

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

**REPLY COMMENTS  
OF THE  
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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The Telecommunications Industry Association (“TIA”) hereby respectfully submits these reply comments in the Federal Communications Commission’s (“Commission’s”) above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

As both an advocacy organization and standard-setting body, TIA represents hundreds of manufacturers and vendors of information and communications technology (“ICT”) equipment and services. These offerings are supplied to critical infrastructure owners and operators, enabling network operations across all segments of the economy. While TIA’s constituent companies are not directly subject to the Commission’s 2015 application of Great Depression-era regulations to the technological marvel of the modern age,<sup>2</sup> our members – the fabricators and innovators who have made the network of networks’ rise possible – have nevertheless been

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<sup>1</sup> *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2013) (“*Notice*”).

<sup>2</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Title II Order*”).

adversely affected by the internet ecosystem-wide shock accompanying the Commission's decision to turn decades of bipartisan consensus on its head.

The record compiled in this proceeding demonstrates that (1) the Commission has clear authority to return broadband internet access service ("BIAS") to the light-touch Title I regulation under which American investment, deployment and innovation flourished; (2) the regulatory uncertainty created by the overly vague and limitless general conduct standard harms innovation; (3) the Title II-contingent ban on paid prioritization harms competition and consumers alike; and (4) there is widespread agreement that Congress should provide a statutory resolution to the debate that promotes a competitive, innovation-enhancing environment for everyone.

Therefore, the Commission should adopt the proposals embodied in TIA's initial comments<sup>3</sup> and alleviate the unnecessary harms of the *Title II Order* until a permanent Congressional solution is achieved.

## **II. THE RECORD IRREFUTABLY ESTABLISHES THE COMMISSION'S AUTHORITY TO RETURN THE INTERNET TO THE TITLE I CLASSIFICATION UNDER WHICH IT DEVELOPED**

As a preliminary matter, the substantive comments filed clearly and correctly explain that the Commission is well within its legal authority to return BIAS to the Title I "information service" classification under which the internet flourished.<sup>4</sup> The Supreme Court has previously

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<sup>3</sup> Comments of the [Telecommunications Industry Association](#), WC Docket No. 17-108 (filed July 17, 2017) ("TIA Comments").

<sup>4</sup> See, e.g., Comments of the [American Cable Association](#) ("ACA Comments") at 35-49, 56-58; Comments of [ADTRAN, Inc.](#) at 9-17 ("ADTRAN Comments"); Comments of [AT&T Services Inc.](#) ("AT&T Comments") at 82-85; Comments of [Cisco Systems, Inc.](#) ("Cisco Comments") at 13-14; Comments of [Cox Communications, Inc.](#) ("Cox Comments") at 11-12; Comments of the [Free State Foundation](#) ("Free State Foundation") Comments at 14-16; Comments of [Inmarsat, Inc.](#) ("Inmarsat Comments") at 9-10; Comments of [Mobilitie, LLC](#) ("Mobilitie Comments") at 1;

upheld the Commission’s classification of BIAS as an information service and has explicitly recognized that the Commission may change its interpretation at its discretion so long as it adequately explains the reasons for the change.<sup>5</sup> As the Supreme Court explained in *Fox*, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>6</sup> The Commission need only look to the weight of this record for such good reason.

In addition to the policy considerations outlined below, the record demonstrates that the internet from a *technical* perspective falls more cleanly and squarely into the category of “information service.”<sup>7</sup> The statute defines an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

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Comments of [NCTA – The Internet & Television Association](#) (“NCTA Comments”) at 9-10; Comments of [T-Mobile USA, Inc.](#) (“T-Mobile Comments”) at 14; Comments of [Verizon](#) (“Verizon Comments”) at 52, 60; Comments of the [Wireless Internet Service Providers Association](#) (“WISPA Comments”) at 21, 25-29.

<sup>5</sup> Cisco Comments at 13, n.39-41 citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-981 (2005) (“[I]f the agency adequately explains the reasons reversal of policy, ‘change is not invalidating, since the whole purpose *Chevron* deference is to leave the discretion ... with the implementing agency. An initial agency interpretation is not instantly carved in stone.”).

<sup>6</sup> *FCC v. Fox*, 556 U.S. at 503; *see also* Comments of [Advanced Communications Law & Policy Institute](#) (“ACLP Comments”) at 26.

<sup>7</sup> *See, e.g.*, Comments of [Alaska Communications](#) (“Alaska Communications Comments”) at 5-6; ACA Comments at 41-49, 53-55; ADTRAN Comments at 5-6; AT&T Comments at 61-82; Comments of [CenturyLink](#) (“CenturyLink Comments”) at 14-15; Comments of [Charter Communications, Inc.](#) (“Charter Comments”) at 13-16; Cisco Comments at 13-14.

making available information via telecommunications,”<sup>8</sup> and, as numerous commenters note, BIAS performs precisely these functions.<sup>9</sup>

Thus, TIA respectfully reiterates its call<sup>10</sup> for the Commission to correct course and return the internet to the light-touch regime under which it flourished, prior to the *Title II Order*.

