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

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

COMMENTS OF
THE FREE STATE FOUNDATION

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I. Introduction and Summary

These comments are filed in response to the Commission's Notice of Proposed Rulemaking (or "Notice") proposing to reclassify broadband Internet access service as a "telecommunications service" under Title II of the Communications Act, impose utility regulation on broadband Internet service providers, and repeal the light-touch market-oriented framework for Internet services established in the 2017 *Restoring Internet Freedom Order*. The Commission's proposal to convert broadband Internet networks into public utilities is legally unsupportable as well as unwise, unnecessary, and unjustified from a policy perspective. Stated bluntly, the Commission's proposal, if adopted, by asserting stringent bureaucratic control over the practices and operations of private sector Internet service providers, would constitute one of the 21st century's most flagrant government power grabs.

Supreme Court decisions such as *West Virginia v. EPA* (2022) have embedded the Major Questions Doctrine in the Court's jurisprudence. And even if the *Chevron* doctrine is not directly

* These 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 the convenience of the reader, the Introduction and Summary does not contain footnotes. But authority for every assertion in the Introduction is contained in the body and footnotes of this 74-page document.

overruled by the Court in the pending *Loper Bright Enterprises v. Raimondo* case, in effect its scope already has been meaningfully curtailed. As a result, the Commission cannot rely on the claimed ambiguity of Communications Act statutory terms as the basis for authority to reclassify Internet services under Title II.

If adopted, the proposed reclassification decision undoubtedly would be a major rule falling within the Major Questions Doctrine. Transforming massive broadband Internet access networks built with over $2.1 trillion in private capital since 1996, and upon which so much of our nation's economy is now dependent to function, unmistakably involves issues of vast economic significance. Reclassification of broadband services away from a lightly regulated Title I "information service" into a heavily regulated Title II "telecommunications service" would impact all broadband Internet service providers (ISPs), online edge companies, and residential broadband subscribers – whether through the regulation of revenues, prices, or service offering terms and conditions. "Net neutrality" regulation also has been a matter of vast political significance and considerable public controversy for two decades, up to and including Chairwoman Rosenworcel's recent call for the public to "make some noise" and "raise a ruckus" so as to influence the Commission's decision.

The Major Questions Doctrine requires a clear statement of authority from Congress authorizing a major rule such as one that would impose public utility regulation on Internet networks that have thrived in a primarily market-oriented environment. But the lack of any such clear statement in the Communications Act almost certainly would be legally fatal, as even two former Obama Administration Solicitors General have concluded.

In a surprise to many who have observed the two decades-long policy debate over "net neutrality" regulation and "Internet openness," the Notice tries to reframe proposed Title II

regulation of broadband services into a national security and public safety measure. But it is highly doubtful that regulating ISPs as public utilities will make the nation and its people more secure and safe. The Notice's security and safety rationale for public utility regulation is a classic case of the tail wagging the dog.

Executive branch agencies already have authority over various key aspects of national security and public safety. Additionally, there is a glaring disconnect between national security and public safety concerns and reimposing public utility regulation on commercial mass-market retail services catering to civilian residences and small businesses. Thousands of public safety agencies rely on FirstNet and other dedicated networks far more than commercial mass market retail broadband services. Unsurprisingly, the Notice fails to articulate any specific threats of harm to national security and public safety that Title II regulation would alleviate. And the Notice provides no basis for concluding that such regulation will improve broadband cybersecurity. If security and safety truly are vulnerable, why has the Commission kept that from public knowledge until the rollout of its regulatory proposal. The Commission could have asked Congress for additional authority to address those specific concerns, and it still can. It's worth noting, however, the Commission believes it already possesses sufficient authority to enter into agreements with states to "jointly pursue privacy, data protection, and cybersecurity enforcement," as it announced the first four agreements with state law enforcement leaders on December 6, 2023.

Nor is there reason to think that the Commission's proposal to impose public utility regulation on broadband Internet services will help consumers. The rulemaking proposal singles out ISPs for regulation in the name of advancing Internet openness, despite the record being abundantly clear that ISPs are not blocking, throttling, or otherwise harming consumers' ability

to access lawful content of their choice on the Internet. Among Big Tech platforms, including Google, YouTube, Amazon, Facebook, Instagram, and TikTok, there is a consensus that they must remain free to censor speech. But among ISPs there is a *de facto* consensus, expressed in terms of service commitments, against blocking, throttling or harming consumers' ability to access lawful Internet content. Those terms of service are enforceable by the FTC, but Title II reclassification would strip the FTC of jurisdiction and cause Internet subscribers to lose those protections.

