

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

In the Matter of	)	
	)	
New Docket Established to Address	)	
Open Internet Remand	)	GN Docket No. 14-28
	)	
	)	
	)	
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**COMMENTS OF  
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

**I. INTRODUCTION AND SUMMARY**

The Telecommunications Industry Association (“TIA”)<sup>1</sup> files these comments as raised in the PN<sup>2</sup> on what actions the Federal Communications Commission (“Commission”) should take, consistent with its “authority under section 706 and all other available sources of Commission authority, in light of the in the DC Circuit’s *Verizon v. FCC* opinion.”<sup>3</sup>

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<sup>1</sup> TIA represents the global information and communications technology (“ICT”) industry through standards development, advocacy, tradeshow, business opportunities, market intelligence and world- wide environmental regulatory analysis. Its hundreds of member companies manufacture or supply the products and services used in the provision of broadband and broadband-enabled applications. Since 1924, TIA has enhanced the business environment for broadband, mobile wireless, information technology, networks, cable, satellite and unified communications. TIA’s standards committees create consensus-based voluntary standards for numerous facets of the ICT industry.

<sup>2</sup> See, New Docket Established to Address Open Internet Remand GN Docket No. 14-28 (rel. February 19, 2014) (“PN”).

<sup>3</sup> See New Docket Established to Address Open Internet Remand GN Docket No. 14-28 (rel. February 19, 2014), (“PN”) p. 2

The underlying policy preferences expressed in the “Open Internet Order” predates its adoption. TIA in 2003 was joined by other trade association in the “High Tech Broadband Coalition” in articulating a set of “Broadband Principles for Consumer Connectivity.”<sup>4</sup> We applaud the Commission for their subsequent actions that incorporated these policy goals. In 2005 the Commission’s “Four Freedoms of the Internet” established solid principles for neutral “last mile” access, connectivity and competition among service providers.<sup>5</sup> The National Broadband Plan adopted in 2010 renewed the same policy commitments.<sup>6</sup> The Commission has also used its merger review authority to attach requirements on individual transactions.<sup>7</sup>

## II. The Application of Section 706 of the Telecommunications Act of 1996

As noted in the PN, the DC Circuit concluded that: “The Commission’s interpretation of Section 706(a) is therefore consistent with the plain language of the statute. Indeed, this Court has recognized that the statute “at least arguably ... delegates” that authority to the FCC.”<sup>8</sup>

The DC Circuit concludes that Section 706(b) “directs the Commission to determine periodically if broadband ‘is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative it *shall take immediate action* to accelerate

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<sup>4</sup> See, High Tech Broadband Coalition Letter to Chairman Powell, September 25, 2003, CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10 <http://apps.fcc.gov/ecfs/document/view?id=6515182413> (last accessed March 21, 2014)

<sup>5</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd 14986 (2005) (Policy Statement).

<sup>6</sup> See, Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (last accessed March 18, 2014) (“*National Broadband Plan*”).

<sup>7</sup> See, SBC Commc'ns, Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18392, para. 211 (2005); Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18537, para. 221 (2005); AT&T Inc. and BellSouth Corp. Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5663, para. 2 (2007).

<sup>8</sup> See, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 14, 2014) (“DC Cir. Decision”)

deployment of such capability *by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.*”<sup>9</sup> (Emphasis added)

The DC Circuit’s opinion quotes the language’s legislative history as supporting the Commission’s interpretation: The Senate Report for the bill that contained Section 706 explained that it was “intended to ensure that one of the primary objectives of [the 1996 Act] – to accelerate deployment of advanced telecommunications capability – is achieved,” and that the FCC was empowered to “provide the proper incentives for infrastructure investment.”<sup>10</sup>

In rejecting Verizon’s argument against attaching broad authority to Sec 706, the DC Circuit comments that: “Verizon wrongly suggests ...that the Commission claims authority over edge providers and others that utilize the services of wire- and radio-based communications providers. Unless an edge provider renders services (such as voice service) that themselves fall within the Act, the Commission would have no more authority over an edge provider than it has over the customers of ordinary telephone service, who also use fixed and mobile communications media.”<sup>11</sup>

The DC Circuit recognizes that there are limits on action that the Commission can undertake: “*Section 706(a) permits the FCC to take only two categories of action:*

- “*measures that promote competition in the local telecommunications market*” and
- “*other regulating methods that remove barriers to infrastructure investment.*”

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<sup>9</sup> In July 2010, the Commission concluded for the first time in the *Sixth Broadband Deployment Report*, 25 FCC Rcd 9556, 9558 ¶¶2-3 (2010), that “broadband deployment to *all* Americans is not reasonable and timely,” thus triggering Section 706(b) “as a consequence of that conclusion.”