### **III. THE REGULATORY UNCERTAINTY CREATED BY THE OVERLY VAGUE AND LIMITLESS GENERAL CONDUCT STANDARD HARMS INNOVATION**

While industry will always face some uncertainty in the marketplace, the uncertainty imposed by the *Title II Order*'s General Conduct Standard goes too far, positioning the Commission as a capricious arbiter of what is and is not allowed, irrespective of the demands of consumers themselves. The unknown and unknowable effects of the General Conduct Standard are particularly burdensome for small ISPs.<sup>11</sup> As ACA notes, the standard falsely treats smaller carriers as gatekeepers without regard for actual market power, overburdening them with the costly need to involve counsel in every business decision for fear of “introducing an innovative new feature or service and being judged in violation after the fact.”<sup>12</sup> The General Conduct Standard was a shot in the dark “aimed at practices not yet known conclusively to harm Internet openness or are not yet seen in the marketplace (‘known unknowns’ and possibly ‘unknown

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<sup>8</sup> 47 U.S.C. § 153(24).

<sup>9</sup> See, e.g., ADTRAN Comments at 5-6; Alaska Communications Comments at 4, Cisco Comments at 14.

<sup>10</sup> TIA Comments at 11-13.

<sup>11</sup> See, e.g., ACA Comments at 59-64.

<sup>12</sup> ACA Comments at 61.

unknowns’),”<sup>13</sup> to be administered on a case-by-case basis. Such a regulatory framework inherently invites capricious application, which will most disserve smaller businesses with less access and influence to the enforcers.

The General Conduct Standard harms larger companies as well, affording parties no good process for determining what conduct has actually been forbidden.<sup>14</sup> The rule simply warns common carriers to behave in accordance with what the Commission might require, without imposing any actual standard at all.<sup>15</sup> Even Chairman Wheeler admitted that he “d[idn’t] really know” what conduct the rule prohibited.<sup>16</sup> This proceeding’s record itself demonstrates the inherent lack of clarity as commenters remain perplexed over what specific offerings do and do not involve prohibited conduct.<sup>17</sup> As Ericsson notes, with 5G for example, “today’s rules put companies at risk in developing new customized services within broadband Internet access offerings that may legitimately treat different bits with different priorities, when they face the prospect of being told, after the fact, that they crossed a line they did not know existed.”<sup>18</sup> Such uncertainty exemplifies the problematic nature of the *Title II Order*’s loose language, which

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<sup>13</sup> *Id.* at 62.

<sup>14</sup> *See, e.g.*, ADTRAN Comments at 23-24; AT&T Comments at 49-52.

<sup>15</sup> *See* AT&T Comments at 51.

<sup>16</sup> February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), available at <http://www.fcc.gov/events/open-commission-meeting-february-2015> (165:30-166:54).

<sup>17</sup> *See, e.g.*, Comments of [Akamai Technologies, Inc.](#) at 2, 10-11, (arguing to maintain *Title II Order* rules, while taking particular care to exempt its own services (Cloud Delivery Networking) from “prioritization” by distinguishing “localization” from “prioritization.”).

<sup>18</sup> Comments of [Ericsson](#) (“Ericsson Comments”) at 4.

places the Commission back in the position of conducting beauty contests to determine what kinds of technologies are good or bad.

The General Conduct Standard also imposes substantial costly delays on all parties through an illusory and opaque advisory process.<sup>19</sup> As Comcast notes, when applying the standard, “the Commission relies on a totality-of-the-circumstances approach on a case-by-case basis that considers a *non-exhaustive* list of at least seven factors, which are themselves imbued with ambiguity.”<sup>20</sup> This process makes it nearly impossible for a company to gauge the legality of potential product and service offerings. Thus, the prudent business choice under such a regime may often be to forego a new offering altogether. The standard has already forestalled the deployment of new products as companies are left to sift regulatory tea leaves.<sup>21</sup> Perhaps the most troubling harm of all has been the standard’s chilling of free data offerings at a time when such zero-rated products are poised to help close the digital divide.<sup>22</sup>

As the Commission works to right the regulatory framework upended by the *Title II Order*, it should take care to avoid broad generalities like the General Conduct Standard, which foster disparate treatment of parties and technologies, stymie innovation, and deny consumers the full breadth of potential offerings.

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<sup>19</sup> See, e.g., Comments of [Comcast Corporation](#) (“Comcast Comments”) at 68-73.

<sup>20</sup> Comcast Comments at 69.

