

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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The Telecommunications Industry Association (“TIA”) respectfully submits these comments in the above-referenced proceeding.¹ As both an advocacy organization and a standard-setting body, TIA represents hundreds of global manufacturers and vendors of information and communications technology (ICT) equipment and services that are supplied to critical infrastructure owners and operators, enabling network operations across all segments of the economy.²

TIA was officially founded in 1988, and since that time has been, along with its members, integral to cultivating the technological foundation upon which the Internet was born and continues to grow. As the capabilities of the modern Internet grow, so too does the demand and need for faster and more reliable Internet service. Capacity for that service is finite, however, and industry, government, and consumers must make decisions about how best to use limited network resources. Most of these decisions are simple matters that involve optimizing certain

¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (May 18, 2017) (“Notice”).

² TIA is the leading trade association for the information and communications technology (“ICT”) industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on industry standards.

types of traffic for certain consumers: feeling the rush of online gaming requires high-speed, low-latency connections that allow for near-real-time interactions with teammates, opponents, and friends; geographically disparate users require high-reliability, low-latency connections for VoIP calls to colleagues and family; those seeking only to browse the Internet, exchange emails, or stream music require significantly fewer provider resources and real-time data transfers. These choices maximize efficiency, provide improved service, and lower costs for both providers and consumers. However, the Federal Communications Commission (the “Commission”) decided in 2015 to reclassify broadband Internet access service (“BIAS”) as “telecommunications services” regulated under Title II of the Communications Act, designating Internet service providers (“ISPs”) as common carriers.³ This decision placed reams of anachronistic regulations and miles of red tape on the once-innovative marketplace and crippled the industry’s ability to make efficient choices, relegating the entire Internet economy to a state of apprehension and uncertainty, and denying consumers the full scope of potential product and service offerings.

Enacted more than eight decades ago and last updated in 1996, Title II of the Communications Act was designed to govern naturally monopolistic technologies like telegraph and narrowband wireline telephony, which was extremely costly to deploy and whose relatively static development was essential to modern life. While the Internet is no less essential to modern life today, it does not function like a common carrier service. Its history is marked by rapidly disruptive innovation, a continual flux of competition and competitors, and shifting business models throughout the network. The application of common carrier status to ISPs confines the industry to an old and ill-fitting model, undermining deployment and innovation and thereby

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5618 at para. 59, GN Docket No. 14-28 (Feb. 26, 2015) (“Title II Order”).

harming consumers. Proponents claim the Commission’s forbearance from these rules free ISPs from most of their obligations under Title II, but the 2015 order’s conditional assurances of forbearance, coupled as they were with threats to apply the same requirements by reversing forbearance at a later date, create more — rather than less — uncertainty in the industry.

With the weight of evidence favoring the traditional light-touch regulatory framework under which the Internet has grown and thrived, the Commission now has the opportunity to remedy its recent error and restore the Internet to its proper “information service” classification under Title I. By reinstating the Title I classification, the Commission will unleash ISPs to deploy ever faster and more robust broadband service and enable businesses to offer new services and innovative products to consumers. This freedom is critical to bridging the digital divide, which will require creative solutions and a flexible regulatory structure so that entities across the nation can test new methods and tailor options. As machine-to-machine communications multiply, enabling vast quantities of data to travel across networks in service of connected vehicles, smart infrastructure, enhanced medical devices, and much more, networks themselves must become smarter and more efficient. To prevent stagnation and to allow technology to reach its full potential, the Commission should seize this opportunity and restore broadband Internet access to its proper status as an information service under Title I.

