Before the
Federal Communications Commission
Washington, D.C. 20554

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

Reply Comments of the
Software & Information
Industry Association

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I. Introduction

On behalf of the Software & Information Industry Association (SIIA), thank you for the opportunity to comment on the Notice of Proposed Rulemaking, *Restoring Internet Freedom* (NPRM), adopted on May 18, 2017.

With nearly 700 member companies, SIIA is the principal trade association of the software and digital content industries. Our members are global industry leaders in the development and marketing of software and electronic content for business, education, government and consumer markets. They range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are leading providers of, among other things:

- Data analytics and artificial intelligence
- business, enterprise and networking software
- software publishing, graphics, and photo editing tools
- corporate database and data processing software
- financial trading and investing services, news, and commodities
- online legal information and legal research tools
- tools that protect against software viruses and other threats
- education software, digital content and online education services
- specialized business media
- open source software, and
- many other products and services in the digital content industries.

As such, members of SIIA and our industry depend on an open, robust and competitive Internet service environment to ensure a return on their investments, create jobs, and provide users (both consumers and enterprises) with innovative products and services. SIIA supports policies that seek to ensure that software and digital content providers are not threatened by potential discrimination or anticompetitive practices from broadband

Internet access service providers (broadband providers) in their ability to deliver lawful products and services to customers through the Internet. At the same time, we are mindful of the dangers of overregulation and the need to assure broadband providers of sufficient business flexibility so that they can tailor their offerings to the needs of their customers and earn a return on investment adequate for them to continually upgrade their networks to provide world-class broadband access.

In reviewing the NPRM and seeking to answer many of the questions, we have drawn not only on our industry's experience in developing innovative products and services and delivering them to a variety of end users, but we have also incorporated our experiences in promoting vigorous, but fair, competition within the software industry. We also make reference to a range of comments submitted by our industry partners and others who have already commented on the NPRM.

II. The Need for Continued FCC Oversight

The continued development of new technologies and infrastructure to support the delivery of software and digital information products and services is not only crucial to the future of the software and digital content industries, but also to consumers and the U.S. economy more broadly. To encourage the development and implementation of such technologies, the Internet policy framework must ensure that providers of innovative content are not disadvantaged in the marketplace. As the Federal Communication Commission ("FCC" or "Commission") reassesses the 2015 *Open Internet Order* and seeks to establish market-based policies that will aim to preserve a competitive Internet through a "light-touch" regulatory framework, we urge you to maintin the key guardrails established by the 2015 Order.[1]

The evolution of the Internet and associated developments in network technology have enabled, and at times encouraged, network operators to differentiate price and service for

[1] NPRM, ¶ 70.

end users and for providers of content, applications, and services. In many cases, this business flexibility works to the advantage of both network providers and their customers. Without sufficient transparency, oversight and operational guidelines, however, these practices could have anti-competitive and adverse effects on both software and digital content providers, as well as consumers.

Although the NPRM cites the lack of "quantifiable evidence of consumer harm" as a result of anti-consumer or anti-competitive practices,[2] we note that the rules in place have served as a check on broadband providers to a varying extent since the 2010 *Open Internet Order*, and that leading up to the initial 2010 *Open Internet Order*, and then the 2015 *Open Internet Order,* there were multiple examples of conduct occurring in the marketplace that warranted attention and oversight, even if quantifiable harm has not been proven. Therefore, SIIA believes that it remains important to maintain a policy framework that provides greater clarity and certainty to maximize innovation and competition.

The evolution of the Internet marketplace and corresponding technological tools available to network operators provides fertile ground for broadband providers seeking to maximize revenue opportunities from their networks. For instance, broadband providers can offer high-quality access predominantly—or only—to their own affiliates and partners or turn them into a service that providers offer to content and application providers for a fee that might not be warranted. Because network technology allows broadband providers to distinguish different classes of traffic—to offer different qualities of services, and to charge different prices to each class—there is a real risk that, as the FCC identified in 2010, "safeguarding historic Internet traffic pricing and practices is needed to preserve the end-to-end architecture of the Internet," so that innovative content and software companies are able to provide "intelligence and control at the edge of the network."[3]

[2] NPRM, ¶ 76.
[3] 2010 *Open Internet Order*, ¶ 62-63.

