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

In the Matter of	
Protecting and Promoting the Open Internet	GN Docket No. 14-28
Framework for Broadband Internet Services	GN Docket No. 10-127

REPLY COMMENTS OF THE INTERNET ASSOCIATION, INC.

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I. INTRODUCTION

The Federal Communications Commission in the initial round of this proceeding received more comments than any other proposed rulemaking before any agency of the federal government. The public has spoken. It has reminded the Commission that the Internet is an indispensable platform for entertainment, commerce, innovation, and democratic discourse. Yet, this docket—and the dockets that led to this one—also demonstrate that the Internet must be defended from interests that would seek to control speech on the Internet, censor content, or provide advantages for speakers that have the means to pay for better access.

At this critical juncture, the Commission should send a clear message not only to stakeholders in the United States, but also to interests around the world that would threaten the openness that has made the Internet the vital communications platform that it is today. It should adopt rules that clearly, unambiguously, and definitively protect an Internet that is free from interference from gatekeepers who would seek to make unilateral decisions about speech on the Internet.

The Commission should reject the trap of "Washington noise" that argues that gatekeepers should be allowed to experiment with pay-to-play deals or that strong rules must be

circumscribed by an unnecessarily restrictive legal framework. Those arguments are of no consequence to the public. Fortunately, the Commission has ample authority to adopt a framework that over a million Americans have said must be implemented to preserve and protect an open Internet. Anything short of that will be judged as a failure.

The Internet Association stands with the public in encouraging the Commission to adopt strong nondiscrimination and no blocking rules to protect consumers, startups, and innovation. These rules must not distinguish among the technologies used by consumers to access the Internet; in particular, the rules must apply to both wired and wireless networks. There is only one Internet and the FCC's openness rules should recognize that.

In the debate about keeping the Internet open there has been too much rhetoric surrounding the FCC's legal tools. Protecting an open Internet, free from discriminatory or anticompetitive actions by broadband gatekeepers, should be the cornerstone of the Commission's network neutrality policy. The Internet Association will continue to stand with Internet users in asking the Commission to use its full legal authority to adopt rules that unambiguously protect an open Internet—nothing should be taken off the table as this discussion evolves.

The Commission should make clear that broadband gatekeepers should not have the ability to create slow lanes and fast lanes on the Internet that discriminate against speech and harm users. We look forward to working with Chairman Wheeler and his fellow commissioners at the Commission to ensure that the Internet remains a vibrant platform for consumer choice, economic growth, and social inclusiveness.

II. ROBUST TRANSPARENCY REQUIREMENTS ARE NECESSARY, BUT INSUFFICIENT BY THEMSELVES, TO PROTECT CONSUMERS

BIAS providers argue that consumers can be protected through the adoption of transparency rules without further rules preventing blocking or discrimination among lawful speech. This issue already has been settled. In the 2010 rules, the Commission explained that, "although transparency is essential for preserving Internet openness," it was not convinced that "a transparency requirement by itself will adequately constrain problematic conduct."[1] The reason for that pessimism is simple: absent meaningful competition among BIAS providers and low switching costs, transparency rules do little to help consumers.[2]

Lack of Competition. Consumers have too few choices among BIAS providers, particularly those that offer truly high-speed Internet access. As Chairman Wheeler recently explained, "meaningful competition for high-speed wired broadband is lacking and Americans need more competitive choices for faster and better Internet connections, both to take advantage of today's new services, and to incentivize the development of tomorrow's innovations."[3] Consumers have a choice of an average of three providers of fixed-location connections at speeds of at least 6 Mbps.[4] As the Commission has recognized, however, the modern trend among consumers is to use more rich media content and more devices, pushing the minimum

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[1] Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905, 17931 ¶ 61 (2010) ("*Preserving the Open Internet Order*").

[2] *Id.* at 17941 ¶ 61 n.194 (citing Barbara van Schewick, *Network Neutrality: What a Non-Discrimination Rule Should Look Like* at 22 (Dec. 14, 2010)).

[3] Prepared Remarks of FCC Chairman Tom Wheeler, The Facts and Future of Broadband Competition at 1 (Sept. 4, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

[4] Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Internet Access Services: Status as of June 30, 2013 (June 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf.

