Before the

Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF ADTRAN, INC

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I. Introduction and Summary

In its initial comments in this proceeding,[1] ADTRAN, Inc. ("ADTRAN") demonstrated that the 2015 decision[2] to re-classify broadband Internet access service ("BIAS") as a Title II telecommunications service was flawed from a legal, technical, economic and policy perspective. In addition, ADTRAN described how the Open Internet rules and Title II "baggage" were far from the "light-touch" regulation that Congress has directed. The *2015 Open Internet Order*'s re-classification holding was driven by a desire to gain authority to adopt Open Internet rules, and conflated the telecommunications component of BIAS with the bundle of services and capabilities that is provided to customers. An objective assessment of the record would conclude that consistent with the analyses in all of the previous decisions, BIAS is an "information service." Nevertheless, ADTRAIN explained that the Commission does have authority to adopt

[1] *Restoring Internet Freedom,* WC Docket No. 17-108, FCC 17-60, released May 23, 2017 (hereafter cited as "*NPRM*").

[2] *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, 30 FCC Rcd 5601 (2015) (hereafter cited as the "*2015 Open Internet Order*").

truly "light-touch" regulations. ADTRAN in its initial comments urged the Commission to eliminate the exceedingly vague "General Conduct" rule, as well as the flat ban on paid prioritization, because those rules may preclude beneficial services. ADTRAN did not have the same objections to the rules limiting blocking and throttling, and requiring disclosures.

ADTRAN takes this opportunity to reply to some of the comments filed in response to the *NPRM*. Given the size of the record, ADTRAN is not in a position to respond to all of the comments. ADTRAN observes that almost 22 million comments have been filed in this proceeding. And while impressive, such volumes are not particularly meaningful with respect to the Commission's role in this proceeding. As ADTRAN explained in its comments in the previous Open Internet proceeding where a "measly" 4 million comments were filed:

> The Commission's role, as an expert agency, is to make a rational and informed decision after carefully assessing and weighing the evidence in the record.[3] Here, in contrast, the Commission appears to simply be responding to whoever "yells the loudest," as measured by the number of e-mails they can generate.[4] And while such "crowd sourcing" may be an appropriate means of deciding which dancing stars get voted off a TV show, it is no way to determine something as critical to our nation as Internet policies.[5]

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[3] *E.g., Qwest Corp. v. FCC*, 258 F.3d 1191, 1202 (10th Cir. 2001):

> We reasoned that the FCC is not a mediator whose job is to pick the "midpoint" of a range or to come to a "reasonable compromise" among competing positions. As an expert agency, its job is to make rational and informed decisions on the record before it in order to achieve the principles set by Congress. Merely identifying some range and then picking a compromise figure is not rational decision-making.

[4] Such processes are also subject to manipulation, as NASA discovered when it sought to name a new module at the International Space Station. *E.g.*, http://www.nbcnews.com/id/29841715/ns/technology_and_science-space/t/oops-colbert-wins-space-station-name-contest/#.U7M3t018O70 .

[5] Comments of ADTRAN in GN Docket 14-28, filed July 15, 2014 at pp. 43-44.

Indeed, the problem is exacerbated in this current proceeding, because a large proportion of the 22 million "comments" may very well be fraudulent and/or submitted by bots.[6]

A number of other manufacturers filed comments that are consistent with ADTRAN's. Indeed, there is near unanimity in the comments of manufacturing interests. To the extent there is some divergence between the positions of ADTRAN and some of the other commenters, it is because those other commenters, like the *2015 Open Internet Order*, also conflate the telecommunications component of BIAS with the service as a whole, or because they believe Title II classification of BIAS is necessary in order to provide the Commission with authority to adopt Open Internet rules. In addition, some of these other commenters erroneously claim that the distinction between "telecommunications services" and "information services" depends on whether the content is created by the ISP or third parties, but such a claim is inconsistent with the statute and with precedent. ADTRAN continues to believe that the best path forward is to re-reclassify BIAS as an "information service," and to impose only truly light-touch regulations on BIAS as ADTRAN suggested in its initial comments in this proceeding.

II. The Comments of Network Equipment Manufacturers

The other network equipment manufacturers that commented in this proceeding took positions similar to ADTRAN. Nokia in its comments supports light-touch regulations in order to further innovation and make efficient use of the networks. Thus, Nokia urges the Commission to eliminate the "General Conduct" rule and the flat ban on paid prioritization.[7] Cisco explained

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[6] *E.g.*, Opposition of CTIA, NCTA and USTelecom to Motion for Extension of Time, WC Docket No. 17-108, filed August 10, 2017 at p. 3.

