

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
Safeguarding and Securing the Open Internet) WC Docket No. 23-320
)
)

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I. INTRODUCTION.

With this NPRM, the Commission proposes to fix one of the biggest mistakes in the history of communications policy: The previous FCC's abdication of its responsibility as our nation's communications regulator, charged with protecting consumers, promoting competition, user privacy, ensuring reliable service, and protecting public safety and national security.

The previous FCC did not just come to a different policy conclusion than other administrations, choosing to prioritize cable and telco profits over consumer protection. It walked away from broadband oversight entirely, on the thinnest of grounds, to such an extent that it even lost the power to pursue its own policy priority, of preempting the states that stepped in to do the work of consumer protection when the FCC refused to.

Broadband, like electricity and water, is indispensable in the modern world. It is not a luxury but a necessity for education, communication, and participation in the economy. The FCC's proposed action will restore its ability to oversee this essential service.

In these comments, Public Knowledge will demonstrate how the Commission is on strong legal footing with its proposal to classify broadband internet access as what it plainly is — “telecommunications.” Both the law and the procedural posture of this long-debated issue mean the Commission can act quickly, overcoming the delay caused by failed efforts to prevent the Commission from having a full slate of five Commissioners.

The comments explain the need for enforceable, bright-line rules that prevent anticompetitive conduct, by reviewing Internet Service Provider (ISP) practices nationwide and around the globe. They explain how the FCC's proposed action will promote broadband deployment and competition goals, support Universal Service for broadband, benefit broadband equity and the fight against digital redlining, promote free expression, and support access to broadband for persons with disabilities.

The comments also explain how net neutrality can promote online competition, preventing big tech from cutting special deals with ISPs, and how they will be an important part of protecting user privacy online.

ISPs can be creative in trying to evade their responsibilities to the public. These comments also rebut the industry-sponsored claim that Title II reclassification would be disallowed under the “major questions doctrine,” and the suggestion that ISPs can simply avoid their obligations by calling “broadband” something else.

Informed by the experience of the past eight years, Public Knowledge also suggests how the Commission's rules can be buttressed with additional clarifications: namely, that ISPs violate net neutrality when they charge “access fees” to content providers, and that “zero-rating” data from certain services is anticompetitive.

II. THE CURRENT PROCEDURAL POSTURE MAKES MOST COUNTERARGUMENTS IRRELEVANT.

In the *NPRM*,¹ the Commission begins with a re-examination of both the *RIFO Remand Order*² and the *RIFO*.³ Separately, the Commission seeks comment⁴ on the pending Petitions for

¹ Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (rel. Oct. 20, 2023) (*NPRM*), at ¶¶ 12-15.

² Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization, WC Docket Nos. 17-108, 17-287, and 11-42, Order on Remand, 35 FCC Rcd 12328 (2020) (*RIFO Remand Order*).

³ Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (*RIFO Order*).

⁴ Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the *RIFO Remand Order*, WC Docket Nos. 17-108, 170287, 11-42, Public Notice, DA 23-996 (rel. Oct. 19, 2023).

Reconsideration⁵ of the *RIFO Remand Order*. The Commission seeks comment on how this posture impacts this proceeding.

This procedural posture has enormous impact on the Commission's analysis and the subsequent analysis on review. Because of the pending Petitions for Reconsideration, the Commission needs no separate reason to reconsider whether to reverse the *RIFO Remand Order* and restore the 2015 Open Internet Rules on the grounds remanded by the D.C. Circuit. Nor is the Major Question Doctrine relevant. As explained in greater detail below, deciding that the D.C. Circuit was correct that the Commission's actions in 2017 are incompatible with the Commission's obligations to protect the safety of the public, and would harm the public interest via its impacts on pole attachments and Lifeline, is not a new exercise of regulatory authority.

Of course, there is no harm in buttressing the Commission's analysis with further consideration of grounds to reverse the *RIFO* for the reasons addressed in the *NPRM*. To the contrary, to go beyond the issues raised by the *Mozilla* remand and update its rules to reflect the lessons learned since 2015 requires a new Notice of Proposed Rulemaking. However, for the purposes of the inevitable judicial review, the Commission should make clear that the reclassification flows from both grant of the Petitions for Reconsideration and as a result of the new analysis under the *NPRM*. They therefore stand and fall on their own merit.

A. The Commission Needs No Additional Justification To Re-Examine Broadband Classification in Light of the Remand.

The Commission begins its *NPRM* with the observation that the COVID-19 shut down and subsequent events demonstrated the vital importance of broadband access and the need for

⁵ Common Cause, et al., Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021); INCOMPAS, Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 4, 2021); Public Knowledge, Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021); County of Santa Clara, et al., Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021).

the FCC to exercise oversight.⁶ This is, of course, correct. As discussed in greater detail in Parts II.B.2 and III below, the lack of oversight left the Commission dependent on the voluntary commitments of ISPs and the self-reports of their performance. This undoubtedly left some unknown number of Americans without broadband access during the COVID shut-down, and those that retained access were subject to unverifiable performance degradation. This is unacceptable. In the years since the COVID shut-down, Americans have only increased their reliance on broadband. As Congress expressly found in authorizing \$45 Billion in broadband subsidies as part of the IIJA: “Access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States.”⁷

But even without this turn of events, the Commission must re-examine the *RIFO Remand Order* as a consequence of the pending petitions for reconsideration. Indeed, the Commission filed a motion with the Federal Court of Appeals for the D.C. Circuit asking the court to hold the pending review of the *RIFO Remand Order* in abeyance pending resolution of the 4 pending petitions for reconsideration.⁸ The Commission is therefore obligated to consider the pending Petitions for Reconsideration, which necessarily requires the Commission to reconsider the *RIFO* in light of the *Mozilla* remand. These Petitions demonstrate that the *RIFO Remand Order* fails to justify the *RIFO*. To the contrary, analysis of the *RIFO Remand Order* demonstrates that reclassification of broadband as a Title I service – especially when combined with the further reversal of the *2015 Open Internet Order* identification of sources of authority to exercise oversight over ISPs – is completely incompatible with the Commission’s public safety obligations. Additionally, the impact on pole attachments and Lifeline impedes the goal of

⁶ NPRM ¶¶ 16-20.

⁷ 47 U.S.C. § 1701(1).

⁸ Respondent Federal Communications Commission’s Unopposed Motion for Abeyance, *CPUC v. FCC*, Docket No. 21-106 (filed April 7, 2021).

ensuring timely deployment and adoption of broadband by all Americans.⁹ The Commission must therefore grant the Petitions for Reconsideration, reverse the *RIFO Remand Order* and the *RIFO* and, at a minimum, reclassify broadband as a Title II service and restore the 2015 Open Internet rules.¹⁰

B. The RIFO Remand is Hopelessly Flawed and the Commission Must Grant the INCOMPAS and Santa Clara Petitions.

As the Public Knowledge *Petition for Reconsideration* made clear, the *RIFO Remand Order* suffered from fatal procedural flaws and faulty analysis. The Public Notice preceding the *RIFO* simply spoke of “updating the record,” and gave no indication that the Commission would go directly to an Order addressing the *Mozilla* remand. This alone warrants reversal of the Remand Order. As Public Knowledge explained in its Petition, the language of the Notice, the cursory analysis in the *RIFO Remand Order*, demonstrated that the Commission had predecided the outcome and lacked the “open mind” necessary under the APA.¹¹ As Common Cause, *et al.*, Santa Clara, and INCOMPAS demonstrated in detail, the *RIFO Remand Order* failed to engage in any serious analysis – especially in light of the emerging COVID-19 pandemic.

The *RIFO* and the *RIFO Remand Order* share several common elements in their analysis. This Section focuses on the common elements in the two orders and how real world experience – including the COVID-19 lockdown – disprove the blythe common assumptions of both the *RIFO* and the *RIFO Remand Order*. Part III addresses the specific flaws in the *RIFO* raised by the *NPRM* (which do not overlap with the issues raised in the Petitions for Reconsideration) that

⁹ *See, e.g.*, 47 U.S.C. §§ 1301(a)-(b) (adoption and deployment), 1302(a)-(b) (deployment), 1701(a)-(b) (access), 1722 (necessity of broadband connection for all Americans), 1754(a) (policy to facilitate equal access to broadband by all Americans).

¹⁰ As discussed below, the 2023 *NPRM* provides additional support for reversing the *RIFO* and for modifying the 2015 Rules. *See also* Petition of Public Knowledge (requesting new *NPRM*); Petition of INCOMPAS (same).

¹¹ Petition of Public Knowledge at 2. *See Rural Cellular Association v. FCC*, 588 F.3d 1095 (D.C. 2009).

constitute independent grounds for reinstating Title II classification and modifying the 2015 open internet rules.

1. ISP Blocking of Social Media and Impact on Public Safety.

The Santa Clara Petition for Reconsideration provides the most blatant example of ISP behavior requiring oversight and the negative impact on public safety from failure to have such rules.¹² On January 11, 2021, the ISP YourT1WiFi.com announced in an email it would block subscriber access to Twitter and Facebook in response to these services de-platforming then-President Donald Trump.¹³ The ISP subsequently clarified that it would only block access at the specific request of subscribers.¹⁴ Because YourT1WiFi offered service in Washington state as well as Idaho, it was subject to Washington state’s net neutrality law.

As Santa Clara explained in its Petition for Reconsideration, public safety entities rely on communications through social media in emergencies both to learn where danger is unfolding and to provide necessary instructions to members of the public as broadly as possible.¹⁵ Even temporary interruptions in the use of important services can create significant problems for public safety.

The *RIFO* and *RIFO Remand Order* assurance that ISPs would never block content – especially popular content – proved hollow. As this incident demonstrates, political motivations might well prompt ISPs to manipulate content based on political or economic motivations. Indeed, this incident echoes earlier episodes before the threat of net neutrality legislation

¹² Petition of Santa Clara at 16. As the court made clear in *Verizon v. FCC*, 740 F.3d 623, 655-56 (D.C. Cir. 2014), the Commission cannot impose obligations to prohibit blocking and to treat traffic neutrally without first classifying BIAS as Title II.

¹³ “Citing 'censorship' concerns, Idaho internet provider blocks Facebook, Twitter,” KREM/CBS Newspath (Jan. 13, 2021), available at <https://perma.cc/658W-TM7H>.

¹⁴ Emily Czachor, *Internet Provider to Restrict Access to Facebook, Twitter to Customers Who Request It*, Newsweek (Jan. 11, 2021), available at <https://perma.cc/PC3D-Q8DV>.

¹⁵ Petition of Santa Clara at 17.

prompted larger ISPs to watch their public behavior. Especially with regard to time-sensitive content, the temptation for ISPs to curry favor with political leaders (especially those with a reputation for vindictiveness) provides a strong motivation for ISPs of any size to temporarily block or degrade content, or to do so in ways that are not immediately detectable.

The Commission should resist arguments that this is “just one case” or “just a small ISP.” The entire point of *ex ante* rules is to protect the smooth functioning of the open internet, not to create an environment where ISPs develop their own separate practices and fragmenting the internet. This is especially true for small communities served by small ISPs – where these ISPs may exercise gatekeeper power. To be clear, the work of these community-based ISPs is extraordinarily valuable, often providing service in communities overlooked by giant ISPs, creating local jobs, and meeting local needs. At the same time, no BIAS provider should have the power to control the information or services available to their subscribers. The Commission’s responsibility to protect users extends to all users, and must not neglect subscribers to small ISPs.

More importantly, this incident provides an example of “falsifiability.” An absolute statement can be proven false by a single counter example. The classic example is disproving the statement “all swans are white” by producing a single black swan. The *RIFO*’s and *RIFO Remand Order*’s insistence that ISPs will not block websites or services in the absence of *ex ante* rules is disproven by an example of just such attempted blocking. And the effectiveness of *ex ante* rules is demonstrated by the subsequent clarification of the ISP that it would only block on an opt-in basis when it found itself subject to Washington’s net neutrality law. Given the importance to public safety of maintaining a neutral internet (and, as discussed, the failure of

deregulation to produce any of the promised benefits), the Commission should grant the Petitions for Reconsideration and – at a minimum – restore the open internet rules.

2. Reclassification Significantly Undermined the FCC’s Effectiveness In Ensuring Broadband Served All Americans During COVID.

The experience during the COVID lockdown underscored the importance of Title II and net neutrality rules to public safety (and to the public generally). The Santa Clara Petition correctly notes the impacts of COVID lockdown on public safety and the inability of the Commission to take effective action, or measure the effectiveness of the action taken. For example, the Commission could not prevent ISPs from terminating subscriptions when newly unemployed subscribers could not pay their monthly bills and was therefore forced to rely on a voluntary pledge. But just the Commission could not compel ISPs to keep customers subscribed during the crisis, the Commission could not monitor whether those ISPs that signed the voluntary pledge followed through on their promises. Despite the self-congratulatory insistence of the Commission at the time about the effectiveness of these voluntary measures, the Commission received thousands of complaints that ISPs were violating their commitments.¹⁶ Other ISPs took advantage of the circumstances to raise fees and impose new caps at a time when customer use of broadband dramatically increased to compensate for the lockdown – effectively price gouging during the crisis.¹⁷ As the Congressional Research Service succinctly put it, as a result of the

¹⁶ See Kelcee Griffins, “ISPs Say They Kept Virus Pledge, But Customers Disagree,” Law360 (December 7, 2020), available at <https://www.law360.com/articles/1335121/isps-say-they-kept-virus-pledge-but-customers-disagree>.

¹⁷ See Press Release, “E&C Leaders Demand Answers from Internet Companies Regarding Raising Prices and Imposing Data Caps During Covid-19 Pandemic,” House Energy & Commerce Committee (January 11, 2021), available at <https://democrats-energycommerce.house.gov/newsroom/press-releases/ec-leaders-demand-answers-from-internet-companies-regarding-raising-prices>.

FCC's decision to classify broadband as an information service: "The FCC may thus lack authority to compel any action from broadband providers."¹⁸

Supporters of Title I classification argue that as a result of deregulation U.S. broadband networks performed in a markedly superior manner to networks subject to net neutrality regulation, particularly in Europe. Proponents of this theory argue that U.S. networks were more resilient and less congested than their European counterparts. Proponents do not explain why this deregulation made a difference, as they do not offer any evidence of enhanced investment or explain what network management techniques net neutrality rules would otherwise have prohibited.

More importantly, proponents offer little evidence of their claim beyond an initial request from EU officials to video providers such as Netflix to downgrade the quality of their video in the first few weeks of the Pandemic as a precautionary measure to manage anticipated congestion. Apparently to the proponents of deregulation, precautions in the face of a crisis constitute weakness rather than prudence. Looking to actual evidence, however, there is no sign of any connection between the existence of absence of net neutrality rules and congestion during the COVID-19 pandemic.¹⁹ As noted above, some ISPs imposed new bandwidth caps during the Lockdown, an indicator of network weakness or price gouging, or both. But more importantly, comparisons between countries with net neutrality rules and the United States show that countries such as Canada, or EU countries considered economic peers of the U.S., had similar or lower rates of congestion.²⁰

¹⁸ Congressional Research Service, "Regulating Internet Access: Lessons from Covid-19," July 20, 2020 at 1. CRS noted that the FCC could assert necessary authority by reclassifying broadband but that the Trump FCC "was unlikely to do so." at 4.

¹⁹ See Harold Feld, "U.S. Actually Performed Worse During Covid Than Some Net Neutrality Countries, Not Better." Tales of the Sausage Factory (April 8, 2021).

²⁰ *Id.*, See also Stan Schroeder, "Internet Is Getting Slower in The U.S. and Europe," Mahable (March 24, 2020).

Again, the lack of any official measurements, considerable variability between private measurement services, and different metrics used to determine network performance make it virtually impossible to determine with certainty how networks actually responded in the crisis. As the Broadband Internet Technical Advisory Group stated in their report on network performance in 2020: “Data sources vary from independent measurement systems to self-reported internal company sources.”²¹ Claims in the absence of any official measurements or agreed upon metrics are easy to make. Given the number of studies that contradict the claim that U.S. networks performed better than networks subject to net neutrality rules, and the lack of any explanation as to why net neutrality rules would have made a difference beyond the asserted superiority of deregulation, the Commission should reject these claims.

Finally, as this section demonstrates, the lack of authority to compel accurate reports or exercise oversight makes it impossible to determine how our critical infrastructure handled the situation when we most desperately needed to know what was going on. This inability to obtain reliable information on ISP behavior or network performance alone justifies reclassification of broadband as Title II. Congress depends on the Commission to provide accurate information on which it can base legislation. The American people depend on the FCC to provide accurate information on critical communications infrastructure to ensure its smooth operation – especially in times of crisis. As the COVID-19 pandemic demonstrated, the supposed advantages of deregulation predicted by the *RIFO* and the *RIFO Remand* did not materialize. Instead, the *RIFO* and *RIFO Remand* left the Commission blind and helpless when the American people needed it most.

²¹ Broadband Internet Technical Advisory Group, “2020 Pandemic Network Performance,” at 7 n.1 (April 4, 2021), available at https://www.bitag.org/documents/bitag_report.pdf.

C. The Commission Should Grant the Petitions for Reconsideration Because of the Negative Impact on Lifeline and Lifeline Reform.

As the Common Cause Petition for Reconsideration demonstrated: “the Commission’s *Remand Order* weakened the Lifeline Program’s ability to provide low-income households with affordable broadband options at a time when the COVID-19 pandemic . . . made the need for connectivity greater than ever.”²² Although the pandemic has passed, the need for affordable broadband options remains greater than ever. The impact of COVID-19 moving enormous portions of our daily lives online remains with us. But the *RIFO Remand Order* solution to the *Mozilla* court’s remand was to limit the application of Lifeline to those ISPs that also offer a covered telecommunications service.²³ As more and more ISPs choose to offer BIAS service only, those who need Lifeline subsidies may find themselves unable to use Lifeline for fixed service to their home.

Furthermore, as the contribution factor continues to rise beyond any measure of sustainability, the Commission must consider how to reform the USF program for the future. Numerous advocates have urged the Commission to consider including BIAS in the contribution factor.²⁴ Classification of broadband as a Title I service makes it difficult, if not impossible, for the Commission to even consider this option. For purposes of expanding both the available services, and services available for inclusion in the contribution fact, the Commission should grant the Common Cause Petition for Reconsideration and reclassify broadband as a Title II service.

²² Common Cause Petition for Reconsideration at 2.

²³ RIFO Remand Order, ¶ 82.

²⁴ Carol Matthey, *USForward: FCC Must Reform USF Contributions Now - An Analysis of the Options* (Sep. 2021), <https://www.shlb.org/policy/research/USForward>.

D. Because This is a Remand, Major Question Doctrine Cannot Apply.

The Commission seeks comment on the applicability of the Major Question Doctrine to reclassification of BIAS as a Title II service and reimposition of the open internet rules.²⁵ Commenters address this question more fully below.²⁶ In addition to the reasons discussed *supra*, MQD is inapplicable where the Commission grants a Petition for Reconsideration and restores the *status quo ante*.

As the Supreme Court has explained, MQD can only arise when an agency claims a new power, reverses a long-standing interpretation of statute. While the Court (and various concurring opinions) mention additional criteria for when to ask whether Congress has “spoken clearly” in authorizing the challenged agency action, the irrefutable minimum is the exercise of some new authority or new interpretation.²⁷ This minimum requirement is further underscored by the cases listed by the Court as foundational to the doctrine.²⁸

The current procedural posture is a remand in which the Commission is considering whether to reverse a 2018 decision reversing its 2015 decision. Reversing an exercise of authority and restoring the *status quo ante* is the exact opposite of claiming a new authority or new interpretation of an existing authority. The very function of a Petition for Reconsideration is to reverse the previous exercise of authority. Petition for Reconsideration, the authority at issue here, is as old as the Communications Act.²⁹ Whether one considers the relevant “regulation” the general act of classifying services under the various Title of the Communications Act generally,

²⁵ NPRM, ¶ 81.

²⁶ See *infra* Part V.

²⁷ *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

²⁸ See *Brown & Williamson Tobacco Corp. v. FDA*, 529 U.S. 120 (2000) (asserting authority for the first time to regulate tobacco); *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (attempt to eliminate tariffing for first time in FCC’s existence); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (asserting authority to regulate practice of medicine).

²⁹ Codified at 47 U.S.C. § 405(a).

or the specific application of classification to BIAS, grant of the pending Petitions for Reconsideration cannot constitute a new assertion of authority or a new interpretation contrary to a long-standing previous interpretation. Accordingly, Major Question Doctrine simply cannot apply to the grant of Petitions for Reconsideration.³⁰

E. The Remand Order Radically Departed From Commission Precedent and the Commission Should Reject Its Reasoning.

Both the *RIFO* and the *RIFO Remand Order* constituted radical departures from previous Commission precedent and which the Commission should reject and reverse. Part III.C discusses the *RIFO*. But the *RIFO Remand Order* contains a significant departure from past Commission precedent that the Commission should expressly reject.

Specifically, the *RIFO Remand Order* repeats with regard to the impact on public safety, the impact on competition (through the impact on pole attachments) and the impact on Lifeline that the benefits of Title I deregulation outweigh the harms. Nowhere has the Commission ever found that the nebulous and unsubstantiated benefits of deregulation outweigh the specific benefits of ensuring that public safety responders can communicate reliably with each other and with the public in times of crisis – as demonstrated by the Santa Clara Petition. Nowhere has the Commission found that the vague and conclusory benefits of deregulation outweigh the substantial concrete harms to competition – as demonstrated by the INCOMPAS Petition. Nowhere has the Commission found that unquantified and unspecified benefits of deregulation justify undermining the goal of providing affordable broadband for all Americans – as demonstrated by the Common Cause Petition for Reconsideration. Indeed, such a calculus is contrary to the instructions of the *Mozilla* remand and to the Communications Act generally.³¹

³⁰ As explained below, even if the Commission did not grant the Petitions for Reconsideration and instead proceeded solely on the basis of the new NPRM, MQD would not apply.

³¹ See, e.g., 47 U.S.C. § 151 (purpose of the Commission to ensure to all Americans a world wide communications network for the purpose of public safety and national security); 47 U.S.C. §

F. The Remand And The Rulemaking Are Separate Proceedings And The Commission Should Make Clear That While They Are Connected, They Stand Or Fall On Their Own Merits.

