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

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

REPLY COMMENTS OF THE FREE STATE FOUNDATION

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I. Introduction and Summary

These reply comments are filed in response to pro-utility regulation comments submitted by parties that support the Commission's Notice of Proposed Rulemaking (or "Notice") proposing to classify broadband Internet access service as a "telecommunications service" under Title II of the Communications Act. The pro-regulatory parties support the repeal of the light-touch market-oriented framework for Internet services established in the 2017 *Restoring Internet Freedom Order*.

It's well-documented that proponents of public utility regulation of broadband Internet services decried the *RIF Order*'s repeal of that regulation as the unleashing of a dystopian nightmare in which the Internet would grind to a halt and broadband providers would prey on consumers, innovators, and small businesses. Of course, their deliberately outlandish claims were quickly proven wrong. For this reason alone, the views of these pro-utility regulation advocates should be given no credence whatsoever. Indeed, were they to be given credence, the Commission's own credibility would be further called into question.

* These reply comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

For example, Mozilla foretold that "[i]f the FCC votes to roll back net neutrality, the decision would harm everyday internet users and small businesses — and end the internet as we know it."[1] Mozilla also declared that "without net neutrality, Americans' favorite online services, marketplaces, or news websites could load far slower — or not at all."[2] The New America's Open Technology Institute warned that "the FCC will be stripping away critical protections that give people the freedom to access the entirety of the internet, effectively letting internet access be sold away to the highest corporate bidders" and that "the repeal of net neutrality will impact every aspect of the internet, from the way we access content and consume news, to the way we organize against and engage in the democratic process."[3] Free Press declared "[t]he real problem is we've lost fundamental rights as a result of this vote, along with our protections against ISPs' editing whims and controlling ways."[4] Public Knowledge said: "If the current policy stands, consumers can expect higher bills and fewer online choices, with fewer expressive and creative outlets. Ultimately, the internet will look more and more like the overpriced cable TV bundles of decades past."[5] The Benton Institute called repeal of Title II rules "The FCC's Darkest Day."[6]

Again, the predicted Internet horrors never happened. Despite being so spectacularly wrong about the effect of the *RIF Order*, many of those same pro-regulatory proponents are back, calling for the reimposition of the short-lived public utility regime established in the now-

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[1] Mozilla, Mozilla Press Center: "Mozilla Joins Net Neutrality Blackout for 'Break the Internet' Day" (December 12, 2017), at https://blog.mozilla.org/press/2017/12/mozilla-joins-net-neutrality-blackout-for-break-the-internet-day/.
[2] Mozilla, Mozilla Press Center: "Mozilla Joins Net Neutrality Blackout for 'Break the Internet' Day."
[3] Open Technology Institute, Press Release: "The FCC's Net Neutrality Repeal is a Threat to Consumers, the Economy, and Internet Freedom" (Nov. 22, 2017), at: https://www.newamerica.org/oti/press-releases/fccs-net-neutrality-repeal-threat-consumers-economy-and-internet-freedom/
[4] Free Press, Press Release: "Today's FCC Will Not Stand" (December 14, 2017), at: https://www.freepress.net/news/press-releases/free-press-todays-fcc-ruling-will-not-stand.
[5] Public Knowledge, Press Release: Public Knowledge Tells D.C. Circuit FCC Illegally Repealed Net Neutrality" (February 1, 2019), at: https://publicknowledge.org/public-knowledge-tells-d-c-circuit-fcc-illegally-repealed-net-neutrality/.
[6] Benton Institute, Press Release: "The FCC's Darkest Day" (December 14, 2018), at: https://www.benton.org/content/fccs-darkest-day.

repealed 2015 *Title II Order*. The FCC cannot accord the claims of these parties – or the claims of allied parties – any credibility whatsoever regarding the future of broadband services when they were so wrong last time around. If it does so, it will confirm that the Commission is intent on regulation as an end in itself, not a means to an end when warranted. Since the *RIF Order* was adopted in late 2017, Internet speeds have significantly increased. Next-generation technologies such as fiber, 5G mobile wireless, and fixed wireless access have deployed and offer significantly improved capabilities as well as more competitive choices for consumers. And broadband service pricing has been more consumer friendly and resistant to price increases than most other service markets.