[7] Nokia Comments at pp. 8-15.

in its comments that the re-classification of BIAS as a "telecommunications service" subject to Title II has harmed investment, harmed competition and innovation, and harmed consumer welfare.[8]

Sandvine in its comments described the broad range of capabilities bundled by ISPs into their BIAS offerings, thus rendering BIAS an "information service."[9] Ericsson's comments explain how the Title II re-classification and the current Open Internet rules stifle investment and innovation.[10] The Ad Hoc Coalition of 17 Small and Mid-Size Manufacturers of Products for Broadband Networks observes that Title II has had an adverse effect on broadband investment by ISPs, which also harms large and small equipment manufacturers.[11] And the Telecommunications Industry Association, with over 200 manufacturer members from the global information and communications technology (ICT) industry, described how the *2015 Open Internet Order*'s re-classification and adoption of vague and harsh rules have impeded broadband investment.[12]

There were some trade associations that include manufacturer members that advocated somewhat different positions in their comments. The Computing Technology Industry Association ("CompTIA") explains that its membership "consists of companies across the tech

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[8] Cisco Comments at pp. 7-12.

[9] Sandvine Comments at pp. 3-6.

[10] Ericsson Comments at pp. 4-10.

[11] Ad Hoc Coalition of 17 Small and Mid-Size Manufacturers of Products for Broadband Networks Comments at pp. 2-6.

[12] Telecommunications Industry Association Comments at pp. 3-9.

industry, from ISPs to edge providers to equipment manufacturers and everything in between."[13] In its comments, CompTIA suggests that the Commission has complete discretion to classify BIAS as either a "telecommunications service" or an "information service."[14] As ADTRAN explained in its comments, however, the classification of a service as a "telecommunications service" or an "information service" depends on the nature of the service and the manner in which it is offered by the service provider – it may not be a decision driven by regulatory goals.[15] Moreover, CompTIA is wrong in suggesting that re-classification of BIAS as a Title II service in the *2015 Open Internet Order* was necessary in order to adopt the Open Internet Rules.[16] The Commission has alternative paths to support the adoption of any necessary light-touch Open Internet rules.[17] ADTRAN also disagrees with CompTIA's advocacy of Commission adoption of a rule prohibiting commercially unreasonable practices that "based on the totality of the circumstances, threaten to harm Internet openness and all that it protects."[18] Such a vague rule suffers from the same defects as the "General Conduct" rule adopted in the 2015 Open Internet

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[13] CompTIA Comments at p. 1.

[14] CompTIA Comments at p. 4:

> There is sound legal grounding for either interpretation of the statute, and thus the FCC can determine which classification it believes is appropriate. Therefore there's no "correct" answer as to its proper legal classification, and there is legitimate justification for either.

[15] ADTRAN Comments at p. 4, citing *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

[16] CompTIA Comments at pp. 5-6.

[17] *See,* ADTRAN Comments at pp. 18-21.

[18] CompTIA Comments at pp. 6-7.

Order – regulators and service providers have no idea what conduct is prohibited, so that valuable and innovative services will be stifled.

In contrast to ADTRAN and the vast majority of network equipment manufacturers, the Computer & Communications Industry Association ("CCIA") filed comments challenging the *NPRM*'s proposal to reverse the *2015 Open Internet Order*'s re-classification of BIAS as a Title II "telecommunications service."[19] CCIA asserts the *NPRM* failed to address the *Advanced Services Order*,[20] but as CCIA acknowledges, that decision addressed the DSL link between the customer premise and the central office where a connection to an Internet Service provider occurred.[21] As ADTRAN explained in its comments in this proceeding, the *2015 Open Internet Order* conflated this telecommunications component of BIAS with the bundled package of services sold to the customer as Internet access service.[22] ADTRAN agrees with CCIA that the "bright line" rules against blocking and throttling (along with a "reasonable network management" exception) and requiring transparency are "light-touch" rules that can help ensure Internet

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[19] It is not clear to what extent CCIA's comments can be characterized as representing the views of telecommunications equipment manufacturers. The only CCIA member that manufacturers telecommunications equipment – Intel – in its comments in GN Docket No. 14-28 urged the Commission not to classify BIAS as a Title II "telecommunications service." https://ecfsapi.fcc.gov/file/7522668421.pdf .