There are two distinct issues first raised by the initial 2010 *Open Internet Order*, both of which were essential underpinnings of both the 2010 and 2015 rules and still relevant to the Commission's current analysis. First, software and digital content companies, often referred to as "edge providers," face the risk that in cases where broadband providers have market power, they will have the incentive and ability to discriminate on the quality of service provision that would have adverse effects on innovation and competition at the edge of the network—such practices would also be harmful to users. These practices include blocking and throttling of content, and discrimination if applied in an anti-competitive manner. The FCC correctly identified that such "service providers generally, and particularly [those] with market power, may have the incentive and ability to reduce or fail to increase the transmission capacity available for standard best-effort Internet access service, particularly relative to other services they offer, in order to increase revenues obtained from content, application, and service providers … who desire a higher quality of service."[4]

Second, there is the distinct risk that broadband providers may limit capacity in order to charge higher prices, creating an inefficient market with unnaturally high prices to content, application, and other service providers. The results could be either reducing the incentive for new entrants, or possibly driving existing providers from the market if prices are too high. Both of these practices would have a negative effect on investment in innovative offerings in these areas and would also be detrimental to customers.

It is highly likely, in our industry's view, that in the absence of enforceable transparency and operational requirements, where broadband providers have market power and are vertically integrated or affiliated with content, application or service providers, that such a broadband provider serve as a gatekeeper to the content, applications, and services offered on the Internet. Examples that reflect concerns within our industry include the following:

[4] 2010 NPRM, ¶ 70-71.

- A broadband provider that is the owner of an online business financial information service or portal could use its gatekeeper position and technology to give preferential treatment to its own service or portal, either charging users more for access to the competitor site or seeking to protect its own or affiliated service by degrading the performance of the competitor website for its subscriber end users.

- A broadband provider enters into agreements with independent software, content, or other service providers to market or promote their services to its base of subscribers and provides assurances that those entities will have preferential treatment by the Internet access service provider's network; or a broadband provider acquires or enters into an equity position with an independent software, content, or other service provider and uses its technology or access gateway to provide better treatment of the products or services of that affiliated or related entity.

- Educational institutions and libraries today increasingly partner with and subscribe to various digital media and instructional services supplied by edge providers in order to provide access to video, audiobooks, courseware and other educational content. These practices are highlighted by the growth of distance learning, particularly in the higher education market. A broadband provider that owns or partners with a particular edge provider offering distance learning courseware to educational institutions would create an incentive for that broadband provider to enhance or expand access to those services, while potentially limiting access to competing services, therefore potentially decreasing competition for these vital services among educational institutions with limited resources. In the K-12 setting, broadband providers with connections to digital publishing or content generation may be more inclined to provide enhanced or expedited access to their proprietary or partner content – which would lead to less flexibility for educators to utilize the content best suited to their classroom.

Central to the concerns outlined above is that even if there is some limited competition among broadband providers, once an end-user has chosen to subscribe to a particular broadband provider, the gatekeeper position of the broadband provider gives it the ability to favor or disfavor any traffic destined for that subscriber, and it is has an economic incentive to do so given the need to maximize return on revenue from its subscriber base. Further as identified in the 2010 and 2015 *Open Internet Orders,* and highlighted by various commenters to this NPRM, the market for broadband services is such that consumers are often not able to easily switch providers. The challenges could be due to high switching costs (as a result of high activation fees and upfront installation fees), long term contracts and early termination fees, as well as costs for necessary equipment, or bundled pricing and family discount plans that also provide an incentive to stick with a single provider, rather than switching for competition purposes.[5]

III. Transparency Requirements

As the NPRM notes, the Commission initially adopted the transparency rule in 2010 and enhanced it in 2015, finding that "effective disclosure of Internet service providers network management practices, performance, and commercial terms of service promotes competition, innovation, investment, end-user choice, and broadband adoption."[6] SIIA strongly supports this conclusion and we appreciate the Commission expressing its continued support for these objectives at this time.