Surely the case for Title II reclassification is far weaker in 2024 than it was in 2015 – and it was demonstrably weak then. Myriad gloom-and-doom predictions about the "end of the Internet as we know it" after repeal of the Commission's short-lived public utility regulation were quicky proven false. That the Notice cannot point to any real-world instances of ISPs blocking, throttling, or otherwise harming consumers ability to access lawful Internet content is readily explainable by economic realities. Increases in broadband network availability, competing alternatives, and broadband speeds have followed in the wake of Title I reclassification. The competitiveness of the broadband Internet access services market has increased since early 2018 due to the expansion of fiber, the rapid nationwide deployment of 5G mobile and 5G fixed wireless access (FWA) services and new satellite services, as well as the launch of DOCSIS 4.0 cable broadband and hybrid cable mobile virtual network operator (cable MVNO) services. And, significantly, U.S. broadband networks passed the ultimate stress test by successfully accommodating dramatic spikes in Internet traffic and actually improving service during the lockdowns of 2020.

Despite the Notice's empty claim that ISPs have the ability and incentive to block, throttle, and harm their subscribers' access to lawful Internet content, the reverse is true.

Broadband ISPs have strong financial incentives to enable consumers to access lawful content of their choosing. Wider access enhances the perceived value of the service and therefore increases demand and subscribership. And because ISPs face effective competition from market rivals, any attempt by an ISP to harm their own subscribers for short-sighted financial gain would jeopardize the ISP's goodwill with subscribers and potential subscribers, with the ISP risking losing subscribers and potential subscribers to market competitors.

Given the competitiveness of today's broadband, it is perhaps not surprising – but nevertheless significant – that the Notice musters no evidence ISPs have market power. Instead, it rehashes the repealed 2015 *Title II Order*'s application of the "virtuous cycle" theory, claiming that ISPs act as gatekeepers. But that theory is premised on monopolistic conditions with restrictions on market entry, and, therefore, it is inapplicable to today's broadband market.

The Commission's tentative conclusion that Title II reclassification of broadband services would "support efforts to safeguard consumers' privacy and data security" makes no sense. Title II reclassification actually will create a gap in privacy protections for broadband subscribers by stripping the FTC of its jurisdiction to oversee privacy protections for broadband subscribers. Federal law prohibits the FTC from regulating common carriers. And once the FTC's privacy expertise and enforcement authority is gone, the FCC still has no general online privacy jurisdiction. The Commission's Section 222 authority is limited to information regarding the time and length of calls, phone numbers called, as well as voice billing. And Congress's 2017 repeal of the 2016 *Broadband Privacy Order* prohibits the Commission from reimposing a rule "in substantially the same form."

An additional problem is that the Commission's proposal opens the Internet to rate regulation. Title II, at its core, *is* a rate regulation regime. The Notice does not propose to forbear

from applying Sections 201(b) and 202(a); it suggests the agency will only refrain from *ex ante* rate regulation, not *ex post*. Those statutory provisions would impose on the Commission a positive duty to consider complaints that rates charged by broadband ISPs are unjust or unreasonably discriminatory. The Notice also suggests rate regulation with its proposed ban on paid prioritization; its assertion of agency authority over network interconnection agreements that set pricing for peering; and its possible ban on "free data" mobile plans. Rate regulation will defeat what should be the Commission's priorities – promoting network investment and deployment, along with consumer choice and innovation.

The Commission also proposes to adopt an impermissibly vague "general conduct standard" as an admitted "catch-all backstop" that would restrict an unknown and unknowable number of network practices that the Commission believes might "unreasonably disadvantage" retail service end users or Internet edge providers like Google and Facebook. This proposed "catch-all backstop" consists of several unclear factors that are not tied to any safe harbors, ascertainable economic theory, or legal precedents that would provide predictable application. The elasticity of those factors would enable the Commission to restrict nearly any network practice it chooses. Also, it appears that the Commission's enforcement rules, in many instances, would require ISPs to prove that they comply with the agency's *ad hoc* determinations regarding what technical network practices best promote Internet openness. The result would be a gross expansion of agency power over private networks and a negative impact on innovation and investment. The "general conduct" standard would be the Commission's tool of choice to ban popular "free data" mobile plans and other innovative offerings.

Aside from the agency's lack of legal authority already described above, the Commission's proposal to regulate broadband ISPs like common carriers under Title II raises

significant issues under the First Amendment. The proposed rulemaking would burden broadband ISPs' First Amendment right to make editorial decisions involving paid priority arrangements as well as "free data" or "sponsored data" offerings. Although an ISP can claim no First Amendment right to hold itself out as a neutral and indiscriminate pathway but then conduct its operations differently, an ISP likely has a First Amendment right to qualify the meaning of that offering in its written terms of service to include certain traffic priority, speed, pricing, content, or other terms.

Moreover, the Commission's suggestion that its proposed regulation is likely to be upheld as content-neutral and subject to intermediate First Amendment scrutiny is questionable because the Commission is unconcerned with findings of market power. If then-Judge Kavanaugh's 2017 opinion dissenting from denial of rehearing *en banc* in *US Telecom v. FCC* is correct that the Supreme Court's 1994 *Turner Broadcasting v. FCC* decision requires the presence of market power for a government restriction on an ISP's editorial speech to satisfy intermediate scrutiny, then the proposal would fail First Amendment intermediate scrutiny.

