Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF MOBILE FUTURE

MOBILE FUTURE

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EXECUTIVE SUMMARY

The comments in response to the *Restoring Internet Freedom* Notice of Proposed Rulemaking show that the goals of ensuring an open internet and a vibrant mobile ecosystem are widely shared. Furthermore, a variety of commenters agree that an open internet is essential for virtually every aspect of modern life, democracy, free speech and participation in the economy. Investment in broadband has produced tremendous economic effects, and will continue to do so if the Commission removes the *Title II Order's* innovation-chilling and investment-stifling regulations.

Commenters have demonstrated that the *Title II Order* has and will continue to negatively affect investment and constructive market experimentation to the detriment of consumers. The increased regulatory uncertainty and the costs of regulatory compliance have harmed small and large providers alike, as well as other players in the ecosystem, and consumers. The record contains a substantial amount of evidence demonstrating the highly competitive nature of the mobile broadband marketplace. Consumers are able to choose among more competitive service offerings than ever before, including unlimited data, at lower prices. This competition calls into question the need for prescriptive utility regulation.

The record also demonstrates widespread support for Congress to provide an ultimate resolution to this debate. Mobile Future agrees, but unless and until Congress acts, the Commission must promptly proceed with its plan to restore internet freedom by returning broadband internet access service to its proper classification as a Title I information service and specifically reaffirming that mobile broadband cannot, and in any event should not, be treated as a common carrier service because it is a private mobile service under Title III of the Act. As the record shows, the FCC has ample legal authority to do so. The FCC must also clarify that broadband is an interstate information service, and preempt states from adopting laws that conflict with the outcome of the proceeding or that create a patchwork of inconsistent regulations that would undermine broadband deployment. Taking such actions will maintain an open internet and stimulate the investment, innovation, competition, job creation, and economic growth made possible by the twenty-year light-touch regulatory regime that preceded the *Title II Order*.

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I. INTRODUCTION

Virtually all commenters in this proceeding[1] agree on the importance of ensuring an open internet and a vibrant mobile ecosystem. Furthermore, a wide variety of commenters agree that these essential policy objectives can be achieved without imposing innovation-chilling and investment-stifling Depression-era utility-style regulation. Commenters have demonstrated with concrete evidence that the *Title II Order* has and will continue to negatively affect investment and constructive market experimentation to the detriment of consumers. The record evidence demonstrates the highly competitive nature of the mobile broadband marketplace, as well as a dearth of evidence of actual "net neutrality" violations or systemic market failure justifying prescriptive regulation. In a debate over demonstrable harms versus hypothetical concerns, facts should prevail over fiction.

The record is packed with calls from parties across the internet ecosphere for Congress to provide an ultimate resolution to this seemingly never-ending debate. Mobile Future agrees, but unless and until Congress acts, the Commission must promptly proceed with its plan to restore

[1] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("*RIF NPRM*").

internet freedom by returning broadband internet access service ("BIAS") to its proper classification as a Title I information service. Also, the Commission should make clear that BIAS is an interstate service beyond the reach of state regulation. Commenters have articulated the clear legal authority and provided the necessary factual basis on which the Commission can rely to take such actions. Doing so will maintain an open internet and stimulate the investment, innovation, competition, job creation, and economic growth made possible by the twenty-year light-touch regulatory regime that preceded the misguided *Title II Order*.

II. ENSURING INTERNET OPENNESS, INNOVATION, AND INVESTMENT IS BEST ACHIEVED BY RESTORING THE CLASSIFICATION OF MOBILE BROADBAND AS A TITLE I INFORMATION SERVICE.