<sup>10</sup> See, S. Rep. No. 104-23 at 50 (1995)

<sup>11</sup> See, DC Cir. Decision at 32.

The specificity of the requirements suggests that this language was not intended as an expansive grant of authority, but rather as a tool with which the Commission can use to reach specific, legislatively prescribed policy objectives.

### **III. NETWORK MANAGEMENT SUPPORTS INTERNET INNOVATION**

Any re-adoption of the vacated Open Internet rules must, at the very least, not constrain Internet Service Providers from exercising broad and flexible network management capabilities. In previously addressing the importance of network management to an Open Internet, TIA has commented that “The open Internet is, and always has been, a managed Internet. It relies on a highly intelligent network core, and management occurs across the network on an ongoing basis.”<sup>12</sup> The years since the Internet’s advent have been characterized by a consistent push to situate intelligence in the core of the network. The end result has been that the Internet continues to evolve and gain intelligence in a way that the initial developers might never have predicted, particularly with respect to traffic management. These developments have promoted user interests, openness and transparency and given rise to today’s robust Internet ecosystem.

In fact even the earliest implementations of the Internet did not require or intend for the network to treat all packets identically. This is clear from the historical design of IP packets – the electronic “envelopes” that carry information over the Internet. This design includes (and has

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<sup>12</sup> See, Telecommunications Industry Association Comments, Preserving the Open Internet Broadband Industry Practices GN Dkt No. 09-191, WC Dkt No. 07-52,(filed January 10, 2010) (“TIA 2010 Comments”) <http://apps.fcc.gov/ecfs/document/view?id=7020374654>(last accessed March 21, 2014)

*always* included) a service parameter that allows communicating computers to indicate to network routers that certain messages deserve precedence over other messages.<sup>13</sup>

In light of this technology evolution, TIA strongly cautions the Commission against changes in its approach to network management practices by broadband Internet access providers. For example, prescriptive rules permitting and/or prohibiting specific conduct, particularly with respect to discrimination, could have the perverse effect of locking in current network management assumptions, and would likely diminish consumer welfare. The Commission must adopt an expansive and flexible definition of “reasonable network management” that reflects the nature and needs of contemporary and continually evolving broadband networks.

At the very least, though, prescriptive network management rules risks deterring network investment, contrary to the goals (and limits) of Section 706.

#### **IV. REGULATION & ENFORCEMENT SHOULD FIRST IDENTIFY ACTUAL HARM AND BE NARROWLY TAILORED**

The Commission’s PN is limited to posing questions concerning its authority under section 706 and other available sources of Commission authority. Chairman Wheeler’s accompanying statement references potential rules he will ask the Commission to consider.<sup>14</sup>

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<sup>13</sup> See, William Stallings *Data and Computer Communications*, 4 Ed., 513 (1994); see also Douglas A. Hass, *The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates*, 22 *Berkeley Technology Law Journal* 1563, 1566 (2008), available at <http://ssrn.com/abstract=957373> (“*The Never-Was-Neutral Net*”). Cited in TIA 2010 comment - p10 <http://apps.fcc.gov/ecfs/document/view?id=7020374654>

<sup>14</sup> See, Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules, February 19, 2014

There is a real risk that prophylactic rules in anticipation of imagined wrongdoing will stifle investment. And if there is a legitimate concern with anticompetitive conduct, then rules that would prohibit anticompetitive conduct should be adopted.

However traffic management practices that, for example, might have posed some hypothetical potential for interference at slower speeds, might not be intrusive as broadband capacity increases. TIA notes that in fact continued investment in increasing broadband capacity can help reduce the potential for the conflicts that rules might be intended to address. The FCC should not be in the role of prescribing particular business models -- e.g., no charging for prioritization.

As it has in the past, TIA supports customer disclosure but cautions that any such requirements should not be overly burdensome or unduly technical.<sup>15</sup> The Commission should refrain from adopting disclosure obligations that would chill network management practices designed to improve the user experience. Recreating a “tariff-like, common law” regulatory regime requiring formal processes for each service modification would inhibit future innovation and dampen incentives for new investment by Internet Service Providers.

In applying a standard of technology neutrality, which has served the Commission well in the past, rules should avoid making any distinction among platforms. To the extent necessary, individual differences can be considered on a case-by-case basis to cure practices found inconsistent with the Commission’s rules. This approach has the advantage of better adjusting to future technology innovation which further advances IP convergence. Platform-centric rules, alternatively, risks creating distortions in the treatment of otherwise equivalent services.

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<sup>15</sup> See, TIA 2010 Comments

**VI. CONCLUSION**

For the foregoing reasons, TIA urges the Commission to act consistently with the recommendations above.

Respectfully submitted,

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