BIAS connection needed to at least 10 Mbps.[5] Indeed, the Commission recognized that "network capacity would likely need to exceed [10 Mbps] to fully utilize . . . services and applications" that consumers require[6] and demand.[7]

There are often far fewer options for consumers seeking these truly high-speed BIAS connections in any given area. For example, Comcast and Time Warner Cable customers have an average of less than one high-speed alternative that offers speeds of at least 10 Mbps.[8] For consumers seeking speeds of at least 25 Mbps, there are an average of 0.42 and 0.39 alternatives in Comcast's and Time Warner Cable's franchise areas, respectively.[9]

High Switching Costs. Even where consumers do have choice, however, the high cost of switching BIAS providers makes it difficult for consumers to switch. In a 2010 survey, the Commission found that only 11.6 percent of respondents switched BIAS providers[10]—most of which were likely moving from slow traditional DSL services to faster cable services. In fact,

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[5] The Commission has observed that consumers "increasingly use VoIP, social networking, video conferencing, and streaming video over their broadband connection" and proposed an increase in the minimum speed required for BIAS from 4 Mbps/1 Mbps to 10 Mbps/2 Mbps. *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Tenth Broadband Progress Notice of Inquiry*, GN Docket No. 14-126, 4-5 ¶ 6 (2014) ("*Tenth Broadband Progress NOI*").

[6] Prepared Remarks of FCC Chairman Tom Wheeler, The Facts and Future of Broadband Competition (Sept. 4, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

[7] *Tenth Broadband Progress NOI* at 7 ¶ 12.

[8] Petition to Deny of Netflix, Inc., Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, at 37 (filed Aug. 25, 2014).

[9] *Id.*

[10] Federal Communications Commission, Broadband Decisions: What Drives Consumers to Switch—Or Stick with—Their Broadband Internet Provider at 5-6 (Dec. 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-303264A1.pdf ("*Broadband Decisions Survey*").

the top three reasons respondents cited for staying with their current provider involved the cost of switching to a new service rather than the cost of leaving an old one: installation fees, hassles associated with installation, and deposits for new service.[11] Similarly, in the *2010 Open Internet Order*, the Commission recognized that consumers face myriad costs in attempting to switch providers, including:

> early termination fees; the inconvenience of ordering, installing, and set-up, and associated deposits or fees; the possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website.[12]

Even if a consumer is able to overcome the difficulty in finding, and then switching to, another BIAS provider, there is no guarantee that that the new provider would not adopt network policies that similarly impede the consumer's choice of edge provider services. As a result, transparency alone is simply not sufficient to protect consumers.

III. THE COMMISSION SHOULD HARMONIZE THE TREATMENT OF FIXED AND MOBILE BIAS PROVIDERS

The Commission should harmonize the treatment of fixed and mobile BIAS providers. While not a true substitute for fixed BIAS services, mobile BIAS is increasingly relied upon by consumers as a critical, and often times sole, means of accessing the Internet. This is particularly true of disadvantaged communities. As the Commission explained in its 2013 Mobile Broadband Report, "[a]pproximately 52 percent of all adults who were poor, 42 percent who

[11] *Broadband Decisions Survey* at 8.

[12] *Preserving the Open Internet Order*, 25 FCC Rcd. at 17924-25 ¶ 34.

were near poor, and 31 percent who were not poor lived in wireless-only households in the first half of 2012."[13]

The Commission's prior rules left mobile BIAS providers with significant leeway to block or degrade access to these communities out of concern that mobile networks had certain "operational constraints" that would place "greater pressure on the concept of 'reasonable network management' for mobile providers" and thus create "additional challenges in applying a broader set of rules to mobile at [that] time."[14] As Chairman Wheeler recently stated, however, "there have been significant changes in the mobile marketplace since 2010."[15] Particularly given the evolution of mobile BIAS since 2010, any operational issues can be resolved through the use of reasonable network management.

Tellingly, CTIA's recent attempt to justify exclusion of mobile BIAS from the generally applicable no blocking and nondiscrimination rules does nothing of the sort.[16] With respect to blocking, CTIA argues that "[w]ireless providers, based on network management requirements developed within industry standards, should have the right to block any use or application on their wireless network if such use would preclude other subscribers from accessing service."[17] Such adherence to an industry-standard practice almost certainly would be permissible as

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[13] Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Sixteenth Report*, 28 FCC Rcd. 3700, 3932 ¶ 369 (2013).

[14] *Preserving the Open Internet Order*, 25 FCC Rcd. at 17957 ¶ 95.

[15] Prepared Remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show (Sept. 9, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf.

[16] *See* Ex parte letter from Scott Bergmann, CTIA, to Marlene H. Dortch, FCC (filed Sept. 4, 2014) (attaching Jeffrey H. Reed and Nishith Tripathi, *Net Neutrality and Technical Challenges of Mobile Broadband Networks*) ("*CTIA Paper*").