A. Commenters Universally Agree That An Open Internet Is Essential In The Modern Economy.

As the National Multicultural Organizations articulated, "[t]he debate is not over whether there should be an open internet, but how best to achieve that objective while also ensuring continued innovation and enhanced broadband access for all communities."[2] Commenters universally agree that an open internet is essential for virtually every aspect of modern life, democracy, free speech and participation in the modern economy.[3] Commenters also agree that

[2] Comments of the National Multicultural Organizations, WC Docket No. 17-108, at 3 (July 17, 2017) ("National Multicultural Organizations Comments") (filed by the Asian Pacific American Institute of Congressional Studies et al.); *See, e.g.*, Comments of the Telecommunications Industry Association , WC Docket No. 17-108, at 3-4 (July 17, 2017) ("TIA Comments"); Comments of Verizon, WC Docket No. 17-108, at 1 (July 17, 2017) ("Verizon Comments"); Comments of AT&T Services Inc., WC Docket No. 17-108, at 1 (July 17, 2017) ("AT&T Comments"); Comments of CTIA, WC Docket No. 17-108, at 7 (July 17, 2017) ("CTIA Comments"); Comments of American Cable Association, WC Docket No. 17-108, at 28-29 (July 17, 2017) ("ACA Comments"); Comments of Ericsson, WC Docket No. 17-108, at 1-2 (July 17, 2017) ("Ericsson Comments").

[3] *See generally* Verizon Comments at 9-11; AT&T Comments at 50; Comments of T-MobileUSA, Inc., WC Docket No. 17-108, at 28 (July 17, 2017) ("T-Mobile Comments"); Cisco Systems Comments, Inc., WC Docket No. 17-108, at 3-4 (July 17, 2017) ("Cisco Comments");

significant investment in broadband over the last decade has produced tremendous economic benefits. In the twenty years of regulatory freedom preceding the FCC's 2015 Title II reclassification decision,[4] the internet generated "trillions of dollars in new economic value, created millions of new jobs, reshaped industries, and empowered consumers in ways unthinkable."[5] In the last seven years, the wireless industry has invested nearly $200 billion of private risk capital in U.S. wireless broadband facilities.[6] By 2014, the broadband industry employed almost 5 million Americans and directly accounted for 5.9 percent of the country's gross domestic product.[7] Several internet service providers ("ISPs") also highlighted that their billions of dollars of investments rely on an open internet to succeed.[8] As discussed below, because the *Title II Order* has had the effect of discouraging investment in broadband networks,

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Ericsson Comments at 2-3; National Multicultural Organizations Comments at 7; Comments of United States Senator Kamala D. Harris, WC Docket No. 17-108, at 3 (July 17, 2017); Comments of the Computer and Communications Industry Association, WC Docket No. 17-108, at 4 (July 17, 2017); Comments of Microsoft Corporation, WC Docket No. 17-108, at 1 (July 17, 2017); Comments of the Progressive Policy Institute, WC Docket No. 17-108, at 2 (July 17, 2017) (filed by Michael Mandel).

[4] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Title II Order*").

[5] Comments of Larry Downes, Georgetown Center for Business and Public Policy, WC Docket No. 17-108, at 3-4 (July 17, 2017).

[6] Comments of Mobile Future, WC Docket No. 17-108, at 1-2 (July 17, 2017) ("Mobile Future Comments"); *see also* CTIA, *Wireless Snapshot 2017* (2017), https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf.

[7] *See* Cisco Comments at 3-4 (citing Kevin A. Hassett and Robert J. Shapiro, *The Impact of Broadband and Related Information and Communications Technologies On the American Economy*, Am. Ent. Inst., at 2 (Mar. 23, 2016)).

[8] *See, e.g.*, Verizon Comments at 5, 7-8; T-Mobile Comments at 3-4; Comments of Frontier Communications Corporation, WC Docket No. 17-108, at 2-5 (July 17, 2017) ("Frontier Comments"); CTIA Comments at 1.

the Commission should return to the light-touch regulatory regime that relied on competition, not regulation, to encourage the development of a free and open internet.

B. A Highly Competitive Mobile Broadband Marketplace Will Ensure An Open Internet, Making Heavy-Handed Title II Regulation Unnecessary.