Title II reclassification will not protect Internet openness, national security, or public safety. To the limited extent that pro-utility regulation comments actually try to prop up the Commission's dubious national security, public safety, cybersecurity, and network resiliency rationales for Title II reclassification, such comments offer no analysis or facts, or concrete dangers or solutions, to substantiate those claims. There is no reason to expect government interference, based on supposed bureaucratic expertise, will make networks perform better or more safely. Comments opposed to the proposed rulemaking rightly point out that broadband Internet service providers (ISPs) already have economic incentives to make available high-performance, resilient networks. Indeed, ISPs demonstrated their performance capabilities under the stress of traffic demand spikes amidst COVID-related government-imposed lockdown orders.

Deep skepticism of the Commission's national security and public safety rationales for Title II classification is warranted. Comments rightly point out that national security, public safety, and cybersecurity have not previously been relied on as a justification for common carrier regulation of broadband services. These supposedly urgent priorities were never raised prior to the agency's announcement of its proposed rulemaking. Public utility regulation of private

commercial services catering to residences and small businesses makes little sense as a safety and security measure, particularly given the heavy reliance of law enforcement and first responder agencies on dedicated networks, including FirstNet. Moreover, it is a weighty matter to impose government controls over private services and property catering to civilians in the name of national security and public safety. It is unlikely that Congress intended to alter the balance between public power and private rights through such an expansive reading of Title II.

And contrary to the claims of pro-utility regulation comments, requiring broadband ISPs to report significant network outages is not dependent on Title II. Most ISPs offering cable, voice, or interconnected VoIP services are subject to the Commission's existing outage reporting rules. Even assuming that additional reporting requirements are needed, the Commission likely already has authority under Section 257(a) and perhaps other provisions of law – or it can seek a targeted fix from Congress.

It is no surprise that comments by many longtime supporters of public utility regulation of broadband do not cite any specific credible examples of ISPs blocking or throttling their subscribers' access to legal content of their choice. Instead of the predicted broadband Internet wasteland following Title II regulation repeal, since early 2018 there is no record evidence that ISPs engage in such harmful conduct or that they are likely to do so. The fact that ISPs do not block or throttle indicates that the existing light-touch policy based on the Commission's transparency rules and Federal Trade Commission enforcement of ISP terms of service pledges is working. ISPs' consensus against blocking or throttling cannot be explained away by pointing to state net neutrality laws. Net neutrality laws exist only in a handful of states, and yet blocking and throttling have not occurred in states that have no net neutrality laws.

We agree with comments opposed to the proposed rulemaking that the Commission's pretensions to secure or safeguard Internet openness, national security, and public safety are

illusory and arbitrary because the rulemaking focuses on only one aspect of the Internet – Internet access services – and does not address far more serious concerns posed by other aspects of the Internet – including Big Tech platforms and other online edge providers that actively censor, shadow ban, and deprioritize speech content. Also, the Commission's myopic focus on ISPs for supposed security and safety purposes leaves completely untouched numerous other major providers in the Internet ecosystem that may pose much greater risks to security and safety than ISPs.

FSF's initial comments explained that Congress nowhere provided a clear statement of authority for the Commission to transform broadband Internet access networks into public utilities and comprehensively regulate them for security and safety purposes. Consequently, the proposed rulemaking runs afoul of the Supreme Court's Major Questions Doctrine. Additionally, the Commission cannot find reassurance in pro-utility regulation commenters' claims that the doctrine would not apply because agency classification decisions supposedly are not exercises of regulatory authority. The proposed Title II classification involves agency interpretation of a federal statute and the assertion of federal authority that is economically and politically significant. If adopted, the proposal likely falls within the scope of the Major Questions Doctrine. Also, Title II reclassification is the predicate for a "comprehensive framework" for regulating broadband. Reclassification is tied to a series of proposed restrictions, including bright-line bans of certain types of conduct, a vague "general conduct" standard that is broader and more restrictive than Sections 201 and 202, and assumption of authority to oversee and intervene in matters involving Internet traffic exchange or network interconnection.

Instead of reclassifying broadband Internet access services under Title II, if the Commission believes that it should "do something" beyond leaving in place the *RIF Order*'s light-touch framework, the agency should adopt a commercial reasonableness standard. If

implemented on a case-by-case basis with a presumption of the reasonableness of ISP practices as well as a market power and consumer harm threshold, such a standard may allow enforcement of a regulatory backstop against claimed harmful ISP practices without extreme agency overreach, permitting flexibility for competing ISPs, and standing a better chance of surviving legal challenge in court.