Finally, Commenters note that while the Petitions for Reconsideration and the pending NPRM are related proceedings that inform each other, they are to some degree separate and stand on their respective merits. The Petitions for Reconsideration are limited to the issues designated by the *Mozilla* court for reconsideration on remand. Although the Commission has the authority (with proper notice) to expand the grounds for reconsideration, grant of the Petitions for Reconsideration simply reverse the *RIFO Remand Order* and, by extension, the *RIFO*, by determining that the conclusions reached in the *RIFO* are incompatible with the Commission's responsibilities to protect public safety, promote competition, and provide for affordable broadband via a robust Lifeline program. To go further, as requested by the INCOMPAS Petition for Reconsideration and as contemplated by the Commission in the NPRM, requires a new proceeding – and new rules (or changes to the 2015 rules) must be adopted based on the record compiled in the new proceeding.

The Commission has certainly met its notice requirements and Commenters agree that the additional experience since reclassification in 2018 warrant both reclassification and some additional adjustments to the Commission's 2015 forbearance (notably with regard to Sections 214, 218 and 220) and to the rules adopted in 2015. But the differences matter. For example, the Commission seeks comments on the impact of the 2018 *RIFO* on its 2015 Forbearance.³² Grant of the Petitions for Reconsideration would reverse the *RIFO*, restoring the 2015 Forbearance. This would stand on its own merits. Modifying the Forbearance, by contrast, would rest on the record compiled in the pending NPRM.

1302 (obligation to ensure timely deployment of broadband to all Americans); 47 U.S.C. § 1754 (obligation to facilitate equal access to broadband to all Americans).

³² NPRM, ¶ 100.

Through the Public Notice on the Petitions for Reconsideration, the Commission has properly expanded the scope of review and the two proceedings are now interrelated. Nevertheless, for reasons addressed above, there are distinctions between the Petitions for Reconsideration and the Notice of Proposed rulemaking. Most importantly, because the D.C. Circuit previously affirmed the *2015 Open Internet Order* and associated reclassification, rules and Forbearance, the grant of the Petitions for Reconsideration and the NPRM need to be treated as related but distinct.

III. EVEN STARTING FROM SCRATCH, THE COMMISSION MUST REVERSE THE RIFO AND RECLASSIFY AS TITLE II.

As noted above, the Petitions for Reconsideration and the NPRM are interrelated but distinct. The Commission therefore appropriately solicits comment in light of the last several years of deregulation. The evidence demonstrates that not only have the purported benefits of deregulation failed to materialize, the harms predicted by net neutrality proponents have occurred. Nor have state consumer protection prevented ISPs from torturing the word “unlimited” to become essentially meaningless. Efforts by ISPs overseas to undermine net neutrality with new forms of tolls or paid prioritization demonstrate that ISPs still have incentive to engage in such conduct – even if state net neutrality laws and concern about potential backlash have prevented them from trying such tactics in the United States.

Additionally, as the NPRM observes, broadband access is even more about speed and reliability today than in 2015. Carriers do not advertise their superior email or caching to attract customers. To the extent ISPs offer incentive services, they rely on non-bundled offerings such as discounts for equipment, partnerships with video services, or subsidized bundles that combine clearly distinct voice, cable and broadband access services.

Finally, the *RIFO* constituted a dramatic about-face of the Commission's previous commitment to consumer protection – notably with regard to privacy, but in other areas as well. Although the *Mozilla* court found that the Commission had not clearly departed from its past precedent in an arbitrary and capricious manner, the Commission should take this opportunity to set the record straight and re-emphasize the importance of consumer protection for BIAS subscribers.

A. There is Evidence That Net Neutrality Rules Are Necessary.

As mentioned above, the period of deregulation has offered ample evidence that net neutrality rules are necessary and desirable. Blocking, degradation of service, zero rating, and other harms have cropped up, both overseas and in the United States even despite state-level consumer protection measures. These examples illustrate that ISPs maintain a motivation for such practices.

1. Examples of Blocking and Degradation of Service.

As discussed above, the ISP YourT1WiFi.com announced in email to its customers on January 15, 2021 that it would block access to Facebook and Twitter in response to those services deplatforming then-President Trump. Although based in Idaho, YourT1WiFi.com offered service also offered service around Spokane, Washington. When asked about compliance with Washington State's net neutrality law that prohibited such blocking, YourT1WiFi clarified that it would only block subscribers who affirmatively asked to block Facebook and Twitter.

In addition to this attempt at politically-motivated blocking, studies in 2019 showed that mobile providers acted to degrade video service. This degradation of service went well beyond the disclosed and neutrally applied throttling of customers who exceeded their bandwidth caps during times of network congestion. A 2019 report found different throttling practices by the 4

largest mobile carriers occurring constantly, regardless of any network congestion.³³ The study showed that the mobile carriers applied their throttling in non-neutral ways, blocking some providers (such as YouTube) more frequently than others (such as Amazon). The study also found that when the traffic from Amazon was encrypted – and therefore it was impossible to tell that it was video traffic – carriers did not throttle it.³⁴ The studies authors note that when confronted with the study evidence, both Sprint and AT&T denied throttling.³⁵ Because such practices would not violate Commission rules, it was impossible to investigate the matter by filing a complaint.

2. ISPs Zero Rated Affiliated Services Until State Laws Went Into Effect.

After AT&T acquired HBO, it began zero-rating HBO but not other video streaming services. Zero-rating affiliated video services constitutes the most significant sort of anti-competitive use of zero rating. Unlike the study regarding degradation of video services, AT&T affirmatively advertised its zero-rating HBO as a feature. Only when California’s net neutrality law took effect did AT&T end this zero-rating practice. In its public announcement ending this discriminatory practice, AT&T made it clear that it did so only because California’s net neutrality law prohibited it from continuing.³⁶

³³ David Choffnes, Ashkan Nikraves, Abbas Razaghpanah, et al., *Your Apps are Watching You: A Detailed Study on Mobile Network Traffic and Policy Enforcement*, (Feb. 2018), <https://wehe.meddle.mobi/papers/wehe.pdf>.

³⁴ Traffic from Youtube and Netflix can be presumed to be video traffic despite encryption, given the nature of the site.

³⁵ Khalida Sarwari, *Northeastern University researcher finds that wireless networks are throttling video streaming 24/7*, Northeastern Global News (Aug. 27, 2019), <https://news.northeastern.edu/2019/08/27/northeastern-university-researcher-finds-that-wireless-networks-are-throttling-video-streaming-24-7>; Fangfan Li, Arian Akhavan Niaki, David Choffnes, Phillipa Gill, and Alan Mislove, A Large-Scale Analysis of Deployed Traffic Differentiation Practices, SIGCOMM ’19: 2019 Conference of the ACM Special Interest Group on Data Communication, August 19–23, 2019, Beijing, China, <https://doi.org/10.1145/3341302.3342092>.

³⁶ Julia Alexander, “Streaming HBO Max Will Now Count Toward Data Limits for AT&T Customers,” *The Verge* (March 17, 2021),

3. *State Consumer Protection Laws and FTC Rules Have Been Ineffective in Protecting Consumers From Degradation of Service, Deceptive Marketing Practices, and Blocking Consumer Use of Devices and Services.*

The *RIFO* attempted to preempt state net neutrality rules, predicting that state consumer protection laws and the FTC would adequately protect consumers from such anti-competitive and anti-consumer conduct. But neither state consumer protection laws or FTC enforcement impacted ISP behavior. Only because some states enacted their own net neutrality laws did ISPs stop their blocking and degradation of service. As this demonstrates, neither consumer protection laws or antitrust laws provide any deterrence to ISPs. To adequately protect all subscribers, the Commission must reclassify broadband as Title II.

Furthermore, while state net neutrality laws have proven adequate to address the most blatant violations of net neutrality, they have proven ineffective to provide consumer protection or address other violations. The most widespread is the abuse of the term “unlimited” by carriers. An examination of the three largest mobile carriers websites shows that carriers offer multiple types of “unlimited plans,” with limits that violate the traditional protections of net neutrality since the Commission first announced its “four freedoms” in the 2005 Internet Policy Statement.³⁷ AT&T offers an “Unlimited Premium,” and “Unlimited Extra,” and an “Unlimited Starter.”³⁸ Only Unlimited Premium offers HD streaming, with the other two “unlimited plans” degraded to standard. While each plan permits use of the phone as a mobile hotspot, the data permitted for a mobile hotspot is limited depending on the level of “unlimited” plan. Verizon has

<https://www.theverge.com/2021/3/17/22336872/hbo-max-data-cap-att-net-neutrality-california-zero-rating-streaming>.

³⁷ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02- 33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005) (Internet Policy Statement).

³⁸ AT&T, “Compare our unlimited data plans,” <https://www.att.com/plans/unlimited-data-plans/> (last accessed Dec. 14, 2023).

“Unlimited Ultimate,” “Unlimited Plus,” and “Unlimited Welcome,” where the latter does not appear to permit use of the phone as a mobile hotspot at all.³⁹ T-Mobile also has three “Unlimited” plans, with different data features and permitting different levels of use for mobile hotspots.⁴⁰ The situation is so confusing for consumers that online reviewers publish guides for selecting the best “unlimited” plan.

The same word games occur when mobile carriers shift from one standard to another. For example, in 2018, the major carriers began marketing their phones as offering “5G” service. This “5G” had no standard meaning. It did not refer to a specific standard, such as the 3GPP Release 15 or 15NR, or to newly opened frequency bands. Because of the lack of any standard or consumer protection, carriers could claim any new phone offered “5G”, and charge customers higher rates as a consequence.⁴¹

4. ISP Practices Overseas Show That ISPs Are Still Trying to Engage in Various Forms of Prioritization.

Opponents of reclassification and restoring open internet rules insist that ISPs simply do not have the incentive to engage in paid prioritization, otherwise they would have already done it. Setting aside the examples discussed above, we can see from the efforts of ISPs in countries that have adopted net neutrality rules to undermine these rules that ISPs still have the incentive to engage in paid prioritization and blocking or degrading content to demand tolls to reach their end user customers. These efforts demonstrate the continued incentive of ISPs to monetize their

³⁹ Verizon, “myPlan,” <https://www.verizon.com/plans/unlimited/> (last accessed Dec. 14, 2023).

⁴⁰ T-Mobile’s lowest unlimited plan, “Essentials” offers unlimited 3G mobile hotspot use. As T-Mobile has deactivated its 3G network, it must be assumed that it throttles hotspots to 3G despite the availability of 4G and 5G networks. See T-Mobile, “Compare our best unlimited cell phone plans,” <https://www.t-mobile.com/cell-phone-plans?INTNAV=tNav:Plans:Magenta> (last accessed Dec. 14, 2023).

⁴¹ See Harold Feld, “Why Wi-Fi 6 Tells You Exactly What You’re Buying, But ‘5G’ Doesn’t Tell You Anything,” Tales of the Sausage Factory (December 28, 2018), available at <https://wetmachine.com/tales-of-the-sausage-factory/why-wi-fi-6-tells-you-exactly-what-youre-buying-but-5g-doesnt-tell-you-anything/>.

control of traffic, and therefore the need for effective rules to prevent such games. Where ISPs have successfully legalized requirements for termination fees, the result has been serious degradation of quality for subscribers and to undermine availability of content.

In South Korea, ISPs persuaded the telecom regulator to adopt “sending party network pays.” Under this regime, networks charge fees to receive (“terminate”) traffic. Large content providers, such as video distributors like Netflix, have asymmetric traffic flows. Particularly in South Korea, where traffic from these services originates outside the country, the South Korean ISPs anticipated significant windfalls – largely from foreign companies.⁴²

What happened instead provided an object lesson in the danger of allowing ISPs to charge access fees. Large content providers promptly began trying to game the system by breaking up content among multiple networks to avoid large asymmetric transfers from one network to another. As a result, South Koreans generally saw a degradation in performance when the law went into effect. For several years, the South Korean Parliament has tried to fashion new laws to force content providers to ensure quality of service and pay higher fees – without notable success.⁴³ Meanwhile, local content providers that cannot break up their content have experienced a dramatic rise in the cost of content production and delivery, which they have passed on to the Korean people.⁴⁴ While the largest providers such as Netflix have been able to

⁴² See Trevor Wagner, “Myths Surrounding Network Usage Fees: South Korea,” CCIA (2023), available at https://research.ccianet.org/wp-content/uploads/2023/11/CCIA_Myths-Surrounding-Network-Usage-Fees-South-Korea.pdf.

⁴³ See Carl Gahnburg & David Frautschy, “Sender Pays: What Lesson European Policy Makers Should Take from the Case of South Korea,” Internet Society (September 30, 2022), available at <https://www.internetsociety.org/blog/2022/09/sender-pays-what-lessons-european-policy-makers-should-take-from-south-korea/>.

⁴⁴ Joe Kane and Jessica Dine, “Consumers are the Ones Who End Up Paying for Sending Party Pays Mandates,” ITIF (November 7, 2022), available at <https://itif.org/publications/2022/11/07/consumers-are-the-ones-who-end-up-paying-for-sending-party-pays-mandates/>.

negotiate settlements with South Korea’s 3 ISPs to reduce costs,⁴⁵ other providers have not. Most recently, Twitch announced that because of the cost of termination fees it would shut down its service in South Korea at the end of February 2024.⁴⁶

South Korea provides an important natural experiment in permitting ISPs to charge “edge providers” for access. As predicted by the *2015 Open Internet Order* (and contrary to the predictions of the *RIFO*), permitting ISPs to demand access charges results in poorer quality service, less content innovation, fewer content-based services with the resultant loss in competition, and overall higher costs to consumers.⁴⁷ Unfortunately, it has not dissuaded other countries with net neutrality rules from considering other paid access or paid prioritization schemes at the insistence of the ISP lobby. For the last year, the European Parliament has been considering an ISP-supported proposal to allow ISPs to “negotiate” access fees with “big content” providers ostensibly to offset the costs created by these providers and to fund rural deployment.⁴⁸ In the United Kingdom, Ofcom recently issued guidance recommending that the UK amend its net neutrality law to permit ISPs to offer paid prioritization for higher quality of

⁴⁵ Joyce Lee, “S. Korean Broadband Firm, Netflix Says Ending All Disputes Over Costs,” Reuters (Sept. 17, 2023), available at <https://www.reuters.com/technology/south-korean-broadband-firm-says-ending-all-disputes-with-netflix-2023-09-18/>.

⁴⁶ See Dan Clancy, Twitch CEO, “An Update on Twitch in Korea,” December 5, 2023, <https://blog.twitch.tv/en/2023/12/05/an-update-on-twitch-in-korea>. It is often argued that services like Twitch affiliated with companies such as Amazon can afford to pay termination fees and therefore they will simply do so. But business does not work this way. The question is not whether a company *can* afford to pay but whether a company finds that it worthwhile to pay. If the cost cuts too far into revenue – especially for a service that is not a core component of its business – it simply stops offering the service.

⁴⁷ VAUNET, “Sending Network Party Pays – A Model That Endangers Media Pluralism,” October 31, 2022, available at https://www.politico.eu/wp-content/uploads/2022/11/02/VAUNET-positionpaper_NetworkFees.pdf.

⁴⁸ John Bergmayer, “The EU’s “Fair Share” Proposal Is a Threat to Net Neutrality Everywhere,” Public Knowledge (Apr. 27, 2023), <https://publicknowledge.org/the-eus-fair-share-proposal-net-neutrality>.

service and to use network slicing to offer “specialized services” at the cost of quality and capacity for general internet access.⁴⁹

These examples show two things. First, ISPs continue to have the incentive to engage in conduct directly contrary to the open internet. Second, where countries have permitted these practices, they have produced all the negative consequences predicted with none of the predicted benefits to the public. Although the presence of state net neutrality laws in some states and the ongoing uncertainty surrounding the future of national net neutrality laws have limited the willingness of ISPs to publicly engage in the worst, most obvious violations of net neutrality, the Commission cannot reasonably expect this to restrain ISPs forever. Rules remain needed to prevent the conduct and harms predicted by the Commission in the *2015 Open Internet Order*.

B. The NPRM Correctly Observes that ISPs Market Even More About Speed (and Reliability) than in 2015.

The NPRM observes that the *2015 Open Internet Order* reclassified broadband not because it reinterpreted the meaning of the word “offer” in the statutory language, but because ISPs effectively changed the nature of their offer. Rather than advertise equal parts email and web hosting in addition to access to internet content (the telecommunications component of BIAS), ISPs focused their advertising on speed (and, to some degree, coverage and reliability).⁵⁰ This is even more true today than it was in 2015.

A brief survey of television and online advertising for both mobile and fixed broadband shows that ISPs compete with each other on the basis of speed, price, ease of use, reliability and availability. For example, cable operators claim that their networks have superior regular

⁴⁹ Ofcom, Ofcom revises net neutrality guidance (Oct. 26, 2023), <https://www.ofcom.org.uk/news-centre/2023/ofcom-revises-net-neutrality-guidance>.

⁵⁰ NPRM ¶ 19.

performance to fixed wireless competitors.⁵¹ Fixed wireless providers respond with advertisements emphasizing that they provide the same broadband capacity and speeds as cable broadband, but cheaper and easier.⁵² To the extent ISPs advertise additional features, they offer non-integrated services such as partnerships with streaming video, discounts on bundles, or equipment discounts.

In short, as the *Mozilla* concurrences recognized, ISPs no longer offer integrated telecommunications and information services as they did in 2005. To the extent the Commission maintains the same definition of “telecommunications service,” it must reclassify broadband as a Title II service to reflect how ISPs offer their service today.

C. The RIFO Was a Radical Departure From Previous Commission Precedent, Including Previous Reclassifications of Broadband as an Information Service.

Although the *Mozilla* court found that that *RIFO*’s “anemic analysis...barely survives arbitrary and capricious review,”⁵³ the NPRM correctly observes that the *RIFO* was a radical break from past Commission decisions – including those classifying various broadband services

⁵¹ See, Daniel Frankel, “Fixed Wireless Ad Wars Heat Up: Comcast and Charter Told to Take Down or Modify Commercials Following Complaints,” NexTTV (Nov. 30, 2023), available at <https://www.nexttv.com/news/fixed-wireless-ad-wars-heat-up-comcast-and-charter-told-to-take-down-or-modify-commercials-following-complaints>.

⁵² <https://www.youtube.com/watch?v=GjHqi90uuyo>

⁵³ *Mozilla v. FCC*, 940 F.3d 1, 59 (D.C. Cir. 2019) (discussing Pai FCC’s reliance on antitrust in place of bright-line rules).

under Title I.⁵⁴ Unlike the *RIFO*, previous Commissions asserted both the authority and intent to prevent blocking of content, protect privacy, and generally protect consumers.

Beginning with the Cable Modem Classification Order in 2002,⁵⁵ the Commission asserted authority to protect consumer privacy and otherwise protect consumers. Specifically with regard to privacy, the *Cable Modem Order* tentatively found that cable broadband was subject to the privacy protections of Section 631.⁵⁶ But more generally, the *Cable Modem Order* asserted broad regulatory power under its Title I ancillary authority. Then Chairman Michael Powell further declared in his concurrence that “The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress has invested the Commission with ample authority under Title I.”⁵⁷ The Commission proceeded to exercise this authority in 2004, when it acted to prevent a local ISP from blocking VOIP service.⁵⁸

⁵⁴ Notably, residential Internet access prior to broadband depended on Title II. First, the FCC’s decision to require that telephone companies allow users to use equipment of their choice on the network, such as modems, ensured that it was possible for users to actually connect their computers to the phone network. This decision was a direct application of Title II. Use of the Carterphone Device in Message Toll Telephone Service, 13 FCC 2d 430 (1967). Second, the requirement that telephone companies provide service to businesses of all kinds, even ones they saw as potential competitors, ensured that dial-up ISPs were able to stay in business. Telephone companies weakly tried to argue that they should be able to cut them off or charge them higher rates, but this went nowhere—Title II ensured that consumers could access the services of their choice. Access Charge Reform, 12 FCC Rcd 15982, ¶¶ 344-348 (1997) (“had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid”). The centrality of Title II to home internet access disproves the claim that classifying broadband as a telecommunications service was somehow unprecedented.

⁵⁵ Inquiry Concerning High Speed Access to the Internet to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 02-52, 17 FCC Rcd 4798 (2002) (“*Cable Modem Order*”)

⁵⁶ *Id.* at Par. 111-12 17 FCC Rcd at 4853-54.

⁵⁷ *Id.* at 4866.

⁵⁸ Madison River Communications, LLC and Affiliated Companies, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (2005).

The Commission was even more specific as to its authority to protect consumers – and intent to exercise that authority – in the *Wireline Framework Order* and associated *Consumer Protection in the Broadband Era Notice of Proposed Rulemaking*.⁵⁹ There, the Commission stated: “Consumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on Internet services.”⁶⁰ The Commission asserted authority under Title I to extend its CPNI privacy rules – and other consumer protections such as Truth-in-Billing and network outage reporting – to wireline broadband services.⁶¹ then Chairman Kevin Martin, as Chairman Powell had before him, asserted that the Commission would continue to play an important role in protecting the public.⁶² Simultaneously, the Commission released the *Internet Policy Statement*, the predecessor to the Commission’s Open Internet Rules.⁶³ In its 2007 *Broadband Practices NOI*,⁶⁴ the Commission asserted that it has authority to enforce the Internet Policy Statement.⁶⁵ A year later, it sought to do so when Comcast blocked access to peer-to-peer applications, notably BitTorrent.⁶⁶

Although the Commission ultimately proved mistaken in its assertions as to the breadth of its Title I authority, it never abandoned its responsibility to protect consumers (particularly consumer privacy) or disowned authority to enforce basic rules of net neutrality. Not until the

⁵⁹ In re Consumer Protection in the Broadband Era, WC Docket No. 05-271; Appropriate Framework for Broadband Access over Wireline Facilities, CC Docket No. 02-33, *Report & Order, Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“*Wireline Framework Order*”).

⁶⁰ *Id.* at 14930-31, ¶¶ 148-49.

⁶¹ *Id.* at 14933, ¶¶ 153-54.