As a result of twenty years of bipartisan light-touch regulation,[9] the U.S. wireless sector is one of the most dynamic and innovative markets in the world. At the end of 2015, almost 90 percent of Americans could choose between four or more mobile broadband providers, with 96 percent of Americans having a choice of three or more.[10] These numbers have continued to increase since 2015, as existing providers further expand the coverage of their networks and as new competitors launch wireless services.[11] As Mobile Future previously noted, in recent months all four nationwide carriers have introduced unlimited data offerings – and prices per bit of data have continued to fall.[12] In the last year alone, the Consumer Price Index for wireless fell 13 percent, underscoring the vibrancy of America's highly competitive mobile marketplace.[13] Fierce competition in this dynamic mobile broadband marketplace is what has produced the free

[9] *See, e.g.*, Cisco Comments at 5-6; National Multicultural Organizations Comments at 7-9.

[10] AT&T Comments at 23-24; Verizon Comments at 13-14; *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Nineteenth Report, 31 FCC Rcd 10534, 10563 ¶ 39 (2016).

[11] AT&T Comments at 23-24; Verizon Comments at 13-14.

[12] Mobile Future Comments at 5-7.

[13] *See* AT&T Comments at 24; Mobile Future Comments at 6-7; CTIA Comments at 3-4. CTIA reports that in 2016, Americans used 35 times more mobile data than in 2010 – 64 percent of which was mobile video. CTIA Comments at 3.

and open internet that Americans enjoyed long before the FCC's 2015 *Title II Order* and it is competition, in part, that obviates the need for heavy-handed Title II regulation.[14]

As Verizon stated, and other parties agree, "competition results in market outcomes that are beneficial to consumers, creating incentives to implement practices that benefit consumers and reducing incentives or ability to engage in practices that harm consumers or competition."[15] If a carrier engages in anti-consumer practices, consumers have the incentive and the ability to simply switch carriers.[16] As is evidenced by 26.5 percent of subscribers switching providers in 2016, it is not a difficult thing for consumers to do.[17] Such rigorous competition in today's wireless marketplace – not command-and-control, top-down 19th century regulation designed for highly concentrated and slow-moving monopolies – will ensure continued access to an open internet for mobile broadband subscribers.[18]

C. Title II Classification of Broadband Has, and Will Continue To, Negatively Affect Innovation and Investment.

The record shows that the *Title II Order* has already had, and will continue to have, a negative effect on innovation and investment in the broadband market. For example, a Wireless

[14] Ericsson Comments at 11; Verizon Comments at 12-13; AT&T Comments at 22-24; Comments of FreedomWorks Foundation, WC Docket No. 17-108, at 8 (July 17, 2017); Comments of Qualcomm Incorporated, WC Docket No. 17-108, at 2-3 (July 17, 2017) ("Qualcomm Comments"); TIA Comments at 2.

[15] Verizon Comments at 14; *see also* Ericsson Comments at 11; AT&T Comments at 22-24; Qualcomm Comments at 2-3; TIA Comments at 2.

[16] T-Mobile Comments at 6-7; Mobile Future Comments at 8; Verizon Comments at 14.

[17] Verizon Comments at 14.

[18] The rules adopted in the *Title II Order* are descendants of the laws adopted in the 1880s to regulate railroad monopolies. Today's highly competitive wireless marketplace bears no resemblance to the railroad industry that Congress sought to regulate in the 19th century.

Internet Service Providers Association ("WISPA") member survey showed that 80 percent of its members "incurred additional expense in complying with the Title II rules, had delayed or reduced network expansion, had delayed or reduced services and had allocated budget to comply with the rules."[19] Additionally, Charter Communications said that it delayed the build-out of its out-of-home Wi-Fi network because it was concerned it would not be able to offer this network as a benefit to subscribers.[20] Furthermore, Cox Enterprises has allocated less resources to Cox Communications because of the heightened investment risk in the communications sector caused by Title II.[21]

The record demonstrates that the *Title II Order's* "general conduct standard" in particular poses a serious threat to innovation and investment. The most telling example of the general conduct standard's threat to innovation is embodied by the previous Commission's treatment of free data.[22] Zero-rated and sponsored data offerings benefit consumers, expanding access,[23]

[19] Comments of WISPA, WC Docket No. 17-108, at 14 (July 17, 2017).