While we reiterate that the Commission should not impose public utility regulation on broadband ISPs, if the Commission nevertheless makes a Title II reclassification decision, it should preempt state laws imposing sector-specific regulation on broadband Internet access providers. Internet openness depends on a free and open interstate commercial market for broadband Internet access services. The Commission can partly mitigate harm to innovation and investment in new technologies and services from public utility regulation by preserving a category of non-regulated "non-BIAS data services" that includes all services not meeting the definition of "broadband internet access services." And it should reject prescriptive rules for Internet traffic exchange, including a ban on access fees charged in privately negotiated traffic exchange agreements. Such a ban would be a form of rate regulation, undermining incentives to deploy infrastructure and the ability to seek returns on investment.

II. Title II Reclassification Won't Protect the Open Internet

A. Pro-Title II Comments Fail to Explain How Title II Would Benefit Public Safety, National Security, Cybersecurity, and Network Resiliency

It is no surprise that initial comments by many longtime supporters of public utility regulation of broadband ISPs do not prioritize or attempt to prop up the Commission's dubious national security, public safety, cybersecurity, and network resiliency rationales for Title II

reclassification.[7] Nor is it surprising that some pro-Title II comments express support for the Commission's safety and security rationales without offering any substantive analysis or factual backup for those rationales.[8] And one notable commenter that supports Title II reclassification actually opposes any attempt by the agency to use Title II to impose new regulation for supposed national security and public safety purposes, as it "maintains that there is no evidence that the FCC needs to address issues beyond net neutrality or expand its authority to do so."[9]

We disagree with pro-utility regulation speculations that the Commission's granting itself sweeping regulatory powers over broadband safety and security will somehow improve network performances and outcomes.[10] Comments filed in this proceeding do not identify or demonstrate any existing concrete security or safety problems requiring new powers. Indeed, we agree with other comments stating that the Commission's Notice "does not propose one enforceable rule that would benefit public safety nor explain how reclassification would actually benefit public safety in any way."[11]

And there is no basis for the idea, implicit in calls for Title II regulation for national security and public safety purposes, that government expertise will make networks perform better or more safely. Indeed, comments opposed to public utility regulation rightly point out that broadband ISPs already have economic incentives to provide networks that perform well and are

[7] *See, e.g.*, Comments of CCIA, WC Docket No. 23-320; Comments of Mozilla, WC Docket No. 23-320; Comments of NARUC, WC Docket No. 23-320; Comments of New Americas's Open Technology Institute, WC Docket No. 23-320.
[8] *See, e.g.*, Comments of Benton, WC Docket No. 23-320, at 5 (calling "cybersecurity" and "public safety challenges" "threats of the 21st Century" but without elaboration); Comments of Comments of NASUCA, WC Docket No. 23-320, at 8 (stating its agreement with the Commission's position on public safety but focusing on arguments about state authority over safety and other matters).
[9] Comments of INCOMPAS, 23-320, at 26. *See also id*. at 28 (stating that "there is no demonstrated need for the FCC to further engage in developing new cybersecurity regulations in this proceeding").
[10] *See* Comments of Public Knowledge, WC Docket No. 23-320, at 62-65; Comments of Free Press, WC Docket No. 23-320, at 37.
[11] Comments of the Digital Progress Institute, WC Docket No. 23-320, at 15.

resilient.[12] Broadband ISPs demonstrated their performance capabilities under the stress of traffic demand spikes amidst COVID-related government-imposed lockdown orders.[13]

As the Free State Foundation's showed in its comments, there are abundant reasons for being highly skeptical of the Commission's partial rebranding of "net neutrality" regulation as matters of national security and public safety, including the fact that these supposed urgent priorities were not raised prior to the Commission's announcement of the proceeding. FSF's comments also observed the incongruity between proposed regulation in the name of security, safety, and the needs of law enforcement agencies that rely heavily on dedicated networks and the target of such regulation: commercial mass market retail services catering to civilian residences and small businesses. Imposing sweeping national security and public safety mandates on private civilian networks and property implicates public-private distinctions that are at the core of American constitutionalism. Given that Title II nowhere provides a clear statement of intent to alter those distinctions, the Commission should show restraint and not risk altering the balance between public power and private rights in broadband networks. We also agree with comments that the Commission's proposed rulemaking is misguided for "significantly expanding the types of regulations the Commission could adopt under Title II, such as for national security, cybersecurity, and various other newfound bases that have never before been relied upon by the Commission as a justification for common carrier regulation of broadband."[14]

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[12] *See* Comments of NCTA, WC Docket No. 23-320, at 72 ("ISPs recognize the importance of maintaining the resiliency and reliability of their networks, for public safety purposes and otherwise, and they know full well that they would have to answer to customers and policymakers if they fail to do so"). *See also* Comments of T-Mobile, WC Docket No. 23-320, at 52 (stating that "providers already face an array of powerful, self-enforcing disciplinary mechanisms oriented toward achieving accessible, secure, open networks that are as, or more, effective than regulatory intervention under section 214" and that "[t]hese mechanisms range from competitive pressures to fiduciary obligations to shareholders to reputation and brand management responsibilities").