⁶² “Together with our state colleagues, the Commission must vigilantly ensure that law enforcement and consumer protection needs continue to be met.” *Id.* at 14976 (Separate Statement of Chairman Kevin Martin).

⁶³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02- 33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005).

⁶⁴ In re Broadband Industry Practices, *Notice of Inquiry*, 22 FCC Rcd 7894 (2007)

⁶⁵ *Id.* at 7896, ¶ 4.

⁶⁶ Formal Complaint of Free Press & Public Knowledge, *Memorandum Opinion & Order*, 23 FCC Rcd 13028 (Aug. 20, 2008)

RIFO did the Commission characterize its previous classification of broadband as information as divesting it of both the responsibility and the authority to protect consumers and preserve the essential openness of the internet. To the contrary, from the first classification of cable modem as an information service, the Commission insisted that it would continue to act to protect the public interest. At no point did the Commission ever claim that the benefits of total deregulation would outweigh any public interest harms – as the Commission did in the *RIFO Remand Order*. The Commission should use this proceeding and the associated Petitions for Reconsideration to reject an approach that deliberately seeks to eliminate Commission authority to protect broadband subscribers and preserve the open nature of the internet as utterly foreign to the Commission’s previous precedent even under Title I.

IV. THE LANGUAGE OF THE COMMUNICATIONS ACT SUPPORTS THE CLASSIFICATION OF BROADBAND AS A TELECOMMUNICATIONS SERVICE.

The Commission has tentatively concluded that it is “both a reasonable and the best reading” of the Communications Act that, “as offered to and understood by consumers today,” broadband internet access service is a telecommunications service. Public Knowledge supports this conclusion as well as the Commission’s analysis of the definitional provisions of the statute.

It is well-settled law that the Commission has both the authority and deference to interpret ambiguous statutes, and even to change its interpretation as conditions may warrant.⁶⁷ In light of this, it is clear that the Commission can—and indeed should—revise the mistaken and disastrous information service classification of BIAS by restoring classification as a telecommunications service. There are numerous policy and factual grounds for such a change in course, but it would be most accurate to say that it is a correction in course: the best reading of

⁶⁷ See, e.g., *Mozilla*, 940 F.3d at 23-24, 43, 50, 53-54, 55-56, 63-64; *USTA*, 825 F.3d at 701-702, 704, 708-10, 723-24; *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64) (emphasis added; internal quotation marks omitted).

the Communications Act presents an unambiguous conclusion that broadband internet access service is a telecommunications service.

There are three statutory definitions relevant to the analysis of the classification of BIAS: telecommunications, telecommunications service, and information service.⁶⁸ Public Knowledge concurs with the Commission’s analysis of these terms (discussed further below) and that the operative distinction between a telecommunications service and information service is “what the provider is ‘offering.’”⁶⁹ Review of the definitions and the state of the broadband market today makes it clear that a reasonable, perhaps the only reasonable, reading of the statute shows that broadband service as offered to, and perceived by, consumers is telecommunications.

A. Ambiguity Around the Classification of Broadband is Historical and More Clearly Resolved Today.

In *Brand X*, the Supreme Court established that the classification of broadband cable modem service was to be considered under the *Chevron* framework because “the Communications Act is ambiguous about whether cable companies ‘offer’ telecommunications with cable modem service.”⁷⁰ The court’s sense of ambiguity about what precisely was on offer is importantly contextualized by the confusion and varied interpretations by lower courts at the time. One district court found that broadband cable modem service was best classified as a cable service.⁷¹ Another district court found that cable modem service was both a cable service and a “telecommunications facility.”⁷² The Ninth Circuit Court of Appeals – the only appellate court to

⁶⁸ NPRM, ¶ 68

⁶⁹ 2015 Open Internet Order, 30 FCC Rcd at 5757, ¶ 355.

⁷⁰ *Brand X*, 545 U.S. at 2706.

⁷¹ *Comcast Cablevision of Broward County v. Broward County*, 124 F. Supp.2d 685.

⁷² *Media One Group v. County of Henrico, VA*, 97 F. Supp.2d 712.

consider the question – recognized it as a telecommunications service.⁷³ In all of the cases, significantly different analysis was undertaken, and—significantly—no court recognized cable modem service as an information service until the Commission classification at issue in *Brand X*. In this backdrop of judicial confusion, and set in the context of a still new and changing technology and marketplace, *Brand X* makes sense.

Yet, today, modern BIAS offerings are understood with much better clarity by consumers and the Commission; what may have been ambiguous twenty years ago is now much clearer. Under the *Chevron* framework, the Commission must receive deference if the statute is ambiguous about what ISPs are really offering, however it is also possible to set aside *Chevron* and look at the language of the Communications Act anew, in the modern, developed marketplace for BIAS with twenty years of social and technological development. Interpreting the statute in that context, as described below, the language of the statute is unambiguous that BIAS is a telecommunications service.

B. Broadband Internet Access Service Provides Telecommunications.

The statute defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”⁷⁴ The Commission correctly concludes that BIAS provides telecommunications in the same sense as telephony, the prototypical telecommunications service, does. Telecommunications services are a conduit—a “dumb pipe”—hired by users to connect them to the people and services (“information services” such as

⁷³ *AT&T v. City of Portland*, 216 F.3d 871. The Fourth Circuit affirmed *Media One Group* on the grounds that by conditioning the transfer of the cable franchise on providing open access to other ISPs, Henrico County had violated 47 U.S.C. § 541(b)(3)(D) by forcing the cable operator to share the transmission facility, but explicitly did not reach the question of how to classify the cable modem service. *See Media One Group v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001).

⁷⁴ 47 U.S.C. § 153.

websites, social media, video and music storage, web productivity apps, online storage, and more). The purpose of broadband is to connect users to the internet and “interactive computer services [that] offer a “forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁷⁵ It is not an end in itself, and the current classification of broadband providers as “information services,” as though a high-speed fiber ISP or a 5G network was equivalent to Etsy.com or Netflix, is an absurdity. ISPs should connect users to the information, services, and people of their choice, not attempt to interject themselves or leverage their control of physical infrastructure to give their own applications and services special priority. As the Commission has previously observed, users “would be quite upset if their Internet communications did not make it to their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages.”⁷⁶

C. Broadband Internet Access Service is a Telecommunications Service.

Consumers understand internet service providers offer “telecommunications.” The statutory definition of “telecommunications service” is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁷⁷ Despite instances of ISPs offering up arguments that make them sound like they are “either crazy or following some too-clever-by-half legal advice,”⁷⁸ this is what ISPs clearly offer, and consumers understand this well. In 2016, the D.C. Circuit found that “[T]he record contains extensive evidence that [BIAS] consumers perceive a standalone offering of transmission, separate from the offering of information services like email

⁷⁵ 47 U.S.C. § 230(a)(3).

⁷⁶ 2015 Open Internet Order, 30 FCC Rcd at 5761-62, ¶ 361.

⁷⁷ 47 U.S.C. § 153.

⁷⁸ See *Nat'l Cable Telecomm. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 1007, (Scalia, J., dissenting).

and cloud storage.”⁷⁹ Nothing in the intervening years can challenge this conclusion, and the NPRM is right to note that “[w]e believe that the increased importance of BIAS to consumers since the onset of the pandemic shows that consumers’ perception and use of BIAS as a standalone telecommunications service is even more pronounced now than it was in 2015.”⁸⁰ This is exactly right. People use their broadband connections to access social media, attend remote classes, read the news, participate in video calls, and listen to music—to access the Internet at large—not to use their ISP’s cloud storage or email offerings, assuming they even know they exist. Even ISP offerings that are not bundled with broadband transmission, such as Comcast’s Watchable⁸¹ or Verizon’s Go90,⁸² are often ignored by users and quickly shut down. BIAS provider’s various attempts to enter adjacent markets or bundle services with broadband do not change the nature of the service they offer, not do they change “what the consumer perceives to be the integrated finished product[.]”⁸³

Because ISPs meet the relevant statutory terms, “BIAS is a telecommunications service as defined in the Act.”⁸⁴

V. APPLICATION OF MAJOR QUESTION DOCTRINE WOULD VIOLATE EVERYTHING THE SUPREME COURT HAS WRITTEN ABOUT THE DOCTRINE.

As noted above, the procedural posture of this matter makes it particularly inapt to a challenge under MQD. The Commission’s previous classification was affirmed in *US Telecom v.*

⁷⁹ *US Telecom Association v. FCC*, 825 F. 3d 674 , 704-05 (D.C. Cir. 2016)

⁸⁰ NPRM, ¶ 18.

⁸¹ Sahil Patel, Comcast puts its OTT play Watchable on life support, DigiDay (Dep. 19, 2017), <https://digiday.com/future-of-tv/comcasts-watchable-is-no-longer-funding-original-content-may-shut-down-soon-sources-say/>

⁸² Nick Statt, Verizon is shutting down its original video app Go90 (Jun. 28, 2018), <https://www.theverge.com/2018/6/28/17516266/verizon-shutting-down-go90-original-video-content-app>

⁸³ *Brand X*, 545 U.S. at 990.

⁸⁴ NPRM, ¶ 72

FCC,⁸⁵ and the Supreme Court declined to either grant certiorari or vacate the decision as moot. Grant of the pending Petitions for Reconsideration, or simply acting on the NPRM based on the new circumstances described by the Commission, would simply restore the *status quo ante*. Reversion to the status quo can hardly be characterized as an unprecedented exercise of authority or a departure from a long-held and Congressionally endorsed interpretation of a statute.

Nevertheless, because opponents of Title II classification (including Commissioner Carr) have raised the issue, the Commission should address it as if it were considered the classification *de novo*. Even so, application of MQD to reclassification of broadband as Title II would contradict everything the Supreme Court has said to date regarding the application of the doctrine because:

- Classification is not an exercise of regulatory power but a preliminary function of the FCC as a prelude to fulfilling its statutory obligations under the Communications Act.
- Even if “classification” were considered an exercise of authority rather than a function as a prelude to application of the Communications Act, the Commission has engaged in classification of services since its inception. It is therefore neither “newfound,” “rarely used,” or “ancillary.” It is a frequently used tool of the agency which Congress has expressly delegated to the agency.
- Even if one treated the application of the definitions in the 1996 Act as the start point for the analysis of MQD, the Commission almost immediately began classifying services – including in response to the direct statutory direction of Congress.
- Even if the question of application were limited solely to classification of “broadband” rather than to the classification of services as a whole (and no one has suggested why classification should be in any way different from classification of other services), the answer would be the same. Indeed, the Commission initially, albeit tentatively, classified cable broadband as a cable service and ILEC internet access services as a telecommunications service.⁸⁶ Classification as an information service was only possible because the Supreme Court recognized that Congress delegated the choice of classification to the FCC.

⁸⁵ 825 F.3d 674 (2016).

⁸⁶ See *National Cable Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002).

- In the more than 25 years since the FCC classified DSL as a Title II service, Congress has not interfered in the FCC’s assertion of classification over broadband. Under *West Virginia v. EPA*,⁸⁷ this silence constitutes ratification of the FCC’s authority.

The argument that MQD prohibits the FCC from once again reclassifying broadband rests on the assertion that classification of broadband as Title II is a question of significant economic or political importance.⁸⁸ But this is a red herring. *Any* classification of broadband – whether as Title I, Title II or Title IV – is a “question of significant economic and political importance.” But no one argues that the FCC is powerless to classify broadband at all. After all, classification of broadband as a Title I service forfeits billions of dollars in USF funds for broadband-only providers, forfeits the availability of access to pole attachments, and potentially imposes billions of dollars in costs to edge providers and consumers. Rather, proponents simply say the quiet part out loud – they dislike the idea of being regulated as Title II because they regard it as more “onerous” and “burdensome” than Title I (and chose to disregard the initial FCC classification of cable modem broadband as Title VI service, a classification reached by two district courts under the relevant statutory definitions). But Major Question Doctrine does not claim that when confronted by a choice the agency must take the “least burdensome” as defined by industry – especially where doing so would require reversing two previous Supreme Court decisions expressly granting deference to the FCC.⁸⁹ As Justice Barrett recently warned, MQD doctrine does not give courts permission to substitute their own interpretation of a statute simply to curb an agency’s authority.⁹⁰

⁸⁷ 142 S.Ct. 2587 (2022).

⁸⁸ *West Virginia v. EPA*, 142 S.Ct. 2587, 2595-96 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 120 (2000)).

⁸⁹ *NCTA v. Brand X*, 545 U.S. 967 (2005); *NCTA v. Gulf Power*, 534 U.S. 327 (2002). *See also Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006).

⁹⁰ *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barret, J. concurring).

A. What Major Question Is, And Is Not.

Scholars and jurists supporting the doctrine have advanced numerous formulations – even different suggested names – of what we now call the Major Question Doctrine. Of relevance here, in his dissent to denial of *en banc* review in *US Telecom v. FCC*, then-Judge Kavanaugh cited a highly restrictive version under the name “Major Rule Doctrine” which would essentially prevent an agency from exercising even powers explicitly granted by Congress in any new circumstance.⁹¹ While the majority opinion references the *US Telecom* dissent in passing,⁹² it does not cite this dissenting opinion among the cases frequently cited and discussed in the majority opinion as providing the basis for the Major Question Doctrine. Nor does the Gorsuch concurrence providing a list of potential “red flags” for considering when to apply the Major Question Doctrine,⁹³ refer to Kavanaugh’s “Major Rule” formulation. We should therefore conclude that the majority rejected the most restrictive versions of the “Major Rule” or “Major Question” doctrine.

The *W. VA v. EPA* Court emphasized that generally the normal course of analysis under the APA applies. It is only in “extraordinary” cases that a court should “hesitate” to simply accept the agency’s assertion of authority. Indeed, the majority opinion states no fewer than three times that major question will apply only in “extraordinary” cases.⁹⁴ Therefore, the presumption remains that agency action is subject to the standard arbitrary and capricious analysis of the Administrative Procedure Act and the familiar two-step *Chevron* analysis. Additionally, the Court made it clear that it was not “announcing the arrival” of a new doctrine,⁹⁵ but that “these

⁹¹ *US Telecom*, 855 F.3d at 417-426 (Kavanaugh, J., dissenting).

⁹² *West Virginia v. EPA*, 142 S. Ct. at 2609.

⁹³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-21 (Gorsuch, J., concurring) (2020) (providing a “list of triggers” for application of MQD) (“Gorsuch Checklist”).

⁹⁴ *Id.* at 2607, 2609.

⁹⁵ *Id.* at 2610.

cases have arisen from all corners of the Administrative state.”⁹⁶ In other words, Major Question Doctrine does not overrule or negate any previous precedent.

A case in which an agency exercises its clearly delegated powers in a subject area clearly delegated it by Congress should not raise a “major question” under the formulation adopted in *W. Va v. EPA*. This is particularly important to remember where the subject matter of the agency is broad, as is the FCC’s. Virtually any decision the FCC makes will have “significant” economic consequences by virtue of regulating multibillion dollar industries. As Justice Barrett makes clear, this does not impose a “clarity tax” on Congress or require Congress to “delegate in highly specific terms.”⁹⁷ In this regard, it is important to observe that *Gonzales v. Oregon*, repeatedly cited in *W. Va v. EPA* as one of the foundational cases for MQD, approvingly cited the FCC generally (and *Brand X* specifically) as an agency clearly delegated broad authority (specifically, the broad authority to classify broadband), in contrast to the narrow delegation to the Drug Enforcement Agency.⁹⁸

Major Question Doctrine therefore does not come into play simply because billions of dollars are at stake – especially where, as here, Congress has expressly delegated to the agency broad jurisdiction over a multibillion dollar sector of the economy where any decision may potentially involve billions of dollars.⁹⁹ If that were the case, Congress would need to delegate with the specificity of a regulatory agency – a result far worse than the “clarity tax” rejected by Judge Barrett.

Additionally, the term “significant political importance” has a narrower meaning than merely whether the decision is potentially controversial. To be “politically significant” means to

⁹⁶ *Id.* at 2608.

⁹⁷ *Biden v. Nebraska* at 2381.

⁹⁸ *Gonzales v. Oregon*, 546 U.S. at 258-59 (citing, as exemplary of satisfying the clear statement rule, *Brand X*, 545 U.S. at 980).

⁹⁹ *Id.*

be the sort of decision that one would reasonably expect Congress to reserve to itself.¹⁰⁰ This makes sense in the context of adopting a cap-and-trade system for emissions or providing blanket forgiveness for student loans – novel social experiments debated extensively in Congress and in the press. It does not apply to the routine business of an agency involving technical details courts have consistently acknowledged fall well within the scope of the agency’s expected business and benefit from the agency’s experience and expertise.¹⁰¹

Put another way, MQD “is not an on-off switch that flips when a critical mass of factors is present.” But the Court emphasized that an MQD analysis should “reflect[] ‘common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude.’”¹⁰² Consistent with this “common sense” standard, the Court asks if Congress had passed the authorizing act “with such power in mind.”¹⁰³

As the NPRM observed, even finding that a “major question” is raised does not end the matter, for Congress may well have made clear that it intended for the agency to make these very decisions.¹⁰⁴ Again, this does not require a direct command, such as “classify broadband as a Title II service.” To the contrary, as the Supreme Court stated in *Gonzales v. Oregon*:

In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S. Ct. 2688, 2699, 162 L. Ed. 2d 820, 837 (2005) (explaining that a Federal Communications Commission regulation received *Chevron* deference because “Congress has delegated to the Commission the authority to . . . ‘prescribe such rules and regulations as may be

¹⁰⁰ *W. Va v. EPA*, 142 S. Ct. at 2613.

¹⁰¹ *Gorsuch Checklist*, 545 U.S. at 2620-23.

¹⁰² *Biden v. Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting *Brown & Williamson*, 529 U.S. at 133).

¹⁰³ *Id.*

¹⁰⁴ *W. VA v. EPA* at 2616. (“A decision of such magnitude must be made by Congress itself **or an agency acting pursuant to a clear delegation** from that representative body” (emphasis added)).

necessary in the public interest to carry out the provisions' of the Act" (quoting 47 U.S.C. § 201(b)).¹⁰⁵

Nor do *W. Va. v. EPA* or *Biden v. Nebraska* use subjective terms such as imposing “onerous” or “burdensome” regulation to make this determination. While then-Judge Kavanaugh may have preferred such a formulation for his “major rules doctrine,” that is not the Major Question Doctrine the court actually adopted. Indeed, *MCI v. AT&T*, cited as one of the foundational cases in both *W. VA v. EPA* and *Biden v. Nebraska*, involved the attempt by the FCC to *deregulate* the telecommunications industry from actual rate regulation.¹⁰⁶ Rather, the overriding question is the context of the relevant statutory provisions. Is the language “oblique” or “obscure?” Is there a “mismatch between the agency’s challenged action and its Congressionally assigned mission and expertise?” Does the agency’s action mark a radical departure from its previous interpretation of the statute? Is the agency using a “statute focused on one problem to solve a new and different problem?”¹⁰⁷

Taking the Supreme Court at its word, therefore, MQD does not uproot past precedent or impose an obligation on agencies to choose a “least regulatory option.” While the Kavanaugh dissent asserting a “Major Rules Doctrine” certainly argued for such a radical outcome, the Supreme Court has yet to embrace such a change. To the contrary, the language of both opinions and their respective concurrences explicitly reject the idea that Major Question Doctrine is a regulatory “weed whacker”¹⁰⁸ designed for the sole purpose of undermining agency authority or

¹⁰⁵ *Gonzales v. Oregon* at 258-59. Indeed, this holding alone should lay the boogeyman of MQD to rest, in that the authority to reclassify broadband upheld in *Brand X* is cited as the paradigmatic example of clear delegation by Congress to make the decision classifying broadband.

¹⁰⁶ *Gorsuch Checklist*, 545 U.S. at 2620-23.

¹⁰⁷ *Id.*

¹⁰⁸ See Remarks of FCC Commissioner Ajit Pai Before the Free State Foundation’s Tenth Anniversary Gala Luncheon (Dec. 7, 2016), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1207/DOC-342497A1.pdf.

forcing agencies to choose policy on what industry or judges find the least “onerous,” “burdensome,” or otherwise pejorative.¹⁰⁹

B. First Question: Is Classification An Exercise of Regulatory Authority?

Before even reaching the question of whether to apply Major Question Doctrine, the first question is whether it is even applicable. It is undisputed that broadband is “communication by wire or wireless” and thus subject to the FCC’s general authority. The FCC cannot simply ignore it in order to exercise its statutory obligations. As the D.C. Circuit explained in *NARUC I*, the classification of SMRS was not for the Commission to declare by regulatory fiat, but as a recognition of the performance and function of the providers of the service.¹¹⁰ The Commission and the D.C. Circuit subsequently affirmed that when Congress created the definition of telecommunications service in the 1996 Act, it codified the *NARUC* test.¹¹¹ The act of declaring a service a Title I service or Title II service, while necessary to determine the applicability of various statutory provisions.¹¹²

This distinguishes the question of classification of broadband from all other cases identified as relevant to the Major Question Doctrine. The other cases involved actual agency

¹⁰⁹ See *U.S. Telecom v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (Srinivasan and Tatel, JJ., concurring in the denial of rehearing en banc).

¹¹⁰ *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC I*) (“we affirm the Commission’s classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions.”) See also *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding leased access a common carrier service).

¹¹¹ *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 121 (D.C. Cir. 1998) (affirming FCC determination that Congress’ definition of “telecommunications services” codified *NARUC I*). See also *Iowa v. FCC*, 218 F.3d 756 at 759 (applying *NARUC* test to overrule FCC classification of provider as not a telecommunications service provider and therefore not eligible for USF support).

¹¹² See, e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Service, 20 FCC Rcd 4826 (2005) (Contribution to USF); Petition for Declaratory Ruling that Pulver.Com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd 3307 (2004) (applicability of Title II obligations generally); *Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000) (eligibility for USF support).

regulation where the agency chose to take an action it did not need to take such as forgiving student loans,¹¹³ adopting a cap and trade system,¹¹⁴ mandating vaccines for large portions of the public,¹¹⁵ or imposing a moratorium on evictions.¹¹⁶ In such cases, it makes sense to ask whether Congress generally intended the agency to take such actions. Here, the action at issue is much more akin to that which the Supreme Court considered in *Massachusetts v. EPA*.¹¹⁷ There, the Court considered the EPA's refusal to classify automobile emissions as a pollutant under the Clean Air Act. The Court found that the EPA did not have discretion to simply ignore the question of the proper statutory definition, despite the fact that answering one way or the other would have significant regulatory impacts. The mere fact that deciding whether automobile greenhouse gas emissions fit the statutory definition would have regulatory consequences did not transform the act of classification into a discretionary exercise in regulatory authority, and therefore did not allow the EPA to evade the question of how to classify.