[17] *CTIA Paper* at 28.

reasonable network management. With respect to discrimination, CTIA expresses concern that mobile operators' network management may include consideration of "the types of applications" being used on the network at a given time, in particular the quality of service that applications in that category require and how much bandwidth such applications demand.[18] Again, these categorical—rather than application-specific—factors can be accommodated under reasonable network management, and taking them into account is a far cry from favoring or disfavoring certain applications that compete within the same category.

There is simply no justification for permitting wireless BIAS providers to censor the Internet access of disadvantaged communities—or of anyone accessing the Internet over a wireless connection—whether in the name of ideology or commerce. The only acceptable justification for blocking or degrading traffic must be a neutral one: reasonable network management.

IV. THE OPEN INTERNET RULES SHOULD NOT EXTEND BEYOND BIAS PROVIDERS

BIAS providers argue that if rules are going to apply to their Internet access services, then similar rules should apply to the Internet itself. The Commission rejected this argument in the *2010 Open Internet Order*. As the Commission explained in that *Order*, "the Communications Act directs us to prevent harms related to the utilization of networks and spectrum to provide communication by wire and radio," not to content providers.[19] And unlike content providers, BIAS providers "control access to the Internet for their subscribers and for

[18] *Id.* at 22, 30-31.

[19] *Id.* at 17933-35 ¶ 50.

anyone wishing to reach those subscribers," meaning that they are the ones "capable of blocking, degrading, or favoring any Internet traffic."[20]

There is no reason for the Commission to revisit its earlier decision. Whereas consumers have few choices for access to the Internet, they have a plethora of choices for Internet content. For example, the once closed market for video services has now dramatically expanded, allowing consumers to choose among any number of providers of online video: from multichannel video programming distributors (like Comcast, DISH, or Verizon) to the programmers themselves (like HBO GO, Disney, and A&E) to Internet video distributors (such as Amazon, Apple, Google, Hulu, Netflix, Vimeo, Veoh, and Twitch.tv). Consumers can and do switch easily between programmers and Internet distributors. This is a far cry from the limited choices and high switching barriers that characterize the Internet access market.

The sea-change in video services is the direct result of the level playing field and relatively low barriers to entry available to any given service that can be provided over the Internet. So long as BIAS providers are required to adhere to the principles of neutrality in the exercise of their control over access to the Internet, no edge provider can hope to foreclose competition from any foe—new or old.

V. THE COMMISSION SHOULD KEEP ALL OF ITS TOOLS AVAILABLE FOR PROTECTING THE OPEN INTERNET

BIAS providers have expended a great deal of ink discussing the limitations of Title II and the adequacy of Section 706. If BIAS providers are to be believed, not only is a Title II approach so burdensome that it would depress investment and innovation in the network, but it also does not give the FCC the necessary authority to ban paid prioritization. On the other hand, BIAS providers argue that reliance on Section 706 is preferable because it requires allowances

[20] *Id.*

for paid prioritization. Those arguments are both too pessimistic about the Commission's Title II authority and too optimistic about the Commission's ability to prevent abuses using only Section 706. In effect, those providers press the Commission into prematurely foreclosing its regulatory options in hopes of pushing the Commission into adopting narrow rules that may not fully protect consumers. The Commission should resist these arguments and leave all of its legal tools on the table.

Although BIAS providers support reliance on Section 706, they do so only for very narrow consumer protections, and even then they hedge their support for Section 706 rules in clear contemplation of suing the Commission should the rules go beyond their proposed framework. While the Commission has sufficient authority to prevent paid prioritization, the use of Section 706, by itself, provides certain challenges in trying to ensure that consumers are adequately protected. Specifically, the *Verizon* court concluded that rules adopted exclusively under Section 706 would need to leave some amount of room for BIAS providers to negotiate commercial arrangements with edge providers if such agreements are consistent with the Commission's mandate under Section 706 to promote broadband deployment and adoption.

On the other hand, BIAS providers err in claiming that Title II is unavailable to the Commission, or that Title II rules could not prohibit paid prioritization. Title II provides direct authority for the Commission to prohibit conduct that that is "unjust or unreasonable," including any practice that either gives an "undue or unreasonable preference or advantage" or that results in an "undue or unreasonable prejudice or disadvantage."[21] Moreover, the Commission's Section 706 mandate would necessitate a finding that any practice that harmed the virtuous circle—including blocking or discrimination of lawful traffic—could and must be prohibited.