I. REINSTATING THE “INFORMATION SERVICE” CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE WILL SUPPORT INCREASED BROADBAND DEPLOYMENT AND FOSTER GREATER INNOVATION

TIA has long supported a free and open Internet. As an original founder of the High Tech Broadband Coalition, TIA helped to develop the “Broadband Principles for Consumer Connectivity,” which closely coincided with the principles embodied in the *Internet Policy*

Statement that the FCC adopted in August 2005.⁴ We continue to support the four principles outlined in that policy statement, namely that consumers should be entitled to: (1) access the lawful Internet content of their choice; (2) run applications and services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, application and service providers, and content providers.⁵

The Commission’s 2015 reclassification decision, however, strayed far from these basic principles, to the detriment of consumers and the Internet ecosystem itself. That decision departed from the FCC’s long, consistent, and bipartisan history of treating Internet access as a lightly regulated “information service” under Title I. It also punished providers and vendors who acted in reliance on the agency’s long-standing approach by deploying new network infrastructure, even though the Commission had expressly *invited* such reliance in an effort to promote broadband investment.⁶ ISPs took the FCC up on this invitation, driving more than \$800 billion into the nation’s broadband infrastructure from 2002 to 2014.⁷ The *Title II Order*

⁴ See Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. on Telecomm. & High Tech. L. 5, 11-12 (2004) (stating that if the Commission can “secure a reasonable balance between the needs of network providers and Internet Freedom, consumers will reap the benefits of broadband *without intrusive regulation*, while preserving industry’s incentives to deploy more high-speed platforms”). Compare Ex Parte Letter from the High Tech Broadband Coalition to FCC Chairman Michael K. Powell, (Jan. 8, 2003) (“[Coalition Letter](#)”), with Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket Nos. 02-33, 98-10 & 95-20 and CS Docket No. 02-52 Policy Statement, FCC 05-151 (Aug. 5, 2005). Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket Nos. 02-33, 98-10 & 95-20 and CS Docket No. 02-52 Policy Statement, FCC 05-151 (Aug. 5, 2005).

⁵ See [Coalition Letter](#) (Jan. 8, 2003).

⁶ See *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007), *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 98-10 & 95-20 and CS Docket No. 02-52, Policy Statement at p.5, FCC 05-151 (Aug. 5, 2005) (“To foster creation, adoption and use of Internet broadband content, applications, services and attachments . . . the Commission will incorporate the above principles into its ongoing policymaking activities”); See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d sub nom.*

⁷ “[U.S. Investment Heroes of 2014: Investing at Home in a Connected World](#),” Diana G. Carew and Michael Mandel, (Sept. 10, 2014).

has placed their investments at risk and undermined the value of their deployments without any commensurate benefit to consumers.

With evidence now showing that the 2015 rules have impeded broadband investment that would otherwise have been made, the Commission must focus on action that will spur greater private investment in new and upgraded broadband networks.⁸ More capacity is needed to meet growing consumer demand for both wired and wireless broadband, to address the “digital divide,” and to support the development of new services that need infrastructure capable of guaranteeing high quality of service (“QoS”).⁹ Restoring the Internet to its original designation as an “information service” under Title I will benefit consumers and providers alike.

Given the rapid pace of change in the Internet economy and service provider experimentation with evolving technologies and new business models, a return to Title I will also provide the regulatory certainty that companies need to develop and pursue innovative service offerings without the constant fear of micromanagement, second-guessing, and capricious enforcement by the FCC.

⁸ See e.g. Hal Singer, “[2016 Broadband Capex Survey: Tracking Investment in the Title II Era](#),” GW Institute for Public Policy, (Mar. 1, 2017) (showing that \$3.6 billion among 12 firms in 2016 lost in capital expenditures). See also Anna-Maria Kovacs, [Regulation in Financial Translation: The Effect of Title II Classification on Wireless Investment](#), Georgetown Center for Business and Public Policy, (July 2017) (showing that wireless capital investment fell from 18 percent of wireless revenues in 2013 to 14 percent by 2016); Patrick Brogan, “[Utility Regulation and Broadband Network Investment: The EU and US Divide](#),” U.S. Telecom (Apr. 25, 2017) (examining the adverse effects Title II-like regulations have had on European investment levels and explaining that “based on OECD data, U.S. broadband investment could decline as much as 50% if it fell to European levels, a reduction in infrastructure investment of roughly \$44 billion dollars yearly.”).