So too here. That the FCC's classification decisions have *consequences* does not make them discretionary exercises in regulatory authority. For this reason alone, MQD is inapplicable. Congress requires the FCC to make a choice. MQD does not somehow constrain that choice based on the statutory consequences that follow.

C. Second Question: What Is the “Power” at Issue?

Assuming the Major Question Doctrine applies, the next question that follows is the nature of the power at issue. Opponents of reclassification argue that the “asserted power” of the FCC in this case is the reclassification of broadband. But proponents have not explained why

¹¹³ *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

¹¹⁴ *West Virginia v. EPA*, 142 S. Ct. 2587 (2020).

¹¹⁵ *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022).

¹¹⁶ *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

¹¹⁷ 549 U.S. 497 (2007).

broadband is somehow different from any other exercise of classification performed by the Commission. The relevant “power” therefore is the power of classifying services.

1. Congress and the Courts Have Acknowledged the FCC’s Authority to Classify Common Carriers Since Its Creation, and The Authority to Classify Telecommunications Services Under the 1996 Act.

Again, virtually every aspect of the Major Question Doctrine described by the Supreme Court counsels against treating the exercise of classification authority as a major question. As noted in *NARUC I*, the Communications Act’s definition of “Carrier” or “Common Carrier” is self-referential: “any person engaged as a common carrier for hire.”¹¹⁸ As *NARUC I* explained, this was intentionally designed by Congress to confer “substantial discretion [to allow] the FCC in both what and how it can properly regulate” because of “the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, it gave the Commission expansive powers.”¹¹⁹ Congress recognized the need for this flexibility when it codified the FCC’s distinction between basic and enhanced service in the definitions of telecommunications services and information services. As both the FCC and the courts have recognized, Congress intended to codify the *NARUC* test in its definition of telecommunications services.¹²⁰ The legislative history also supports the intention to provide the FCC with the same flexibility as *NARUC*.¹²¹

Even taking passage of the 1996 Act as the starting point to determine whether Congress intended the FCC to make classification decisions or chose to “reserve that power to itself,” the evidence shows unambiguously that Congress delegated to the FCC the power to apply the

¹¹⁸ Codified at 47 U.S.C. § 153(11).

¹¹⁹ *NARUC I*, 525 F.2d at 638 n.37.

¹²⁰ *Virgin Islands*, 198 F.3d at 925-27. See also *Brand X*, 545 U.S. at 976 (describing historic origin of information service and telecommunications service classifications).

¹²¹ S. Rep. No. 104-23 at 18 (1995) (“The Committee intends that the FCC would have continued flexibility to modify its definitions and rules pertaining to enhanced services.”)

statutory definitions and determine the classification of services. Almost immediately following passage of the 1996 Act, the FCC found itself classifying services as either telecommunications services or something else to properly apply the various provisions of the Communications Act.¹²² Congress confirmed this delegation of classification authority in the 1998 Appropriations Act, by requiring the FCC to provide:

a detailed description of the extent to which the Commission's interpretations [identified below] are consistent with the plain language of the Communications Act of 1934 (*47 U.S.C. 151 et seq.*), as amended by the Telecommunications Act of 1996, and shall include a review of --

(1) the definitions of "information service", "local exchange carrier", "telecommunications", "telecommunications service", "telecommunications carrier", and "telephone exchange service" that were added to section 3 of the Communications Act of 1934 (*47 U.S.C. 153*) by the Telecommunications Act of 1996 and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers in all areas of the Nation, including high cost and rural areas;

(2) the application of those definitions to mixed or hybrid services and the impact of such application on universal service definitions and support, and the consistency of the Commission's application of those definitions, including with respect to Internet access under section 254(h) of the Communications Act of 1934 (*47 U.S.C. 254(h)*).¹²³

Certainly one must consider universal service policy “an issue of great economic and political importance.” The statement here by Congress that the FCC interprets the definitions of “information and service” and “local exchange service” and how it applies those definitions is certainly an indication of sufficient clarity to overcome any “hesitation” prompted by application of Major Question Doctrine.

¹²² See *Virgin Islands*, 198 F.3d at 925-27 (application of Section 214); *Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000) (eligibility for USF support).

¹²³ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522 § 623 (1997).

The Commission complied with what is now known as the “Stevens Report.”¹²⁴ The Stevens Report represents not only a clear demonstration that Congress had committed the question of classification of services to the FCC, it reflected the FCC’s early interpretation on the scope of its classification authority under the 1996 Act. Such an early interpretation is “entitled to some weight as evidence of the statute’s original charge to the agency.”¹²⁵ Regardless of the relevance of the Stevens Report to the question of *how* to classify broadband (a matter much debated throughout the various classification proceedings), it is undeniable that the Stevens Report reflects the FCC’s interpretation – supported by the initial report requirement from Congress – that Congress assigned it the authority to classify services as either information services or telecommunications services.¹²⁶

The FCC continued to classify various services as either information services or telecommunications services throughout the first decade of the 21st Century.¹²⁷ Of particular relevance here, the FCC on its own initiative classified voice roaming as a telecommunications service in 2007. The FCC took this action on its own initiative to achieve the specific policy objective of promoting competition in the CMRS market.¹²⁸

In short, the authority to classify services as Common Carriers or non-Common Carriers has existed since the creation of the Commission. This power is precisely the kind of authority that Congress would choose to delegate to an expert agency, rather than reserve to itself.

¹²⁴ Federal State Joint Bd. on Universal Serv., 13 FCC Rcd 11501 (1998).

¹²⁵ *Gorsuch Checklist*, 545 U.S. at 2620-23 (citations omitted).

¹²⁶ Stevens Report at 11501 ¶¶ 2-3.

¹²⁷ See *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 F.C.C. Rcd. 3307 (2004); *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs. Regul. of Prepaid Calling Card Servs.*, 20 F.C.C. Rcd. 4826 (2005) *aff’d sub nom. AT&T v. FCC*. 454 F.3d 329 (2006).

¹²⁸ *Reexamination of Roaming Obligations of Commer. Mobile Radio Serv. Providers, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

Congress preserved this delegation of authority when it codified the definitions of “telecommunications service” and “information service” in the 1996 Act – an interpretation immediately confirmed by Congress in the 1997 Appropriations Act when it required the FCC to report on its classification policies and how they impacted the “question of great economic and political importance” of universal service.

2. *Even Assuming the Question is Limited to Classification of Broadband, Congress Clearly Delegated the Authority to the FCC.*

Even assuming that while classification generally is delegated to the Commission, but Congress withheld the power to classify “broadband” (a word not found or defined in the 1996 Act), the result is the same – MQD does not prevent reclassification of broadband as Title II. Immediately following passage of the 1996, the FCC asserted authority to classify various high-speed internet access services now collectively referred to as “broadband.” The FCC classified DSL as a telecommunications service, tariffed it, and subjected it to its unbundled network elements regime beginning in 1998.¹²⁹ Although the FCC repeatedly declined to define cable modem service, and repeatedly asked courts to avoid reaching the question,¹³⁰ it nevertheless asserted the authority to make the classification decision.

The Supreme Court upheld both the power to classify various BIAS services and the power to change its initial classifications on multiple occasions. In *Gulf Power*, the Court wrote:

Respondents are frustrated that Respondents are frustrated by the FCC's refusal to categorize Internet services, and doubly frustrated by the FCC's contingent decision that even if commingled services are not “cable service,” those services nevertheless warrant the § 224(d) rate. On the first point, though, decisionmakers sometimes dodge hard questions when easier ones are dispositive; and we cannot fault the FCC for taking this approach. . . . ***We note that the FCC, subsequent to the order under review, has reiterated that it has not yet categorized Internet service.*** See, e.g., Pet. for Cert. in No. 00-843, p. 15, n. 4. It has also suggested a

¹²⁹ *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466 (1998).

¹³⁰ *NCTA v. Gulf Power*, 534 U.S. 327 (2002); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

willingness to reconsider its conclusion that Internet services are not telecommunications. See, e.g., *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287, 19294 (2000). ***Of course, the FCC has power to reconsider prior decisions.***¹³¹

Justice Thomas, in his partial dissent, would have remanded to the Commission and “required the Commission to decide at long last whether high speed internet access provided through cable wires constitutes cable service or telecommunications service or falls into neither category.”¹³²

As Justice Thomas observed, while the FCC had been swift to classify DSL as a telecommunications service, it had repeatedly refused to classify cable modem service.¹³³ For Justice Thomas there was no question that the FCC had authority to classify broadband as a “cable service or telecommunications service or falls into neither category.” Rather, Justice Thomas believed that the FCC could not fulfill its statutory responsibilities *without* classifying all flavors of broadband and accepting the regulatory consequences that flowed from this classification.

Unsurprisingly, three years later in *Brand X*, Justice Thomas’ majority opinion reaffirmed the FCC’s authority to classify cable broadband service as a Title I service. Indeed, Justice Thomas forcefully asserted that “no one questions that the order is in the Commission’s jurisdiction.”¹³⁴ This clear delegation of authority to issue an order determining the classification of broadband did not hinge on some lack of authority to do otherwise under MQD. To the contrary. This “unquestionable” authority derived from the broad, general congressional delegation of Sections 1 and 201(b) of the Communications Act. Congress has delegated to the

¹³¹ *Gulf Power*, 534 U.S. at 338 (emphasis added). See also at 342 (observing that regulation of “commingled cable and Internet service . . . fall within the heartland of the Act. The agency’s decision, therefore, to assert jurisdiction over these attachments is reasonable and entitled to our deference.”)

¹³² *Id.* at 347 (Thomas, J. dissenting in part).

¹³³ *Id.* at 352-353 & n.4 (citing relevant FCC decisions).

¹³⁴ *Brand X* at 981.

Commission the authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, § 201(b).¹³⁵ These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority."¹³⁶ Thomas further went on to reaffirm the power of the FCC to *change* classification of broadband when circumstances warranted. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations."¹³⁷

If this were not sufficient to allay any doubt as to the Commission's classification authority, the Court's decision in the next term in *Gonzales v. Oregon* definitively settled the matter. The grant of broad powers to the Commission is not "cryptic" or "obscure" or "ancillary" and therefore subject to suspicion under MQD. To the contrary, delegation to classify broadband is the paradigmatic case of "clear delegation" because "a statute gives the agency broad power to enforce all provisions of the statute."¹³⁸ "When Congress chooses to delegate a power of this extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret."¹³⁹

It is impossible to square this characterization of the Commission's authority to classify broadband as Title II service with the characterization of statutory language giving rise to MQD in either *W. VA* or *Nebraska*. Whereas the Court characterized the statutory language in those

¹³⁵ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).

¹³⁶ *Id.* at 980-81.

¹³⁷ *Id.* at 981 (cleaned up). See also *NARUC I*, 525 F.3d at 644 ("If practice and experience show the SMRS to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions").

¹³⁸ *Gonzales v. Oregon*, 257 9 citing *Brand X*).

¹³⁹ *Id.* at 265 (citing *Brand X*).

cases as “obscure,” “cryptic” and “ancillary,” the Court characterized the delegation of authority to classify broadband as “clear,” “unquestionable” and falling in the “heartland” of the Act.

Whether one takes this language to mean that no major question arises, or that the “hesitation” of MQD is overcome, the result is the same. The FCC’s authority to revisit its classification decisions is, at a minimum, permissible – and under both *Brand X* and *NARUC I* mandatory in light of changed circumstances.

D. Congressional Acquiescence in FCC Reclassification Authority.

Both *W. Va* and *Nebraska* look to Congressional inaction to confirm their interpretation of non-delegation of authority to take the relevant action. This is somewhat at odds with the past cautions of the Court against relying on Congressional inaction to determine FCC authority.¹⁴⁰ Nevertheless, it is useful to note that bills to strip the FCC of its authority to classify broadband as Title II (and to reverse or prohibit the FCC from establishing net neutrality rules) have frequently been introduced and failed to pass.¹⁴¹ To be sure, bills to require the FCC to classify broadband as a Title II service have also failed to pass. But all this stalemate shows is that while

¹⁴⁰ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

¹⁴¹ *See, e.g.*, Net Neutrality and Broadband Justice Act of 2022, S. 4676, 117th Cong. § (2022); A Bill to Amend the Communications Act of 1934 to Ensure Internet Openness, to Prohibit Blocking Lawful Content and Non-Harmful Devices, to Prohibit Throttling Data, to Prohibit Paid Prioritization, to Require Transparency of Network Management Practices, to Provide that Broadband Shall be Considered to be an Information Service, and to Prohibit the Commission or a State Commission from Relying on Section 706 of the Telecommunications Act of 1996 as a Grant of Authority, S. 2853, 115th Cong. (2018); Open Internet Preservation Act, H.R. 4682, 115th Congress (2017); Internet Freedom Act, H.R. 4682, 115th Cong. § 2 (2017) (introduced); Internet Freedom Act, H.R. 1212, 114th Cong. § 2(a) (2015) (introduced); Internet Investment, Innovation, and Competition Preservation Act, H.R. 166, 112th Cong. § 2 (2011) (introduced); Internet Investment, Innovation, and Competition Preservation Act, H.R. 5257, 111th Cong. § 2 (2010) (introduced). *See also* H.R. Rep. No. 112-51 at 2 (2011) (Intent to prevent FCC from creating open internet rules under Title II) (Report on H.J. Res. 37 to repeal FCC 2010 Open Internet Rules).

different members hold different opinions as to the FCC’s course of action, Congress respects the FCC’s authority to classify broadband, and to revisit that classification decision as necessary.¹⁴²

To conclude, whether analyzed under “Step 1” of Major Question Doctrine (should the interpretation ‘give one pause’) or “Step 2” of Major Question Doctrine (has Congress clearly delegated the relevant authority), or even “Step 0” of MQD (is this an exercise of agency authority at all), the result is the same. The FCC has clear authority to revisit the current classification of broadband services and reclassify them as Title II.

VI. TITLE II CLASSIFICATION SUPPORTS ACCESS TO BROADBAND.

Public Knowledge supports the Commission’s analysis that “[c]lassifying BIAS as a telecommunications service will enable the Commission to better support the deployment of wireline and wireless infrastructure, advance universal service, and increase the accessibility of communications networks.”¹⁴³ This section highlights the transformative potential of this classification in removing barriers and streamlining processes for both wireline and wireless broadband infrastructure. This approach not only promises to foster competitive markets but also aligns with congressional and Commission efforts to extend broadband services universally, ensuring equitable access across various communities. The discussion also touches on the critical role of Title II classification in enhancing consumer protections, promoting digital equity, and supporting free expression in accordance with First Amendment principles. Moreover, the classification's impact on the sustainability of the Universal Service Fund and the potential benefits for persons with disabilities are examined, showcasing the wide-ranging benefits of

¹⁴² See *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 137 (1985) (finding that Congress continued failure to pass legislation reversing interpretation of Clean Water Act by Army Corps of Engineers meant “Congress acquiesced in the in the administrative construction.”)

¹⁴³ NPRM, ¶ 46.

proper classification as a telecommunications service. All of these effects serve the ultimate goal of the Commission: to support robust, equitable, universal access to broadband.

A. Title II Classification Supports Broadband Infrastructure Deployment.

Classification under Title II will give the Commission authority to remove obstacles to broadband infrastructure deployment that create delays, inefficiencies, and competitive barriers to entry. These challenges exist for both wireline and wireless broadband infrastructure, and proper classification as a telecommunications service will enable the Commission to definitively tackle these persistent issues.

1. Title II Classification Supports Wireline Broadband Infrastructure Deployment Through Access to Pole Attachments.

The failure to classify BIAS as Title II also deprives ISPs access to utility poles under Section 224. Section 224 provides access at regulated rates to providers of Title VI cable services and providers of Title II telecommunications services to utility poles and other rights of way owned by utilities.¹⁴⁴ Congress recognized that access to utility poles at affordable rates is critical to providers of wireline services, and that requiring providers of wireline services to build new poles along the same routes to service created a significant barrier to entry. As the Commission recognized in the 2020 Remand Order, the statute does not authorize access for providers of Title I information services.¹⁴⁵ Thus, without Title II classification not all BIAS providers can command mandatory access to utility poles at regulated rates.

As the Commission has observed, this is particularly significant in light of Congress' recent significant support for broadband infrastructure deployment. Congress has allocated “billions of dollars of federal funding for broadband buildout, including a variety of programs administered by the National Telecommunications and Information Administration (NTIA),

¹⁴⁴ 47 U.S.C. § 224.

¹⁴⁵ *RIFO Remand Order* at ¶¶ 68-70.

including the Broadband, Equity, Access, and Deployment Program (BEAD), the State Digital Equity Capacity Grant Program and its federal counterpart, the Middle Mile Infrastructure Grant Program, and the Tribal Broadband Connectivity Program.”¹⁴⁶ This represents an important change in the broadband deployment ecosystem compared to 2015.¹⁴⁷ These funding sources will allow new entrants, smaller regional ISPs, community networks, and other broadband-only providers to invest in new broadband infrastructure in unserved and underserved communities, but many of those places may already have existing pole infrastructure. Granting broadband-only providers access to pole attachments through Section 224 is a necessity to ensure that this unprecedented investment in closing the digital divide is spent efficiently, and that there is robust competition among broadband providers.

We support the Commission’s view that restoring the protections of section 224 to all ISPs will “pave the way for quicker and less expensive broadband deployment, thereby enabling that funding to go as far as possible.”¹⁴⁸

2. Title II Classification of Broadband Supports Broadband Infrastructure Deployment by Removing Barriers to Mobile Broadband Deployment.

As with pole attachments for wireline broadband deployment, wireless infrastructure deployment can also be hindered by barriers to accessing rights of way or by state and local zoning approval processes. Title II classification will allow the Commission to bring the provisions of section 253 to bear on these barriers to enable regulated, nondiscriminatory access to rights of way, and preemption of state and local regulations that hinder the deployment of mobile broadband infrastructure.¹⁴⁹ In past proceedings, commenters have argued that the classification of broadband as a Title I service prevented the Commission from applying the

¹⁴⁶ NPRM, ¶ 47.

¹⁴⁷ *Id.*

¹⁴⁸ NPRM, ¶ 47.

¹⁴⁹ 47 U.S.C. § 253(c); 47 U.S.C. § 253(d).

provisions of section 253 in efforts to enable the deployment of mobile broadband infrastructure.¹⁵⁰ Proper classification of broadband as a telecommunications service will therefore support the Commission’s continued efforts to support mobile broadband service.

B. Title II Classification Advances Universal Service for Broadband.

Universal service—the principle that all Americans should have access to communications services—is a cornerstone of the Commission’s mission.¹⁵¹ As the Commission has repeatedly recognized, broadband internet access is essential for participation in our society and economy.¹⁵² Universal service principles and programs were responsible for ensuring ubiquitous access to telephone service, even in the most remote rural areas of our nation, and now they are needed again because broadband internet access service has become “the 21st Century’s essential communications technology.”¹⁵³ The Commission has made steady progress in expanding universal service principles and programs to include BIAS, but the Commission’s mistaken reclassification away from Title II has put the promise of universal service at risk: a problem which can be remedied by restoring Title II classification now.

1. Title II Classification Allows For Full USF Program Support For Broadband.

The Commission has tentatively concluded that classifying BIAS as a telecommunications service will improve the availability and affordability of BIAS through the support of Universal Service Fund (USF) programs; we support this analysis and conclusion. Title I classification has weakened the Commission’s ability to support broadband service

¹⁵⁰ See e.g., Comments of the Colorado Communications and Utility Alliance, et. al. at 15-16 , WT Docket No. 17-79 (Jun. 14, 2017) available at <https://www.fcc.gov/ecfs/document/106142139004865/1>.

¹⁵¹ *Universal Service*, Federal Communications Commission (last updated Dec. 1, 2023), <https://www.fcc.gov/general/universal-service> (*FCC Universal Service Webpage*).

¹⁵² NPRM, ¶ 1.

¹⁵³ FCC, *Universal Service*, <https://www.fcc.gov/general/universal-service>.

through USF programs because section 254(c) specifically defines universal service as an “evolving level of telecommunications services.”¹⁵⁴ This has created issues in allowing broadband-only providers to qualify as supported services under section 254(c). Reclassifying BIAS as a telecommunications service would allow broadband-only providers to once again participate in the Lifeline program, allow for rural and Tribal households to benefit from the Link Up program, and unlock other opportunities for further support for BIAS through USF programs.

2. Title II Classification Will Ensure The Long-Term Sustainability of the USF Through Contribution Reform.

The Commission has correctly noted that Title II classification as a telecommunications service will enable the Commission to adjust service obligations for ETCs.¹⁵⁵ More importantly, it would allow the Commission to ensure the long-term sustainability of the USF by including broadband internet service providers as contributors to the USF.

The USF revenue is financed by telecommunications providers through a contribution fee, but unfortunately that fee is passed on to phone service subscribers. As more consumers have shifted their usage to broadband, this end-user charge has fallen largely on those that have not yet made the switch, including senior citizens. The contribution factor is currently at an outstanding 34.5%.¹⁵⁶ Assuming trends continue, phone service subscribers could pay 40% or more of the contribution fee – an unsustainable, unfair burden that jeopardizes the entire USF and our nation’s ability to close the digital divide.¹⁵⁷

¹⁵⁴ 47 U.S.C. § 254(c)

¹⁵⁵ NPRM, ¶ 50.

¹⁵⁶ Proposed Fourth Quarter 2023 Universal Service Contribution Factor, CC Docket No. 96-45 (Sep. 13, 2023), <https://docs.fcc.gov/public/attachments/DA-23-843A1.pdf>.

¹⁵⁷ Carol Matthey, *USForward: FCC Must Reform USF Contributions Now - An Analysis of the Options* (Sep. 2021), <https://www.shlb.org/policy/research/USForward>.