If the Commission persists in yielding to the bureaucratic impulse to "do something," instead of the rulemaking proposal contained in the Notice, a less intrusive option is available that stands a better chance of surviving judicial review. The Commission may have limited but sufficient Section 706 and Title I ancillary authority to adopt a "commercial reasonableness" standard for overseeing ISP conduct. Under this approach, the Commission could adopt procedural rules for a case-by-case enforcement process that confers on ISPs a presumption of reasonableness and requires that any complaint alleging anticompetitive conduct by an ISP be based on findings, supported by clear and convincing evidence, that the ISP possesses market power and that the alleged practice caused consumer harm. Such a standard may allow the

Commission to enforce a regulatory backstop against discriminatory ISP practices that does not result in (as much) agency overreach, while also ensuring flexibility for competing broadband ISPs to supply consumer demands. The Commission's 2011 *Data Roaming Order* and the D.C. Circuit's 2012 *Cellco Partnership v. FCC* decision upholding the order provide guideposts that the agency can follow in establishing a commercial reasonableness standard.

Another perhaps better alternative would be for Congress to enact a narrowly-circumscribed "net neutrality" law. A commercial reasonableness standard could be established in the legislative framework. This approach also would be conducive to investment and innovation, while providing the predictability and certainty that are essential to the rule of law.

II. The FCC Does Not Have Legal Authority Under Title II to Transform Internet Providers Into Public Utilities

In the Notice, the FCC now claims, for the first time, that broadband Internet access service is an "essential service" and a "public utility" and, therefore, it needs to be subject to public utility regulation. Another first-time claim by the Commission is that Title II reclassification and public utility regulation are necessary to safeguard national security and protect public safety. But these novel rationales cannot overcome the lack of clear statutory authority for the Commission to subject broadband ISPs to utility regulation. Instead, the Notice's essential service, national security, and public safety rationales reinforce the point that Title II reclassification of broadband involves matters of vast political and economic significance. Indeed, the more serious the Notice's characterization of the policy necessities to regulate broadband networks as public utilities, the more serious the proposed rulemaking runs afoul of the Supreme Court's Major Questions Doctrine's requirement of a clear statement of authority for the Commission's proposal.

The eclipsing of the *Chevron* doctrine by the major questions doctrine means that the Commission cannot rely on statutory ambiguity as the basis of agency authority for its proposed Title II reclassification of broadband services. If adopted, the Commission's proposed reclassification decision undoubtedly would be considered a major rule. Indeed, Chairwoman Rosenworcel would not have urged members of the public to "raise a ruckus" in the rulemaking if she didn't consider it to be a matter of major importance. Transforming massive broadband Internet access networks unmistakably involves issues of vast economic and political significance. In part, that significance is reflected in the approximately $2.1 trillion in private capital that has been expended since 1996 to construct broadband networks that the Notice deems essential for commercial and civic participation. And because the Communications Act of 1934 provides no clear statement of authority for the Commission to impose public utility regulation on broadband Internet services, the agency's proposed rulemaking – if adopted – will not survive judicial scrutiny.

A. The Commission Cannot Rely on Statutory Ambiguity and *Chevron* Deference as the Legal Basis for Its Proposal to Reclassify Broadband Services Under Title II

In our view, the 2017 *Restoring Internet Freedom Order*'s interpretations of "information service," "telecommunications service," "offerings," "capability," and other statutory terms supporting a Title I classification for broadband Internet access service are correct.[1] Conversely, the alternative interpretations proffered in the Notice[2] appear to be results-driven and lack firm rooting in the text, structure, and history of the Telecommunications Act of 1996 as well as

[1] *See Restoring Internet Freedom Order*, at ¶¶ 26-57. *See also* Comments of the Free State Foundation, Restoring Internet Freedom Order, WC Docket No. 17-108 (July 17, 2017), at 9-17, available at: https://freestatefoundation.org//wp-content/uploads/2019/08/FSF-Initial-Comments-Restoring-Internet-Freedom-071717-1.pdf; Comments of the Free State Foundation, Restoring Internet Freedom Order, WC Docket No. 17-108 (July 17, 2017), at 21-33, available at: https://freestatefoundation.org//wp-content/uploads/2019/08/FSF-Restoring-Internet-Freedom-Reply-Comments-Final-083017.pdf.

[2] *See* Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Notice of Proposed Rulemaking ("Notice") (released October 20, 2023), at ¶¶ 68-80.

earlier authorities. Despite continuing disagreements over the meaning of those statutory terms, the Commission previously could be somewhat confident that whatever minimally reasoned rationale for Title I or Title II classification had gained acceptance among the majority of its current membership would carry the day in court. But the law has changed, and that is no longer the case.