[20] Comments of Charter Communications, Inc., WC Docket No. 17-108, at 11 (July 17, 2017) ("Charter Comments").

[21] Comments of Cox Communications, Inc., WC Docket No. 17-108, at 2-3 (July 17, 2017) ("Cox Comments").

[22] Zero-rated content is content that subscribers can access without the data consumed being applied to the subscriber's data usage allowance or data cap. Sponsored data arrangements are those that allow an edge provider to offer their services to consumers on a zero-rated basis by "sponsoring" the data the consumers use. Because zero-rated data does not count toward a consumer's data allowance or cap, consumers have greater access to different content, with lower costs to access such content. Moreover, networks are encouraged to further expand their investment in broadband networks to support access to the zero-rated content.

[23] *See, e.g.*, CTIA Comments at 25-27;

promoting service differentiation and "encourag[ing] Internet adoption,"[24] and working to "close the digital divide, particularly for people of color" while allowing "small, multicultural businesses a means to reach their audiences."[25] Yet, after initially praising one provider's free data product, the Commission inexplicably launched an investigation into free data services, underpinned by the general conduct standard.[26] While the current Commission wisely closed the Wireless Bureau investigation,[27] there is no certainty that the vague and limitless general conduct standard will not be invoked in the future to "favor[] the interests of *competitors* over those of *consumers*."[28]

This regulatory whiplash, where a service is praised one day, then threatened the next, creating great confusion and uncertainty, demonstrates why the Commission must eliminate the general conduct standard.[29] It is especially troubling that – as many commenters point out – the

[24] *See* Comments of Christopher S. Yoo, WC Docket No. 17-108 (June 22, 2017) (attaching a paper, *Avoiding the Pitfalls of Net Uniformity: Zero Rating and Nondiscrimination*).

[25] National Multicultural Organizations Comments at 11-12 (internal citations omitted).

[26] *See, e.g.*, Letter from Roger C. Sherman, Chief, FCC Wireless Telecommunications Bureau to Kathleen Ham, Senior Vice President, Government Affairs, T-Mobile (Dec. 16, 2015); Letter from Roger C. Sherman, Chief, FCC Wireless Telecommunications Bureau to Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T (Dec. 16, 2015); Letter from Matthew S. DelNero, Chief, FCC Wireline Competition Bureau to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation (Dec. 16, 2015).

[27] *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, Order, 32 FCC Rcd 1093 (WTB 2017).

[28] AT&T Comments at 58.

[29] *See* Cisco Comments at 10 n.32 ("Zero-rating went, under the Title II Order, from being deemed in at least one instance by the former Chairman himself 'pro-competitive' and 'pro-innovation,' to the subject of intrusive investigation and eventual negative treatment by the Wireless Bureau, and back again to uncertain status quo following the rescission of the Bureau's action. Such regulatory impermanence produces the opposite of stability, and must per se chill

application of the general conduct standard to free data shows just how much arbitrary wiggle room the Commission left itself in the *Title II Order*. If "a violation [can occur] even in the absence of any evidence that consumers or competition had suffered any harm,"[30] the metes and bounds of what may or may not constitute a violation are inherently unanchored from empiricism, and therefore unknowable. As Ericsson points out, companies cannot help but be fearful to develop new services or offerings when they may be told, after the fact, that they violated a rule they could not have foreseen being applicable.[31] This uncertainty chills the investment in and development of new products and offerings that not only improve consumer experience, but drive opportunity and adoption for those most in need.[32]

The record also shows that Title II reclassification severely harmed investment by increasing the level of regulatory uncertainty and the costs of regulatory compliance.[33] As Charter Communications underscored, the "Title II regulatory environment undermines the very

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competitors' consideration of free data products."); T-Mobile Comments at 8-11; Verizon Comments at 12.

[30] CTIA Comments at 11.

[31] Ericsson Comments at 4.