By reclassifying broadband as a Title II telecommunications service, the FCC can mandate to preserve and advance universal service, modernize the contribution mechanism, and save critical USF programs necessary to support broadband. Title II classification will enable the Commission to expand the USF contribution base from phone service to include BIAS, which can lower the contribution factor significantly. The USForward report estimates that the contribution factor would fall and remain under 4% for everyone over the next four years just by extending the fee to broadband subscribers.¹⁵⁸ Universal service programs are critical to ensuring the affordability, and therefore universality, of BIAS and those programs cannot be sustained without the contribution of broadband providers to the USF. In short, Title II authority enables the FCC to stabilize the USF and support the core programs focused on connecting us all.

C. Title II Classification Increases Broadband Equity and Accessibility.

Recognition of broadband as a telecommunications service will enable the Commission to act in a variety of areas that will enhance equity and accessibility, for broadband access and in society more broadly through improved access to the vital connectivity that broadband provides.

1. Title II Classification Will Enable Protections for Consumers in Multiple-Tenant Environments.

Multiple-tenant environments (MTEs), both commercial and residential, continue to grapple with broadband access challenges. One persistent problem is the continued use of various forms of exclusive agreements between landlords and ISPs. These arrangements often leave residents and businesses with no alternative but to accept the broadband provider that best serves the landlord's interests, rather than considering their own needs or preferences. This not only stifles competition among providers, but results in elevated broadband costs for consumers, diminished service quality, and depressed innovation in service offerings.

¹⁵⁸ *Id.*

Despite the previous efforts by the Commission to limit this practice, these exclusive agreements persist, largely due to limits on the Commission’s authority to reach broadband-only practices. The current classification as an information service has significantly hampered the Commission’s capacity to protect consumers from these practices. Reclassifying broadband as a telecommunications service under Title II provides clear—and necessary—authority to enable the Commission to take more robust action in promoting broadband competition in MTEs. With almost a third of the country living in MTEs, it is essential that the Commission put an end to these unfair, monopolistic practices, and restore to consumers the freedom to choose the broadband services that best meet their needs at competitive prices.

2. Title II Classification Supports Digital Equity.

Promoting equity and nondiscriminatory access for all is a key element of the Commission’s mission.¹⁵⁹ The Commission has recently taken a historic step forward in combating digital discrimination with its proposed rules implementing section 60506 of the Infrastructure Investment and Jobs Act of 2021.¹⁶⁰ Title II reclassification poses further opportunities to advance the mission of digital equity by ensuring the Commission is armed with the regulatory authority to fully enforce those rules and implement robust protections against nondiscrimination for BIAS. For example, section 202(a) explicitly prohibits “any unjust or unreasonable discrimination” and gives the FCC clear authority to make and enforce rules to ensure that telecommunications providers do not discriminate in deployment or in pricing, or

¹⁵⁹ Section 1 of the Communications Act of 1934 as amended provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151

¹⁶⁰ Preventing Digital Discrimination, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69 (Oct. 25, 2023), <https://docs.fcc.gov/public/attachments/DOC-397997A1.pdf>.

otherwise treat their customers differently.¹⁶¹ People of color and other historically marginalized people have long been underserved and adversely affected by lack of access to communications and technology. We have the opportunity to begin to rectify those wrongs now with renewed and determined focus on ensuring a robust regulatory environment that affirmatively supports the needs of the vulnerable; proper classification of Title II and a full embrace of its nondiscrimination principles is a critical element of that project.

3. Title II Classification Supports Free Expression and the First Amendment by Facilitating the Free Flow of Diverse Speech.

The First Amendment aims to ensure that every voice can be heard, which is critical to a functioning democracy. An open internet—enabled by Title II net neutrality rules—serves this goal by facilitating the free flow of diverse speech over the internet. As the Commission has noted, this is particularly important for marginalized groups that have historically been excluded from access to traditional media.¹⁶²

The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹⁶³ Thus, “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”¹⁶⁴ Indeed, facilitating speech from diverse sources “has long been a basic tenet of national communications policy.”¹⁶⁵ Recognizing the great First Amendment value of online speech, courts have consistently acted to preserve speech over the internet. In *Reno v.*

¹⁶¹ 47 U.S.C. § 202(a).

¹⁶² NPRM, ¶ 53.

¹⁶³ *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945); *see also U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972).

¹⁶⁴ *Turner Broadcasting System. v. FCC* (Turner I), 512 U.S. 622, 663 (1994).

¹⁶⁵ *Turner Broadcasting System. v. FCC* (Turner II), 520 U.S. 180, 192 (1997); *Turner I*, 512 U.S. at 663-664; *Midwest Video Corp.*, 406 U.S. 649, 668, n. 27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1, 2 (1945).

ACLU, the Supreme Court held that speech over the internet deserved unqualified First Amendment protection.¹⁶⁶ That case followed *Sable Communications of California v. FCC*, in which the Court vindicated the right of users of common carrier services for free expression.¹⁶⁷

An open internet serves the goals of the First Amendment by facilitating and protecting the free flow of information from diverse and antagonistic sources.

4. Title II Classification Supports Accessibility for Persons with Disabilities.

The Commission seeks comment on how Title II classification could enhance protections for persons with disabilities and improve accessibility of BIAS.¹⁶⁸ Public Knowledge commends the Commission for its recognition of the importance of BIAS for people who rely on internet-based communications tools and services; it is another example of the tremendous liberatory potential of internet access, and its growing importance to the everyday life of so many people in the United States. Section 255 is specifically intended to promote accessibility for persons with disabilities and the Commission should decline to forbear from the section in order to enhance its authority to implement and enforce sections 716 and 718. The Commission should also determine if other rules are needed to enhance the accessibility of BIAS and equipment.

VII. TITLE II WILL PROTECT CONSUMER PRIVACY.

Under the Communications Act, Congress gave the FCC statutory authority to protect consumer privacy on communications networks. Section 222 of the Communications Act requires telecommunications carriers to protect customer proprietary network information (CPNI) – data collected by telecom companies on their customers.¹⁶⁹ Through this statute, Congress and the FCC emphasized the importance of giving consumers control over how their

¹⁶⁶ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

¹⁶⁷ *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 128 (1989).

¹⁶⁸ NPRM, ¶ 54.

¹⁶⁹ <https://www.law.cornell.edu/uscode/text/47/222>

information is being used. The FCC has effectively exercised its authority under Section 222 to protect consumer privacy on telephone networks for over 20 years, making telephones one of the most secure forms of communication.

As Congress could not predict upcoming technological changes, it entrusted the FCC with the authority to determine what type of privacy requirements to place over future communications networks. As a result, the FCC continuously updated its CPNI rules to reflect changes in communications technology. The FCC now has CPNI rules for mobile phones and interconnected voice over internet protocol (VoIP) services.¹⁷⁰ Despite the fact that Congress repealed the broadband privacy rules, the FCC still maintains its authority under Title II to treat the ISPs as common carriers and protect consumer information. The FCC relies on Section 222 to determine the requirements for ISPs to protect consumer privacy, oversee ISPs' usage of the collected personal information, and prevent abuses of power.

When Congress repealed the broadband privacy protection rules,¹⁷¹ it also prohibited the FCC from adopting substantially similar rules in the future. It is likely that changes in the broadband marketplace, data collection practices, and threats to consumer privacy mean that the FCC should enact rules taking account of these developments, and that any privacy rules it issues will not be of “substantially the same form” as those earlier rules.¹⁷² Additionally, the FCC would

¹⁷⁰ 47 C.F.R. § 64.2005. *See also* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, ¶ 3 (2007).

¹⁷¹ Joint Resolution, 131 Stat. 88 (Public Law No. 115-22) (2017) (CRA action regarding previous broadband privacy rules).

¹⁷² 5 U.S.C. § 801(b). The CRS wrote that “The CRA seems to contemplate that an agency may reissue a rule related to the rule that was disapproved or within the same policy area, so long as the new rule is not substantially similar to the disapproved rule. In other words, it does not appear that disapproving a rule under the CRA prevents an agency from reissuing a rule—it merely places a condition on the agency’s ability to do so,” and noted that “two rules that had previously been struck down under the CRA have been reissued.” Congressional Research

still have the statutory framework under Title II to apply CPNI authority to broadband, protect consumer privacy, and bring enforcement actions against ISPs, as well as to issue guidelines and best practices for consumer data protection.

Moreover, the FCC has its general consumer protection authority under Section 201(b) of the Communications Act.¹⁷³ The FCC has used this statute to protect consumers from unjust and unreasonable practices for the last eight decades and recently applied it in the privacy context. In the case of Lifeline low-income telephone services,¹⁷⁴ the FCC found that the ISPs TerraCom and YourTel violated Section 201 by failing to use reasonable data security practices for the protection of consumer information.¹⁷⁵

Despite the fact that Congress repealed the broadband privacy rules, if the FCC reclassifies BIAS providers, they are able to treat the ISPs as common carriers and protect consumer information. While the FCC would not be able to reinstate the previous privacy rules verbatim, Sections 222 and 201 would provide the foundation to create rules for ISPs data privacy practices, oversee ISPs usage of the collected personal information, and prevent ISPs from abusing or exploiting their users' data.

VIII. TITLE II WILL PROMOTE COMPETITION AMONG EDGE PROVIDERS AND ISPS.

Net neutrality promotes competition among edge providers, ensuring that ISPs don't use their gatekeeper power to harm online competition. The Commission identifies edge providers as

Service, The Congressional Review Act (CRA): Frequently Asked Questions (Nov. 12, 2021), <https://crsreports.congress.gov/product/pdf/R/R43992>, at 18-20.

¹⁷³ 47 U.S.C. § 201(b).

¹⁷⁴ FCC, Lifeline Program for Low-Income Consumers, <https://www.fcc.gov/general/lifeline-program-low-income-consumers>.

¹⁷⁵ Terracom, Inc. & YourTel Am., *Notice of Apparent Liability for Forfeiture*, 29 FCC Rcd 13325, ¶ 1 (re. Oct. 24, 2014) ("Today, we take action against two companies that collected names, addresses, Social Security numbers, driver's licenses, and other proprietary information (PI) belonging to low-income Americans and stored them on unprotected Internet servers that anyone in the world could access....").

those who, like Amazon or Google, provide content, services, and applications over the Internet for end users who consume their content, services, and applications.¹⁷⁶ In order to promote competition and encourage innovation, we need to do everything we can to lower barriers to entry and success for smaller edge providers, including ensuring that providers of every size have a chance to reach users.

Such barriers could include conduct by ISPs to diminish edge providers' access to users over the internet. In the absence of FCC authority or effective state law protections, dominant digital platforms can leverage their powerful market position with ISPs. However, a small upstart edge provider with significantly less market power may be at risk for diminished access or an ISP catering to large platforms at their expense.

Paragraph 144 asks, "Should large, or even small, ISPs begin seeking paid prioritization arrangements, for example, would this disproportionately harm small edge providers, for example, because larger edge providers could use their own countervailing power to better manage the situation? Would this increase entry barriers, harming edge provider competition and innovation, for example, by discouraging new entry against larger established edge providers?" This is certainly a concern. A potential new entrant considering attempting entry to compete against established edge providers dominant digital platforms has a lot of compelling reasons not to enter. Strong network effects limited to incumbent firms, strong pressures for expensive dual-market entry created in part by economies of scope in this data-intensive industry, and in part by vertical integration and the power of defaults or other mechanisms of self-preferencing that existing incumbents use to protect their powerful position. This is an incredibly important sector of the economy. Key tools in our modern world like the search engine and ecommerce marketplace have been suffering from a lack of competition and therefore diminished innovation

¹⁷⁶ *Verizon v. FCC*, 740 F.3d 623, 635-42 (D.C. Cir. 2014) (Verizon).

for years. Public Knowledge, along with other public interest advocates and a coalition of Members of Congress, is fighting for new laws and rules to address these concerns and open up this important sector for competition. It would be absolutely counterproductive and extremely harmful if paid prioritization, or even the risk of paid prioritization, in favor of the incumbent edge providers were added to the list of reasons a new entrant is likely to fail.

The recent example of Twitch announcing it will leave South Korea due to the “sending party network pays” rules demonstrates the risk consumers face in the U.S. without net neutrality rules should edge providers begin charging termination fees and access charges.¹⁷⁷ As the announcement from Dan Clancy, Twitch’s CEO, explained:

Ultimately, the cost to operate Twitch in Korea is prohibitively expensive and we have spent significant effort working to reduce these costs so that we could find a way for the Twitch business to remain in Korea. First, we experimented with a peer-to-peer model for source quality. Then, we adjusted source quality to a maximum of 720p. While we have lowered costs from these efforts, our network fees in Korea are still 10 times more expensive than in most other countries. Twitch has been operating in Korea at a significant loss, and unfortunately there is no pathway forward for our business to run more sustainably in that country.¹⁷⁸

Even an edge provider as well-financed as Twitch (now owned by Amazon) makes investment decisions based on profitability. The question is not whether Amazon could “afford” to pay the fees in some abstract sense. Markets do not work that way. Businesses make decisions based on whether they see sufficient value from offering the service. When Twitch saw no pathway to profitability, it did the logical thing and exited the market. This is not to say, of course, that every company will exit. Netflix, whose business depends entirely on reaching end users, was

¹⁷⁷ For more detail on this situation, *see supra* Part III.A.4.

¹⁷⁸ Dan Clancy, “An Update on Twitch in Korea,” Twitch blog (December 5, 2023). <https://blog.twitch.tv/en/2023/12/05/an-update-on-twitch-in-korea/>

sufficiently motivated and sufficiently popular with subscribers to be able to negotiate a better deal with South Korea’s ISPs.¹⁷⁹

This is precisely the worst case scenario predicted by the *2015 Open Internet Order* that the *RIFO* claims will never happen— ISPs acting as gatekeepers, picking and choosing which content providers will reach their customers without regard to their customer’s preferences. If even a competitor as well financed as Twitch is driven out of the market, certainly no smaller provider will survive. Unless, of course, the ISP gatekeeper chooses to cut a deal. .

Paragraph 144 further asks, “In all of these cases, what legal case would a harmed edge provider be able to bring under antitrust law and what would the likelihood of success be?” Market participants cannot rely on antitrust law alone to protect their access to an open internet. In the Communications Act, Congress correctly identified that telecommunications services require sector-specific rules from an expert regulator: the FCC. Ongoing monitoring by experts in telecommunications is necessary to identify, demonstrate, and remedy harms. Specific rules set forth in advance will significantly increase compliance and success at court. A generalist agency with tools of general applicability such as antitrust law is absolutely not sufficient.

Further, two particular limitations of antitrust law seem especially relevant here. First, efforts to enforce the antitrust laws in this area may be stymied by prior (wrongfully decided) cases such as *Verizon v. Trinko*¹⁸⁰ and *Pac. Bell v. linkLine*,¹⁸¹ which threw into question the applicability of antitrust law in areas where the FCC may have authority. These cases held that certain duties to deal fairly were more appropriately handled by FCC regulations than by the antitrust laws. The fact that the FCC did not actually act to stop the conduct at issue was never

¹⁷⁹ Patrick Frater, “Netflix and S. Korea’s SK Broadband End Lawsuits Over Fees, Technology,” *Variety* (September 18, 2023).

<https://variety.com/2023/biz/news/netflix-korea-sk-broadband-end-lawsuits-fees-1235726280/>

¹⁸⁰ *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 (2004).

¹⁸¹ *Pac. Bell Tel. Co. v. linkLine Communs.*, 555 U.S. 438, 450 (2008).

considered, and the conduct was allowed to continue in both cases. We cannot risk a similar situation with the critical principle of net neutrality. Second, harms to innovation are notoriously difficult to vindicate under antitrust law.¹⁸² If we worry about the impacts that paid prioritization or other ISP conduct on innovation—i.e. by erecting barriers for small disruptive providers—we should be particularly concerned that simply enforcing existing antitrust law will be unlikely to stop the conduct.

Title II can promote competition among ISPs as well as among edge providers. First, if the Commission grants the request by INCOMPAS to assert authority over interconnection,¹⁸³ it will have the authority to prevent abuses that may arise in the interconnection context. As the Commission is well aware from its 90 year history, interconnection is frequently a requirement for competition among rival services. Literally the first express statutory power Congress granted the Commission in 1934 was the power to order carriers “to establish physical connections with other carriers.”¹⁸⁴ A general assertion of authority over interconnection, as requested by

¹⁸² Giulio Federico, Fiona Scott Morton, & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POLICY AND THE ECON., 125, 137-38 (2020), (“Merging firms often argue that any concerns about harm to innovation are speculative because the process of developing new products is uncertain, because market conditions in the future are hard to predict, and because competition can arise from unexpected sources. These points may well be valid to some degree, but they do not provide a sound basis for dismissing the harm to innovation that is inherent when business stealing effects are internalized.”)

¹⁸³ INCOMPAS wrote,

Without rules in place that prevent such behavior, large BIAS providers can block services or de-facto block them by charging unreasonable interconnection fees, and the Remand Order fails to acknowledge what the effect of uncertainty will be on edge innovators who will no longer know whether their customers will be able to access their content and services. This is a serious concern especially since the D.C. Circuit recently voided Charter’s merger condition on interconnection, and as INCOMPAS members voice concerns that they face increasing interconnection fees that are unreasonable.

INCOMPAS, Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 4, 2021) (citing *Competitive Enterprise Institute v. FCC*, 970 F.3d 372 (2020) (D.C. Cir. 2020)., at 17.

¹⁸⁴ 47 U.S.C. § 201(a).

INCOMPAS in its Petition for Reconsideration, will encourage ISPs to engage in good faith negotiations and avoid the need for regulatory intervention to promote competition.

Additionally, if the Commission declines to forbear from Section 214, it can use its Section 214 authority to review mergers and acquisitions of ISPs that would otherwise escape Commission review. At present, the Commission may only review a transaction where acquiring an ISP also transfers a Title III license or separate Title II license. As more and more ISPs of significant size stop offering voice and cable services, the Commission risks permitting unhealthy levels of concentration. Such a process need not be unduly burdensome, or impact small ISPs. The Commission has in the past used its authority to grant blanket permission under Section 214 based on the dominant or non-dominant status of the carrier.¹⁸⁵ The Commission could promote competition and protect the public interest by giving ISPs blanket permission to make any acquisition below some dollar threshold or other criteria, while requiring an application for acquisitions that create undue market concentration..

The Commission need not make any determination on any specific details at this time, or even whether to adopt such a regime at all. It is enough for this proceeding to recognize that in the event it becomes necessary, the Commission can use its Title II authority to review consolidation in the ISP market and prevent unhealthy levels of concentration. By contrast, if the Commission retains the existing Title I classification, it will have no authority to act to protect competition should it prove necessary.

¹⁸⁵ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Fifth Report and Order*, 98 FCC 2d 1191 (1984) (granting blanket authority for entry and construction to all non-dominant carriers).

IX. RECLASSIFICATION IS ESSENTIAL TO PROTECT PUBLIC SAFETY AND NATIONAL SECURITY.

The NPRM seeks comment¹⁸⁶ on the need for reclassification to promote public safety and national security – core goals of the Commission as set forth in Section 1 of the Communications Act.¹⁸⁷ As discussed above in Part II.B in support of the Santa Clara Petition for Reconsideration, reclassification and restoration of the Open Internet Rules are essential to protecting public safety. Furthermore, without Title II authority, the FCC cannot effectively monitor ISP performance. This is not merely a question of ensuring that consumers get the speed they pay for, but critical for understanding and utilizing network capacity in emergencies. Without Title II authority, the Commission cannot impose regulations to meet the need for resilience and reliability as more and more critical traffic passes through IP networks. Indeed, without Title II authority it is unclear how the Commission could require wireline networks to even report outages – let alone require ISPs to address them.¹⁸⁸

As the Commission previously observed, because the Commission does not require that broadband providers participate in mandatory outage reporting: “the Commission has limited situational awareness about outages involving broadband service” in times of emergency.¹⁸⁹ Indeed, the Commission has repeatedly sought comment on whether to require broadband

¹⁸⁶ NPRM, ¶¶ 25-39.

¹⁸⁷ 47 U.S.C. § 151.

¹⁸⁸ The Commission’s authority with regard to wireless networks is somewhat broader without Title II classification in light of the Commission’s authority to regulate wireless licensees in the public interest. *See* 47 U.S.C. § 303(r). But exercise of this authority is complicated in light of the “common carrier prohibition,” which prohibits the Commission from regulating non-common carriers as common carriers. By contrast, Title II grants the Commission clear authority under multiple provisions and removes the common carrier prohibition.

¹⁸⁹ Resilient Networks; Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; New Part 4 of the Commission’s Rules Concerning Disruptions to Communications, PS Docket No. 21-346, 36 FCC Rcd 14802, ¶ 28 (2021).

providers to report outages.¹⁹⁰ Each time, however, the Commission has shied away from doing so.¹⁹¹ Title II would provide the Commission with the necessary authority to finally require broadband providers to report significant outages. Title II would also provide the Commission with needed authority to impose backup power requirements and other steps the Commission may find necessary to ensure operation of broadband during national emergencies – and to ensure restoration of service as quickly as possible when service does fail.

Title II would Enhance National Security.

With regard to national security, the NPRM correctly observes that the Commission cannot address concerns over foreign networks without Title II authority.¹⁹² Specifically, the Commission must have authority under Section 214 to revoke the right of networks to operate. The Commission can achieve this by granting blanket authority to operate under Section 214

¹⁹⁰ Amendments to Part 4 of the Commission's Rules in re Disruptions to Communs., *Report & Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration*, 2016 FCC LEXIS 1806, ¶ 10 (F.C.C. May 26, 2016) (“[W]e examine a newer set of services -- broadband services -- on which Americans are equally, if not more dependent, and explore how outage reporting can be most effectively applied to broadband services.”); Public Notice, “Public Safety and Homeland Security Bureau Seeks Comment on Whether the Commission’s Rules on Disruption to Communications Should Apply to Broadband internet Service Providers,” 25 FCC Rcd 8490 (rel. July 2, 2010).

¹⁹¹ As then-Commissioner Rosenworcel stated,

It's hard to believe, but while the FCC collects information about outages on telephone lines, it does not collect information about disruptions involving broadband service. That means if the infrastructure that supports modern life goes down, the FCC will not have a full picture of the problem. How is it possible that we are the expert agency with responsibility for our nation's communications but do not have a mandatory requirement to report where broadband service was cut off and when?