[13] *See* Comments of the Free State Foundation, WC Docket No. 23-320, at 35-36. See also *See* Restoring Internet Freedom, WC Docket No. 17-108, *et al*., Order on Remand ("*RIF Remand Order"*) (released October 29, 2020), at ¶ 36 (observing U.S. broadband networks' abilities to handle "unprecedented increases in traffic" and "shift in usage patterns" during lockdowns).

[14] Comments of NCTA, at 52.

Additionally, we agree that "[t]he NPRM does not identify any evidence that continuing Title I regulation of mass-market broadband poses national security threats"[15] and that "the Notice does not identify any real-world gaps that a Title II classification would fill" regarding national security.[16] As other comments have rightly explained, "[t]he Commission's existing authority, together with other agency requirements and processes under other statutes, is sufficient to safeguard America's communications networks from threats posed by foreign adversaries or other national security concerns."[17]

Furthermore, we disagree with pro-utility regulation comments expressing the view that requiring broadband ISPs to report significant network outages depends on Title II.[18] Other comments have pointed out that "most ISPs also offer cable, telecommunications, or interconnected VoIP services, each of which is subject to the Commission's existing outage reporting rules" and that "in many cases, these ISPs' outage reports already cover the broadband components of their commingled networks."[19] But even assuming, for the sake of argument, that additional reporting requirements are desirable as a policy matter, it appears the Commission already has at least some authority for such purposes. As other comments point out, the Commission has required outage reports for undersea cables.[20] And Section 257(a), which furnished the basis for the Commission's transparency rule in the *RIF Order* and was upheld by the D.C. Circuit's 2019 *Mozilla v. FCC* decision,[21] could provide a basis for requiring outage

[15] Comments of USTelecom, at 70.
[16] Comments of CTIA, WC Docket No. 23-320, at 31.
[17] Comments of NCTA, at 62. *See also* Comments of USTelecom, at 70-74 (describing the "whole of government" framework for national security established by Congress and coordinated among different agencies consistent with federal law and those agencies' respective jurisdictions, including the FCC).
[18] *See, e.g.*, Comments of Public Knowledge, at 62.
[19] Comments of NCTA, at 73. *See also* Comments of Digital Progress Institute, at 15-16 (observing that the Network Outage Reporting System (NORS) "already captures major broadband outages because it captures major network outages—telephone calls and broadband data transfers ride over the same networks").
[20] Comments of INCOMPAS, at 28 ("Outage reporting is already required of subsea cables that are not common carriers (e.g., not Title II), so Title II is not a prerequisite to outage reporting").
[21] Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*RIF Order")* (released January 4, 2018), at ¶ 232; *Mozilla v. FCC*, 940 F.3d 1, 48-49 (D.C. Cir. 2019).

reports. *In Mozilla v. FCC*, the court hinted that the Commission's ancillary jurisdiction may support transparency requirements.[22] To the extent that the Commission reinterprets Section 706 as an affirmative grant of authority, that provision also might furnish a basis for outage reporting requirements for broadband ISPs.

B. Pro-Title II Comments Fail to Show Any Real Instance of ISPs Censoring

It is no surprise that comments by many longtime supporters of public utility regulation of broadband ISPs don't cite any specific examples of ISPs blocking or throttling their subscribers' access to legal content of their choice.[23] Indeed, there is no record evidence indicating that ISPs engage in such conduct. And there is no evidence that ISPs are likely to do so. The fact that ISPs do not engage in such conduct indicates that the existing light-touch policy based on the Commission's transparency rules and FTC enforcement of ISPs' terms of service pledges to not block or throttle content is working.

One pro-utility regulation comment cites an alleged incident of blocking in early 2021 by a small ISP based in Idaho,[24] but that matter involved no harmful blocking at all. According to a *Daily Caller* report, which embeds and links to social media captures of communications by the small Idaho ISP called Your T1 WiFi, the provider apparently was administratively burdened by numerous complaints that Big Tech social media platforms like Facebook and Twitter were rampantly censoring individual user viewpoints and purging users for expressing those views.[25] Apparently, many complaining Internet subscribers wanted their own access to those online

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[22] *Mozilla*, 940 F.3d at 48 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010) ("We readily accept that certain assertions of Commission authority could be reasonably ancillary to the Commission's statutory responsibility to issue a report to Congress")).