In each instance of judicial review of the Commission's prior Internet service classification decisions – *NCTA v. Brand X Internet Services* (2005),[3] *US Telecom v. FCC* (2016),[4] and *Mozilla v. FCC* (2019)[5] – the application of *Chevron* deference based on statutory ambiguity was outcome-determinative. But the *Chevron*[6] doctrine is in retreat and may soon become defunct. The Supreme Court has not relied on or even mentioned *Chevron* in five years, including in several recent notable administrative law decisions involving statutory interpretation, such as *Alabama Association of Realtors v. Department of Health and Human Services* (2021)[7] and *National Federation of Independent Businesses v. OSHA* (2022).[8] And the *Chevron* doctrine may meet its demise, or at least be meaningfully constrained, in *Loper Bright Enterprises v. Raimando*, a case pending on the Court's docket for the 2023-2024 term.

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[3] *NCTA v. Brand X Services*, 545 U.S. 967 (2005)(holding that the Communications Act's definitions of "information services" and "telecommunications services" and applying the *Chevron* deference rule, affirmed the FCC's 2002 determination that Internet services are reasonably classified as information services).

[4] *US Telecom v FCC*, 825 F.3d 674 (D.C. Cir. 2016)(relying primarily upon *Chevron* deference as applied in *Brand X* to affirm the Obama Administration FCC's decision to change the regulatory classification of broadband Internet services as telecommunications services).

[5] *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)(affirming the Trump Administration FCC's decision to return to the information service classification because the court deemed itself bound by *Brand X*'s holding that the statute's ambiguity required deference under *Chevron* to the agency's interpretation); *id*. at 19 ("[W]e view *Brand X* as binding precedent in this case").

[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

[7] *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021). *See* Randolph J. May and Andrew K. Magloughlin, "*NFIB v. OSHA*: A Unified Separation of Powers Doctrine and *Chevron*'s No Show," 74 *South Carolina Law Review* 264 (2023)(analyzing recent major question decisions and discussing absence of Chevron in those cases as well future implications), available at: https://ssrn.com/abstract=4067799.

[8] *National Federation of Independent Businesses v. Department of Labor, Occupational Safety & Health Administration,* 144 S.Ct. 661 (2022).

The takeaway from these Supreme Court developments is that the Commission cannot rely on *Chevron* deference as the basis for the agency's authority. The *Chevron* doctrine – to the extent it is still good law – already has been curtailed significantly by the major questions doctrine. The fact that the Notice only mentions *Chevron* one time – in a sole footnote citation to *Brand X*'s internal citation to *Chevron*[9] – suggests that the Commission is aware that reliance on statutory ambiguity for Title II reclassification is a legal dead end. It would be totally at odds with the major questions doctrine's requirement of a "clear congressional authorization" for the agency to interpret the statute to allow it to seize so much control over Internet providers.

The Commission appears to put some hope in the D.C. Circuit's determination in its 2016 decision in *US Telecom v. FCC* that *Brand X* conclusively gave the Commission the authority to determine the proper classification of Internet access service, that the agency's determinations involved matters of statutory ambiguity and were entitled to deference, and that there was no need to consult the Major Questions Doctrine.[10] But the D.C. Circuit's determination predated the emergence of the Major Questions Doctrine in Supreme Court jurisprudence as well as the eclipse of *Chevron* deference, and the appeals court's decision now appears to be inconsistent with current jurisprudence. Judge Brown's 2017 opinion dissenting from denial of rehearing *en banc* in *US Telecom v. FCC* is much more aligned with current Supreme Court jurisprudence when she writes:

> The mere fact that a "statutory ambiguity" exists for some purposes does not mean it authorizes the agency to reach major questions—statutory context and the overall scheme must be considered… When the statutory context and backdrop against which Congress passed the 1996 Act are considered, as they were in *Brand X*, the Supreme Court's decision reinforces the need for FCC to show a textual assignment of authority before it can reclassify broadband Internet access as common carriage.[11]

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[9] *See* Notice, at ¶ 67, fn. 233 (citing *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64)).
[10] See Notice, at ¶ 81 (*citing US Telecom v. FCC*, F.3d at 704)(additional citation omitted).
[11] *US Telecom v. FCC*, 855 F.3d 381, 404 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing *en banc*).

B. The Commission's Proposal to Reclassify Broadband Services Under Title II Involves a Major Question of Vast Political and Economic Significance

The Major Questions Doctrine has become firmly embedded in the Supreme Court's jurisprudence through its 2022 decisions in *West Virginia v. EPA*[12] as well as its 2023 decision in *Biden v. Nebraska*.[13] As explained by Chief Justice Roberts' opinion for the Court in *West Virginia v. EPA*, regarding "certain extraordinary cases. . . something more than a merely plausible textual basis for the agency action is necessary."[14] In cases of major economic and political significance, the agency must demonstrate "clear congressional authorization" for the power it claims.[15]