[32] Verizon Comments at 13; AT&T Comments at 49; Comments of Comcast Corporation, WC Docket No. 17-108, at 69 (July 17, 2017) ("Comcast Comments"); Cox Comments at 30-31; CTIA Comments at 9-11; Comments of NTCA – The Rural Broadband Association, WC Docket No. 17-108, at 12 (July 17, 2017); Comments of Sprint Corporation, WC Docket No. 17-108, at 6-7 (July 17, 2017) ("Sprint Comments"); T-Mobile Comments at 17; Cisco Comments at 10-11; Comments of Nokia, WC Docket No. 17-108, at 8-9 (July 17, 2017); TIA Comments at 9-10; Comments of the Wireless Infrastructure Association , WC Docket No. 17-108, at 11-12 (July 17, 2017) ("WIA Comments"); National Multicultural Organizations Comments at 17-18; Comments of Tech Policy Institute, WC Docket No. 17-108, at 10 (July 17, 2017).

[33] Sprint Comments at 2; ACA Comments at 5-6; AT&T Comments at 54; Comments of CenturyLink, WC Docket No. 17-108, at 11 (July 17, 2017) ("CenturyLink Comments"); T-Mobile Comments at 7; Charter Comments at 9; Comcast Comments at 8; Cox Comments at 2-3; Frontier Comments at 4-5; Ericsson Comments at 4.

private investment and buildout of broadband networks the Commission is seeking to encourage."[34] And as the American Cable Association pointed out, reclassification also made it more difficult for wireless providers to finance their businesses.[35] The "mere threat that the Commission may … impose rate regulation" has affected the decision of lending institutions for several companies.[36]

A number of studies have estimated the amount of investment lost since November 2014, when the wireless industry first knew that reclassification under Title II was likely.[37] With respect to mobile, CTIA's annual survey found that investment declined from $32.1 billion in 2014 to $26.4 billion in 2016, a drop of 17.8 percent in only two years.[38] This downturn, which disproportionately affects poor, minority, and rural Americans, will continue to persist under a Title II utility regime.[39] As the National Multicultural Organizations point out, "[h]istory shows that when businesses contract as a result of over-regulation, it disproportionately impacts consumers on fixed or lower incomes, many of whom are people of color," and many of whom rely only on mobile broadband service to access the internet.[40] More broadly, according to a

[34] Charter Comments at 9; Cox Comments at 2-3.

[35] ACA Comments at 16-17.

[36] *Id*. at 16.

[37] Comments of Hal J. Singer, WC Docket No. 17-108, at 1 (July 17, 2017).

[38] Anna-Maria Kovacs, Ph.D., CFA, *The Effect of Title II Classification on Wireless Investment*, at 8 (July 2017), http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Kovacs%20-%20Title%20II%20and%20wireless%20investment.pdf (citing CTIA Annual Report for 2017).

[39] *See* Comcast Comments at 8-9; Comments of the Hispanic Leadership Fund, WC Docket No. 17-108, at 1 (July 17, 2017).

[40] National Multicultural Organizations Comments at 5.

study by Hal Singer, there was a $3.6 billion drop in broadband investments among ISPs in 2016 alone.[41] The Free State Foundation projected a decrease of $5.6 billion in broadband capital investment over 2015 and 2016.[42] And the Phoenix Center, which traces lost investment back to 2010, when then-Chairman Julius Genachowski first considered Title II-like rules, has found that from 2011 to 2015, another $150 to $200 billion of investment was deterred by the potential change in rules.[43] As Dr. Kovacs concluded in her recent study, the Title II rulemaking and subsequent order had the effect of forcing the industry to reduce capex budgets in 2014 and 2015 and beyond.[44]

As AT&T stated, "Title II classification will always subject broadband ISPs to major and unpredictable regulatory risks."[45] Therefore, the Commission must end this uncertainty and liberate broadband providers to continue investing at pre-*Title II Order* levels by reclassifying BIAS under Title I.

[41] CenturyLink Comments at 11 (citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (2016)).

[42] Comments of the Free State Foundation, WC Docket No. 17-108, at 30 (July 17, 2017).

[43] *Id*. (citing George Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal and Economic Public Policy Studies (Apr. 25, 2017)).

[44] Kovacs at 9.

[45] AT&T Comments at 53.