[23] For comments supporting Title II reclassification but offering no actual instances of blocking or throttling, *see, e.g.,* Comments of CCIA; Comments of Free Press; Comments of NARUC; Comments of NASUCA WC Docket No. 23-320; Comments of Mozilla.

[24] *See* Comments of Public Knowledge, at 6, 16.

[25] *See* Marolo Safi, "Customer Complaints About Censorship, Local Internet Provider Offers to Block Twitter And Facebook," *Daily Caller* (January 11, 2021), at: https://dailycaller.com/2021/01/11/north-idaho-your-t1-wifi-censorship-donald-trump-twitter-facebook-block/.

platforms cut off. The small ISP offered their understandably outraged subscribers the ability to individually opt-in to having access to those sites blocked from their Internet feeds. There is an abundance of content, applications, and services on the Internet that many people reasonably disagree with or find offensive. And many Internet users may prefer to keep such content, apps, or services out of their homes or devices. Many consumers use filtering software apps and programs to control content and website access according to their preferences. Your T1 WiFi offered its consumers an ostensible benefit. The fact that some proponents of Title II regulation point to this incident as matter of concern just goes to show that real instances of ISPs deliberately blocking or throttling access against their subscribers' wishes are non-existent.

Some comments try to explain away ISPs' consensus against blocking or throttling their subscribers by pointing to state net neutrality laws.[26] But proving such a link is unlikely and such an explanation seemingly ignores other factors, including the effects of the existing policy of FCC transparency rules and FTC enforcement. Another shortcoming with that explanation is that state net neutrality laws exist in only a handful of states, and blocking and throttling have not occurred in states that have no net neutrality laws.[27]

C. Title II Would Not Actually Address Problems of Internet Censorship, National Security, Public Safety, and Cybersecurity

We agree with comments opposed to the proposed rulemaking that the Commission's pretensions to secure or safeguard Internet openness, national security, and public safety are illusory because the proposal focuses on only one aspect of the Internet – Internet access services – and does not address far more serious concerns posed by other parts of the Internet ecosystem – including Big Tech platforms and other online edge providers. As stated in FSF's initial comments, major online edge providers such as Alphabet, Amazon, Apple, Meta, and Netflix

[26] *See, e.g.*, Comments of Free Press, at 38, 70; Comments of Public Knowledge, at 6, 16, 99-100.
[27] *See* Comments of USTelecom, at 54.

have higher market capitalization and more users than major broadband ISPs.[28] We also agree with comments that observed:

> The Big Tech giants effectively function as the gateway to information on the internet, affecting what users see when they search for information, shop for goods, seek out news, and look for entertainment options. The Big Tech companies' algorithms — and the choices they make about what information to promote and what information to demote — affect which content users see and, thereby, influence where they go on the internet. Indeed, while the NPRM lacks any examples of ISPs engaging in blocking or throttling, social media companies have reportedly been caught throttling user-posted links to other, competing platforms.[29]

The Commission's proposed rulemaking will not secure Internet openness because it is looking in the wrong place. Other comments correctly point out that "[t]he Biden Administration has alleged several instances in which Tech Companies could have a potentially negative effect on the openness and innovation that the Notice seeks to protect—but none of these allegations involve BIAS providers."[30] Those comments correctly conclude that "a Title II order would apply to the wrong entities while failing to reach the practices of Tech Companies that are the subject of Biden Administration scrutiny."[31]

Additionally, the Commission's myopic approach is aptly described by comments critical of the agency's proposal to impose "national security-related obligations on ISPs without accounting for other major participants in the Internet ecosystem, whose business practices are not open or neutral and whose privacy-, data security-, and national security-related risks and harms have been extensively recognized, investigated, penalized, and reported by regulators, legislators, attorneys general, and the media alike."[32] We agree with comments stating that "the Commission's asserted national security and data privacy rationales for reclassifying broadband

[28] Comments of the Free State Foundation, at 29. *See also* Comments of USTelecom, at 51.
[29] Comments of USTelecom, at 52.
[30] Comments of CTIA, at 19.
[31] Comments of CTIA, at 20.
[32] Comments of NCTA, at 57.