[20] CCIA Comments at pp. 6-7, citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability* ("*Advanced Services Order"*), 13 FCC Rcd. 24,012 (1998).

[21] CCIA Comments at p. 7: "According to the Commission, ***the transmission component of DSL***—the phone lines that carried the information—was a telecommunications service." (emphasis added)

[22] ADTRAN Comments at pp. 5-9.

openness,[23] but the Commission does not need to classify BIAS as a Title II telecommunications service in order to adopt such rules.

CCIA also takes issue with the *NPRM*'s reliance on studies showing decreased investment since the *2015 Open Internet Order*.[24] ADTRAN has direct knowledge of anecdotal evidence of the decreases in broadband investment. And the record contains studies measuring the impact on broadband investment of those 2015 Open Internet rules. But ultimately classification of BIAS is dependent on the nature of the services being provided and how they are bundled by the service provider. It is the unnecessary and exceedingly vague Open Internet rules adopted in 2015 -- exacerbated by the "side effects" of Title II re-classification undertaken simply to provide authority for adopting those bad rules – that dis-incentivizes investment; it was not the Title II re-classification *per se* that stifles investment. Determining the precise degree of investment disincentives is unnecessary to correct the Title II re-classification, since it was wrong on the facts and wrong on the law.[25]

III. The Comments of Some Engineers and Congressmen

ADTRAN also takes issue with some of the comments filed in this proceeding by engineers. John Peha, currently a Professor at Carnegie Mellon and formerly Chief Technologist at the Commission, submitted a paper in WC Docket No. 17-108 entitled

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[23] ADTRAN Comments at pp. 25-27.

[24] CCIA Comments at pp. 13-27.

[25] In contrast, when the Commission adopted rules in 2010 based on Section 706 authority, the Commission's (incorrect) predictions with regard to a positive effect on investment incentives was very relevant to the extent the Commission in that earlier decision relied on its theory of the "virtuous cycle."

"Fallacies Behind Reclassifying Broadband Internet Access Service as an Information Service." His claim that the 2015 re-classification was correct is flawed in several respects. As an initial matter, like the *2015 Open Internet Order*, he conflates the telecommunications component of BIAS with the bundled service offered to subscribers as a whole.[26] The 1996 Telecommunications Act definition of information services – "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information ***via telecommunications***, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service"[27] -- makes clear that there is necessarily a telecommunications element to an information service. But BIAS customers buy that service because they want to generate, acquire, store, transform, process, retrieve, utilize, and make available information, and BIAS allows them to do all of those things (via telecommunications).

Professor Peha also submitted a paper in this docket entitled "Light-Touch Regulation by Banning Unreasonable Discrimination." ADTRAN agrees with Professor Peha that the "General Conduct" rule is exceedingly vague, and that only light-touch rules are necessary.[28] As ADTRAN explained in its comments, however, the Commission need not rely on Title II re-

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[26] *E.g.,* Peha Re-Classification Comments at p. 8: "The primary thing that 'consumers want and pay for' is IP Packet Transfer, which meets the definition of telecommunications under the 1996 Telecommunications Act."

[27] 47 U.S.C. §153(24) (emphasis added).

[28] Peha Light-Touch Comments at pp. 5-8.

classification of BIAS as a "telecommunications service" for authority to adopt proper, light-touch rules.

Opposition to the *NPRM*'s proposed re-reclassification of BIAS as an "information service" was also provided in a submission from a slew of "Internet Engineers, Pioneers, and Technologists."[29] However, their arguments suffer from many of the same flaws as the *2015 Open Internet Order*. Their comments do recognize that there is a telecommunications component to BIAS.[30] But then throughout their comments they conflate that telecommunications component with the bundle of capabilities that comprises BIAS. In addition, their comments over-simplify the role ISPs play in managing their customers' Internet experience.[31]

The Internet Engineers, Pioneers, and Technologists also assert that BIAS is a "telecommunications service" because customers get most of their content from third

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[29] Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC's Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order," filed in WC Docket No. 17-108 (hereafter cited as "Comments of Internet Engineers, Pioneers, and Technologists").

[30] Comments of Internet Engineers, Pioneers, and Technologists at p. 3:

> A typical ISP network connects anywhere from dozens to millions of homes and businesses (or in the case of some wireless ISPs, mobile devices) to the rest of the Internet. This connection occurs in two parts. First, the ISP must connect its customers (i.e. its retail subscribers) within a given geographic area to its own network facilities. This connection can be made over a variety of mediums: coaxial cables (originally used solely for cable TV transmission), copper wires (originally used solely for telephone communication), fiber optic cables, or, in the case of wireless ISPs, radio waves.