Amendments to Part 4 of the Comm’ns Rules Concerning Disruptions to Communs., *Second Further Notice of Proposed Rulemaking*, 2020 FCC LEXIS 733, *93-94 (Statement of Commissioner Jessica Rosenworcel). *See also* ; Outage Reporting to Interconnected VoIP Serv. Providers et al., *Report & Order*, 27 FCC Rcd 2650, ¶ 48 (“We are not acting at this time on the extension of Part 4 rules to broadband Internet service providers or to outages based on performance degradation, both of which were sharply opposed by industry on several bases....”).

¹⁹² NPRM, ¶¶ 25-27.

without the need to apply for a specific license – although the Commission may require foreign networks to apply for a license rather than grant them blanket authority.

The Commission has used tailored blanket authority under Section 214 in the past to achieve important public interest goals. Beginning in 1999, the Commission granted blanket authority under Section 214 to all domestic carriers to enter markets, build and improve lines. But the Commission continued to require applications for foreign carriers to operate in the United States.¹⁹³ The Commission provided blanket authority for certain types of line acquisitions, but maintained the application requirement for transfers of corporate control.

The Commission used a conditional blanket certification when it reclassified DSL and other ILEC broadband services in 2005.¹⁹⁴ There, the Commission gave blanket permission to discontinue offering customers “common carrier broadband Internet access service” subject to notice requirement to customers and to the Commission. Of particular relevance here, the *Wireline Framework Order* stipulated that: “Upon notification of discontinuance, the Commission reserves the right to take actions where appropriate under the circumstances to protect the public interest.”¹⁹⁵

Following these precedents, if the Commission reclassifies broadband as a Title II telecommunications service subject to Section 214, the Commission can tailor Section 214 blanket authority to protect national security. For example, the Commission could grant blanket authority to all domestic ISPs but require foreign ISPs to file applications to operate in the United States. Even if the Commission extends blanket authorization to all ISPs, foreign owned as well as domestic, it can subsequently withdraw the 214 authorization for specific carriers that

¹⁹³ Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 FCC Rcd 11364, 11377 ¶ 23 (1999).

¹⁹⁴ *Wireline Framework Order*, 20 FCC Rcd at 14908, ¶ 101.

¹⁹⁵ *Id.*

constitute a threat to national security, or otherwise “reserve the right to take actions where appropriate under the circumstances to protect the public interest.”

Title II classification would also provide clarity on the applicability of Section 605,¹⁹⁶ a critical statutory authority in times of war or national emergency. Section 605(a) limits the power of the President to prioritize specific communications to “carriers.” Section 3(11) of the Communications Act explicitly defines “carriers” as “common carriers.”¹⁹⁷ On its face, ISPs have no obligation to follow instructions to prioritize communications under Section 605(a). This creates confusion as to whether Section 605(d), which authorizes the President to take control of any “station or facility” of communication by wire or wireless, applies to ISPs. Classifying ISPs as Title II carriers resolves any ambiguity in time of war or national emergency.

A. Title II Will Enhance The Commission’s Role In Promoting Cybersecurity, But the Commission Should Proceed Gradually.

Classification of broadband as a Title II service would refute the arguments that the FCC has no role in cybersecurity.¹⁹⁸ The European Union,¹⁹⁹ Canada,²⁰⁰ the UK²⁰¹ and other countries all involve their telecom regulator in cybersecurity planning and implementation. The United States alone has sidelined the agency responsible for overseeing broadband access by eliminating

¹⁹⁶ 47 U.S.C. § 606.

¹⁹⁷ 47 U.S.C. § 153(11). (“The term ‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire.”)

¹⁹⁸ See, e.g., Violet Blue, “FCC: Your Cybersecurity Isn’t Our Problem,” Engadget (March 17, 2017) (observing that then-Chairman Pai and then Commissioner O’Reilly “have made it clear they don’t think the FCC should have any role in cybersecurity.”), available at <https://www.engadget.com/2017-03-17-fcc-your-cybersecurity-isnt-our-problem.html>.

¹⁹⁹ Body of European Regulators for Electronic Communications (BEREC), Cybersecurity, <https://www.berec.europa.eu/en/berec/cybersecurity>.

²⁰⁰ Canadian Radio-television and Telecommunications Commission, Compliance and Enforcement and Telecom Decision CRTC 2022-170, (June 23, 2022), <https://crtc.gc.ca/eng/archive/2022/2022-170.htm>.

²⁰¹ Ofcom, Network Security and Resilience, <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/network-security-and-resilience>.

oversight of broadband access. This leaves us vulnerable, and lacking in coordination among our critical communications infrastructure providers.

Classification of BIAS as Title II would provide the Commission with necessary authority to both study cybersecurity needs and impose minimum standards on BIAS providers. Specifically, 47 U.S.C. § 162(a) authorizes the Commission to “undertake any research and development work in connection to any matter in relation to which the Commission has jurisdiction” (emphasis added). Section 218, which on its face applies to Title II carriers only, authorizes the Commission to “inquire into the management of all carriers subject to this chapter, and shall keep itself informed as to technical developments and improvements.”²⁰² To achieve this goal, this Commission is authorized to “obtain from such carriers, or from persons directly or indirectly controlling, or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.”²⁰³ Where the Commission finds it necessary to impose obligations and conditions, it may do so pursuant to Sections 201(b) and 214(c). Without reclassification, these necessary statutory authorities are inapplicable.

The NPRM seeks comment on detailed ways in which the Commission could use Title II authority to enhance cybersecurity, in particular with regard to its open proceeding on BGP reliability.²⁰⁴ While the Commission has an important role to play in protecting broadband networks from cyberattacks, it is unnecessary – and ill-advised – for the Commission to seek such detailed proposals at this stage. This record does not provide a useful forum for developing a record on such complex issues, and the Commission should instead focus on the more general use of Title II authority to enhance cybersecurity. As the Gospel advises, “sufficient unto the day

²⁰² 47 U.S.C. § 218 (emphasis added).

²⁰³ *Id.* (Emphasis added).

²⁰⁴ NPRM, ¶¶ 30-32.

are the evils thereof.”²⁰⁵ It is enough for this proceeding to observe that reclassification provides multiple new authorities for the Commission to engage on cybersecurity and take appropriate steps where necessary. By contrast, without reclassification, the Commission’s role in cybersecurity is nebulous and its authority to take appropriate action highly questionable.

X. NON-BIAS SERVICES ARE NOT A LOOPHOLE ALLOWING ISPS TO EVADE THE COMMISSION’S RULES.

The Commission’s approach to non-BIAS data services can recognize that not all communications services need to be offered over the Internet, while ensuring that this simple observation is not used by BIAS providers to engage in regulatory arbitrage and evade their Open Internet obligations.

A. BIAS Providers Cannot Evade Their Common Carrier Obligations By Simply Declaring That They Wish to Do So.

As a starting point a “non-BIAS” service cannot simply be a relabeled form of BIAS itself,²⁰⁶ even one that is allegedly “curated.”²⁰⁷ A “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints”²⁰⁸ meets the definition of BIAS and should be treated as such, whatever an ISP might choose to call it. To the extent that some ISPs may hope that by simply declaring that they intend to violate their common carrier obligations, they can take themselves out of the definition of BIAS, they are wrong. The court in *US Telecom* found that ISPs that offer access to “a limited set of websites” — that is, a whitelisted set of sites — may no longer fit the definition of BIAS, and would not be subject to those rules.²⁰⁹ Such a service would not be competitive with or substitutable for BIAS. But an ISP that engages in paid prioritization or blocks access to

²⁰⁵ Matthew 6:34.

²⁰⁶ NPRM, ¶ 66.

²⁰⁷ NPRM, ¶ 216.

²⁰⁸ 47 CFR § 8.1.

²⁰⁹ *US Telecom v. FCC*, 825 F.3d 674, 743 (D.C. Cir. 2016).

certain sites would not be offering a non-BIAS service; it would be violating its common carrier duties as a BIAS provider. In a non-precedential opinion concurring in the denial of an *en banc* rehearing of the court’s ruling, Judges Tatel and Srinivasan speculated about what such a “curated” experience might look like, before concluding that “There is no need in this case to scrutinize the exact manner in which a broadband provider could render the FCC’s Order inapplicable by advertising to consumers that it offers an edited service rather than an unfiltered pathway.”²¹⁰ And, as confirmed by the judges, “the threats of consumer deception and confusion are simply too great” to allow an ISP to simply avoid being a common carrier by declaring that it wishes not to be one.²¹¹ This analysis should be guided by the principle, confirmed by the Supreme Court, that a common carrier may not use contract law or any form of “stipulation” to evade its common carriage duties.

It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation. The rule rests on broad grounds of public policy justifying the restriction of liberty of contract because of the public ends to be achieved. The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence “seeks to put off the essential duties of his employment.” It is recognized that the carrier and the individual customer are not on an equal footing.²¹²

Common carriage is not an optional regulatory category, but a legal status that stems from the functionality of the carriage service offered, and how it is offered to consumers. “A particular system is a common carrier by virtue of its functions, rather than because it is declared to be

²¹⁰ *US Telecom v. FCC*, 855 F.3d 381, 390 (D.C. Cir. 2017) (concurring in the denial of rehearing *en banc*).

²¹¹ *Id.*

²¹² *Santa Fe Railway v. Grant Bros.*, 228 U.S. 177, 184-85 (1913) (citations omitted). *See also Household Goods Carriers' Bureau v. ICC*, 584 F. 2d 437 (DC Cir. 1978).

so.”²¹³ The only way for a BIAS provider to evade its Open Internet obligations would be to exit the consumer broadband market.

B. Non-BIAS Services Cannot Merely Be Relabelled Edge Services.

Beyond this, when evaluating non-BIAS services, the Commission’s analysis should be guided by two main principles. First, it must adopt a framework that ensures that only genuine non-BIAS services are so categorized. ISPs must not be able to bypass the Open Internet rules with word games, by simply labeling online services or applications they are favoring as “non-BIAS,” or as “specialized services,” or as “managed services,” or anything else. Second, it must ensure that even non-BIAS services are not deployed in an anti-competitive way, and that capacity and resources are not diverted from the open Internet to ISP-managed walled gardens.

Non-BIAS services have coexisted with and shared capacity with broadband for as long as broadband has existed. Cable broadband shares capacity with cable TV, and voice service shares capacity with DSL. Modern fiber broadband networks often have capacity dedicated to VoIP and video service, and wireless networks standards, in addition to dedicated voice capacity, often have the ability to deliver services other than BIAS. In a sense, this was simply a matter of historical sequencing: subscription video (MVPD) and voice service both preexist broadband, and the advent of broadband did not (and still does not) mean that these services should be discontinued, or only offered “over-the-top” and subject to the Commission’s Open Internet rules. While the Commission must ensure that its Open Internet rules are not bypassed or undermined through the misuse of the “non-BIAS” label, there is no reason to think that communications and media services should be offered over the Internet, or not at all. The Commission’s consideration of whether a service is a genuine non-BIAS service or merely a

²¹³ *Nat. Ass’n of Regulatory Utility Com’rs v. FCC*, 525 F. 2d 630, 644 (D.C. Cir. 1976).

re-labeled edge service (that is, a service typically accessed over BIAS) should include (but not be limited to) the following factors:

- Are the services subject to an alternate regulatory regime, or regulated themselves as common carriers? (Title II, Title III, Title IV). If so, then this weighs in favor of their being non-BIAS.
- Are the services “over-the-top” services available to any Internet user, or are they facilities-based services that can only be offered to users on dedicated, specific, last-mile infrastructure? To the extent that services are delivered over, and require, specific last-mile infrastructure, this weighs in favor of their being non-BIAS.
- If they are not available to any Internet user, is there a technical justification for this, or is an ISP artificially limiting the service for regulatory purposes? To the extent that services are artificially limited, this weighs against non-BIAS treatment.
- Can a customer subscribe to a non-BIAS service without also subscribing to BIAS? If a customer can subscribe to a service (e.g., MVPD video service) without also subscribing to the same provider’s broadband service, this weighs in favor of their being non-BIAS. If this is not possible—due to technical reasons, or because of bundling practices by the ISP, this weighs against their being considered non-BIAS.
- Is there a legitimate technical need for a service to be non-BIAS, or a significant technical benefit to offering it in this way? For instance, ISPs have long claimed that certain applications required specialized treatment. Experience has shown most of these claims to be false. At the same time, certain kinds of services may benefit from a different delivery model than packet-based switching on an IP network. Some kinds of live video, for instance, are more efficiently delivered on a one-to-many broadcast model that is not an easy fit with existing IP networks.

Under this analysis, dedicated, facilities-based IPTV MVPD services or VoIP calling services that can be purchased separately from broadband would likely be considered non-BIAS services

and would likely pose relatively little competitive risk—in part stemming from the long history of separately offered, and separately regulated, video and voice services.²¹⁴

Many services that ISPs frequently claim require some sort of specialized treatment, such as video calling or telehealth, in the experience of millions of consumers, plainly do not, and attempting to offer such services as a “non-BIAS” service is likely to be an attempt to engage in anti-competitive paid prioritization or zero-rating. However emerging areas such as Internet-of-Things (IOT) devices, or consumer wearables that are not suited for general-purpose Internet access, may be areas where non-BIAS services may be useful. Devices that track the location of vehicles or items using GPS or other means and then update their location to a cloud database might also qualify. Services like music or video streaming, most forms of online gaming, or any other activity that millions of consumers currently use BIAS to access, likely do not.

C. Non-BIAS Services Must Be Examined for Harmful Consumer and Competitive Effects.

Finally, while a genuine non-BIAS service may be outside the scope of the Open Internet rules, this does not end the inquiry. An ISP that offers a non-BIAS service may still be found to be acting anti-competitively, and its deployment decisions may be contrary to national broadband goals. These goals emphasize the importance of widespread, affordable, and equal access to the internet as a tool for innovation, education, and economic growth. If non-BIAS services are deployed in a way that significantly disadvantages or discriminates against certain populations or areas, it would run counter to these national objectives.

Moreover, the commission must consider the impact of non-BIAS services on market competition. While a non-BIAS service in itself might not pose a direct competitive threat, the

²¹⁴ John Bergmayer, *No, Cable TV is Not a Net Neutrality Violation*, Public Knowledge (June 27, 2014), <https://publicknowledge.org/no-cable-tv-is-not-a-net-neutrality-violation>.

manner of its deployment could. For instance, if an ISP uses its control over network infrastructure to unfairly promote its own non-BIAS services over competitors', this could stifle competition and innovation in the broader market. This is particularly concerning in markets where consumers have limited ISP choices.

Furthermore, the commission should assess how non-BIAS services might affect consumer choice and pricing structures. There's a risk that ISPs could bundle non-BIAS services with BIAS in such a way that consumers are indirectly coerced into purchasing services they neither need nor want, potentially leading to higher prices and reduced choice.

Additionally, the quality of service (QoS) considerations for non-BIAS services must be carefully balanced against the needs of the open internet. It's essential that the allocation of network resources does not degrade the quality or accessibility of BIAS for consumers. ISPs should not be allowed to create a tiered internet experience where non-BIAS services receive preferential treatment at the expense of general internet access.

Finally, transparency is key in the deployment and management of non-BIAS services. ISPs should be required to clearly disclose how these services are managed, their impact on network resources, and any potential effects on the open internet. This transparency will enable regulators, consumers, and competitors to better understand and evaluate the implications of non-BIAS services.

While non-BIAS services can coexist with BIAS, their deployment must be approached with an eye towards maintaining competitive fairness, upholding national broadband goals, ensuring consumer choice, and preserving the quality of the open internet. Only through such careful oversight can the potential benefits of non-BIAS services be realized without undermining the broader objectives of the Open Internet framework.

XI. ZERO-RATING VIOLATES NONDISCRIMINATION PRINCIPLES AND HARMS THE OPEN INTERNET.

ISPs may discriminate against Internet traffic through technical measures such as selectively slowing down or speeding up some Internet traffic, or through economic measures, like “zero-rating.” “Zero-rated’ content, applications, and services” are those that end users can access without the data consumed being counted toward the usage allowances or data caps imposed by an operator’s service plans.”²¹⁵

Customers are more likely to prefer a service that does not count against their data cap than one that does, which can disadvantage competing services as much as throttling or paid prioritization. In some respects zero-rating may be *worse* than paid prioritization. Using a service that has not been prioritized may be a poor experience for a user, but using a service that has not been zero-rated can carry a financial cost. Further, a customer can tell—just by using an app or visiting a website—whether it has slow or degraded performance. But a user has no way to know which services they are using are zero-rated, and which are not. Simply tapping a link, switching apps, or opening an email may take users away from a zero-rating offering to one with metered billing.

A. Zero-Rating is a Poor Fit for the Internet That Raises Prices and Drives Consolidation.

Zero-rating fundamentally misapprehends the way people use the Internet, and the way that content is delivered to them. Say an ISP wanted to zero-rate both Apple Music and Spotify. The Spotify app also provides podcasts, and delivers them to users the same way it delivers music. Are those zero-rated as well? If Spotify podcasts are zero-rated—how does this compare

²¹⁵ Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services (Jan. 11, 2017) (“WTB Report”) (withdrawn by Policy Review of Mobile Broadband Operators’ Sponsored Data 1093, 32 FCC Rcd 1093 (Feb. 3, 2017).

with Apple Music? Apple does not include podcasts in Apple Music, but does offer a Podcasts app. Zero-rating this podcast app would be difficult because Apple Podcasts is a client that downloads podcasts directly from podcast providers, not a central server. It is challenging to even envision how an ISP might zero-rate mp3 files that can be downloaded from arbitrary locations. Simply identifying traffic to be zero-rated is a daunting challenge. This is no doubt why T-Mobile's BingOn, often cited as a form of relatively benign zero-rating, only applies to a limited number of services,²¹⁶ with procedural and technical hurdles put on the shoulders of services that want to be included. As T-Mobile's BingOn FAQ puts it,

[V]ideo must be delivered over T-Mobile's network in a way that allows T-Mobile to identify the provider's video traffic. This requires that video detection signatures be present. T-Mobile will work with content providers to ensure that our networks work together to properly detect video. We will continue to work with content providers as new traffic identification means are needed in the event of future technology enhancement or changes. Use of technology protocols which make detection of video difficult such as https and UDP require additional collaboration with T-Mobile to enable the video detection.²¹⁷

In almost every scenario users are accessing multiple kinds of data from multiple sources even for the simplest task. "Sender-pays" models that were appropriate for telephony are a poor fit for broadband,²¹⁸ and "good enough" is not good enough when the result for users is unexpected and confusing charges. These complexities are not something that can be addressed with mere transparency or disclosure requirements.

Zero-rating can also drive online consolidation, further entrenching the market position of today's Internet giants and content incumbents. An OECD report found that,

²¹⁶ T-Mobile, Binge-On Video Services, <https://www.t-mobile.com/tv-streaming/binge-on/apps-list.html>.

²¹⁷ T-Mobile, Unlimited video streaming with Binge On, <https://www.t-mobile.com/tv-streaming/binge-on>.

²¹⁸ See Dean Bubley, "Sender-pays" is a ridiculous 19th-Century idea misapplied to the Internet, *Disruptive Analysis* (Feb. 4, 2014), <https://disruptivewireless.blogspot.com/2014/02/sender-pays-is-ridiculous-19th-century.html>.

[E]specially in markets with insufficient competition, zero rating may have negative effects on competition between different [online content providers]. It can, for example, support market dominance, if the content of a dominant player is zero-rated while the content of its competitors is not. Consequently, this might impede other companies from entering the market and undermine the benefit of the Internet as an open platform for innovation. Even if a dominant platform opens itself up to other services, it remains in overall control – not subject to the disciplines competition can place on behaviour.²¹⁹

Further, a recent study comparing European markets “found that the availability of zero-rating offers coincides with prices being on average 9.9 higher than we would predict them to be without such offers present.”²²⁰ This is intuitive, as zero-rating (particularly versions that charge edge providers for inclusion) encourages providers to keep data caps low, as a means of monetizing bandwidth scarcity. This makes customers more likely to go over their caps, and increases the overall costs of accessing content. Even companies that are zero-rated may have to raise the costs or lower the quality of their services to offset ISP-imposed fees. A service that harms online competition, drives up costs for content, and raises mobile prices should be discouraged.

B. The Commission’s Past Approach to Zero-Rating, Applied to Today’s Market, Shows that the Practice is Anticompetitive.

In 2015, the Commission declined to categorically view all forms of zero-rating as anti-competitive.²²¹ Nor did the Commission decide that zero-rating was necessarily permissible. Instead, it elected to assess the practice, then relatively new, on a case-by-case basis under the

²¹⁹ The Effects of Zero Rating, OECD Digital Economy Papers, No. 285 (Jul. 2019), https://www.oecd-ilibrary.org/science-and-technology/the-effects-of-zero-rating_6eefc666-en, at 9.

²²⁰ Epicenter.works, The Net Neutrality Situation in the EU (2019), https://epicenter.works/fileadmin/import/2019_netneutrality_in_eu-epicenter.works-r1.pdf, at 59.

²²¹ 2015 Open Internet Order, 30 FCC Rcd 5601, ¶¶ 151-53 (2015).

General Conduct rule.²²² The Commission has laid out a number of factors to assess when determining whether a given practice would violate this rule:

(i) whether a practice allows end-user control and enables consumer choice; (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices; (iii) whether a practice affects consumers' ability to select, access, or use lawful broadband services, applications, or content; (iv) the effect a practice has on innovation, investment, or broadband deployment; (v) whether a practice threatens free expression; (vi) whether a practice is application agnostic; and (v) whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organizations.²²³

These factors are designed to be applied to individual practices on a case-by-case basis.

However, while the Commission's caution in avoiding bright-line rules may have been warranted in 2015 based on the record as it then existed, applying the Commission's own factors to zero-rating as it is understood today would appear to violate them at the outset. This warrants the imposition of bright-line rules.

End-user Control and Consumer Choice (i): Most forms of zero-rating limit end-user control and consumer choice because they create an environment where users are inclined to choose zero-rated services over others, regardless of their preferences or the quality of services. This preferential treatment reduces the incentive for consumers to explore and use non-zero-rated services, constraining their choices.