⁹ [Cisco Visual Networking Index: Forecast and Methodology](#), 2016–2021, (last visited June 6, 2017) (showing that global IP traffic is projected to triple by 2021).

A. *BECAUSE BROADBAND DOES NOT FUNCTION LIKE AN OLD-FASHIONED TITLE II COMMON CARRIAGE SERVICE, REGULATING IT IN THAT MANNER IMPOSES REAL HARMS*

Common carriage rules were devised for technologies – first railroads, then analog telegraphy and then voice telephony supported by copper wires – that were relatively static for many decades after they were introduced. While the rules grew more complex over time, the static and relatively uncompetitive marketplaces in which these services operated helped ensure that the growing morass of regulatory mandates did not inflict much damage on network innovation. As a result, in a period during which the pace of change was slow compared to today’s Internet-driven economy and competition was non-existent, regulation was not a significant bar to the development and deployment of more powerful train engines or the computerization of telephone exchanges.

In contrast, broadband technologies are developing and changing at a breakneck pace, such that ambiguous common carrier regulation that was well-suited to governing trains and telegraphs is a substantial impediment to broadband innovation. The introduction of broadband technologies did not only completely upend the telephone marketplace; broadband *itself* has morphed dramatically in the two decades since consumers first began adopting it – and it continues to do so.¹⁰ Heavy-handed common carrier regulations force manufacturers, ISPs, and others to second-guess every new development and turn every innovation into a calculated gamble.

¹⁰ Since Martin Cooper of Motorola introduced DynaTAC, the first commercially available handset, in 1973 to the early 2000s, when 3G technology made web-browsing feasible on mobiles, to now as we eagerly anticipate the almost limitless capacity of 5G, rapid transitions in broadband capabilities distinguish it from common carrier technologies. See [“Wireless: the next generation: A new wave of mobile technology is on its way, and will bring drastic change.”](#) The Economist, (Feb. 20, 2016).

Investment is necessary to spur the development of new services dependent on robust broadband networks that can guarantee high QoS for the connections.¹¹ For example, achievable visions for the future delivery of innovative health-care services – including health monitoring services that allow the elderly or far-flung rural patients to communicate with their doctors from home – could have a dramatic impact on life expectancy and quality.

Companies, however, need regulatory predictability to justify increasing their investments. Even where the FCC has exercised its power to forebear from applying specific common carriage rules, that decision affords providers no long-term security, because those forbearance choices could be changed by any future FCC – as the *Title II Order* makes quite clear, referring repeatedly to its decisions not to apply a given mandate “at this time” or “for now.” This uncertainty forestalls long-range planning and inhibits decisions on early investment. It can limit steps in the planning and investment process, causing delays or even stopping the process entirely.¹² In the wake of the *Title II Order*, TIA member’s customers have raised concerns about investing due to limited options and the potential for reactionary backlash from the Commission.

The certainty of light-touch regulation is critical for nurturing an environment in which companies are willing to devote resources to developing innovative services and testing their potential in the marketplace. The 2015 rules stymied such innovation. The new rules have

¹¹ Ericsson, “[Keeping the Internet Open for Innovation](#)” at 8 (June 2015). (“In a scenario where all bits are treated equally . . . a service [] provider could use repetitive codes to ensure QoS. This uses a large amount of bandwidth and network resources, hampering the experience of others sharing the same network. [T]he use of innovative compression, coding and QoS mechanisms would help to ensure both reasonable and fair network and bandwidth allocation.”).

¹² See *supra* n.8 [AT&T to Pause Fiber Spending on Net Neutrality Uncertainty](#), statements of Randall Stephenson CEO AT&T (“We can't go out and invest that kind of money deploying fiber to 100 cities not knowing under what rules those investments will be governed We think it is prudent to just pause”).

forestalled development and the roll-out of new services. In the wake of the *Open Internet Order* companies have had to enlist lawyers to vet new engineering and business ideas, occasionally abandoning the pursuit of new concepts altogether.