In answer to the Commission's question about whether the additional reporting obligations from the 2015 *Open Internet Order* remain necessary in today's competitive broadband market, SIIA strongly believes that they do. SIIA strongly concurs with the findings of both the 2010 and 2015 orders that detailed disclosure of service performance in particular, "promotes competition, innovation, investment, end-user choice, and broadband adoption."

[5] Internet Association (IA) comments at p. 20; 2010 *Open Internet Order* ¶ 34; 2015 *Open Internet Order* ¶ 81.
[6] NPRM, ¶ 89.

SIIA concurs with the Information Technology and Innovation Foundation's (ITIF) conclusion that the currrent transparency requirements are very useful for information users and civil society of traffic management practices, as well as the technical details of an offering, and that this transparency accomplishes "much of the heavy lifting in securing the open internet."[7] SIIA therefore urges the Commission to retain the transparency requirements from the 2015 order without weakening them in any way.

The FCC determined in its 2010 NPRM that there was evidence of service providers concealing information that consumers would consider relevant in choosing a service provider or a particular service option.[8] This led to an expansion of the transparency requirements in 2015, which SIIA supports keeping in place.

It is critical to recognize the importance of transparency on enterprise users, as well as consumer subscribers. Given the complex set of applications that enterprises run, and the diverse set of content and service they rely on, the need for accurate and reliable network management and other practices engaged in by broadband providers is essential for business enterprise operations. Such information should include transmission rates, capacity, limitations on use of any applications, and any network management practices that could interfere with or restrict service.

Software and digital content service providers need adequate information about network management practices to enable them to innovate and provide their products and services effectively to users. Without reliable and timely information on how network management practices might affect such interoperability, information content, application and other service providers will be unable to make sure that their products and services can be

[7] ITIF comments at p. 22.
[8] 2010 *Open Internet Order*, 2015 *Open Internet Order*.

delivered to their subscribers and customers consistent with the product and services design.

Therefore, SIIA strongly concurs with the comments of ITI that there is a need to maintain a transparency rule which, at a minimum, provides consumers specific and accurate information about the performance of the broadband internet access service offering they are purchasing; this is a conclusion that enjoys very broad agreement, particularly within the technology industry.[9]

IV. Blocking and Throttling

The 2015 *Open Internet Order* established bright line rules prohibiting blocking and throttling. SIIA supports these prohibitions and believes they should be retained by the FCC. As discussed above in these comments, broadband providers have both the incentive and ability to block and throttle content, and these practices could be very harmful to software and digital content providers, and to their consumers. In order to maintain a competitive market for software and digital content providers, and to sustain the necessary investment to propel this market, broadband providers must not be empowered to inappropriately block or slow traffic. This should be a fundamental precondition of service provision, and there must be an opportunity for legal recourse if this activity occurs.

While many commenters suggest that existing antitrust authority provides an adequate backstop for this type of behavior, [10] and we appreciate the Federal Trade Commission (FTC) staff comments reassertion about their antitrust enforcement authority,[11] we note that antitrust policy would provide a slow-moving, delayed approach, and one that presents a greater risk to the overall market for broadband services. SIIA concurs with the conclusion

[9] Information Technology Industry Council (ITI) Comments at p. 5, IA comments at p. 30, ITIF comments at p. 22, Computer and Communications Industry Association (CCIA) comments at p. 8.
[10] Technology Policy Institute (TPI) comments at p. 11,
[11] FTC comments at p. 23.

of ITIF that pure antitrust-style enforcement, while superior to rigid prophylactic rules, is not ideal to address anti-competitive behaviors of broadband providers.[12]