under Title II" are effectively arbitrary because they "ignore the far more significant threats to such interests posed by foreign ownership and/or control of apps such as TikTok, with which Americans—including millions of children—entrust their most sensitive personal information."[33]

III. The Major Questions Doctrine Precludes the FCC From Reinterpreting the Communications Act to Impose Public Utility Regulation on Broadband ISP

FSF's initial comments explained that the Commission's proposal to reclassify broadband Internet access services under Title II – based in part on the agency's novel claims that broadband is an "essential service" and needs to be regulated for national security and public safety purposes – surely raises matters of vast political and economic significance.[34] Congress nowhere provided a clear statement of authority for the Commission to transform Internet access networks into public utilities and comprehensively regulate them for security and safety purposes. Consequently, the proposed rulemaking runs afoul of the Supreme Court's Major Questions Doctrine. Accordingly, we agree with comments that similarly conclude the agency is precluded, due to a lack of authority, from regulating Internet services under the Major Questions Doctrine.[35]

We disagree with pro-utility regulation comments suggesting that the Major Questions Doctrine would not apply because an agency reclassification decision supposedly would not constitute an exercise of regulatory authority – even if the reclassification decision has obvious regulatory consequences.[36] The Commission's proposed Title II reclassification decision involves agency interpretation of a federal statute for the purpose of imposing a scheme of public utility regulation on Internet providers. This surely qualifies as economically and politically significant

[33] Comments of NCTA, at 58.
[34] *See* Comments of the Free State Foundation, at 11-21.
[35] *See, e.g.*, Comments of CTIA, at 6; Comments of Digital Progress Institute, at 19-22.
[36] *See* Comments of Public Knowledge, at 37-38.

and almost certainly would fall within the scope of the doctrine. The Supreme Court's recent decisions, such as *West Virginia v. EPA* (2022) and *Biden v. Nebraska* (2023),[37] do not appear to expressly carve out or exclude agency classification decisions from the scope of the Major Questions Doctrine. It's the consequences of the Commission's action that matter. Here, the Commission's proposal means imposition of a sweeping new "comprehensive framework" for regulating broadband, and it ties reclassification to a series of proposed new restrictions on ISPs.[38] The Commission's proposal would impose bright line rules that ban certain types of conduct, including charging premiums for differentiated services, institute a vague general conduct standard that is broader and more restrictive than Section 201, and confer on itself authority to oversee and intervene in matters involving Internet traffic exchange or network interconnection. These all unmistakably involve new expanded exercises of regulatory authority that are economically, if not politically, significant.

Moreover, we agree with comments concluding that "Section 332 independently bars the Commission from treating a 'private mobile service' as a common carrier, and the term 'private mobile service' unambiguously includes mobile BIAS."[39] In brief, Section 332 states that the provider of a "private mobile service," which is any mobile service that is not interconnected with the public switched network, "shall not… be treated as a common carrier."[40] Section 332 recognizes a mutually exclusive category of "commercial mobile service" that is interconnected with the public switched network and subject to common carrier regulation.[41] But the Commission now proposes to regulate mobile broadband service providers as common carriers

[37] *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Nebraska v. Biden*, 143 S.Ct. 2355 (2023).
[38] *See* Notice, at ¶ 137.
[39] Comments of CTIA, at 65. *See also id*. at 6 ("Mobile BIAS is further insulated from common carrier regulation as a 'private mobile service' that Congress expressly barred the Commission from regulating under Title II, which reinforces why the Act cannot be interpreted to allow Title II classification of BIAS more generally.")
[40] 42 U.S.C. § 332(c)(2).
[41] 42 U.S.C. § 332(d)(1).

under Title II by changing the definition of "the public switched network" from the public telephone network to the Internet.[42]

We disagree with the Commission's proposal and with comments supporting the proposed redefinition of statutory terms by which the Commission would effectuate its proposal.[43] It is correct that the D.C. Circuit in *US Telecom v. FCC* (2016) upheld the *Title II Order*'s redefinition of "the public switched network" and "interconnected service" as being within the Commission's delegated authority.[44] But the *RIF Order* made a more plausible finding that the Commission's original interpretation of "public switched network" as the traditional switched telephone network "appropriately reflects the fundamental canon of statutory construction that 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'"[45] Moreover, *US Telecom* is not the sole or last word regarding the agency's interpretive authority concerning those statutory terms. The D.C. Circuit in *Mozilla v. FCC* (2019) upheld the Commission's restoration of the original interpretation of "the public switched network" and "interconnected service" as reasonable interpretations of ambiguous terms.[46] But now, given the Major Questions Doctrine, the Commission cannot rely on statutory ambiguity and *Chevron* to claim elastic powers to stretch the meaning of Section 332 and to reinterpret the meaning of the public switched network in such a far-fetched manner with such far-reaching consequences for mobile broadband services.

