Written Testimony In Support of HB 957
Before the House Economic Matters Committee
February 26, 2020

Mark Del Bianco
3929 Washington St.
Kensington, MD 20895
301-602-5892
mark@markdelbianco.com

Written Testimony of Mark Del Bianco
in Support of House Bill 957

My name is Mark Del Bianco. I am a lifelong resident of Maryland and an attorney admitted to practice in Maryland. I am submitting this testimony in my personal capacity to express my strong support of House Bill 957, which is being considered by this Committee today.

My support for HB 957 is both personal and professional. I am fully aware of the potential dangers posed to competition, to innovation and to Maryland consumers by discriminatory behavior on the part of broadband communications networks. My first job out of law school was as an attorney in the Antitrust Division of the U.S. Department of Justice, where I worked on FCC appeals, including the breakup of AT&T. For the last twenty-five years, I have specialized in communications and network related matters. Since opening my own practice in 2003, I have represented many smaller competitors and innovative startup companies in the broadband, cloud services and tech sectors.

It has been my experience that all of these innovators and competitors depend on a free and open Internet provided through broadband in order to build their businesses. HB 957 would guarantee that in Maryland.

In my legal practice, I have been involved with net neutrality issues at the federal level for more than a decade. I represented a competitive broadband provider supporting net neutrality in the FCC proceeding that led to the original 2010 net neutrality rules. When those rules were overturned by the DC Circuit, the FCC went back to the drawing board and adopted new

net neutrality protections in its 2015 Open Internet Order. In order to implement those strong network neutrality rules, the FCC reclassified Broadband Internet Access Service (BIAS) as a "telecommunications service" under Title II of the Communications Act of 1934. Title II has governed telephone service since 1934, and it applied to Internet access from its invention until 2002, when the Republican FCC reclassified Internet access as a virtually unregulated "information service."

In many ways, the Open Internet rules were an application to broadband service of the competition policies that the FCC had developed for the telephone system in the 1960s and 70s, policies that led to the breakup of AT&T in 1981 and eventually to the development of the competitive telephone system and Internet we know today. This is not surprising. Whether or not you believe broadband Internet is or ought to be a utility, it is as vital to consumers and businesses as telephone service and electricity were throughout the 20th century.

Unfortunately, in 2018 the Trump FCC repealed the Open Internet Order in its misleadingly named "Restoring Internet Freedom Order" (the "RIFO"). In addition to stripping all of the consumer and competitor protections provided by the Open Internet Order, the RIFO reversed the classification of BIAS, concluding once again that it was an "information service." As an information service, BIAS was and is outside of the FCC's regulatory jurisdiction. Most importantly for purposes of HB 957, the RIFO also purported to preempt any state regulation of BIAS.

Predictably, the RIFO was appealed by numerous parties on a wide variety of grounds. Last August, in *Mozilla v. FCC,* the DC Circuit upheld most of the substantive provisions of the RIFO, including the reclassification of BIAS as

an information service. But the court struck down the portion of the RIFO in which the FCC preempted state regulation of BIAS. The court concluded that once the FCC had reclassified BIAS as an information service, over which it had effectively no regulatory jurisdiction, the FCC had no power to prevent states from regulating BIAS. In effect, the court said that the FCC had been too clever by half.

I agree with other commenters, including Gigi Sohn of Georgetown University, that in the RIFO the FCC thoroughly abdicated its responsibility to oversee the broadband market and to regulate broadband providers. It renounced its own jurisdiction in repealing the rules, and left nothing to replace them. The FCC suggested that the FTC has authority to regulate the broadband market, but the FTC has argued that it has little or no authority to do so. The upshot is that there are effectively no federal rules governing BIAS, which is far more crucial to the U.S. economy and to residents of Maryland than the legacy voice telephone system.

The only option, then, is for Congress or the states to take action. Congress has shown no intention of acting, so the states have to step in.