D. The Commission Has Clear Authority to Classify Mobile Broadband As An Information Service.

The Commission is on solid legal ground to restore BIAS to its proper interstate information service classification.[46] As an initial matter, while the D.C. Circuit upheld the *Title II Order*, the window to seek certiorari from the Supreme Court is still open until September 28, and the Court could very well reverse all or significant parts of the lower court's decision.[47] Mobile Future is confident that high court would look seriously at whether under the Communications Act BIAS can be properly classified as a telecommunications service and whether mobile broadband can be treated as a common carrier service under Title II.

In any event, the Court has clearly stated that the Commission has the authority to interpret the Communications Act, and that an agency retains the flexibility to change its interpretation so long as it acknowledges and justifies the change.[48] As many in the record

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[46] Indeed, the Communications Act requires the Commission to determine whether a communications service is an "information service" or a "telecommunication service" (47 U.S.C. § 153(50), (53)) and the Supreme Court upheld the FCC's prior decision to classify BIAS as an information Service. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). Numerous commenters agree with this conclusion. *See, e.g.*, AT&T Comments at 69-70, 101; Comments of NCTA - The Internet & Television Association, WC Docket No. 17-108, at 9 (July 17, 2017) ("NCTA Comments"); Comments of R Street Institute, WC Docket No. 17-108, at 14-15 (July 17, 2017); CenturyLink Comments at 14; CTIA Comments at 28, 31-33; Verizon Comments at 28-29; Ericsson Comments at 12.

[47] Application for an Extension of Time to File Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *United States Telecom Ass'n v. FCC*, No. 17A54 (granted July 20, 2017), (application available at https://www.ustelecom.org/sites/default/files/documents/US%20Telecom%20Net%20Neutrality%20Application.pdf); *see also* John Eggerton, *Supreme Court Extends Time for Title II Appeal*, Broadcasting and Cable (July 20, 2017), http://www.broadcastingcable.com/news/washington/supreme-court-extends-time-title-ii-appeal/167321.

[48] *See, e.g.*, *Brand X*, 545 U.S. at 981 ("[C]hange is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."); *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (Srinivasan,

demonstrate, classification of broadband as an information service is the far better reading of the Communications Act. The term information service "means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[49] This definition makes clear that Congress was focused on whether the service "offered a capability" for making the information available and recognized that pure transmission is a component of such offerings. As CTIA stated, "neither the presence of transmission nor the fact that a particular capability was not used by a consumer" was intended to alter the classification of a service as an information service.[50] And although the internet has advanced since 1996, the technological principles that led the Commission to initially treat the internet as an information service have not changed.[51] Just as they did twenty years ago, subscribers continue to use the internet to generate, acquire, store, transform, process, retrieve, utilize, and make available information via telecommunications – the eight core functions that are the hallmarks of an information service.[52] BIAS clearly fits the above

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J., joined by Tatel, J., concurring in the denial of rehearing en banc) (finding that the Commission reclassified BIAS under Title II because it believed doing so was "necessary to establish three bright-line rules, the anti-blocking, anti-throttling, and anti-paid-prioritization rules," and noting that this justification "represents a perfectly 'good reason' for the Commission's change in position"); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (holding that "inauguration of a new President . . . [was] a perfectly reasonable basis" for agency's shift in interpretation) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)); *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1113-14 (9th Cir. 2006)(upholding FCC's reversal of its prior interpretation of Section 252(i) under the APA, and noting that "public policy considerations allow the government to change its position" on interpretive matters).

[49] 47 U.S.C. § 153(24).

[50] CTIA Comments at 28.

[51] Verizon Comments at 30-31.