Anti-competitive Effects (ii): Zero-rating can have significant anti-competitive effects in the market for applications, services, content, or devices. By favoring certain services (especially

²²² The General Conduct rule states that "Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule." NPRM ¶ 166.

²²³ NPRM, ¶ 166 (restating factors from 2015 Order).

those owned or affiliated with ISPs), zero-rating can disadvantage competing services, stifling competition and innovation. It can particularly harm small or new entrants who cannot afford to pay for zero-rating.

Impact on Lawful Broadband Services (iii): Zero-rating impacts consumers' ability to select, access, or use lawful broadband services, applications, or content. Consumers may be deterred from using services that count against their data caps, leading to a less diverse and open Internet experience.

Effect on Innovation, Investment, or Broadband Deployment (iv): Zero-rating can negatively affect innovation and investment in the broader Internet ecosystem. When ISPs favor certain services, it can discourage investment in competing services and hinder the overall innovation in content and application development.

Threat to Free Expression (v): Zero-rating practices can threaten free expression by creating a two-tiered Internet: one for zero-rated, often mainstream services, and another for everything else. This disparity can limit the diversity of content and viewpoints accessible to users, undermining the principle of free expression online.

Application Agnosticism (vi): Most zero-rating practices are not application agnostic. They typically favor specific applications or services, violating the principle of treating all data equally regardless of its source or destination.

Conformity to Best Practices and Technical Standards (vii): Zero-rating often does not conform to best practices and technical standards set by independent Internet engineering and standards-setting organizations. Typically zero-rating practices are marketing tactics developed by ISPs to maximize profits, not to optimize network performance.

Applying these factors to then-current zero-rating programs, the Wireless Telecommunications Bureau found that most of them unlawfully “present significant risks to consumers and competition in downstream industry sectors because of network operators’ potentially unreasonable discrimination in favor of their own affiliates”²²⁴ in violation of the General Conduct Rule.²²⁵ The Bureau found that there was an unacceptable competitive risk when an ISP zero-rates its own content or that of its affiliates, but found that it may not be anticompetitive for ISPs to zero-rate entire categories of content (e.g., video or music streaming) without charging edge providers.²²⁶ The Bureau further found that “Given the powerful economic incentives of network operators to employ these practices to advantage themselves and their affiliates in various edge service markets, we are equally concerned that – absent effective oversight – these practices will become more widespread in the future.”²²⁷

C. The Commission Can Learn From Jurisdictions Such as California, the EU, and India.

Acting on these concerns and in response to the Pai FCC's decision to remove federal oversight of broadband practices, California's Internet Consumer Protection and Net Neutrality Act clarified that zero-rating is unlawfully discriminatory when an ISP zero-rates “some Internet

²²⁴ WTB Report at 1.

²²⁵ Conduct that violates the General Conduct Rule in most cases will also violate Title II’s statutory directives as well. *See* 47 U.S.C. §§ 201, 202. Moreover, to the extent that zero-rating is a form of “preferential traffic management,” it would appear to “favor some traffic over other traffic,” in violation of the bright-line rule against paid prioritization, which provides an illustrative but not exhaustive list of preferential traffic management techniques.

²²⁶ The Bureau also found that AT&T's Data Perks program “based on the information we have” was not anticompetitive to the extent that it allows users to “get additional data to use for whatever purpose they choose.” WTB Report at 12. The Bureau did not consider zero-rating approaches where an ISP charges edge providers, but on a purportedly “neutral” basis, and does not favor its own affiliates. However those arrangements would be anticompetitive for the same reason that paid prioritization is. Among other things, paid prioritization harms “individual bloggers, libraries, schools, advocacy organizations, and other speakers” who cannot afford to pay for priority. 2015 Open Internet Order ¶ 68.

²²⁷ WTB Report at 1.

content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category,” and does so without charge to edge providers or in exchange for any other consideration.²²⁸ California’s rules proved immediately effective, in that they forced AT&T to stop its anticompetitive practice of zero-rating its own preferred video content.²²⁹

The California rules represent an appropriate compromise for state-level rules: By allowing providers to zero-rate categories of content, but not specific applications or content providers, they leave the door open to the kinds of zero-rating the Commission in 2015 speculated “could benefit consumers and competition,”²³⁰ but they forbid the kinds of zero-rating that have already been found to be anti-competitive. In effect, they codified the FCC’s earlier analysis.

But the Commission’s analysis should not be static, and it now has the opportunity to learn not just from its own and California’s experience, but that of regulators globally. The European Union has also grappled with the question of zero-rating, a practice that has historically been more prevalent in that market than in the US.²³¹ The EU legal structure is complex, involving the interaction of the EU Parliament and Council; the Body of European Regulators for Electronic Communications (BEREC), where member state national telecommunications regulators coordinate their activities to ensure a smoothly functioning common market; and the national telecommunications regulators themselves, who ultimately

²²⁸ CA Civ Code § 3101.

²²⁹ Jon Brodtkin, *AT&T lies about Calif. net neutrality law, claiming it bans “free data,”* Ars Technica, (March 18, 2021), <https://arstechnica.com/tech-policy/2021/03/att-lies-about-calif-net-neutrality-law-claiming-it-bans-free-data/>

²³⁰ 2015 Open Internet Order, ¶ 152.

²³¹ *Net Neutrality Challenges in the World: Zero-Rating in the European Union* (July 18, 2017), <https://publicknowledge.org/net-neutrality-challenges-in-the-world-zero-rating-in-the-european-union>.

issue and enforce rules pursuant to EU direction. In 2020, the EU-level Court of Justice of the European Union (CJEU) found that the EU's existing open Internet rules, Regulation (EU) 2015/2120,²³² prohibited common forms of zero-rating²³³ (even though the practice was not specially mentioned), “thanks to the combined reading of Article 3, sections 1 and 2.”²³⁴ Those provisions read:

(Section 1). ‘End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service. This paragraph is without prejudice to European Union law, or national law that complies with EU law, related to the lawfulness of the content, applications or services.’

(Section 2). ‘Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.’²³⁵

While the CJEU's decision does not necessarily mean that “all zero-rating practices are banned in principle,” the Court has confirmed “that Article 3, sections 1 and 2 of the Regulation is a correct legal basis for the enforcement of the ban on zero-rating,”²³⁶ and that zero-rating is never allowed

²³² European Parliament and Council of the European Union, Regulation (EU) 2015/2120 of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services and Regulation (EU) No 531/2012 on Roaming on Public Mobile Communications Networks within the Union, (“Regulation (EU) 2015/2120”) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>.

²³³ Court of Justice of the European Union, Grand Chamber, Judgment of 15 September 2020, (“CJEU Opinion”), ECLI:EU:C:2020:708, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=231042&pageIndex=0&doclang=EN>

²³⁴ Innocenzo Genna, EU Court of Justice Rules on Zero-Rating, Int'l Bar Ass'n (2020) (“IBA”), <https://www.ibanet.org/article/DAAB099C-A736-4ED7-BB4D-4719A1593A5F>.

²³⁵ *Id.* See also Regulation (EU) 2015/2120.

²³⁶ IBA.

to the extent it may “limit the exercise of end users’ rights.”²³⁷ Notably, the actual zero-rating plan brought before the CJEU was found to be just such a practice.

India’s example is also instructive. The Telecom Regulatory Authority of India (TRAI), in response to a Facebook-led effort to widely deploy a substandard form of Internet access known as “Free Basics,”²³⁸ enacted²³⁹ strong rules stating that “No service provider shall offer or charge discriminatory tariffs for data services on the basis of content,” and that “No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged by the service provider for the purpose of evading the prohibition in this regulation.”²⁴⁰ TRAI opted for a clear prohibition instead of a case-by-case approach. This was necessary to ensure administrative efficiency and certainty, particularly benefiting end-users and smaller entities who might lack resources for regulatory or legal actions, as well as promoting human rights values, such as ensuring open access to online information.

Informed by the global and state experience on the topic of zero-rating since 2015, the Commission should adopt a clear prohibition on zero-rating. A case-by-case assessment is an appropriate way to evaluate novel practices, but zero-rating is no longer novel, and bright-line rules banning anti-competitive practices are now appropriate. The Commission should also

²³⁷ CJEU.

²³⁸ Toussaint Nothias, *The Rise and Fall... and Rise Again of Facebook’s Free Basics: Civil Society and the Challenge of Resistance to Corporate Connectivity Projects*, Global Media Tech. & Cultures Lab (Apr. 21, 2020), <https://globalmedia.mit.edu/2020/04/21/the-rise-and-fall-and-rise-again-of-facebooks-free-basics-civil-and-the-challenge-of-resistance-to-corporate-connectivity-projects>.

²³⁹ Pankaj Doval, *Internet to Remain Free and Fair in India: Govt Approves Net Neutrality*, Times of India (Jul 11, 2018), <https://timesofindia.indiatimes.com/business/india-business/internet-to-remain-free-and-fair-in-india-govt-approves-net-neutrality/articleshow/64948838.cms>.

²⁴⁰ Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016*, Press Information Bureau, Gov’t of India, Ministry of Communications (Feb. 8, 2016), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=136211>.

refrain from categorically preempting state laws like California’s that address this practice, which has been globally recognized as anti-competitive and contrary to open Internet principles.

XII. THE COMMISSION SHOULD ENACT RULES PREVENTING ISPS FROM CHARGING “ACCESS FEES.”

Broadband Internet Access Service (BIAS) providers are in the business of providing broadband to their subscribers. This entails that they provide their customers with the ability “to transmit data to and receive data from all or substantially all internet endpoints.”²⁴¹

Unfortunately, experience has shown that many broadband providers are willing and able to degrade their customers’ experience by failing to make the arrangements necessary to actually provide that service.²⁴² In some instances this entails broadband providers failing to invest in their networks, in the hope of getting someone else (edge providers, taxpayers) to pay for it. In other cases broadband providers refuse to honor reasonable interconnection requests, holding out for the payment of “access fees,” in the meantime degrading their own users’ experience. The Commission should block this practice.

A. Access Fees Are Anticompetitive Tolls That Can Prevent Users from Accessing the Content of Their Choosing.

Access fees are charges levied (or proposed to be levied) by BIAS providers against edge providers, transit networks, and other players in the internet ecosystem simply to access the BIAS provider’s customer base. These charges do not reflect true costs—they represent the unique gatekeeper leverage that BIAS providers, as the “last mile” in between users and the internet, have over other kinds of providers. They can amount to nothing more than an end-run around net neutrality rules, or an ISP’s own Open Internet commitments.

²⁴¹ 47 CFR § 8.1(b); NPRM, ¶ 66.

²⁴² Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif. Wildfire*, ArsTechnica (Aug. 21 2018), <https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/>.

Last-mile ISPs have the power to charge access fees because there is no way to reach a user except through a last-mile network. This is true regardless of the state of competition elsewhere in the network, and to an extent, even if end users have other broadband options. This is sometimes called “gatekeeper” power, or a terminating access monopoly. While ISPs have rejected this description of their place in the network,²⁴³ the D.C. Circuit was not convinced:

[B]roadband providers have the technical and economic ability to impose such restrictions [against edge providers]. Verizon does not seriously contend otherwise. In fact, there appears little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic. The Commission also convincingly detailed how broadband providers’ position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers. Because all end users generally access the Internet through a single broadband provider, that provider functions as a “terminating monopolist,” with power to act as a “gatekeeper” with respect to edge providers that might seek to reach its end-user subscribers. As the Commission reasonably explained, this ability to act as a “gatekeeper” distinguishes broadband providers from other participants in the Internet marketplace — including prominent and potentially powerful edge providers such as Google and Apple — who have no similar “control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.”²⁴⁴

As an analogy, transit providers, edge networks, cloud providers, CDNs, and all manner of other Internet players exchange traffic with each other in complex ways, much like how cars and trucks can traverse the Interstate Highway System, state highways, city streets, and backcountry

²⁴³ Jon Brodtkin, *Verizon to critics: Stop calling us a monopoly*, Ars Technica (Jan. 15, 2015), <https://arstechnica.com/information-technology/2015/01/verizon-to-critics-stop-calling-us-a-monopoly> (rejecting “terminating access monopoly” argument).

²⁴⁴ *Verizon v. FCC*, 740 F. 3d 623, 646 (D.C. Cir 2014) (citations omitted; emphasis added). As the Supreme Court found in the analogous situation of cable television, “When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994). Notably, this is not a simple “market power” test that depends solely on the number of end user choices. *Contra Comcast v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

roads. They can take multiple routes to the same destination, avoiding traffic jams and toll roads if they wish. But there are some places that cannot be reached except through one road, or across one bridge. If that bridge charges a substantial toll, there is no alternative to paying it, and the owner of the toll booth can charge as much as it can. Of course, in this analogy, BIAS providers own that bridge, and want to charge those tolls.

Perhaps the most fallacious argument from BIAS providers attempting to justify access fees relates to “traffic balance,” or to the amount of traffic that particular edge providers are claimed to generate.²⁴⁵ When a broadband subscriber watches YouTube, streams music from Spotify, or joins a meeting on Zoom, that traffic is caused by the user, not the edge service. Netflix and other major edge providers are not in the business of dumping traffic on BIAS providers for no clear reason. To the extent that they are popular, they are popular with a BIAS provider's customers, and delivering that requested traffic to them is part of what the user hired the broadband provider to do.

There will almost always be more traffic going into a BIAS network than exiting it because more people watch TV shows and movies than make and stream them themselves. While video conferencing, social media, and many other internet applications mean that it is not accurate to think of BIAS networks as primarily used for consumption, they are often referred to by network engineers as “eyeball” networks²⁴⁶ due to their expected traffic ratios. Unbalanced traffic ratios do not reflect a market imbalance or some kind of unfairness that BIAS providers must levy charges to remedy, but reflect the relative position in the network, and different uses of different kinds of networks. These are not transactions between peers. Networks that are actually

²⁴⁵ *E.g.*, Ben Popper, *Verizon says Level 3 is looking to get a 'free ride' for its massive Netflix traffic*, The Verge (Jul. 21, 2014), <https://www.theverge.com/2014/7/21/5922793/verizon-level-3-netflix-peering-transit-congestion>

²⁴⁶ “Eyeball network,” https://en.wikipedia.org/wiki/Eyeball_network (last accessed Dec. 11, 2023).

peers—different backbone providers, for instance—may choose to exchange traffic with each other on a settlement-free basis when they have roughly balanced traffic ratios, because each network benefits from the exchange equally.²⁴⁷ This has no applicability to BIAS networks, which are Internet traffic's ultimate destination.

B. The FCC Should Enact Bright-Line Rules Banning Access Fees, and it Has the Legal Authority to Do So.

The FCC should enact a clear, bright-line rule prohibiting BIAS providers from levying access charges, subject to certain technical requirements. While there are reasonable costs associated with some kinds of interconnection, larger networks have the ability to charge a premium to access their large customer bases. The Commission should put in place rules banning “access fees”—that is, charges by BIAS providers to edge providers that have no cost justification, but represent only the BIAS provider leveraging its customer base to extract rents from edge companies, transit providers, and other parties BIAS providers interconnect with in order to provide broadband service to their customers. Given the *de minimis* costs of interconnection and the incentive and history of BIAS providers attempting to leverage their position in the network (their “terminating access monopoly”) to extract anticompetitive fees or to degrade the traffic of certain edge providers, Public Knowledge proposes that BIAS providers be required to interconnect with other providers on a settlement-free basis, provided 1) That traffic is reasonably localized, and 2) That the interconnecting provider meet a minimum traffic threshold. In other circumstances, BIAS providers should be permitted to recover actual interconnection and transit costs—but not access fees, which are not appropriate in any circumstance.

²⁴⁷ See Rob Frieden, *Conflict in the Network of Networks: How Internet Service Providers Have Shifted From Partners to Adversaries*, 38 *Hastings Comm. & Ent. L.J.* 63 (2015) (for an overview of historical traffic exchange practices).

If the broadband market were more competitive, and if competition policy had prevented BIAS providers from transforming from local and regional providers to nationwide behemoths, then they would not be in the position to offer “take it or leave it,” or “take it or go out of business” offers to edge providers. A BIAS provider who failed to provide adequate service to its users might lose customers to a competitor, and no single BIAS provider (even though it would still possess “gatekeeper” power over its customers and should be fully subject to open Internet rules) would be in a position to extract rents from edge providers, who might be able to ignore unreasonable demands from ISPs that represent a small fraction of their user base. But that is not the market we have, and the FCC's rules should reflect reality. That reality strongly demonstrates the need for bright-line rules that prevent BIAS providers from constructing toll booths that every other provider must pass through.

While the rules the Commission should enact are new, the legal authority underlying them is not. The Commission has already established its legal authority for these proposed rules, and that authority has been upheld by the DC Circuit. In 2015, the Commission asserted authority to prevent unreasonable actions that undermine consumer choice and the ability of edge providers to deliver services, and to “stop new and novel threats to the Internet” in traffic exchange.²⁴⁸ The Commission at that time rightly viewed interconnection as part of the service offered to end users, not as a separate “service” provided to interconnecting parties—a conclusion the NPRM rightly reiterates.²⁴⁹ At the time, it explained that it would use the General Conduct

²⁴⁸ 2015 Open Internet Order, at 315 (Statement of Tom Wheeler) (“The Order also includes a general conduct rule that can be used to stop new and novel threats to the Internet. That means there will be basic ground rules and a referee on the field to enforce them. If an action hurts consumers, competition, or innovation, the FCC will have the authority to throw the flag.”).

²⁴⁹ NPRM, § ¶ 66. The concept of a separate service offered to interconnecting parties arose only because the FCC in *Verizon* had failed to classify BIAS as telecommunications, and the court found that the non-discrimination rules the FCC had tried to enforce were similar to a common carrier duty, with respect to edge providers. *Verizon v. FCC*, 740 F.3d 623, 653. But the court in *US Telecom* found that “The problem in *Verizon* was not that the Commission had misclassified

rule to address these behaviors, identifying the “deleterious effect” of anticompetitive conduct in traffic exchange.²⁵⁰ Even this oversight was effective in preventing anticompetitive conduct.²⁵¹

The Commission should build on this success by banning access fees, as an important part of protecting the open Internet.

XIII. THE COMMISSION SHOULD NOT ADOPT A PRESUMPTION OF FORBEARANCE.

The Commission seeks comment on adopting a framework of when to forbear from specific provisions.²⁵² Forbearance is a tool that gives the Commission flexibility to respond to a dynamic marketplace. It is a powerful tool, to be used with precision and care, because it overrides the initial judgment of Congress that a particular statute protects the public interest. The Commission must use this power in a deliberate, thoughtful manner and must always proceed with caution when considering forbearance. It would be tragic if the Commission invested time and effort in properly reclassifying broadband to ensure an appropriate framework to protect the public only to find, when a crisis arose, that the Commission had eliminated its authority through an imprudent forbearance.

The Commission has clear authority to forbear when appropriate, but only when it serves the public interest. The Commission’s authority to forbear under Section 10 is broad and should be exercised carefully. Both the text of the statute and the relevant jurisprudence make clear that

the service between carriers and edge providers but that the Commission had failed to classify broadband service as a Title II service at all. The Commission overcame this problem in the Order by reclassifying broadband service — and the interconnection arrangements necessary to provide it — as a telecommunications service.” *US Telecom v. FCC*, 825 F. 3d 674 (D.C. Cir. 2016).

²⁵⁰ 2015 Open Internet Order, at ¶ 195 (“This authority is cited under sections 201, 202, and 208 of the Act (and related enforcement provisions”).

²⁵¹ Jason Aycock, *Cogent signs latest interconnection pact with CenturyLink*, Seeking Alpha (Nov. 24, 2015),

<https://seekingalpha.com/news/2949546-cogent-signs-latest-interconnection-pact-centurylink>.

²⁵² NPRM, ¶¶ 98-114.

the Commission has extensive forbearance authority, and its forbearance decisions have previously been reviewed deferentially under the “arbitrary and capricious” standard.²⁵³ Thus, because the Commission’s forbearance authority is so broad, it falls upon the Commission to ensure it only exercises that authority when doing so would serve the public interest.

Any concerns that the Commission should not reclassify because it might be too difficult to forbear when necessary are unwarranted. While the Commission does need to evaluate forbearance requests according to the test set forth in Section 10, a review of the relevant case law reveals that the Commission’s forbearance decisions have received great deference in the courts. For example, the D.C. Circuit rejected a challenge to the Commission’s forbearance from dominant-carrier rules as applied to special access lines, even though the Commission had forbore based on the nationwide broadband market instead of special access lines in identified local markets.²⁵⁴ In that decision, the court emphasized: “The general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic.”²⁵⁵

The legislative history of Section 10 indicates that discretion to forbear should be exercised judiciously. In 1994, the Supreme Court held that the FCC exceeded its statutory authority to “modify” the rate-filing requirements of Section 203 of the Telecommunications Act when it declared that common carriers without market power had no obligation to file their rates with the Commission.²⁵⁶ The Court stated that the Commission’s decision to change the statute

²⁵³ *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

²⁵⁴ *Id.* at 908; *see also EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006).

²⁵⁵ *Ad Hoc Telecomm. Users Comm.*, 572 F.3d at 906-7.

²⁵⁶ *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994), *superseded by statute*, Telecomm. Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

“from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist . . . may [have been] a good idea, but it was not the idea Congress enacted into law in 1934.”²⁵⁷

The clear purpose of providing the Commission with forbearance powers, then, is to grant it the ability to make certain provisions discretionary. This should not be taken, however, as *carte blanche* for the Commission to legislate on its own behalf, disregarding at will the intent of Congress.²⁵⁸ Section 10 operates within the confines of the Act, and it only reaches so far as it is necessary for the Commission to be able to remove mandatory regulations from carriers when doing so serves the public interest. Forbearance can only apply to those provisions where Congress has placed a duty upon a carrier, and not the Commission or another party—since Section 10 only allows the Commission to refrain from applying regulations “to a telecommunications carrier.” The Commission therefore cannot (as is logical) exempt itself from its congressionally mandated duties by claiming forbearance. Nor does it make much sense for the Commission to forbear from provisions that are already discretionary—if the purpose of forbearance is to provide the Commission with the flexibility to deregulate when regulation is uncalled for, it is pointless for Section 10 to grant discretion (and provide a separate system of procedure for that grant) when it is already present.