While the Commission now suggests that evidence of harm resulting from anti-competitive practices is lacking,[13] the Commission has identified in both 2010 and 2015 *Open Internet Orders* that broadband providers have clear economic incentives to favor their own or affiliated content over third-party content.[14] The case that the Commission is currently making suggests that despite multiple known incidents of broadband providers blocking and throttling third-party content, this is perfectly acceptable model going forward because there is insufficient quantifiable harm. This logic fails to recognize two key points. First, measuring quantifiable harm in the dynamic marketplace is difficult, if not impossible, over a limited period of time. Second, and more importantly, we have seen only a limited number of instances of blocking and throttling because broadband providers adapted their practices over the last decade due to a clear indication from the Commission to enforce prohibitions of these practices.

If the Commission now concludes that bright line rules prohibiting blocking and throttling are not necessary, broadband providers will recognize this abandonment of the FCC's long-standing commitment to these requirements and will therefore adapt their business practices to this new unrestrained environment. This is an observation offered by the IA which SIIA strongly agrees with.[15] As noted above, the transparency requirements have likely been effective in their objective to incentivize broadband providers to avoid practices that would lead to heightened customer and media scrutiny. So even where there have been questions over the last decade surrounding the FCC's legal authority to enforce these prohibitions, the presence of these bright-line rules, coupled with disclosure requirements,

[12] ITIF comments at p. 17-18.
[13] NPRM, ¶ 76.
[14] 2010 *Open Internet Order* ¶22, 2015 *Open Internet Order* ¶ 82.
[15] IA at p. 25.

provided a framework where anti-competitive practices would have drawn considerable scrutiny from policymakers, including not just from the Commission, but from Congress.

SIIA concurs with the assessment of the IA that "in assessing incidents of throttling, the Commission should consider any slowing of traffic to the end user (subject to reasonable network management, of course) caused by the gatekeeper ISP."[16] We also concur with the comments of the IA and ITIF that the existing exceptions for reasonable network management are sufficiently flexible to address legitimate, non-anticompetitive needs to prioritize certain content or otherwise manage traffic during incidences of network congestion.[17]

V. Paid Prioritization Rule

The 2015 *Open Internet Order* established a bright line rule on no-paid prioritization. The Commission now raises various appropriate questions about the potential impact of a "no prioritization" rule, such as whether this could suppress pro-competitive activity. In many ways, this type of rule is more challenging than the bans on blocking and throttling.[18]

SIIA concurs with comments by ITIF that networks should be able to evolve and adapt to applications' needs, and with their fundamental conclusion that "[b]roadband networks are the future of all communications, and the network should be allowed to be intelligent enough to compensate for architectural biases to support higher order systems. The key of course has been, is and will continue to be crafting rules that enable pro-consumer and pro-innovation discrimination, rather than banning all discrimination…" [19] Also, reasonable commercial deals, many of which are already part of the broadband and services marketplace, could be harmed by an overly-restrictive ban on prioritization. For example, as ITIF points out, the dynamic, latency-sensitive applications such as high-definition video

[16] IA comments at p. 27.
[17] IA comments at p. 27, ITIF comments at p. 22-24.
[18] NPRM P 85-86.
[19] ITIF comments at p. 22.

conferencing, or data-intensive real-time cloud services would benefit from a more flexible "commercially reasonable standard" in this area.[20]

Therefore, while SIIA favors additional flexibility for commercial arrangements, we also urge the FCC to provide proper oversight in order to prevent potential consumer harm or anti-competitive behavior, and to ensure that incentives to invest in the best-efforts Internet are not diminished. SIIA concurs with the conclusions of ITI whereby recognizing that without proper protections, commercial arrangements between online service providers and broadband providers have the potential to adversely impact competition and choice in the online marketplace, and can encourage the maintenance of network scarcity.[21]

VI. FCC Approach and Authority to Establishing Light-Touch Regulations

As stated above, SIIA supports continuation of the core guidelines established by the 2010 and 2015 Open Internet Orders, including the needs for strong transparency requirements and prohibitions on blocking and throttling, as well as guidelines and oversight regarding paid prioritization practices. However, SIIA does not espouse a particular viewpoint regarding which is the best approach for the FCC to achieve new rules in light of the proposed re-categorization of broadband providers as information service providers and therefore return to the more limited tools provided by the 1996 Telecommunications Act under Title I.