[52] *See* 47 U.S.C. § 153(24).

definition, and the Supreme Court has reaffirmed classification of broadband as an information service as a lawful construction of the Communications Act.[53]

Regarding mobile BIAS ("MBIAS"), the statute and the record supports the restoration of MBIAS's classification as a private mobile service and its definitions of interconnected service and public switched network. Under the Communications Act, a commercial mobile service is a service "provided for profit" that "makes interconnected service available" to the public.[54] The term "interconnected service" means "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)."[55] A private mobile service is any service that is not a commercial mobile service,[56] and cannot be regulated as common carriage.[57] As the record makes clear, until the *Title II Order*, the FCC properly interpreted the term "public switched network" in such a way that precluded mobile broadband from being an interconnected service, and as a result, a commercial mobile service outside the reach of common carriage regulation.[58] In the *Title II Order*, however, the FCC wrongly redefined "public switched network" as two networks – the telephone network and the internet – and "interconnected service" to include any service that connects to "some" end points on the

[53] *Brand X*, 545 U.S. at 980-81.

[54] 47 U.S.C. § 332(d)(1).

[55] *Id.*§ 332(d)(2).

[56] *Id.*§ 332(d)(3).

[57] *Id.* § 332(c)(1)(A) and (c)(2).

[58] *See* AT&T Comments at 91; Verizon Comments at 43; T-Mobile Comments at 15.

public switched network, contrary to twenty years of Commission precedent.[59] In reversing nearly two decades of FCC decisions, the FCC "ignore[d] the accepted meaning" of the terms and "butcher[ed] basic linguistic principles"[60] with the misguided intention of overcoming Title III's barriers. The Commission's unreasonable legal contortions to the above terms in 2015 have led to conclusions that run contrary to both statute and logic. Because mobile broadband is a private mobile service under Title III, it cannot be treated as a common carrier service, which the Commission should reaffirm.

[59] See AT&T Comments at 92-94; Verizon Comments at 44-47; T-Mobile Comments at 15-17; CTIA Comments at 47-49.

[60] AT&T Comments at 93.

E. The Commission Should Affirm That Broadband Is An Interstate Information Service.

Mobile Future agrees, moreover, with commenters that argue that the Commission should more specifically clarify that broadband is an *interstate* information service and preempt states from regulating broadband.[61] As T-Mobile rightly explains, internet communications – especially *mobile* internet communications – cannot by technical necessity be cabined along state lines; not only do fixed and mobile users alike "almost surely interact many times with information stored in other states," mobile users have the additional freedom to physically traverse state lines over the course of a single session.[62] This basic reality of the internet's operation demands interstate classification – a reaffirmation which would comport with decades of the Commission's precedent on the topic.[63]

Beyond the value of regulatory clarity in and of itself, the Commission's confirmation that broadband is an *interstate* information service would reinforce that states lack jurisdiction to impose a patchwork quilt of inconsistent standards and regulations on broadband.[64] As Commissioner O'Rielly rightly stated, "[i]f the Commission decides that BIAS is an interstate information service, then states and localities should be foreclosed from regulating it."[65] Mobile Future concurs with CTIA that the Commission would be well within its rights, and acting in the

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[61] *See, e.g.*, Comcast Comments at 78-82; CTIA Comments at 54-57; T-Mobile Comments at 25-27; WIA Comments at 10-11.

[62] T-Mobile Comments at 26.

[63] *See* Comcast Comments at 78; T-Mobile Comments at 25-26 n.85.

[64] *See* CTIA Comments at 55-56, Comcast Comments at 52; Cox Comments at 35-36; T-Mobile Comments at 25-26; WIA Comments at 10, n. 39.

[65] *RIF NPRM*, 32 FCC Rcd at 4508.

public interest, if the agency clarified that "the federal interest [of regulating broadband] is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[66] Even if, *arguendo*, the Commission does not entirely occupy the field, the Commission can and should preempt any state or local laws that conflict with the outcome of this proceeding or that create a patchwork of inconsistent regulations that would undermine broadband deployment.[67] Inconsistent state or local rules risk the balkanization of the internet as we know it today. Requiring broadband providers to comply with unique rules within different states, or localities within states, such as such as state or local regulation of the privacy practices of ISPs,[68] would make it more difficult and expensive for broadband providers to offer services. This will undoubtedly undermine broadband deployment and service experimentation, precisely the opposite of what the Commission seeks to achieve in this proceeding.