[21] 47 U.S.C. §§ 201, 202.

Further, BIAS providers are mistaken in suggesting that, as a matter of law, that the Commission is incapable for revisiting the prior classification of BIAS as an information service. The Commission has discretion to reevaluate its prior determination that the telecommunications component of BIAS is severable from the information component. The Commission faces no steeper burden of proof when changing a regulation than it faced in adopting that regulation in the first instance,[22] and it enjoys great deference when using its expertise to determine the proper approach for technical and complex issues in telecommunications policy.[23] The opinions of Justices Breyer and Scalia in *Brand X* suggest that a reinterpretation would find a more favorable reception than did the Commission's previous interpretation.[24] Moreover, the facts as they stand today are in the Commission's favor.[25]

Importantly, the use of Title II does not require the application of 1930s-style rules. The Commission could forbear from applying all (or virtually all) provisions of Title II, except as

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[22] *See Verizon*, 740 F.3d at 636-37; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (noting that there is "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subject to a more searching review" where the agency implements a change in regulatory policy).

[23] *See Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Services*, 545 U.S. 967, 992 (2005) (finding that the Communications Act "leaves federal telecommunications policy in this technical and complex area to be set by the Commission") ("*Brand X*").

[24] *See Brand X*, 545 U.S. at 1003 (Breyer, J., concurring) (stating that the Commission's interpretation was "perhaps just barely" within the scope of its authority); *id.* at 1007 (Scalia, J., dissenting) (analogizing the Commission's interpretation to a pizzeria saying that it did not offer delivery, but would bring pizza to your door).

[25] Recent evidence suggests that consumers now purchase BIAS primarily for the general purpose of sending and receiving information of their own choosing, rather than for specific applications provided by BIAS providers (such as email or newsgroups). Moreover, network functions (such as the Domain Name System) or protocols (such as http or ftp) could be easily excluded from the definition of information service due to their use "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

necessary to adopt strong open Internet requirements.[26] The route for doing so has already been outlined in the *Third Way* previously proposed by Chairman Genachowski. Indeed, the Commission can undertake the required forbearance simply through the device of failing to rule on a petition for such forbearance "within one year after the Commission receives it."[27]

Because of the significant danger posed by pay-to-play arrangements and other forms of discrimination, the Commission should not rule-out any single source of authority at this time—including all uses of its authority under Section 706 and Title II. In addition, the Commission should also consider using enforceable industry standards and self-regulatory codes of conduct to bolster and clarify the open Internet protections that the Commission adopts. Issuing such guidance at the time it adopts new open Internet rules will avoid the uncertainty inherent in the application and enforcement of new rules and standards.

VI. APPLICATION OF OPEN INTERNET PRINCIPLES TO POINTS OF INTERCONNECTION WITH THE BROADBAND INTERNET ACCESS PROVIDER

There have been reports that consumers' access to certain content providers has been degraded by their BIAS providers regardless of what speed tier consumers have paid until and unless that content provider pays an arbitrary interconnection fee.[28] Interconnection should not be used as a choke point to artificially slow traffic or extract unreasonable tolls from over-the-top

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[26] *See* Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, Federal Communications Commission at 4 (May 6, 2010) ("The upshot is that the Commission is able to tailor the requirements of Title II so that they conform precisely to the policy consensus for broadband transmission services.").

[27] 47 U.S.C. § 160(c).

[28] *See, e.g.,* Stacey Higginbotham, *Why the Consumer Is Still Held Hostage in Peering Disputes*, Gigaom (Jul. 18, 2014), http://gigaom.com/2014/07/18/why-the-consumer-is-still-held-hostage-in-peering-disputes/ ("In the last-mile broadband market, Verizon, Time Warner Cable, AT&T and Comcast have no incentive to make Netflix streaming better. For example, in my market, I'm in the midst of switching from TWC over to AT&T (my only two wireline options). Both are having trouble delivering Netflix's bits because of a breakdown in peering negotiations.").

providers. Consumers should get the download speeds they pay for, regardless of whether a content provider pays a terminating access fee to connect traffic to the BIAS provider's network.

VII. CONCLUSION

The Internet Association encourages the Commission's continued effort to protect the open Internet. The Commission has many tools available to implement clear, effective rules that promote consumer welfare and fair marketplace practices on the Internet, and protect the virtuous circle to ensure continued innovation and competition online.

Respectfully Submitted,

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