[31] *E.g.*, Comments of Internet Engineers, Pioneers, and Technologists at p. 9 ("All the Internet Protocol requires is for a router to read incoming packets, figure out the next hop along their path, and make its best effort to send them off. The actual specialization comes entirely from the computers and servers and smartphones that connect at the 'edge' of the Internet.").

parties,[32] but that is no different from the situation in 2002 when the Commission classified cable modem service as an "information service." Finally, the comments of the Internet Engineers, Pioneers, and Technologists suggest that Title II classification of BIAS is necessary in order to authorize the *2015 Open Internet Order*'s rules.[33] As ADTRAN explained previously, such a policy choice is not a valid basis for classification.[34] And the Commission need not rely on Title II re-classification of BIAS in order to adopt any necessary light-touch regulations.[35]

Finally, ADTRAN finds it necessary to respond to several of the claims made in the late-filed comments submitted by eleven Members of Congress.[36] These Congressmen assert that "Net neutrality is crucial to protecting free speech."[37] This lofty rhetoric rings hollow, however. There is no generalized right to "free speech" – the First Amendment applies to government attempts to control speech, and indeed government compulsion to carry speech with which a

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[32] Comments of Internet Engineers, Pioneers, and Technologists at pp. 17-18. *But c.f., ibid* at p. 22 ("Further, although Internet users obtained many functions from third parties in 2002, the wealth of capabilities that users can find on the Internet today simply did not exist at that time.").

[33] *E.g.*, Comments of Internet Engineers, Pioneers, and Technologists at p. 21 ("If the FCC reclassifies BIAS providers as information services and is unable to enforce light-touch rules against ISP interference with customer traffic, …"); *ibid*. at p. 31 ("Based on legal analysis done by others we are concerned that if the FCC proceeds with this NPRM and reclassifies BIAS providers as information services, it will be unable to enforce the light-touch, bright-line rules the FCC promulgated as part of the 2015 Open Internet Order.").

[34] ADTRAN Comments at pp. 3-4.

[35] ADTRAN Comments at pp. 18-21.

[36] Letter from Congressman Frank Pallone, Jr. and Congressman Mike Doyle in WC Docket No. 17-108, dated August 4, 2017 (hereafter cited as "Democratic Congressmen Comments").

[37] Democratic Congressmen Comments at p. 3.

company disagrees raises First Amendment concerns.[38] Indeed, such a claim that net neutrality can be invoked to protect free speech would suggest that ISPs would not be able to disassociate themselves from hate-filled social media sites.[39] In any event, the role of the Internet in facilitating communications was not changed by the *2015 Open Internet Order*'s re-classification, since the Internet played a robust part in facilitating speech prior to the Title II-based Open Internet rules. Thus, the Democratic Congressmen's speculative concerns of stifled speech are not well-grounded. Moreover, the Commission has authority to adopt any necessary, light-touch Open Internet rules without improperly classifying BIAS as a Title II telecommunications service.

The Democratic Congressmen also raise concerns regarding the potential adverse effect of the *NPRM* on small business, economic development and jobs.[40] But again, the Internet supported all of these before the 2015 Title II-based Open Internet rules. In contrast, the stifling effect on broadband investment caused by the 2015 Open Internet rules will harm small business, economic development and jobs.[41] Indeed, the flat ban on paid prioritization cements the

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[38] *E.g., USTelecom v. FCC*, 855 F.3d 381, 428 (D.C. Cir. 2017)(Kavanaugh, J., dissenting from the denial of rehearing *en banc*) ("Internet service providers enjoy First Amendment protection of their rights to speak and exercise editorial discretion . . . ." (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994)).

[39] *Cf.*, New York Times, "This Was the Alt-Right's Favorite Chat App. Then Came Charlottesville," available at https://www.nytimes.com/2017/08/15/technology/discord-chat-app-alt-right.html.

[40] Democratic Congressmen Comments at pp. 5-7.

[41] *Cf., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3266 (2017) at ¶ 1.

