), WC Docket No. 17-108 (filed July 17, 2017), at 15 & n.45; Comments of Home Telephone Company, Inc., WC Docket No. 17-108 (filed July 17, 2017), at 6 & n.8; Comments of Internet Association (“IA Comments”), WC Docket No. 17-108 (filed July 17, 2017), at 14 & n.29; Comments of Public Knowledge and Common Cause, WC Docket No. 17-108 (filed July 17, 2017), at 81 & n.298.

the Era of Net Neutrality.”<sup>18</sup> It should go without saying that the anecdotal experience of several broadband providers operating in the very wealthy and tech-centric environs of San Francisco Bay can hardly be considered representative of the experience of most other ISPs, particularly those operating in rural or historically underserved areas.

In contrast, small broadband providers favoring the proposals advanced in the *NPRM* have provided supporting information and sworn declarations to support their positions. Indeed, the *NPRM* itself refers to affidavits filed in connection with the appeal of the *Open Internet Order* in which small ISPs specifically described changes in their capital investment plans that were prompted by Title II reclassification.<sup>19</sup> Added to this data are five individual sworn declarations submitted as attachments to the ACA Comments, which detail “the various ways in which the overhang of regulatory enforcement of vague Title II mandates and standards has dampened their incentive to invest and innovate, causing them to delay, defer or shelve planned service and network improvements and expansions.”<sup>20</sup> WISPA itself provided the results of a survey of its members in which more than 80 percent of respondents reported that Title II regulation has caused delay or reduction of network expansion and services, and/or allocation of significant financial resources to comply with the new rules.<sup>21</sup>

And the single letter sponsored by the Electronic Frontier Foundation is far from being the most representative submission from small ISPs regarding these issues, a far greater number of whom have registered, both via trade groups and ad hoc coalitions, their strong desire for the Commission to repeal the Title II regulations. For example, in early May 2017, a group of 70 WISPs filed a detailed letter expressing their strong support for the *NPRM*’s proposals “to

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<sup>18</sup> See CCIA Comments at 10 & n.26 and 15 & n.46; IA Comments at 14 & n.28.

<sup>19</sup> See *NPRM* at 4450 (¶ 47).

<sup>20</sup> ACA Comments at 6-7 and Exhibits A through E thereto.

<sup>21</sup> See WISPA Comments at 14.

reverse Title II re-classification and a return to the pre-2015 environment where light-touch regulation enabled our businesses to get off the ground and become successful.”<sup>22</sup> Similarly, just prior to the official opening of this docket, 22 small wireline providers wrote to Chairman Pai expressing their hope that the then-anticipated proceeding would relieve them of the “black cloud” over their businesses, and stating that “because the Commission’s reach under the Open Internet rules appears to be virtually unlimited, each of us has slowed, if not halted, the development and deployment of innovative new offerings which would benefit our customers.”<sup>23</sup>

The disparate impact of Title II regulation on the smallest service providers is particularly insidious for two distinct reasons. First, as a number of commenters observe, there is no evidence that small providers have engaged in or are even capable of engaging in anticompetitive conduct of the type that the rules adopted under Title II are intended to prevent. For example, ACA notes that “with a single exception over a decade ago, no small ISP has been accused or found guilty of blocking or throttling consumer access to the Internet or engaging in anticompetitive paid prioritization practices to speed up transmission of one edge provider’s traffic while slowing that of others.”<sup>24</sup>

Second, as a number of parties explain, small internet providers disproportionately provide service in rural and underserved areas where they are either the only available broadband service option or provide the only viable alternative to an incumbent broadband provider.<sup>25</sup> The

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<sup>22</sup> Letter from Mark Radabaugh, President of Amplex, *et al.*, to The Honorable Ajit Pai, FCC Chairman, *et al.*, WC Docket No. 17-108 (filed May 9, 2017), at 2.

<sup>23</sup> Letter from Herb Longware, President, Cable Communications of Willsboro, Inc., *et al.* to The Honorable Ajit Pai, Chairman, FCC, GN Docket No. 14-28 and WC Docket No. 16-106 (filed Apr. 25, 2017), at 2.

<sup>24</sup> ACA Comments at 36. *See also* Comments of NTCA – The Rural Broadband Association, WC Docket No. 17-108 (filed July 17, 2017), at 22 (“smaller or rural ISPs ... possess little, if any, bargaining power in negotiating the terms of interconnection and data or content exchange with larger network operators, edge providers, and [content delivery networks]”) and Comments of USTelecom Association, WC Docket No. 17-108 (filed July 17, 2017), at 22 (“The suggestion that ISPs with only tens or even hundreds of thousands of end-users could have market power over an edge provider like Netflix is contrary to both common sense and the experience of those ISPs”).

<sup>25</sup> *See, e.g.*, Cisco Comments at 9; ACA Comments at 25-26; WISPA Comments at 25.

record demonstrates that saddling small service providers with burdensome Internet governance regulations negatively affects investment and expansion, which in turn limits the ability of currently unserved consumers to gain access to broadband.<sup>26</sup>

## **II. THE RECORD JUSTIFIES ELIMINATING THE GENERAL CONDUCT RULE AND STREAMLINING THE ENFORCEMENT PROCESS**

As described in its initial Comments, perhaps the most damaging element of the current Title II regulatory scheme is the standardless “general conduct rule” codified in Part 8 of the Commission’s Rules.<sup>27</sup> Many commenters have provided similar critiques of the rule, referring to it variously as “amorphous”,<sup>28</sup> “boundless,”<sup>29</sup> “far-reaching and poorly defined,”<sup>30</sup> “ill-conceived and unnecessary,”<sup>31</sup> “open-ended,”<sup>32</sup> “problematically vague,”<sup>33</sup> and “undefined.”<sup>34</sup>

The impact of this uncertainty falls particularly heavily on WISPs and other small service providers, who have little margin to absorb additional regulatory compliance and litigation expenses. As the Free State Foundation describes it, the “‘general conduct’ standard lacks [the] necessary clarity to adequately inform broadband ISPs of what they can and cannot do.”<sup>35</sup>

Accordingly, “[t]he inherent vagueness of the general-conduct standard,” which is highlighted by several parties, “creates significant regulatory uncertainty, which is a major barrier to investment and growth.”<sup>36</sup> ACA cogently describes the overall impact – an unclear standard of conduct “that virtually requires advice of counsel before a single decision is made, raising smaller ISPs costs as

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<sup>26</sup> See ACA Comments at 17 & 25-29; Cisco Comments at 9.