[42] *See* Notice, at ¶¶ 85-88.
[43] *See* Comments of New America's Open Technology Institute, at 13-32.
[44] *US Telecom v. FCC*, 825 F.3d 674, 713-724 (D.C. Cir. 2016).
[45] *RIF Order*, at ¶ 75.
[46] *Mozilla v. FCC*, 940 F.3d 1, 35-43 (D.C. Cir. 2019).

IV. If the Commission Insists on "Doing Something," It Should Regulate Broadband Services Under a "Commercial Reasonableness Standard" to Mitigate Harm to Innovation and Investment

Due to the lack of substance for the Commission's proffered security and safety rationales for imposing public utility regulation, the lack of evidence of blocking, throttling, or other anticompetitive conduct and consumer harm in the competitive broadband marketplace, and the lack of any clear statement by Congress authorizing the Commission to turn broadband networks into public utilities, the Commission should not classify broadband Internet access services as Title II telecommunications services. If the Commission wrongly believes that it should "do something" beyond leaving in place the existing light-touch framework for broadband services, it should adopt a "commercial reasonableness" standard based on Section 706 and perhaps also based on the agency's Title I ancillary jurisdiction.

As explained in FSF's initial comments, "[c]ourt precedents indicate that the Commission may have limited but sufficient authority under Section 706 and Title I ancillary authority to adopt a commercial reasonableness standard for overseeing broadband ISP conduct."[47] If properly implemented, a commercial reasonableness standard may allow the Commission to adopt a backstop against discriminatory ISP practices that does not constitute agency overreach, while ensuring flexibility for competing broadband ISPs to supply consumer demands. Such an approach stands a much better chance of surviving a Major Questions or other legal challenge in court.

If the Commission adopts this approach, it should implement the standard through a complaint process that is adjudicated on a case-by-case basis. As a result of the competitive conditions in the broadband market, ISPs should enjoy a presumption of commercial reasonableness. And any prohibition or sanction on an ISP's conduct should be conditioned on

[47] Comments of the Free State Foundation, at 66.

factual findings, supported by clear and convincing evidence, that the ISP possesses market power and the alleged practice caused consumer harm. The Commission's 2011 *Data Roaming Order* as well as the D.C. Circuit's 2012 *Cellco Partnership v. FCC* decision provide helpful guidance.[48] The Commission can adopt a set of specific factors with sufficient clarity for adjudicating acceptable conduct under the standard.

V. If the Commission Wrongly Adopts Title II Reclassification, It Should Mitigate Harm to Innovation and Investment to the Maximum Extent Possible

We reiterate that the Commission should not impose public utility regulation on broadband ISPs. At most, if the Commission insists on "doing something," the agency should consider adopting a commercial reasonableness standard consistent with the existing Title I "information services" classification of broadband Internet access services. Nonetheless, if the Commission wrongly makes a Title II reclassification decision, it should take steps to attempt to reduce regulatory burdens and mitigate the harm to innovation and investment that would result from imposing public utility regulation.

A. The Commission Should Preempt State Regulation of Broadband Internet Services

The Commission should preempt state laws imposing sector-specific regulation on broadband Internet access providers. Internet openness depends on a free and open interstate commercial market. In Section 230(b) of the Telecommunications Act of 1996, Congress declared its intent "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[49] The Commission's 2017 decision to repeal the 2015 *Title II Order*'s short-lived public utility regulation and reclassify broadband

[48] *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data services ("*Data Roaming Order*"), WT Docket No. 05-265 (April 7, 2011); *Cellco Partnership v. FCC* (2012) 700 F.3d 534, 548 (D.C. Cir. 2012) (upholding *Data Roaming Order*'s "commercially reasonable" standard).
[49] 47 U.S.C. 230(b).

Internet access services as non-regulated, or at least lightly regulated, Title I "information services" is consistent with Congress's intent in Section 230(b). The *RIF Order* reestablished free market competition as the basic rule by which interstate commercial activity in the broadband Internet access services market is to be conducted.