More investment in broadband infrastructure is critical to realizing the potential of the Internet of Things and actually achieving the Commission’s mission of universal service. Bridging the digital divide will require creative solutions and a flexible regulatory structure so that entities across the nation can test new methods and tailor options. As machine-to-machine communications multiply, enabling vast quantities of data to travel across networks in service of connected vehicles, smart infrastructure, enhanced medical devices, and much more, networks themselves must become smarter and more efficient.

Investment is necessary to meet growing consumer needs and demands: Broadband networks face a looming congestion problem that likely will impede innovation – and frustrate millions of Americans – unless capacity constraints are addressed. For example, Cisco recently forecast that mobile data traffic will grow fivefold from 2016 to 2021, a compound annual growth rate of 35%.¹³

Investment is necessary to address the “digital divide.” There is widespread bipartisan concern that those Americans still not connected to broadband today will fall farther behind in terms of access to information, education, health care, job opportunities, as well as all the other communications needs that the Internet serves.¹⁴ Many of these Americans live in hard-to-serve

¹³ *Supra* n.9.

¹⁴ “[13% of Americans don’t use the internet. Who are they?](#)” Pew Research Center, (Sept. 7, 2016).

rural and urban-core areas where high-risk investments already are challenging – government policies must make such investments more attractive, not less, if the digital divide is to be closed.

B. THE “GENERAL CONDUCT RULE” ONLY EXACERBATES THE REGULATORY UNCERTAINTY INHERENT IN TITLE II CLASSIFICATION

The inherently vague nature of the General Conduct Rule is – ironically – demonstrably clear. In his now oft-quoted comments following the Commission’s adoption of the 2015 regulations, then-Chairman Tom Wheeler himself could not describe the General Conduct Rule’s boundaries. “We don’t really know. We don’t know where things will go next. We have created a playing field where there are known rules, and the FCC will sit there as a referee and will throw the flag.”¹⁵ Businesses cannot operate in world where arbitrary enforcement action may be looming around any corner.

The General Conduct Rule prohibits broadband providers from “unreasonably interfer[ing] with or unreasonably disadvantag[ing] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.”¹⁶ Even with a record containing millions of comments, at a time when zero-rating plans were at the center of debate over net neutrality concerns, the Commission was unable to decide whether these plans were or were not barred by the General Conduct Rule. In fact, a year-long Bureau investigation of these practices still failed to produce certainty.¹⁷

¹⁵ See [Statements from Chairman Tom Wheeler](#), FCC Open Meeting at 165:30 – 166:52 (Feb. 26, 2015).

¹⁶ See *Title II Order* at para. 21.

¹⁷ [Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services](#), (WTB Jan. 11, 2017), (*Zero Rating Report*). That report was subsequently

In an effort to delineate the fuzzy line the rule sets down, the *Title II Order* offered a “non-exhaustive list of factors” that the agency would consider in ruling on any complaint: end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnosticism; and standard practices. While this non-exhaustive list may have been sufficient to save the General Conduct Rule from facial legal challenge in *U.S. Telecom v. FCC*, the same cannot be said of the rule as a *business* matter. In any event, the additional degree of uncertainty created by the General Conduct Rule simply makes a bad situation even worse.

II. BECAUSE PRIORITIZATION OF BROADBAND TRAFFIC IS, AND ALWAYS HAS BEEN, CRITICAL TO THE INTERNET’S OPERATION, THE FCC SHOULD ELIMINATE ANY RESTRICTIONS THAT WOULD IMPEDE NETWORK MANAGEMENT OR THE DEVELOPMENT AND DELIVERY OF INNOVATIVE SERVICES

Prioritization is key to how broadband networks function. The traffic management processes encompassed by the term “prioritization” deliver the quality experiences that broadband consumers expect, and these prioritization processes continue to grow more important over time as we ask networks to perform more tasks. Consequently, the maintenance of vague, complex rules about when prioritization can be used, how it gets paid for, and what practices are prohibited would be unsustainable. Growing use of high-definition video for telehealth, public safety, and other services on the horizon like 5G and IoT require prioritization – and many of these applications either today are, or soon could be, provided with or via broadband Internet access service. As the rate and sophistication of cybersecurity attacks increase, developing

rescinded. *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services*, DA 17-127, released February 3, 2017.

resilient networks will require prioritization. Ultimately, as more and more capabilities are realized, future products and services will require the ability to prioritize as well.