III. STAKEHOLDERS ACROSS THE INTERNET ECOSPHERE AGREE THAT CONGRESS IS BEST SUITED TO PROVIDE A LASTING SOLUTION ENSURING AN OPEN INTERNET.

Many commenters, including large and small ISPs, academics, and minority groups, conclude that Congressional action is the only way to provide a lasting solution ensuring an open internet.[69] Large edge providers,[70] as well as the Internet Association,[71] and the Application

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[66] CTIA Comments at 56 (citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

[67] *See* CTIA Comments at 55-56; Comcast Comments at 78-79; Cox Comments at 35; T-Mobile Comments at 25-26; WIA Comments at 10, n. 39.

[68] According to the National Conference of State Legislatures, in 2017 at least 21 states and the District of Columbia introduced legislation with different requirements for ISP privacy practices. *See Privacy Legislation Related to Internet Service Providers*, National Conference of State Legislatures (Aug. 4, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-legislation-related-to-internet-service-providers.aspx.

[69] *See* Verizon Comments at 5; AT&T Comments at 7; Cox Comments at 3-4; Comments of the Illinois Department of Innovation and Technology, WC Docket No. 17-108, at 2 (July 17, 2017);

Developers Alliance,[72] have also indicated their support for a legislative solution. Even if the Commission reclassifies BIAS under Title I, there is the real possibility of a future return to common carriage regulation of BIAS.[73] Mobile Future agrees and encourages Congress to modernize the statute by providing clear rules to protect the open internet by enabling consumers to go where they want to go and do what they want to do online, while simultaneously promoting innovation and investment. Internet access services are too fundamental to American life to generate new regulatory regimes every time the Commission leadership changes.

Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 17-108, at 4 (July 17, 2017); Comments of U.S. Mayors, WC Docket No. 17-108, at 1 (July 17, 2017) (filed by the City of Boston, Massachusetts); CenturyLink Comments at 61-62; Comcast Comments at 9-10; CTIA Comments at 6; Mobile Future Comments at 15; NCTA Comments at 6; Comments of the Advanced Communications Law & Policy Institute at New York Law School, WC Docket No. 17-108, at 3 (July 17, 2017); Comments of the American Action Forum, WC Docket No. 17-108, at 2, 7 (July 17, 2017); Comments of Center for Individual Freedom, WC Docket No. 17-108, at 5 (July 17, 2017); Comments of the Institute for Policy Innovation at 2 (July 17, 2017); Comments of the National Venture Capital Association, WC Docket No. 17-108, at 3 (July 17, 2017); Comments of the U.S. Hispanic Chamber of Commerce , WC Docket No. 17-108, at 1 (July 17, 2017).

[70] *See, e.g.*, Anita Balakrishnan, *Mark Zuckerberg Says Facebook Is Open To Working With Congress on Net Neutrality Issues*, CNBC (Jul. 12, 2017), https://www.cnbc.com/2017/07/12/facebook-ceo-mark-zuckerberg-supports-net-neutrality.html.

[71] Internet Association, *Statement on Fight For The Future's "Betrayal" Billboards* (Jul. 18, 2017), https://internetassociation.org/statement-fight-for-future-betrayal-billboards (stating that the Internet Association has "indicated a willingness to work with Congress to ensure strong enforceable net neutrality rules are left intact.").

[72] Letter from Bruce Gustafson, Senior Advisor, Application Developers Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108 (June 5, 2017), (stating that "we believe that the proper way forward is a set of Net Neutrality rules, established by Congress, to finally put this issue to rest.").

[73] *See generally* Cox Comments at 3; Comments of Information Technology & Innovation Foundation, WC Docket No. 17-108, at 16-17 (July 17, 2017) (calling for Congress to end what could become an endless game of "ping-pong"); National Multicultural Organizations Comments at 4-5.

IV. CONCLUSION

For the forgoing reasons, and consistent with the record, the Commission should reclassify BIAS as an interstate Title I information service and eliminate the general internet conduct standard. Regardless of any Commission action, however, Congress should pass legislation to protect consumers and promote an open internet, investment, innovation, and economic growth.

Respectfully submitted,

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