Then-Judge Kavanaugh in his 2017 opinion, dissenting from denial of rehearing *en banc* in *US Telecom v. FCC*, explained that "[t]he Court has not articulated a bright-line test that distinguishes major rules from ordinary rules," but "the Court's cases indicate that a number of factors are relevant, including: the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[16]

These factors all weigh decisively in favor of the conclusion that the Commission's rulemaking proposal, which would impose public utility regulation on broadband ISPs, raise issues of vast economic and political significance. The Commission's proposal would convert broadband Internet networks – constructed with over $2.1 trillion in private capital since 1996 and infrastructure being upgraded and deployed with annual capital investments of over $100

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[12] *West Virginia v. EPA*, 597 U.S. ---, 142 S.Ct. 2587 (2022).
[13] *Nebraska v. Biden*, 600 U.S. ---, No. 22-506 (2023).
[14] *West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).
[15] *West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. at 324).
[16] *US Telecom v. FCC*, 855 F.3d 381, 422-423 (Kavanaugh, J., dissenting from denial of rehearing *en banc*). In *West Virginia v. EPA*, as explained below, Chief Justice Roberts' opinion for the Court cited then-Judge Kavanugh's *US Telecom* dissent favorably. *See* 142 S.Ct. at 2609.

million and upon which a considerable part of the nation's economy depends – into public utilities.[17] The proposal would upend the market-oriented light-touch regulatory environment in which broadband networks have, at least for the most part, operated since 1996.

Given the ubiquity of Internet connectivity in the United States, all broadband Internet users would at least indirectly be impacted by the reclassification, either because the regulation would restrict ISPs service offerings and plans or because the regulation would impact pricing and rates. The reclassification not only would restrict broadband ISPs' network management decisions regarding their own networks,[18] it would subject ISPs to intrusive oversight of their operations according to a vague "general conduct" standard with an open-ended "catchall-backstop."[19] The proposed rulemaking could potentially restrict the ability of consumers to sign up for "free data" mobile plans that have proven popular with low-income and value-conscious consumers.[20] And the proposed rulemaking would categorically prohibit broadband ISPs from charging highly capitalized Big Tech platforms based on their enormous data traffic volumes and outsized usage of broadband networks compared to other services and everyday users.[21]

Moreover, considerable congressional and public attention has been focused on the issue of "net neutrality" regulation, the "Open Internet," and "Internet freedom." Numerous bills have been filed in Congress that address these issues from multiple angles. Reclassification of broadband Internet services under Title II even became a matter for unprecedented intervention

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[17] *See* US Telecom, "2022 Broadband CapEx Report: Broadband Providers Invested $102.4B In Communications Infrastructure Last Year" (September 8, 2023), at: https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf. *See also* CTIA, 2022 Annual Survey Highlights (July 25, 2023), at 4 (reporting $39 billion invested in wireless networks in 2022), available at: https://api.ctia.org/wp-content/uploads/2023/11/2023-Annual-Survey-Highlights.pdf.
[18] *See Notice*, Section V-B.
[19] *See Notice*, at ¶¶ 164-167.
[20] *See Notice*, at ¶ 167.
[21] *See Notice*, at ¶¶ 158-159.

by the President in the proceedings of the supposedly independent FCC, highlighted by then-President Obama's November 10, 2014 "Message on Net Neutrality."[22]

Publicity campaigns have been waged both for and against Title II regulation of broadband Internet services, millions of public comments have been filed with the agency in the last two net neutrality proceedings, and the Commission's repeal of the *RIF Order* prompted dangerous threats of violence against then-Chairman Pai as well as other members of the Commission. And Chairwoman Rosenworcel's call, during her September 2023 announcement of the proposed rulemaking, for members of the public to "makes some noise" and "raise a ruckus" called even greater public attention to this considerably major policy issue.[23]

Furthermore, the vast political and economic significance of prospective Title II reclassification is further confirmed by claims made in the Notice, for the first time, that Internet access service is an "essential service."[24] According to the Notice, "the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers' participation in our society and economy."[25] Indeed, the Notice repeatedly declares that broadband Internet access service is essential to consumers "for work, health, education, community, and everyday life"[26] and that it is perceived by consumers to be essential.[27] Additionally, the Notice declares that broadband Internet access service is an "essential utility," stating: "Not unlike other essential utilities, such as electricity and water,

[22] See *US Telecom v. FCC*, 855 F.3d 381, 409-412 (D.C. Cir. 2017) (Brown, J., dissenting from rehearing *en banc*).
[23] *See* Remarks of Chairwoman Jessica Rosenworcel (September 26, 2023), at: https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.
[24] *See* Notice, at Section III.A. ("Broadband Internet Access Service is Essential").
[25] Notice, at ¶ 1.
[26] Notice, at ¶ 16. *See also id*. at ¶¶ 21, 23, 39, 49, 16, 128, 142, and 156.
[27] Notice, at ¶¶ 19, 116.

BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression."[28]

Although the 2015 *Title II Order* described the open Internet as "critical" for commerce, communication, education, speech, and civic engagement,[29] it did not declare Internet access services to be "essential services" or "essential utilities." Nor did it rely on such declarations as the basis for imposing Title II public utility regulation. The Notice's new characterization of broadband Internet access services as "essential" and the proposal to convert ISPs to rigidly constrained public utilities on the basis of that characterization have vast political and economic implications.

C. There Is Judicial Recognition That Reclassifying Broadband Services Under Title II Involves a Major Question of Vast Political and Economic Significance

Although the Major Questions Doctrine's place in Supreme Court jurisprudence was less solidified prior to *US Telecom v. FCC* and *Mozilla v. FCC*, now that the doctrine appears firmly in place there are judicial analyses that persuasively reinforce the conclusion that the Commission's proposal to transform broadband networks into public utilities through regulatory reclassification involves a major question of political and economic significance.

Notably, *West Virginia v. EPA* provides a tell-tale sign that reimposition of public utility regulation on broadband ISPs would be a major question. Chief Justice Roberts' opinion for the Court cited then-Judge Brett Kavanaugh for the proposition that "Congress intends to make major policy decisions itself, not to leave those decisions to agencies."[30] It is difficult to believe

[28] Notice, at ¶ 17.
[29] *See 2015 Open Internet Order*, at ¶¶ 1, 77, and 92.
[30] *West Virginia v. EPA*, 142 S.Ct. at 2609 (quoting *US Telecom v. FCC*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

the Chief Justice and his five colleagues in the majority were not well aware of the import of now-Justice Kavanaugh's dissent, in which he declared:

> [The] net neutrality rule is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States. The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The economic and political significance of the rule is vast.[31]

Judge Kavanaugh also wrote:

> The rule therefore wrests control of the Internet from the people and private Internet service providers and gives control to the Government. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The financial impact of the rule — in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business — is staggering.[32]

Judge Brown agreed that "turning Internet access into a public utility is obviously a 'major question' of deep economic and political significance—any other conclusion would fail the straight-face test."[33] And Judge Brown noted that the D.C. Circuit's 2014 decision in *Verizon v. FCC* "already characterized 'net neutrality' regulation as a 'major question,' even without the distinct salience brought by implementing 'net neutrality' through reclassifying broadband Internet access."[34] As the court stated in the earlier case:

> Before beginning our analysis, we think it important to emphasize that ... the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years.... Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.[35]

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[31] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[32] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[33] *US Telecom v. FCC*, 855 F.3d 381, 402 (D.C. Cir. 2017) 402 (Brown, J., dissenting from rehearing *en banc*).
[34] *US Telecom v. FCC*, 855 F.3d 381, 402 (D.C. Cir. 2017) 402 (Brown, J., dissenting from rehearing *en banc*)(citing *Verizon v. FCC*, 740 F.3d at 634).
[35] *Verizon v. FCC*, 740 F.3d at 634.

D. Congress Did Not Provide the FCC With a Clear Statement of Authority to Regulate Internet Service Providers as Public Utilities Under Title II

Under Supreme Court jurisprudence, when the Major Questions Doctrine applies, agency Interpretations of statutory provisions at issue do not receive *Chevron* deference. Instead, under such circumstances the courts are required to look for a clear statement of congressional authorization for the agency's action.[36] As we stated in our comments in the *Restoring Internet Freedom* proceeding, "it is evident that Congress made no clear statement authorizing the Commission to reclassify broadband Internet access service as a telecommunication service under Title II."[37] And the Notice nowhere identifies any clear statement authorizing the agency to impose public utility regulation on broadband ISPs. This lack of clear congressional authorization is ultimately fatal to the Commission's proposal.

Generalized resort to "the Commission's recognized expertise and authority as the federal regulator" of advanced communications services surely does not constitute the requisite clear statement.[38] Moreover, it appears that the Supreme Court's decision in *Brand X* makes the lack of clear statement a foregone conclusion. As then-Judge Kavanaugh presciently observed: "*Brand X*'s finding of statutory ambiguity cannot be the *source* of the FCC's authority to classify Internet service as a telecommunications service. Rather, under the major rules doctrine, *Brand X*'s finding of statutory ambiguity is a *bar* to the FCC's authority to classify Internet service as a telecommunications service."[39] In other words: "*Brand X*'s finding of ambiguity by definition means that Congress has not clearly authorized the FCC to issue the net neutrality rule. And that

[36] *See West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. at 324).
[37] Comments of the Free State Foundation, Restoring Internet Freedom, WC Docket 17-108, at 20.
[38] Notice, at ¶ 81.
[39] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

means that the net neutrality rule is unlawful under the major rules doctrine."[40] That lack of clear authorization legally dooms the Commission's proposal to turn broadband Internet networks into public utilities.