While we take no position on whether the provision of broadband internet access service should be categorized under Title II as a telecommunications service, we do concur with the findings in the NPRM that there is "lengthy agency precedent defining broadband internet access as an information service," as also pointed out in comments by ITIF, among others.[22] The Commission, ITIF and other commenters are correct in noting that the term "information service" was defined in the Telecommunications Act as meaning "the offering

[20] Ibid.
[21] ITI comments at p. 6-7.
[22] ITIF comments p. 12.

of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[23] Indeed, it is difficult to make a case that provision of broadband services do not fit this detailed definition.

As a general matter, SIIA is supportive of "light touch" regulatory approach for the Internet because this approach provides for greater flexibility to adapt along with technological innovation and market evolution. Over the last two decades, the Internet has thrived under such a framework, and we believe this can continue to produce robust investment and innovation. The question at this juncture, as the NPRM and many other commenters have pointed out the legal challenges to the ability of the FCC to implement new guidelines for broadband providers under Title I, is whether this can be achieved sufficiently given the Commission's limited authority under the Telecommunications Act. The NPRM and many other commenters discuss some of the potential limitations, but also opportunities to utilize authority granted under Sec. 706 or under Section 230(b).[24]

SIIA appreciates the Commission raising this question in the NPRM, and we believe the FCC should explore both options if it moves forward with reclassification to Title I. We concur with the conclusion of multiple commenters, including the IA, who are also open to these or alternative sources of legal authority for net neutrality rules as long as they provide a firm basis for new rules that closely track the current rules, consistent with our comments above.[25] While there are no assurances that new rules would withstand judicial scrutiny, we join with a wide swath of the technology industry in urging the Commission to retain bright line rules regarding blocking, throttling and transparency.[26]

[23] 47 U.S.C. § 153(24).
[24] NPRM ¶ 102.
[25] IA comments at p. 18-19.
[26] Comments from the IA, ITI, ITIF and CCIA, among many companies and other technology industry trade associations representing "edge providers" unanimously support retention of these rules.

SIIA believes that the ideal solution to achieving an effective framework for broadband providers is through legislation. We believe this for two reasons. First, given the past and potential future legal challenges to the Commission's current authority, only legislation could solidify the FCC's authority and establish a clear framework. Second, the objectives of continued innovation, investment and competition are not served under a system where the FCC can change the rules based on the changed composition of the Commission's membership and leadership. SIIA therefore strongly supports a bipartisan congressional effort to achieve the objectives we have identified, regardless of the outcome of the NPRM.

VII. The Impact on Privacy

SIIA filed comments and follow-up comments to the FCC regarding the 2016 Broadband Privacy regulations. In our comments, while we recognized the regulatory gap that was created for broadband providers—although not for edge providers—as a result of the 2015 *Open Internet Order* Title II reclassification, we expressed concerns about an expansion of privacy regulation for broadband providers under the FCC jurisdiction. The privacy framework developed by the FCC in 2016 presented a bifurcated privacy regulatory framework that lacked consistency and uniformity.

As the FTC staff identified in its comments on the NPRM, if the FCC adopts the proposal in the NPRM, "the common carrier exception would no longer bar the FTC's oversight of a BIAS provider's privacy and data security practices. Accordingly, a BIAS provider that makes commitments—either expressly or implicitly— regarding its privacy or data security practices, and fails to live up to such commitments, would risk violating the FTC Act." The FTC staff comment also goes on to highlight that "even absent such statements, a BIAS provider that fails to take reasonable precautions to protect the privacy or security of consumer data may violate the unfairness prohibition of the FTC Act."[27] Therefore, the

[27] FTC staff comments p. 13.

repeal of Title II classification for broadband providers would achieve a positive result for achieving a robust, uniform privacy regime under the FTC.