Even before the *Mozilla* decision, state legislators had begun to introduce bills to reestablish net neutrality protections for residents of their states. The first successful statute was the California Net Neutrality Act enacted last year. HB 957 is very similar to the California law, and both largely track the 2015 Open Internet Order.

I strongly support HB 957 because it will provide the net neutrality protections of the Open Internet Order to any individual or business that

uses the Internet in Maryland or offers products or services to Internet users in Maryland.

The key provisions of HB 957 are the rules prohibiting blocking or throttling of Internet websites, content or services, and the paid prioritization of content or services. It will also prevent BIAS providers from engaging in discriminatory "zero rating" practices – allowing some content to be exempt from data use limitations, a/k/a "data caps." HB 957 also replicates the Open Internet Order's strong transparency rules, so that Maryland residents and businesses will know what policies and procedures their BIAS provider is using to manage traffic on its network. Finally, there is a "general conduct standard" in Section 14-204, which bars broadband providers from using other ways to discriminate against or favor certain Internet traffic, or to otherwise try to get around the bill's net neutrality rules. Each of these protections is critical to ensuring that Internet users and content providers, and not broadband providers, control users' Internet experience.

The provisions of HB 957 are absolutely necessary. In the absence of net neutrality rules, BIAS providers continue to have both the incentive and the ability to discriminate against the services and Internet traffic of their competitors, or to favor the traffic of their affiliates and business partners (i.e., those paying for paid prioritization). Gigi Sohn has shown, for example, that nearly every major mobile wireless broadband provider has been throttling video services like YouTube and Netflix, even when the mobile networks are not congested. Public interest witnesses are testifying today about various other forms and instances of discrimination that are occurring since the RIFO went into effect.

But it is not just throttling that is a real problem today. Blocking is also occurring. BIAS providers are implementing services that use artificial intelligence and algorithms to proactively block subscriber access to URLs and websites that the algorithm concludes are problematic. I am aware of allegations that these programs are blocking access to legal, but encrypted, websites. In addition, I became aware of another instance of blocking just last week. I was contacted by A, a small client that offers services to allow "mystery shopper" companies to test the effectiveness of the customer service departments of large corporations (see, e.g., http://www.shoppersview.com, but note that Shoppers' View is not the mystery shopper company involved here). Most mystery shopper companies employ testers who make calls from their own homes, some of which may be in Maryland. The testers provide the service by using the Internet to access A's website and placing VoIP calls through the website to the CSRs at call centers. Starting in January, numerous testers reported to their mystery shopping employer that they could no longer access the A website to place calls. Upon investigation, it turned out that the testers all had Comcast home internet service and had been upgraded by Comcast to its new xFi service. That service apparently automatically blocks certain websites that Comcast's algorithm deems to be potentially problematic, including that of A. The testers were told by Comcast that there was nothing Comcast could do. Apparently, unlike the programs used to identify and combat voice robocalls, xFi has no capability to allow the user to permit or "whitelist" access to specific URLs. Each of the home-based testers had to get rid of their xFi service in order to keep working. The great irony here is that Comcast itself uses such mystery shopper services to improve its own customer service. See https://www.csr-net.com/our-clients.

I do not mean to suggest that Comcast or anyone else is deliberately blocking competitors' websites today. However, these examples demonstrate how BIAS providers can and do block websites based on their own subjective criteria without offering any recourse because of the lack of net neutrality rules. Even when inadvertent, this behavior can harm consumers and workers, and trample innovation by smaller competitors.

Until there are strong state or federal net neutrality protections in place, the attitude of the large BIAS providers will be best captured by a paraphrase of Lily Tomlin's famous "Ernestine the telephone operator" routine: "We don't care, we don't have to. We're your broadband provider." See https://vimeo.com/355556831.

Conclusion

HB 957 will do what the FCC will not do – protect Americans from anti-consumer and anticompetitive practices of BIAS providers. The Committee should recommend, and the House of Delegates should pass, this bill expeditiously.