III. Title II Reclassification of Broadband Services Is Not Necessary for National Security and Public Safety

In a surprise to many who have observed the two decades-long debate over "net neutrality" regulation and "Internet openness," the Notice turns an entirely new corner by attempting to reframe Title II regulation of broadband services as a national security and public safety measure. It is highly doubtful that regulating broadband ISPs as public utilities will make the nation and its people more secure and safe. The Notice's newly-minted national security and public safety rationale is unconvincing and an instance of the tail wagging the dog.

Executive branch agencies already have authority over national security and public safety. Additionally, there is a glaring disconnect between national security and public safety concerns and imposing public utility regulation on commercial mass-market retail services catering to civilian residences and small businesses. Public safety agencies rely on FirstNet and other dedicated networks far more than commercial services. The Notice fails to articulate any specific threats of harm to national security and public safety that public utility regulation would alleviate. And the Notice fails to recognize that innovative service offerings, including paid prioritization offerings, could benefit first responder agencies to the extent that they make use of broadband Internet access services. If security and safety truly are vulnerable, then the Commission should ask Congress for authority to address those concerns.

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[40] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*). Two former Obama Administration Solicitors General agree the Commission's proposal is unlikely to survive judicial review in light of the Major Questions Doctrine. *See* Donald Verrilli and Ian Gershengorn, "Net Neutrality Rules Face 'Major Questions' Buzzsaw at High Court," *BloombergLaw* (September 20, 2023), available at: https://news.bloomberglaw.com/us-law-week/net-neutrality-rules-face-major-questions-buzzsaw-at-high-court.

A. The Commission's National Security and Public Safety Rationales Are Dubious and Do Not Justify Regulating Broadband Networks as Public Utilities

The unexpectedness of the Commission's proffering of national security and public safety rationales for public utility regulation as well as the agency's use of a notice of proposed rulemaking to announce its supposed security and safety concerns provide ample reason for doubting that those rationales are genuine. National security and public safety were hardly mentioned in the *Title II Order*, and neither was proffered as a justification for utility regulation. The *Title II Order*'s provision that "[n]othing in this part supersedes any obligations or authorization" an ISP "may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities" was "not intended to expand or contract broadband providers' rights or obligations with respect to other laws or safety or security considerations."[41] That safety and security provision only was intended to ensure "that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement authorities" and "that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules."[42]

But now the Notice suddenly makes national security and public safety into primary claimed justifications for reimposing public utility regulation on broadband Internet services. Over a dozen paragraphs in the draft notice address speculated future vulnerabilities in network management operations, functionalities, and equipment.

If national security and public safety concerns are as serious as the FCC's Notice intimates, it begs the question why the agency waited until the September 2023 to publicly raise those concerns. In the national security and public safety areas where bipartisanship prevails,

[41] *Title II Order*, at ¶300; *id*. at ¶ 299.
[42] *Title II Order*, at ¶ 301.

Chairwoman Rosenworcel and other members of the Commission could have gone directly to Congress to seek clear targeted authority to address any security and safety concerns that they believed could not be addressed under the agency's present authority.

To the extent that security and safety supposedly are endangered due to the lack of public utility regulation of broadband Internet networks, it would appear that the Commission needlessly has delayed action for over two years, contrary to Section 151's mandate that the Commission act "for the purpose of promoting safety of life and property through the use of wire and radio communications."[43]

B. The Notice Provides No Basis for Concluding Public Utility Regulation of Commercial Retail Broadband Services Furthers National Security and Public Safety

Moreover, the Notice's highly generalized concerns about future broadband network and service vulnerabilities do not even rise to the level of being "What if?" scenarios. The Notice does not identify any evidence that mass commercial market retail broadband Internet services for residential and mobile subscribers pose actual national security or public safety problems. The Notice similarly lacks specifics about how its exercise of expanded regulatory power under Title II, including imposing domestic Section 214 requirements on broadband ISPs, actually would improve security and safety for consumers.[44]

Furthermore, there is a glaring disconnect between imposition of public utility regulation on commercial broadband Internet access services as ostensible national security and public safety measures and the fact that military, law enforcement, emergency first responders, and other government agencies rely heavily on enterprise or dedicated networks. Even the Notice

[43] 47 U.S.C. §151.
[44] *See also* FCC Commissioner Carr, Statement: "Fact-Checking President Biden's Myth-Filled Plan for Government Control of the Internet" (October 11, 2023), available at: https://docs.fcc.gov/public/attachments/DOC-397587A1.pdf.

acknowledges that "much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband services."[45] Indeed, the Commission's 2020 *Restoring Internet Freedom Remand Order* found that public safety agencies rely increasingly on FirstNet and competing dedicated networks with quality-of-service guarantees for communications.[46] FirstNet has reported approximately 5.3 million connections across nearly 27,000 government agencies.[47]

In other words, even assuming, for the sake of argument, that there are legitimate national security and public safety concerns regarding the communications networks used by military, law enforcement, emergency first responders, and other government agencies, the Commission's proposal is directed to the wrong services and the imposition of Title II would not actually address those concerns. It's noteworthy that on December 6, 2023, the Commission announced it had entered into agreements with law enforcement authorities in four states – with more to come – to jointly pursue privacy, data protection, and cybersecurity enforcement.[48] In one way or the other, each of these areas may implicate national security and public safety, and the Commission apparently believes it possesses the authority to coordinate activities with the state law enforcement officials.