Even where the current rules do not necessarily preclude activities that are necessary to contemporary networks, the uncertainty over their scope is itself harmful. Today’s regime requires network engineers and solutions developers to be regulatory experts, or at least to consult with regulatory experts, to determine whether a practice will violate the law, or to predict that a practice might be deemed to violate the law. The multi-sided market involving consumers, wireless operators, and application and over-the-top providers is still rapidly developing. Given enormous technological changes on the horizon (such as wireless 5G) that will revolutionize network capabilities, it is extremely difficult to predict the applications, services, and uses that will emerge even over a relatively short time horizon. Capabilities such as remote health-care monitoring, health service delivery by mobile networks, and connected vehicle technologies will all require networks that can ensure a level of service quality that current networks cannot today fully support. Significant investments will be required to move broadband networks forward to this promising future. An uncertain regulatory climate or inflexible “one size fits all” regulation would hinder innovation in those areas – areas where the U.S. currently enjoys a competitive edge.

III. THE FCC HAS LEGAL AUTHORITY TO RETURN TO ITS ORIGINAL CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE AS A LIGHTLY REGULATED TITLE I “INFORMATION SERVICE”

The Commission is well within its powers to “re-reclassify” broadband as a lightly regulated Title I information service, founded on the recognition that marketplace forces largely and effectively ensure that ISPs work diligently to serve their customers’ needs – and that

elimination of vague and unnecessary regulation is likely to prompt greater investment in new and upgraded broadband infrastructure.

Court rulings on the FCC’s broadband classification decisions over the years, beginning with the Supreme Court’s 2005 *Brand X* decision and running through the D.C. Circuit’s 2016 *U.S. Telecom* decision, agree on one finding: The relevant statutory terms are ambiguous.¹⁸ They therefore are subject to reasonable interpretation by the Commission, so long as the outcome is “within the limits of [Congress’s] delegation of authority, *Chevron*, 467 U.S. at 865, and not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹

The Supreme Court also has made clear that an agency may change its interpretation of a statute – and that the evidentiary support needed to justify the change is no greater than the support needed for the earlier interpretation.²⁰ In this case, however, the FCC already has considerable empirical data to more than justify the return to Title I. The Commission already has evidence on hand indicating that the 2015 rules rest on the erroneous prediction that common carriage would have no negative impact in the marketplace. The Title II classification has, as the NPRM explained, slowed investment in broadband infrastructure.

The NPRM’s analysis of the statutory construction flaws behind the 2015 rules– much of which is directly supported by the Supreme Court’s *Brand X* decision – also is correct. The same

¹⁸ See *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 986-989 (2005) (holding that the key statutory term “offering” in the definition of “telecommunications service” in the Communications Act is ambiguous) (“*Brand X*”). See also *United States Telecom Association, et. al. v. FCC*, 825 F.3d 674, 702 (2016) (“*U.S. Telecom*”).

¹⁹ 5 U.S.C. § 706(2)(A).

²⁰ *FCC, et. al. v. Fox Television Stations, Inc., et. al.*, 129 S. Ct. 1800 (2009).

infirmities plague the 2015 construction of the statutory provisions relevant to mobile broadband service.

IV. CONCLUSION

Classification of broadband Internet access services as a common carrier “telecommunications service” under Title II of the Communications Act discourages investment in the network – investment that is critical to bringing more access to more people and fostering the ecosystem of innovation relying on the network. Prioritization has always been critical to network management and will only become more important as new technologies emerge. The Commission has the legal authority to reclassify the Internet as an information service under Title I and should do so to enable the Internet to reach its full potential.