<sup>21</sup> See, e.g., Cox Comments at 30-32; Charter Comments at 11

<sup>22</sup> See, e.g., Comments of the [National Multicultural Organizations](#) (“National Multicultural Organizations Comments”) at 3, 11-12, 17-18 (demonstrating the pro-consumer impact of zero-rated and free data products); see also Cisco Comments at 10-12 (explaining the pro-competitive / pro-consumer service differentiation function of free data).

#### IV. COMMENTERS HAVE DEMONSTRATED THAT A BAN ON PAID PRIORITIZATION WILL HARM COMPETITION AND CONSUMERS

In addition to properly restoring the classification of BIAS as a Title I information service and eliminating the General Conduct Standard, the Commission should eliminate the rule banning paid prioritization. The record provides ample evidence demonstrating this rule’s anti-competitive and anti-consumer effect, offering numerous examples of how paid prioritization may provide vital incentives to innovation at the network level.

As commenters have demonstrated, the paid prioritization ban is unnecessary to prevent unreasonable conduct,<sup>23</sup> and it ignores the needs of latency-specific products<sup>24</sup> – including products that will further improve consumer welfare,<sup>25</sup> such as telehealth.<sup>26</sup> As the App Association has noted, by preventing wireless carriers and even edge providers from utilizing free data models and future innovative pro-consumer approaches to network management, the *Title II Order*’s rules impose negative consequences across the ecosystem in a manner that is at

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<sup>23</sup> See, e.g., Comments of [ACT | The App Association](#) (“ACT | The App Association Comments”) at 3; AT&T Comments at 19-20; CenturyLink comments at 34; Comcast Comments at 50-51, 61-63; Comments of [ITTA – The Voice of America’s Broadband Providers](#) (“ITTA Comments”) at 3-6; Comments of [NTCA – The Rural Broadband Association](#) (“NTCA Comments”) at 11.

<sup>24</sup> See, e.g., ACLP Comments at 18-20; ADTRAN Comments at ii-iii, 24-25; AT&T Comments at 5, 39-41; Verizon Comments at 20-21; Comments of [Qualcomm Incorporated](#) (“Qualcomm Comments”) at 6-7.

<sup>25</sup> See, e.g., Cisco Comments at 9-10; Comments of [CTIA](#) (“CTIA Comments”) at 15-16; Comments of the [Competitive Enterprise Institute](#) (“CEI Comments”) at 2-3; Free State Foundation Comments at 50-54; Comments of the [Information Technology Industry Council](#) (“ITI Comments”) at 6-7; Comments of [MediaFreedom](#) (“MediaFreedom Comments”) at 2-3; Comments of [Nokia](#) (“Nokia Comments”) at 4, 9, 14; Comments of [R Street Institute](#) (“R Street Institute Comments”) at 22-25; Comments of the [Technology Policy Institute](#) (“Tech Policy Institute Comments”) at 8-9.

<sup>26</sup> See, e.g., TIA Comments at 10-11; see also Cox Comments at 27-28; WIA Comments at 11.

best premature, “especially considering the Commission’s initial commitment to evaluate the impact of free data plans on consumers and conduct data-driven analysis to determine whether a full prohibition was necessary before taking further action.”<sup>27</sup> Just as the ban on paid prioritization “prohibits conduct that is beneficial” and which the Commission has approved in other contexts, it also undercuts content providers’ clear interest in providing their customers with the benefits of enhanced experiences, as demonstrated by the popularity of Content Delivery Networks.<sup>28</sup> In addition to providing enhanced consumer choice, such pricing models “encourage bandwidth conservation, which is essential to supporting the rapidly growing number of users and their skyrocketing mobile data demands.”<sup>29</sup>

Moreover, the ban negatively impacts competition by particularly disadvantaging small innovators. Well-heeled corporations are likely to be able to afford engineering-based QoS solutions in order to differentiate their products regardless of the ban.<sup>30</sup> For small competitors with (1) products whose success is contingent on low latency, and (2) less money to invest in research and development, paid prioritization *should* be an equalizing tool. Unfortunately, the *Title II Order* robbed such would-be disruptors of this potential asset.

Nor are competitive companies the only parties negatively impacted by the unreasonable and unnecessary ban on prioritization. The *Title II Order*’s prophylactic restriction functionally increases consumer broadband prices by artificially forcing networks to charge lower prices to

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<sup>27</sup> See ACT | The App Association Comments at 4.

<sup>28</sup> ADTRAN Comments at 24-25.

<sup>29</sup> Qualcomm Comments at 6.

<sup>30</sup> Shane Greenstein, Martin Peitz, and Tommaso Valletti, “[Net Neutrality: A Fast Lane to Understanding the Trade-Offs](#),” American Economic Association, 30.2 J. Econ. Perspectives 127, (Spring 2016).

edge providers, requiring that costs be passed along to end users instead.<sup>31</sup> In this way, Title II common carriage imposes a regressive subsidy,<sup>32</sup> transferring wealth *away* from the economically disadvantaged by forcing those with fewer resources to support high-bandwidth subscription services skewed towards the wealthier.