> High-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband can create economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries.

advantages enjoyed by the largest edge providers that presently obtain the functional equivalent of priority access by constructing their own extensive networks that interconnect directly with the ISPs.[42]

The Democratic Congressmen also claim that the Commission's proposals raise privacy concerns.[43] There is some irony in claiming that the *NPRM* fails to address adequately privacy concerns, because it was the re-classification of BIAS as a Title II telecommunications service that divested the Federal Trade Commission ("FTC") of jurisdiction to regulate the privacy practices of ISPs. As ADTRAN has explained elsewhere, the same privacy protections should apply across the Internet ecosphere,[44] and the *NPRM* can help accomplish that by re-reclassifying BIAS as an information service, and thus restoring authority to the FTC so that uniform requirements can apply across the marketplace.

The Democratic Congressmen additionally criticize the *NPRM* for focusing too much on the impact of the *2015 Open Internet Order* on broadband investment.[45] The decision with regard to classification of a service as an "information service" or a "telecommunications service" should be driven by the particular facts and circumstances under which the service is offered, not by a desire to achieve a particular policy goal.[46] But the adverse effects on

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[42] *See*, ADTRAN Reply Comments in GN Docket No. 14-28, filed September 15, 2014, at pp. 18-19.

[43] Democratic Congressmen Comments at pp. 8-9.

[44] *See*, ADTRAN Comments in WC Docket No. 16-106, filed May 27, 2016 at pp. 6-10.

[45] Democratic Congressmen Comments at pp. 9-10.

[46] ADTRAN Comments at pp. 3-4.

broadband investment is relevant to the particular rules that are adopted, and the public interest is harmed when such investment is stifled. The decline in investment following the *2015 Open Internet Order* reflects the heavy-handed and vague rules that were adopted, which was exacerbated by the Title II re-classification. The *NPRM* was thus right to raise this issue. The Democratic Congressmen also fault the Commission for using unreliable data on broadband deployment,[47] but the *2015 Open Internet Order* relied on those same data sources. While arguably not perfect, the data is consistent over time, thus allowing accurate measurement of trends.

ADTRAN disagrees strongly with the claim of the Democratic Congressmen that the distinction between "information services" and "telecommunications services" is creating versus carrying content.[48] Such an assertion is inconsistent with the statutory definition of "information service."[49] The ISPs' customers retrieve and manipulate information and content stored/cached in the ISPs' networks, as well as from third parties. Indeed, that was the case going all the way

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[47] Democratic Congressmen Comments at pp. 10-12.

[48] Democratic Congressmen Comments at pp. 12-13.

[49] The Democratic Congressmen indicate (at p. 12-13) that "In the Act, we labeled services that create content as 'information services' which we defined as those that offer the capability to generate content ***among other things***." (emphasis added). But the statutory "other things" includes the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. §153(24). Which is far more than simply "generating content."

back to "enhanced services" under the pre-1996 Telecommunications Act scheme,[50] and the "information services" category mirrors the pre-1996 "enhanced services" category.[51]

Finally, the Democratic Congressmen speculate that the *NPRM* may be tainted by White House influence.[52] Even assuming *arguendo* that the White House "directed" the policy underlying the issuance of *NPRM*, the proposals are public and subject to comment by all interested parties. And of course any rulemaking decision must be justified by record evidence and subject to judicial review. So in this case, any alleged undue influence would be "harmless error" in any event. In contrast, apparently the previous Chairman disregarded the career staff's advice to seek additional comment when he reversed course on the Title II classification at the behest of the White House,[53] so there was no similar opportunity for public input. Indeed, the *NPRM* was subject to the Commission's new procedures of publicly releasing a draft of the item before it was voted on at the Commission's public meeting. Thus, this process has been much more transparent than when the *2015 Open Internet Order* was adopted.

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50 *E.g.*, *Bell Atlantic Tel. Cos.*, 3 FCC Rcd 6045 (Com. Car. Bur. 1988) (a "gateway service" that would "allow a customer with a personal computer . . . to reach an array" of "databases providing business … investment, . . . and entertainment information" was an unregulated enhanced service).

51 *E.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975–77 (2005).

52 Democratic Congressmen Comments at pp. 14-15.

53 *See*, "Regulating The Internet: How The White House Bowled Over FCC Independence," A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs, United States Senate (February 29, 2016) at pp. 17-22 (available at https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-how-the-white-house-bowled-over-fcc-independence).

In sum, ADTRAN believes the record fully supports the *NPRM*'s proposals to re-reclassify BIAS as an "information service" and only apply truly light-touch regulations, consistent with ADTRAN's comments in this proceeding.

Respectfully submitted,
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