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

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

REPLY COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

The Entertainment Software Association ("ESA") submits these brief reply comments to call particular attention to two issues in the vast record collected in response to the Commission's Notice of Proposed Rulemaking.[1] **First**, ESA reiterates the continuing need for a flexible standard for review of harmful open Internet practices. **Second**, ESA believes the record reveals a consensus "middle ground" approach to the otherwise divisive issues raised by this proceeding. A surprisingly diverse set of parties, with otherwise diverging views, seems to agree that section 706 is an alternative source of legal authority for at least some open Internet protections. Overall, the record supports ESA's view that the Commission should adopt enforceable protections to safeguard the long-held open Internet principles—and that it has the legal authority to do so.

[1] *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60, WC Docket No. 17-108, 32 FCC Rcd. 4434 ¶ 70 (rel. May 23, 2017) ("NPRM"). Unless otherwise specified, all comments cited herein are to WC Docket No. 17-108.

I. A Flexible, Forward-Looking Open Internet Standard Remains Necessary

The massive record in this proceeding includes much discussion of the need for a standard by which the FCC can oversee broadband providers' practices to prevent harm to the free and open Internet. Many commenters support ESA's view that such a standard continues to be necessary.[2] As explained in our opening comments, ESA believes the Commission can—and should—retain a flexible, forward-looking standard to protect against discriminatory or otherwise harmful broadband provider practices on a case-by-case basis. Absent a backstop standard of some kind, open Internet principles may not survive, particularly if the Commission decides not to maintain other bright-line protections.

The large broadband providers stand united in their view that the standard set forth in the 2015 general conduct rule should be eliminated and that the Commission should not adopt any standard to replace it.[3] Their position, however, essentially reduces to a complaint that any such

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[2] *See, e.g.*, Comments of INCOMPAS at 73-74 (filed July 17, 2017) (supporting 2015 general conduct rule) ("INCOMPAS Comments"); Comments of Internet Association at 29-30 (filed July 17, 2017) (same); Comments of Vimeo at 17 (filed July 17, 2017) (same); Comments of Public Knowledge and Common Cause [Updated] at 123-27 (filed July 19, 2017) ("Public Knowledge Comments") (same); Comments of CompTIA at 3 (filed July 17, 2017) (supporting a commercially reasonable standard) ("CompTIA Comments"); Comments of the American Association of Community Colleges, American Association of State Colleges and Universities, American Council on Education, Association of American Universities, Association of Research Libraries, Educause, National Association of College and University Business Officers and the National Association of Independent Colleges and Universities at 3-4 (filed July 17, 2017) ("Comments of American Association of Community Colleges, et. al") (supporting an "Internet reasonable" standard).

[3] *See, e.g.*, Comments of AT&T Services Inc. at 51-54 (filed July 17, 2017) ("AT&T Comments"); Comments of Comcast Corporation at 67-72 (filed July 17, 2017) ("Comcast Comments"); Comments of the NCTA – The Internet & Television Association at 43-45 (filed July 17, 2017) ("NCTA Comments"); Comments of CTIA at 11-14 (filed July 17, 2017).

standard would create insurmountable uncertainty, supposedly chilling innovation.[4] But some uncertainty is an inherent feature of all *ex post* case-by-case review, which—by definition—is based on the particular circumstances of a particular case. This is true of all such review—from common law adjudication[5] to the familiar section 202 standard against unreasonable discrimination.[6] The Communications Act and FCC regulations are replete with examples of such case-by-case standards, which have not ground the marketplace to a halt.[7]

Such case-by-case standards are equally common and no less unworkable outside of communications law. Indeed, some of the broadband providers most critical of the uncertainty that would supposedly be created by an FCC open Internet standard advocate for Federal Trade Commission ("FTC") enforcement of net neutrality principles under section 5's prohibition on "unfair methods of competition" and "unfair or deceptive trade practices."[8] But section 5 is, of course, itself a general conduct standard applied on an *ex post* case-by-case basis. Apparently, these broadband providers have no problem with an *ex post* case-by-case standard—so long as it is done by another agency. However, as ESA and many other parties have pointed out,[9] it is the FCC that has the experience and expertise to adjudicate open Internet concerns.

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4 *See, e.g.*, Comcast Comments at 69-73.

5 As Justice Holmes long-ago said of legal decision-making, "certainty generally is illusion." *The Path of the Law*, 10 Harv. L. Rev. 457, 465 (1897).

6 47 U.S.C. § 202(a).

7 *See, e.g.*, 47 C.F.R. § 20.12(e) (requiring "commercially reasonable" data roaming arrangements and establishing "case-by-case" review of any disputes); *id.* § 76.65 (requiring "good faith" negotiation of retransmission consent agreements).