While reimposing public utility regulation on broadband is at odds with Section 230(b), combining Title II federal regulation of broadband networks with state-level public utility regulation would be even more at odds with the statute and make the Internet strongly fettered. Accordingly, we disagree with pro-utility regulation comments that oppose preemption of state regulations, including comments that call for Title II to be the floor and state regulation to be the ceiling.[50] We also disagree with comments that support only limited preemption of state net neutrality laws or that seek to preserve local protectionist and competitor-welfare regulations that will harm Internet innovation and investment.[51]

The intrastate and interstate portions of broadband Internet network operations cannot practically be segregated. As the Commission rightly concluded in the *RIF Order*: "[I]t is well-settled that Internet access is a jurisdictionally interstate service because 'a substantial portion of Internet traffic involves accessing interstate or foreign websites'" and that "it is impossible or impractical for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[52] Broadband Internet networks transmit data among and within the borders of different states, and adding to public utility regulation at the federal level a layer of state-level restrictions would impair the free flow of

[50] *See* Comments of NARUC, at 12-19.
[51] *See* Comment of Public Knowledge, at 96-101; Comments of INCOMPAS, WC Docket No. 23-320, at 52-53 (supporting "total preemption" of states for net neutrality but opposing preemption of "state regulations that promote network market entry and wholesale access" to broadband Internet services).
[52] *RIF Order*, at ¶ 199 (internal cites omitted).

Internet data and commerce across state lines. Internet openness is best served by a uniform system of regulation.

The D.C. Circuit has recognized that "providing interstate [communications] users with the benefit of a free market and free choice" is a "valid goal" and that "[t]he FCC may preempt state regulation... to the extent that such regulation negates the federal policy of ensuring a competitive market."[53] For instance, free data plans offerings and broadband ISP network management decisions are forms of competition. And state laws that restrict network freedom undermine the competitive market.

The Notice characterizes the Commission's proposal as "a comprehensive framework that prevents consumers from experiencing harms that inhibit their access to an open Internet."[54] In effect, the proposal, if adopted, would occupy the entire field of broadband regulation. Given the comprehensive nature of the proposed regulation, state-level public utility regulation and other broadband sector-specific regulation should be preempted entirely.

B. The Commission Should Clearly Exempt Non-Broadband Internet Access Services

The Commission can partly mitigate harm to innovation and investment in new technologies and services that would result from imposing public utility regulation on broadband Internet access services by preserving a category of non-regulated "non-BIAS data services" that encompasses all services outside the definition of "broadband internet access services." We agree with comments that "[a]dopting a privative definition of "non-BIAS data services" better aligns with the terminology and better reflects current-generation network technologies and features, including the network virtualization features inherent in standalone 5G."[55] We further agree the

[53] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430, 431 (D.C. Cir. 1989).
[54] Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Notice of Proposed Rulemaking ("Notice") (released October 20, 2023), at ¶ 137.
[55] Comments of T-Mobile, at 26.

Commission ought to provide an expanded non-exhaustive list of services that are "non-BIAS" to reduce regulatory uncertainty that inevitably would result from imposing the proposed rulemaking.[56]

C. The Commission Should Not Regulate Rates for Internet Traffic Exchange

The Commission should not impose prescriptive rules regarding network interconnection or Internet traffic exchange. Prescriptive rules advocated in pro-utility regulation comments, such as a presumption against access fees or a bright-line ban on access fees,[57] go beyond anything required by the 2015 *Title II Order* and beyond anything proposed in the Notice.[58] Moreover, presumptive prohibitions or outright bans on access fees charged by broadband ISPs through privately negotiated network interconnection or traffic exchange agreements would constitute a form of rate regulation. The Commission should not engage in rate regulation of network interconnection or traffic exchange arrangements because, as we explained in our initial comments, rate regulation of Internet services would undermine network freedom and the incentive and ability to deploy infrastructure and generate financial returns.[59] And comments rightly point out that the Notice "does not identify any issues that have arisen in the internet traffic exchange marketplace since the *2018 Order*" that would justify *ex ante* rules.[60]

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein. Rather than follow the lead of pro-utility regulation commenters whose predictions about broadband doom and "the end of the Internet as we know it" following Title II

[56] Comments of T-Mobile at 26.
[57] *See* Comments of New Americas, at 10; Comments of Public Knowledge, at 82-86.
[58] *See Title II Order*, at ¶ 202; Notice, at ¶ 66.
[59] *See* Comments of the Free State Foundation, at 45-48.
[60] Comments of USTelecom, at 194.

repeal were proven spectacularly wrong, the Commission should preserve the successful policy of Internet freedom that defines broadband services as light-touch regulated Title I information services.

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