<sup>27</sup> See 47 C.F.R. § 8.11.

<sup>28</sup> R Street Institute Comments at 26; Comments of NCTA – The Internet & Television Association (“NCTA Comments”), WC Docket No. 17-108 (filed July 17, 2017), at 3.

<sup>29</sup> Comments of Cox Communications, Inc. (“Cox Comments”), WC Docket No. 17-108 (filed July 17, 2017), at 16; NCTA Comments at 3.

<sup>30</sup> Cox Comments at 5.

<sup>31</sup> ACA Comments at 59.

<sup>32</sup> *Id.*; Free State Comments at 55.

<sup>33</sup> Free State Comments at 56.

<sup>34</sup> WISPA Comments at 28.

<sup>35</sup> Free State Comments at 56. See also ACA Comments at 59 (“hopelessly vague”).

<sup>36</sup> R Street Institute Comments at 26. See also NCTA Comments at 43 (describing the “chilling effect on investment and innovation”).

they struggle to understand its application to their service prices, terms, conditions, and practices and chilling their willingness to take the risk of introducing an innovative new feature or service and being judged in violation after the fact.”<sup>37</sup>

Given these problems with the current process, any rules that the Commission retains should be enforced though streamlined and certain enforcement procedures, as WISPA outlined in its initial Comments,<sup>38</sup> which incorporate the following revisions to the current procedures:

- Eliminating the formal complaint process, which has not been an effective tool for those alleging violations;<sup>39</sup> at a minimum, small broadband providers should be exempt.
- Requiring end users and providers to attempt to resolve disputes for a 30-day period *before* an informal complaint can be filed with the Commission in light of the fact that the vast majority of complaints raise routine customer service issues that can ordinarily be resolved without Commission involvement.
- Adopting a time limit for the filing of complaints, ideally within one year of the alleged rule violation.
- Preventing the filing of complaints where the broadband provider’s network management practices are “*per se* reasonable.”<sup>40</sup>
- Establishing a “shot clock” mechanism requiring the Commission to render a decision on any complaint within sixty (60) days of the completion of the pleading cycle, which would particularly benefit small providers by affording greater procedural certainty that will mitigate the current risk of long, indefinite, and expensive inquiries.
- Amending Section 1.80 of the Commission’s Rules to specify maximum forfeiture amounts for violations of Section 8 rules to establish a range of potential exposure, allowing providers and their investors to assess the risk of violations, and creating a sliding scale that takes into account the size of the service provider.
- Abandoning the Advisory Opinion mechanism which, as detailed by Commissioner O’Rielly, has been “utterly useless” and has apparently gone unused.

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<sup>37</sup> ACA Comments at 61. *See also* Cox Comments at 31 (“Cox (like other BIAS providers) has been forced to undertake additional costly and open-ended regulatory reviews to consider whether new products and services could be alleged to run afoul of this extraordinarily vague standard, and has approached such decisions more cautiously”).

<sup>38</sup> *See* WISPA Comments at 44-49.

<sup>39</sup> *See, e.g.,* Comments of T-Mobile USA, Inc. WC Docket No. 17-108 (filed July 17, 2017), at 23-24 (Instead, “the Enforcement Bureau can investigate and take or recommend enforcement action based on informal requests for investigation or informal complaints”).

<sup>40</sup> *See* WISPA Comments at 38-39.



With respect to this last point, NCTA correctly points out that “ISPs cannot be expected to put any new product offerings on hold and reveal their confidential businesses plans to the Commission in exchange for an opinion from the Enforcement Bureau that: (i) is not promised in any particular period of time, or even in a timely manner at all; (ii) cannot be relied upon to protect the ISP from enforcement if the Bureau later concludes that ‘all of the relevant facts were [not] fully, completely, and accurately presented to the Bureau’; (iii) is not binding on the full Commission in any event; and (iv) is not subject to judicial review.”<sup>41</sup>

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<sup>41</sup> NCTA Comments at 44-45. *See also* Comcast Corporation Comments, WC Docket No. 17-108 (filed July 17, 2017), at 72-73.

## **Conclusion**

The Commission is correct to propose relief from the regulatory burdens engendered by Title II regulation, particularly as they impact small broadband providers that frequently provide service to rural and other underserved areas. In order for these small service providers to develop and deploy new and better service to unserved communities and areas where consumers lack competitive choice, broadband Internet access service in general must be restored to information service classification under Title I of the Communications Act. Further, the Commission should eliminate the capriciously vague general conduct rule and streamline its enforcement process to provide greater certainty that will stimulate innovation and investment. By adopting these changes, the Commission will unleash the entrepreneurial energy of legions of small providers that, once relieved from the burdens of utility-style regulation, will be both ready and better able to help bridge the digital divide and meet the objectives of Section 706.

Respectfully submitted,

### **WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

August 30, 2017

By:    /s/ *Alex Phillips*, President  
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