Moreover, the Commission should understand its Section 10 abilities as a means to ensure that the ultimate goals of the Communications Act—protecting the public interest, convenience, and necessity—are met. Those goals are also generally reflected in the provisions of Title II, and Congress has shown through those provisions its preferred means to those ends.

²⁵⁷ *Id.* at 231–32.

²⁵⁸ Such a broad interpretation would raise the question of whether Congress could delegate such authority to the Commission. It is one thing to allow an agency to convert a mandatory statute into a discretionary one given appropriate guiding principles. It is another thing to say that Congress delegated authority to permanently repeal a statute.

The Commission should therefore presume, absent strong evidence to the contrary, that Congress deemed its statutes necessary, and should not forbear from them cavalierly.

A. In Making Forbearance Determinations, the Commission Must Account For Consumer Protection, Competition, and the Public Interest.

As the Commission engages in its analysis of which provisions it may forbear from, it must consider several factors. Foremost among them are the factors required by statute in Section 10(a) and elaborated upon in Section 10(b).²⁵⁹ Since the Commission is not contemplating forbearance from Sections 201 and 202,²⁶⁰ the primary statutory factors it must consider in forbearance determinations for other Title II provisions are consumer protection and the public interest, including the public interest in competition amongst telecommunications providers. Also informing any decision to forebear should be the consideration that the Commission should retain authority necessary to promote the public interest and protect the network in the event of unforeseen violations, malfunctions, or other crises.

1. Consumer Protection.

Section 10 only allows the Commission to forbear from a regulation or a provision of the Act if it finds the provision is not necessary for the protection of consumers. Consumer protection is not limited to the protection of the privacy of CPNI,²⁶¹ nor to freedom from unjust

²⁵⁹ Section 10(a) states that the Commission shall forbear from applying a provision or regulation “if the Commission determines that--(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.” 47 U.S.C. § 160(a). Section 10(b) elaborates upon 10(a)(3) by noting that the Commission should consider whether forbearance would promote competitive market conditions as part of its public interest analysis. 47 U.S.C. § 160(b).

²⁶⁰ 47 U.S.C. §§ 201, 202 (2014).

²⁶¹ *See id.* § 222.

and unreasonable discrimination.²⁶² Many other Title II provisions, including the Section 203 requirements of carriers to report rates,²⁶³ provide consumers with the transparency necessary to protect their interests, whether through legal action or their exercise of buying power. Even in the presence of a competitive market, this transparency is necessary for consumers to take advantage of that competitive market. Without the necessary information to distinguish between providers, consumers are no better off with several providers to choose from. Nor should the mere presence of competitors permit carriers to execute changes in subscriber selections of providers contrary to Section 258,²⁶⁴ for example.

2. Competition.

Section 10(b) emphasizes the importance of promoting competition in the public interest, indicating that a provision should not be forborne if it is necessary to promote competition. A wide variety of provisions that the Commission proposes to forbear from enforcing are essential to promoting competition beyond the protections provided by Sections 201 and 202, and forbearance from them is unwarranted.

Underlying the need for preserving these provisions is the fact that the most current markets in broadband internet connectivity services are insufficiently competitive.²⁶⁵ The Commission cannot abdicate its responsibilities under the various pro-competitive sections of Title II unless it first finds that competition can be promoted without the authority granted by those provisions. A bare finding that a particular geographic region lacks a dominant carrier, for instance, would not suffice to allow the Commission to forbear from Section 251(a). As an initial

²⁶² *See id.* §§ 201, 202.

²⁶³ *See id.* § 203.

²⁶⁴ *See id.* § 258.

²⁶⁵ *See* Consumer Reports, Broadband: A Nationally Representative Multi-Mode Survey (Jun. 2021), https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_Broadband_June_2021.

matter, the lack of a single dominant carrier does not translate into a competitive market—the presence of a near-duopoly or oligopoly can prevent any one carrier from being dominant while failing to provide consumers with a competitive market.²⁶⁶

3. *Other Public Interest Factors.*

However, competition is not the sole consideration of the public interest. Several other provisions of Title II were enacted by Congress out of specific concern for interests and values separate from competitive and market concerns. Just as the Commission needs to secure its authority to protect the public interest in customer privacy and disability access, the Commission’s charge to promote other aspects of the public interest, such as media diversity, robust competition, and technological innovation, should not be quarantined within the realm of telephony. Nor is the public interest limited to the specific goals anticipated and explicated in the provisions of Title II. The Commission’s public interest duty extends to ensuring that the network remains open and operable. The Commission’s concerns therefore do not extend solely to potential violations of regulations by carriers, but to more fundamental potential failures as well.

For example, in 2001, the California-based ISP Northpoint declared bankruptcy and, unable to raise funds, shut down its network, leaving 100,000 subscribers without broadband access.²⁶⁷ While a service interruption of that nature was massively inconvenient in 2001, its effects would be devastating today, given increased consumer and small business reliance upon broadband internet services to engage in commercial and civic life. Instances of peering disputes

²⁶⁶ Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion & Order*, 25 F.C.C.R. 8622 (2010).

²⁶⁷ *Northpoint Shuts Down DSL Network*, InformationWeek (Mar. 29, 2001, 2:17 PM), <http://www.informationweek.com/northpoint-shuts-down-dsl-network/d/d-id/1010266?>

also abound, in each case causing significant disruption of internet traffic.²⁶⁸ While these cases have, happily, not created major disruptions of service, they provide warning to the prudent that—despite the incentives of network carriers to reach agreement and to remain solvent—consumers, businesses, and others dependent on internet connectivity may suffer because of market failure.

B. In Making Forbearance Determinations, The Commission Must Account For Specific Statutory Provisions.

While the Commission has significantly narrowed the number of Sections being considered for forbearance since the 2015 Open Internet Order, the Commission should consider limiting its proposed forbearances further. Commenters recommend that the Commission keep its discretionary authority to compel production of information (Sections 211, 213, 215, and 218-20),²⁶⁹ and the provisions which provide explicit power for the Commission to hold parties accountable and prescribe adequate remedies (Sections 205-07, 209, 212, and 216).²⁷⁰ While the

²⁶⁸ See, e.g., Patricia Fusco, *PSINet, Exodus Terminate Peering Agreement*, Internet News (Apr. 5, 2000), http://www.internetnews.com/xSP/article.php/8_334471 (peering dispute between PSINet and Exodus threatening access to “25 to 30 percent of the content on the Internet”); James Evans, *PSINet, C&W Spat Causes Net Disconnect*, IDG News Service (June 7, 2001), http://www.computerworld.com/s/article/61180/PSINet_C_W_spat_causes_Net_disconnect_ (2001 peering dispute between PSI Net and C&W resulting in a four-day disruption in customers’ service); *France Telecom Severs All Network Links to Competitor Cogent*, Heise Online (Apr. 21, 2005), <http://morse.colorado.edu/~epperson/courses/routing-protocols/handouts/cogent-ft.html> (France Telecom severing connections to Cogent, which allegedly “blackholed” all France Telecom IP address in retaliation); Yuki Noguchi, *‘Peering’ Dispute with AOL Slows Cogent Customer Access*, Wash. Post (Dec. 28, 2002), available at <http://legalminds.lp.findlaw.com/list/cyberia-l/msg42080.html> (dispute between Cogent and AOL leads to AOL disconnecting from Cogent, affecting many customers including DC-area students); Stacy Cowley, *ISP Spat Blacks Out Net Connections*, InfoWorld, Oct. 6, 2005, <http://www.infoworld.com/t/networking/isp-spat-blacks-out-net-connections-492> (dispute between Level 3 and Cogent preventing customers from accessing the internet); Mikael Ricknäs, *Sprint-Cogent Dispute Puts Small Rip in Fabric of Internet*, IDG News Service, Oct. 31, 2008, http://www.pcworld.com/businesscenter/article/153123/sprintcogent_dispute_puts_small_rip_in_fabric_of_internet.html (dispute leading Sprint to disconnect from Cogent).

²⁶⁹ See *id.* §§ 211, 213, 215, 218-20.

²⁷⁰ See *id.* §§ 205-07, 209, 212, 216.

Commenters largely agree with the Commission’s proposed forbearance framework, these particular authorities are important to the ongoing oversight and enforcement capabilities of the agency.

1. Discretionary Authority to Compel Production of Information.

Congress recognized that for the Commission to exercise proper oversight of those providing critical infrastructure such as telecommunications, the Commission would need broad authority to compel production of information relevant not merely to a specific service, but also to the broader economic context in which these carriers operate. Congress therefore gave the FCC broad discretionary powers to compel production of useful information or the filing of regular reports on matters ranging from filing of contracts (Section 211), carrier property valuation (Section 213), financial information (Section 220), general management practices (Section 218), and any other information of interest to the Commission (Section 219).²⁷¹

Forbearance from these statutes, to the extent forbearance from an exercise of an already discretionary statute has meaning, would not serve the public interest. As this Commission has emphasized, the ability to make informed policy choices that promote the Congressional goals of ubiquitous, affordable deployment depends on access to accurate data in a timely manner. The reports or other information the Commission may require providers to produce, and subsequent description and analysis of this information by the Commission, serve to inform other stakeholders and enhance the overall consideration of broadband policy issues. As an economic matter, the functioning of efficient markets depends on ensuring sufficient information with indicia of reliability, something that may only be possible when the government acts as a neutral party to compel production of information from all market participants.²⁷²

²⁷¹ See *id.* §§ 211, 213, 215, 218-220.

²⁷² See generally, George Akerlof, *The Market for “Lemons”*: *Quality Uncertainty & the Market Mechanism*, 84 Q.J. Econ. 488 (1970).

While the Commission might be able to compel production of information under other statutes, there is no offsetting advantage to forbearance that would warrant creating needless confusion or curtailing the ability of the Commission to demand prompt production of information in the absence of an “unforbearance” proceeding. Application of these statutes is already discretionary. To the extent carriers fear that any specific production requirement would impose unnecessary costs or might needlessly expose proprietary information, the Commission can consider such arguments in the context of any specific production request or rule and weigh the competing benefits and costs accordingly.

In short, the ability to compel truthful information is “necessary for the protection of consumers” and potentially enhances competition — the Commission cannot find that Sections 211, 213, 215, and 218-20 are “not necessary for the protection of consumers” or that forbearance would “promote competitive market conditions.” The Commission therefore must not forbear from these statutes.

2. Power to Provide Adequate Remedies and Accountability.

For similar reasons, the Commission should not forbear from express delegations of authority by Congress to hold carriers accountable and prescribe sufficient remedies to make injured parties whole and promote the public interest—even where the Commission might arguably have similar authority under the broad grant of Sections 201 and 202 and its general authority under Section 4(i).²⁷³ There appears to be no a priori reason to assume that the Commission can adequately protect consumers by disclaiming its authority to suspend unjust rates and practices (Section 204),²⁷⁴ prescribe specific just and reasonable rates and charges

²⁷³ 47 U.S.C. §§ 4(i), 201, 202. (2014).

²⁷⁴ *See id.* § 204.

(Section 205)²⁷⁵ or order payments of money (Section 209)²⁷⁶ where justified and the public interest so demands. Nor does it protect consumers to relieve carriers of liability for damages (Section 206)²⁷⁷ or from responsibility for the acts or omissions of their agents or to relieve receivers and trustees of their obligations (Sections 216-17).²⁷⁸ Nor does it foster competition to automatically allow interlocking directorates (Section 212).²⁷⁹

Universal Service

As noted in the NPRM, the Commission decided in 2015 not to forbear from Section 254 and 214(e).²⁸⁰ The Commission should apply the same approach here. In doing so, the Commission should reverse the portion of the *RIFO Remand Order* to limit eligibility for Lifeline to providers offering voice as an additional covered service and restore the regulations adopted by the Commission in 2016 explicitly designating BIAS as a covered service.²⁸¹

XIV. THE COMMISSION SHOULD ONLY PREEMPT INCONSISTENT STATE LAWS.

By properly reasserting its authority over broadband by recognizing it as a telecommunication service, the Commission will establish a national broadband framework. Like all federal laws and regulations, this framework will preempt inconsistent state laws,²⁸² as well as expanding consumer protection to the millions of broadband users in states that have not passed their own broadband consumer protection or open Internet rules. In addition to benefiting broadband users, this national framework will benefit broadband providers, by providing them with clarity as to a baseline level of service they are expected to provide to all broadband users,

²⁷⁵ See *id.* § 205.

²⁷⁶ See *id.* § 209.

²⁷⁷ See *id.* § 206.

²⁷⁸ See *id.* § 216-17.

²⁷⁹ See *id.* § 212.

²⁸⁰ NPRM, ¶ 110.

²⁸¹ See *RIFO Remand Order* at ¶ 97.

²⁸² U.S. Const. art. VI., § 2.

anywhere in the country. However, there are neither legal nor policy reasons for the Commission to go further than the preemption provided by the national framework itself.

States have long played a role in protecting broadband consumers. When the FCC abdicated its responsibility to regulate broadband in the public interest in 2017, several states stepped in. The Trump FCC tried to have its cake and eat it too by disclaiming any authority over broadband, yet attempting to preempt state broadband laws. But as the D.C. Circuit held, “in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.”²⁸³ For this reason, post-*RIFO* state broadband initiatives withstood legal challenge.

There is no reason for the Commission to abandon the cooperative federalism model that governs traditional telecommunications service and many other areas. As the Supreme Court wrote,

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.²⁸⁴

Historically, states have played a crucial role in regulating telecommunications services, focusing on local needs and consumer protection.²⁸⁵ This state-level oversight has coexisted with federal jurisdiction, which primarily addresses interstate communications and broader policy goals. This dual structure has allowed for a balanced approach, ensuring both the national consistency needed for an effective telecommunications infrastructure and the responsiveness to local needs and conditions.

²⁸³ *Mozilla v. FCC*, 930 F.3d 1, 75 (2019).

²⁸⁴ *Gregory v. Ashcroft*, 501 US 452, 457-58 (1991).

²⁸⁵ *See* 47 U.S.C. §§ 253, 332, 410.

Preempting state authority would undermine this successful balance. Broadband, much like traditional telephone service, has local and national dimensions that justify both state and federal oversight. States are uniquely positioned to understand and address the specific needs of their communities, particularly in areas such as consumer protection, privacy, and local infrastructure development. These are areas where one-size-fits-all federal regulation may not be sufficient or sensitive to local contexts.

Moreover, states have been instrumental in filling regulatory gaps and advancing broadband access and quality, especially in underserved areas. As shown below, they have often been agile and innovative in responding to emerging challenges and opportunities in the broadband landscape. Preempting state regulation risks stifling these local initiatives and could lead to a less adaptable and less responsive regulatory environment.

Title II gives the FCC the legal authority to expressly preempt state broadband laws, and the Commission's "regulatory approach to BIAS will remedy the infirmities the D.C. Circuit identified in the RIF Order's approach,"²⁸⁶ with respect to preemption. But the Commission should exercise that authority cautiously and not issue categorical or sweeping statements concerning preemption. As an initial matter, conflict preemption alone is enough "to ensure that BIAS principally is governed by a federal framework."²⁸⁷ State laws that go beyond this framework but are not inconsistent with it should remain in place, as events since 2015 have shown that states can and should have a bigger role to play in broadband consumer protection, including open Internet protections. To the extent that state laws that do not expressly conflict with federal statutory or regulatory law nevertheless undermine federal policies, the Commission can consider these on a case-by-case basis.

²⁸⁶ NPRM, ¶ 79.

²⁸⁷ NPRM, ¶ 81.

A. States Stepped Up When the Previous FCC Abandoned Its Oversight Role.

One example of the important role that states can play in broadband consumer protection happened in 2017, when the State of New York took legal action against Charter Communications for deceptive practices related to broadband speeds, where Charter advertised speeds it knew it could not deliver, and deliberately provided users with deficient WiFi equipment. As a result of this lawsuit, New York obtained tens of millions of dollars in refunds to deceived consumers, as well as behavioral remedies that ensure that customers actually get the speeds and quality of service they are promised.²⁸⁸

During the pendency of this case, the Trump FCC rolled back most federal consumer broadband protections. The case therefore highlighted the importance of state intervention in local consumer protection, especially in areas, or during times, where federal oversight was lacking or insufficient. But New York was not the only state that saw the need to protect broadband users. In 2018, California enacted the California Internet Consumer Protection and Net Neutrality Act of 2018,²⁸⁹ in another example of how state law can benefit consumers.

California's law was challenged on preemption grounds, but was upheld because there was no federal law in place for it to conflict with, and the Commission had no authority to expressly preempt in areas where it had disclaimed jurisdiction.²⁹⁰

The Commission's proposed rules do not conflict with the California Internet Consumer Protection and Net Neutrality Act either, and there is no reason for the Commission to sweep it

²⁸⁸ Chaim Gartenberg, *Charter-Spectrum reaches \$174.2 million settlement in New York AG's speed fraud lawsuit*, The Verge (Dec. 18, 2018), <https://www.theverge.com/2018/12/18/18146210/charter-spectrum-174-million-settlement-new-york-state-attorney-general-internet-speeds>

²⁸⁹ SB 822, codified at CA Civ Code § 3100.

²⁹⁰ *ACA Connects v. Bonta*, 24 F. 4th 1233, 1237 (9th Cir. 2022) (noting that “only the invocation of federal regulatory authority can preempt state regulatory authority,” and further finding 1) that state open Internet laws do not conflict with the Communications Act, and 2) that states have authority to regulate interstate as well as intrastate communications.).

aside. Some provisions may duplicate the Commission’s federal rules, such as the prohibition on blocking or slowing traffic. But that is different from conflicting with them, and it can benefit the public interest and conserve both federal and state enforcement resources to have multiple ways to protect the open Internet.

In other situations, California’s law more expressly addresses certain anticompetitive conduct, such as discriminatory zero-rating policies, than the Commission’s proposed rules do. While anticompetitive zero-rating is likely unlawful under both the proposed rules and Title II itself, it can be beneficial to have laws and regulations that specifically address a known anti-competitive practice. California’s law does this, and even if it goes further than the Commission’s rules in some areas, that is not the same thing as conflicting with them. The federal rules will provide a floor for all Americans, but states will be free to experiment and innovate with policies designed to ensure an open Internet, digital equity, and basic consumer protection.

B. The Commission Can Consider Preemption on a Case-by-Case Basis.

In 2015, the Commission stated that “should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of BIAS through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.” To the extent that states enact entry barriers or other incumbent-protecting rules that restrict competition the Commission should address these on a case-by-case basis after a full record concerning those specific provisions. But it should not issue blanket preemption statements, nor assume that states that take different approaches that do not expressly conflict with FCC rules should be preempted. States should be free to experiment with different approaches to regulating broadband, including ensuring affordable service. Some states may enact policies that are ineffective, but even this would be instructive to the states themselves, and

in guiding federal policy. Similarly, some states may enact measures that are different from what the Commission has envisioned that may serve as a model for future federal policy.

C. State Initiatives Can Promote Broadband Consumer Protection, Deployment, and Affordability.

The Commission has asked “What issues may benefit most from shared regulatory responsibility with states?”²⁹¹ At the outset the Commission should note that, while broadband and broadband traffic have interstate characteristics, some aspects of broadband are intrastate matters best addressed by states and which are outside the scope of the Communications Act.²⁹² But regardless of whether there are interstate components or effects that give the Commission preemption authority, in certain issue areas the Commission should presume that state laws on certain topics should not be preempted.

Consumer protection is a critical area where states have shown their ability to effectively safeguard the interests of their residents. Ensuring that consumers get what they pay for in terms of quality and performance is a vital role for states. States are often better positioned to respond to misleading bills and deceptive practices, as they are closer to the consumer and can more quickly identify and address issues that arise in their specific markets, and may even be limited to them. This proximity to the consumer base allows for more tailored and immediate responses to violations of consumer trust. Preserving the authority of states in these matters not only complements federal oversight but also ensures a more robust protection framework for consumers.

In the area of affordability, state-level initiatives can supplement federal programs like Lifeline and BEAD (Broadband Equity, Access, and Deployment Program). States understand

²⁹¹ NPRM, ¶ 81.

²⁹² See 47 U.S.C. § 151 (Commission created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio[.]”). See also U.S. Const. art. I, § 8 (limited powers of Congress do not include regulation of in-state activities).

the unique demographic and economic characteristics of their populations and can thus tailor solutions to ensure that broadband services are affordable for all segments of their communities. This localized approach can be particularly effective in addressing the digital divide and ensuring that disadvantaged or underserved groups have access to and can afford necessary broadband services. While federal programs provide a necessary foundation for broadband affordability, state initiatives can fill in the gaps and address specific local needs that federal programs may not fully cover.

States play an indispensable role in promoting broadband deployment as well. They can implement policies and incentives tailored to their geographic and demographic landscapes to ensure that broadband infrastructure reaches even the most remote areas. This local understanding is crucial in identifying and overcoming barriers to broadband deployment, whether they be geographical challenges, lack of existing infrastructure, or economic constraints. State-level action in this area ensures that the federal goal of universal broadband access is achievable and responsive to the diverse needs of different states.

On the topic of open internet rules, states should be allowed to enact regulations that either go further than or offer more specificity than federal rules. This approach allows for a more nuanced and comprehensive regulatory landscape that can adapt to the rapidly evolving nature of broadband technology and its uses. States might identify specific practices or market conditions that are not adequately addressed by federal regulations and can enact rules to protect consumers and ensure fair competition. Such state-level initiatives can serve as testing grounds for innovative regulatory approaches, potentially informing and improving federal policy in the long term.

While a national broadband framework established by the FCC provides a necessary foundation, it should not be seen as a ceiling. States have demonstrated their capacity to address the specific needs of their residents effectively. In areas of consumer protection, affordability, buildout requirements, and open Internet rules, state actions complement and enhance federal efforts, leading to a more comprehensive and responsive broadband policy landscape.

XV. CONCLUSION.

For the above reasons, the Commission should reclaim its authority over the most important communications technology of our time by reclassifying broadband Internet access service as “telecommunications,” and put into place strong, enforceable net neutrality rules.

Respectfully submitted,

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