



By Electronic Delivery

February 18, 2015

Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of Protecting and Promoting the Open Internet, Framework for Broadband Internet Service; GN Docket No. 14-28, GN Docket No. 10-127

Dear Chairman Wheeler:

The Telecommunications Industry Association¹ (“TIA”) hereby submits this ex parte communication to the Federal Communications Commission (“Commission”) to expand on our prior comments in the Open Internet proceeding.²

What is its most effective means to achieve the policy objective of an Open Internet?

Broad agreement exists on the record that Internet users should be assured of unfettered access to their choice of content or services. The record indicates no appetite for empowering Internet Service Providers as “Internet Gatekeepers,” with the ability to decide what content or

¹ TIA is a Washington, DC-based trade association and standard developer that represents the global information and communications technology (ICT) industry through standards development, advocacy, tradeshow, business opportunities, market intelligence and world-wide environmental regulatory analysis. For over eighty years, TIA has enhanced the business environments for broadband, mobile wireless, information technology, networks, cable, satellite, and unified communications. TIA’s hundreds of member companies’ products and services empower communications in every industry and market, including healthcare, education, security, public safety, transportation, government, the military, the environment, and entertainment. TIA is an accredited standard development organization for the ICT sector by the American National Standards Institute (ANSI).

² See, TIA Reply comments with FCC on Protection and Promoting the Open Internet (with Declaration of Alcatel-Lucent) (September 15, 2014) “TIA Reply Comments”; TIA Comments with FCC on Protecting and Promoting the Open Internet (July 15, 2014) “TIA Comments”; TIA letter on Open Internet to House Judiciary Committee (June 18, 2014) <http://www.tiaonline.org/sites/default/files/pages/TIA%20Open%20Internet%20House%20Jud%20letter%2006%2018%202014.pdf>; TIA Letter on the Senate Judiciary Committee, (September 16, 2014) <http://www.tiaonline.org/sites/default/files/pages/TIA-Open-Internet-Senate-Jud-letter-09-16-14.pdf>; TIA letter to FCC on Protecting and Promoting the Open Internet (May 13, 2014); TIA Comments to FCC on Open Internet Remand (March 21, 2014)

services users can reach. The Commission’s long standing policy promoting the open and interconnected nature of the public Internet is not fundamentally in question.³

The central choice the Commission faces, then, is what is its most effective means to achieve the policy objective of an Open Internet?

Using Title II

TIA has previously joined others in observing that a decision for reclassification under Title II raises thorny questions regarding the distinction to be made between the various entities other than broadband Internet access providers that own broadband facilities or transmit information by wire or radio and thus would fall within the scope of regulation. For example, the Commission would need to evaluate existing regulations to determine which specific mandates would, or would not, be appropriate.⁴ Doing so would require some reliance on the Commission’s forbearance authority,⁵ a process that itself is cumbersome, unpredictable, and prone to uncertainty.⁶

However some of these challenges associated with Title II forbearance might be addressed at the outset with a clear determination only to employ only those sections which directly apply to the Commission’s Open Internet policy goals for “broadband Internet access service.”

TIA notes the focused use of Title II advocated by Compel, the Computer & Communications Industry Association (CCIA), Engine and the Internet Freedom Business

³ See, “FCC Adopts Policy Statement: New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet” (August 5, 2005) https://apps.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf, Chairman Michael Powell speech “Internet Consumer Freedoms” (October 19, 2004) https://apps.fcc.gov/edocs_public/attachmatch/DOC-253325A1.pdf, 2010 Open Internet R&O https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf (rel. December 23, 2010)

⁴ See, TIA Comments at 16-17; *see also* Ericsson Comments at 12 (Reclassification would force the Commission to “recognize that an admittedly overly burdensome set of requirements is not appropriate for a dynamic industry, apply those requirements anyway, but in the same breath make the determination that only a subset of those requirements should *actually* apply.”); Tech Freedom and International Center for Law and Economics Comments at 37-41.

⁵ See, CenturyLink Comments at 49 (“[U]nder Section 10’s forbearance standard, the Commission would have to forbear from the application of all provisions in Title II.”).

⁶ See, e.g., WISPA Comments at 41 (“The time, effort, and legal fees associated with participating in multi-faceted and potentially contentious forbearance proceedings would place small businesses at an extreme disadvantage given their lack of resources. And just because the Commission has the right to forbear does not mean that a majority of the Commissioners will make the right legal or policy decision every time. Moreover, forbearance now is no guarantee about forbearance in the future.”).