8 Comcast Comments at 64-67 (citing 15 U.S.C. § 45(a)).

9 *See* Comments of the Entertainment Software Association at 13-14 (filed July 17, 2017) ("ESA also urges the Commission to adopt clear rules of the road, enforceable by the Commission as expert agency") ("ESA Opening Comments"); Comments of Innovation

Some commenters suggest that *no* open Internet protections are needed because current "antitrust constraints [act] as an already-existing backstop against truly harmful provider behavior."[10] In so doing, these parties ignore the resource-intensive nature and elevated legal burdens of modern antitrust litigation and enforcement. As ESA and others in the record have explained, existing antitrust regulatory regimes cannot effectively protect against broadband provider practices that harm the open Internet.[11]

ESA understands the importance and value of regulatory certainty, but this must be balanced against the importance and value of retaining *some* regulatory oversight to protect consumers and competition—particularly where long-held open Internet principles are at stake. Far from new, as some commenters suggest,[12] such a standard has always been a part of the Commission's open Internet principles to guard against discriminatory practices.[13] Indeed, it would become even more critical to retain such a standard should the Commission decide to narrow or eliminate the current bright-line rules. As discussed in our opening comments, ESA supports *ex ante* rules against blocking and throttling *in addition* to a flexible standard for

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Technology and Information Foundation at 18-19 (filed July 17, 2017) ("ITIF Comments"); Public Knowledge Comments at 103-05; Letter from Abigail Slater, General Counsel, Internet Association, to Marlene Dortch, Secretary, FCC, at 1, WC Docket 17-108 (filed May 11, 2017).

10 *See* Comments of CenturyLink at 34 (filed July 21, 2017). *See also* Comments of Cox Communications at 31 (filed July 17, 2017); Comments of ADTRAN, Inc. at 25 (filed July 17, 2017); Comments of Free State Foundation at 38-39 (filed July 17, 2017).

11 *See* ESA Opening Comments at 8-9. *See also* ITIF Comments at 17-18; Public Knowledge Comments at 103-05; Comments of the Open Technology Institute At New America at 15-18 (filed July 17, 2017).

12 *See, e.g.*, Comcast Comments at 68.

13 *See* ESA Opening Comments at 9-10.

reviewing other practices.[14] To the extent the Commission decides to weaken or eliminate those bright-line rules, however, ESA urges the Commission to define the flexible standard in such a way that it protects against broadband provider blocking and throttling. Absent a general conduct standard, consumers and edge providers would be left with no legal recourse against discriminatory practices by broadband providers.

II. Diverse Parties Support Section 706 as an Alternative "Middle Ground" Approach

There is no shortage of disagreement on many issues raised by this proceeding. Our review of the record, however, suggests that a diverse set of parties, with a diverse set of positions, supports ESA's view that section 706 of the Telecommunications Act is a viable source of authority for at least some enforceable open Internet protections.[15] Several broadband providers, united in their opposition to Title II classification, support section 706 as an alternative approach the Commission can take to adopt enforceable open Internet rules. AT&T, for example, supports new Congressional legislation as the "[o]ptimal" solution,"[16] but, "in the absence of such legislation," agrees that "the Commission can adopt baseline open Internet rules" under its section 706 authority.[17] Setting forth multiple paths on which the Commission

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[14] *See id*. at 6-8.

[15] Section 706 provides the Commission jurisdiction to adopt strong open Internet protections and vigorously pursue discriminatory broadband provider practices that interfere with consumers' freedom to access the online services and lawfully distributed content of their choice.

[16] AT&T Comments at 7.

[17] AT&T Comments at 7. *See also* AT&T Comments at 101-06 (explaining AT&T's view on how section 706 can support baseline rules); Comments of Verizon at 18 (filed July 17, 2017) (section 706 may be interpreted as a source of authority "for certain open Internet rules that would provide the Commission a means of curbing some problematic practices").

can move forward, Comcast advocates for FTC enforcement of industry commitments, but also concludes that the Commission can "reasonably choose to reestablish certain core rules pursuant to [its] section 706 authority."[18]

At the same time, other commenters, who (to varying degrees) support broadband classification as a Title II service, agree that the Commission could, alternatively, adopt certain open Internet protections pursuant to section 706. INCOMPAS, for example, while supporting Title II classification, identifies section 706 as a valid source of authority for the existing general conduct rule.[19] While supporting Title II as a "sound basis" for open Internet rules, comments filed by a coalition of higher education institutions conclude, in the alternative, that "section 706 offers an effective path to preserving an open internet."[20] Similarly, the Communications Workers of America and NAACP explain that, while Title II may provide "solid legal footing," section 706 is an alternative approach that can also support judicially sustainable open Internet rules.[21] And CompTIA advocates for section 706-based rules, finding the statute sufficiently ambiguous so as to support either Title I or Title II classification.[22]

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[18] Comcast Comments at 57-63. *See also* NCTA Comments at 57-58 (FCC can act on an ex post basis pursuant to section 706, where necessary).

[19] INCOMPAS Comments at 64-65. *See also*, Comments of Cogent Communications Inc. at 22-25 (filed July 17, 2017) (identifying section 706 as a source of affirmative authority that could be used to address interconnection concerns).

[20] Comments of American Association of Community Colleges, et.al. at 20-25.

[21] Comments of Communications Workers of America and NAACP at 15-16 (filed July 17, 2017).

[22] CompTIA Comments at 4-5.

Taken as a whole, the comments from these parties reveal striking agreement, which is particularly notable for this proceeding. All agree with ESA that section 706 is an affirmative source of authority and all agree with ESA that the Commission can rely on section 706 to adopt open Internet protections. Thus, the record makes clear that section 706 presents a viable middle ground for FCC enforcement of long-held open Internet principles.

Respectfully submitted,

Scott Blake Harris
Stephanie Weiner
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Eighth Floor
Washington, DC 20036

Counsel for the Entertainment Software Association

Stanley Pierre-Louis
Senior Vice President & General Counsel
Michael Warnecke
Chief Counsel, Tech Policy
Delara Derakhshani
Counsel, Tech Policy
ENTERTAINMENT SOFTWARE ASSOCIATION
601 Massachusetts Ave. NW, #300
Washington, DC 20001
(202) 223-2400

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