Many service and pricing models which may be considered paid prioritization under the *Title II Order* actually provide greater consumer choice and welfare enhancement, while generating additional monetization and value for the ecosystem to support infrastructure buildout.<sup>33</sup> As Nokia notes, “[s]treaming video, online gaming, remote health monitoring and other latency sensitive services are critically dependent on the ability of mobile operators to manage congestion at multiple points in the network to reduce latency and packet loss, among other challenges.”<sup>34</sup> Exponential increases in demand for bandwidth across the ecosystem will require substantial investment in research and development to provide innovative management solutions. Rather than forcing end users to bear the entire burden of supporting the network through inflated subscription fees, policymakers should empower consumers to identify with their BIAS provider the application or applications for which they would like a guaranteed level of service quality. BIAS providers should be allowed to provide plans and pricing options that meet consumer usage preferences. In this way, continued investment in the internet’s backbone may be, like its benefit, shared across the ecosystem.

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<sup>31</sup> Michael L. Katz, “[Wither U.S. Net Neutrality Regulation?](#),” Rev. Ind. Organ., (2017).

<sup>32</sup> Cf. Keith N. Hylton, “[Law Social Welfare, and Net Neutrality](#),” Rev. Ind. Organ., (2016).

<sup>33</sup> See Ericsson Comments at 5-8; Nokia Comments at 3-7.

<sup>34</sup> Nokia Comments at 6.

For consumers and competition alike, the ban on prioritization must be struck down, and should not be included in any future protections of the open internet.

**V. PARTIES ACROSS THE INTERNET ECOSYSTEM AGREE CONGRESS SHOULD PROVIDE A STATUTORY RESOLUTION THAT PROMOTES A COMPETITIVE ENVIRONMENT FOR EVERYONE**

Internet stakeholders have been arguing about how to maintain freedoms on the internet for nearly two decades. The record in this proceeding demonstrates how devastating the abrupt reclassification of internet service under Title II has been, particularly in the uncertainty wrought across the internet ecosystem. By returning internet service to its original information service classification, the Commission is taking a vital step to restore the ecosystem in which the internet has developed and thrived. However, as the Commission's 2015 classification vacillation has shown and commenters have confirmed,<sup>35</sup> any future Commission might easily revisit classification under Title II.

Therefore, because of Title II's inherently restrictive nature, and because the deference which allows the Commission to return the internet to Title I might one day be used to harm innovation and consumers in the same manner it was in 2015, TIA supports a permanent resolution to the open internet and broadband classification debates that would protect consumers and enable the full scope of beneficial products and services that may be offered.

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<sup>35</sup> See ACT | The App Association Comments at 16; American Action Forum Comments at 2,7; AT&T Comments at 7; Center for Individual Freedom at 5; CenturyLink Comments at 61-62; Comcast Comments at 9-10; Cox Comments at 3; CTIA Comments at 6; Ericsson Comments at 14; ITIF Comments at 2; MediaFreedom at 6; Mobile Future Comments at 15; National Association of Manufacturers at 2; National Multicultural Organizations at 4-7; NCTA Comments at 6; NTCH Comments at 3-4; Oracle Comments at 5; T-Mobile Comments at 27-29; Verizon Comments at 15; WIA Comments at 11.

With the House and Senate poised to remedy this regulatory ambiguity,<sup>36</sup> TIA looks forward to collaborating with Congress on a positive framework that promotes openness across the full internet ecosystem. That said, while as an industry we are working towards a permanent legislative solution that would provide certainty, the Commission can and should act now consistent with these comments to revise the previous rules by reclassifying BIAS under Title I, eliminating the General Conduct Standard and bright line bans on paid prioritization.

## **VI. CONCLUSION**

For the foregoing reasons, TIA reiterates its initial call on the Commission to side with consumers, creators, and innovation by returning to the consensus pre-2015 Title I regime under which the internet and its diverse stakeholders have thrived.

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<sup>36</sup> See, e.g., Press Release, House Energy & Commerce Committee, [#FullCmte to Hold Hearing with Leading Edge Providers and ISPs on Ground Rules for Internet](#), (July 25, 2017) (Walden: “A strong consensus is forming across party lines and across industries that it’s time for Congress to call a halt on the back-and-forth and set clear net neutrality ground rules for the internet.”); John Thune, [“On this day of action, the internet needs a law, not a regulation.”](#) Recode (July 12, 2017) (“True supporters of a free and open internet should spend their energy today driving leaders toward a lasting and bipartisan solution”).

Respectfully submitted,

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