Alliance (IFBA): “Application of three provisions of Title II—201, 202, and 208—is all that is required to provide the firm legal foundation for Open Internet rules.”⁷

As they note in further explanation: “[I]t is not necessary that the Commission adopt onerous regulations to accomplish a firm legal foundation for the Open Internet rules. We urge you to move forward expeditiously and adopt Open Internet rules using a light-touch policy framework to provide the clarity and certainty that all stakeholders are seeking from the Commission in this proceeding.”⁸

The Commission’s decision contained in the 2015 Broadband Progress Report⁹ raising its broadband benchmark speed to 25Mbps down/3Mbps up underscores the necessity of continued broadband infrastructure investment. Achieving the desired more than 600% increase in download speeds requires the telecommunications industry to maintain a very robust investment pace. Yet in December sixty of America’s top technology companies warned that over-regulation could result in a reduction of up to \$45.4 billion in potential capital investment over the next five years.¹⁰ By clearly articulating such a focused approach to Title II from the outset, the Commission can mitigate some of the adverse impact that regulatory uncertainty will have on continued broadband investment.

Creating Marketplace Rules – Conducting a Competitive Analysis

As the Notice acknowledges, a key test both for enforcement and for evaluating marketplace practices will be consideration of issues of “market structure and the extent of competition in a given market.”¹¹ To the extent that the Commission undertakes such a competitive market analysis, TIA suggests that in cases involving a challenge to a newly introduced broadband service or practice, the broadband provider could, at its option, rest on a showing that the relevant broadband market in which the new service or practice is being offered is currently performing competitively. Where markets are determined to be competitive, the Commission would conclude that new services and practices are commercially reasonable. Such a conclusion coincides with past Commission precedent directly on point.¹²

⁷ See, Ex Parte Letter from Compel, the Computer & Communications Industry Association (CCIA), Engine, Internet Freedom Business Alliance (IFBA) to Marlene H. Dortch, Secretary, Commission, GN Docket No. 14-28, Protecting and Promoting the Open Internet. (filed Dec. 30, 2014)

⁸ Ibid

⁹ See, Fourth International Broadband Data Report (2015); FCC FINDS U.S. BROADBAND DEPLOYMENT NOT KEEPING PACE: Updates Broadband Speed Benchmark to 25Mbps/3 Mbps to Reflect Consumer Demand, Advances in Technology, Adopted January 29, 2015 (Report Rel. February 4, 2015)

¹⁰ See, Ex Parte Letter from Telecommunication Industry Association filed on behalf of multiple companies to FCC Chairman Wheeler et al., GN Docket No. 14-28, Protecting and Promoting the Open Internet, (filed Dec. 9, 2014) https://www.tiaonline.org/sites/default/files/pages/Internet_ecosystem_letter_FINAL_12.10.14.pdf

¹¹ Notice ¶¶ 124-25.

¹² See, e.g. *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3285-92 (1995).

The scope of “broadband Internet access service” should be limited to retail broadband service purchased by the general public from cable, phone, and wireless providers on a subscription basis. Beyond our broader concerns about Title II, TIA believes that it is especially ill-advised to extend Title II regulation to “edge providers” even if bundling retail broadband service with an application, service or device. While certainly not the Commission’s intention to do so, this could have unintended consequences of inhibiting innovation in new products, business models and services.

For example, edge providers may bundle a limited broadband service with a device that supports access to the service designed to be used with the device. The proposed rules could inhibit “edge-providers” from developing devices which incorporate broadband services that also furnish wireless connectivity. The business model for such bundles is achieved only by limiting the use of broadband to specifically tailored services and bandwidth loads to keep the bundle affordable.

- For example, if a health-care remote monitoring device furnished by a provider could only connect to that specific provider, would the rules apply?
- Alternatively, if an e-book reader was intended to be used only with a particular e-book retailer, would the device or application be required to allow offerings from competitive retailers?

Edge providers who wish to provide broadband service via Wi-Fi for use in a facility may also need to think twice before offering such a service. In such cases, the facility owner may wish to limit the kinds of applications used (e.g. only to email or web) in order to limit the bandwidth load and ensure that their facility’s limited bandwidth connection can be available to be shared with all customers. Examples of such services may include:

- Would the proposed rules cover any facility (i.e. a coffee shop or hotel) in which Wi-Fi service is offered to their customers?
- Would the rules apply, for example, to in-flight Wi-Fi service provided by a plane operator using a satellite or ground-to-air system?

To avoid triggering an unending series of case-by-case exemption requests or competitive analyses that could create substantial uncertainty and inhibit innovation, the Commission should adopt a presumption that a given broadband market is competitive – and that the practice in question thus is commercially reasonable – unless a complainant presents clear and convincing evidence to the contrary. This procedure would preserve the ability to undertake a meaningful competitive analysis without forcing broadband providers to make a specific showing for each and every new practice or service they launch or seek to introduce. For these reasons, the Commission should not apply Title II to “edge providers” or to broadband service that provided by facility operators or bundled with an applications, service or device.

Respectfully submitted,

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