The Commission is the wrong agency to be addressing national security and public safety concerns in the manner set forth in the Notice. Executive Branch agencies such as the Department of Defense, the Department of Homeland Security, and the Department of Justice

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[45] Notice, at ¶ 34.
[46] *See* Restoring Internet Freedom, WC Docket No. 17-108, et al., *Order on Remand* ("*RIF Remand Order*") (released October 29, 2020), at ¶¶ 24-26.
[47] Linda Hardesty, "AT&T reports postpaid phone net adds in Q3 2023," *FierceWireless* (October 19, 2023), at: https://www.fiercewireless.com/wireless/att-reports-468000-postpaid-phone-net-adds-q3-2023.
[48] FCC, News Release: "FCC Privacy & Data Protection Task Force Launches First-Ever Enforcement Partnerships with State Attorneys General" (December 6, 2023), available at: https://www.fcc.gov/document/fcc-launches-first-ever-enforcement-partnerships-state-attorneys-general.

already have national security powers and expertise to address security issues in the communications sector. Indeed, the Commission's purported national security rationale appears to disregard the Fifth Circuit's word of caution the FCC that "[i]t is not the Department of Defense, or the National Security Agency, or the President," and that Commission should not act as a "junior-varsity" State Department.[49]

And although the public safety section of the Notice cites *Mozilla v. FCC*,[50] the D.C. Circuit's decision does not establish that regulating broadband services as a public utility is a vital matter of public safety. Appellate judges are not public safety policy experts. The court's pronouncements on public safety were limited to the "discrete" issue, under the Administrative Procedures Act, of whether the Commission had considered the implications of its Title I reclassification decision in the *RIF Order* for "promoting safety of life and property through the use of wire and radio communication" under Section 151.[51]

The Commission's *RIF Remand Order* provided a more thorough explanation regarding the public safety benefits of Title I classification of broadband services. As the Commission rightly concluded there, public safety services are decidedly more likely to benefit from Title I reclassification than from the restrictive policy that existed under the *Title II Order*.[52] As the Commission recognized in both the *RIF Order* and in the *RIF Remand Order*, public utility regulation inhibited innovation and reduced incentives for investment by depriving broadband ISPs of full use of their property and ability to generate returns on their investment.[53]

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[49] *Huawei Technologies USA, Inc. v. FCC*, 2 F.4th 421, 427 (5th Cir. 2021).
[50] *See* Notice, at ¶ 25 (citing *Mozilla v. FCC*, 940 F.3d at 59-63), *id.* at ¶ 33 (citing *Mozilla v. FCC*, 940 F.3d at 60).
[51] *Mozilla v. FCC*, 940 F.3d 1, 18, 59-63 (D.C. Cir. 2019); 47 U.S.C. §151.
[52] *See RIF Remand Order*, at ¶ 21, ¶¶ 32-36.
[53] *See RIF Order*, at ¶ 5, ¶¶ 162-169; *RIF Remand Order*, at ¶ 21, ¶ 32.

Indeed, another problem with the Commission's national security and public safety rationales is that they rest on a fatal conceit that a government bureaucracy can better anticipate and respond to threats to innovative private networks than the broadband ISPs who invest in, build, and operate those networks and who have a vested interest in protecting their own infrastructure and the integrity of their services. This conceit is especially evident with regard to the Commission's related rationales that imposing public utility regulation on broadband services will enhance cybersecurity as well as network resiliency and reliability.[54]

The Commission is neither the exclusive nor primary expert on cybersecurity policy. For instance, the 2013 Presidential Policy Directive on Critical Infrastructure Security and Resilience identifies a limited, if not subordinate role for the FCC in partnering with the Departments of Homeland Security and State and other federal departments and agencies in addressing communications sector vulnerabilities.[55] And where Congress has authorized the FCC to address national security matters, such as in the Secure Networks Act and the Secure Equipment Act, it his directed the Commission to follow or rely on other federal agencies.[56] But the Commission's regulatory proposal for addressing national security and cybersecurity is not based on any recognizable delegation of authority by Congress.

Additionally, public utility regulation is ill-suited to address cybersecurity and network resiliency. Utility regulation primarily is focused on non-discriminatory mandates for commercial services offered in concentrated static markets. But broadband services are information technologies offered in a technologically dynamic competitive market in which

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[54] *See* Notice, at ¶¶ 30-32, ¶ 39.
[55] *See* The White House, Presidential Policy Directive 21: Critical Infrastructure Security and Resilience (February 12, 2013), at 5, available at: https://www.cisa.gov/sites/default/files/2023-01/ppd-21-critical-infrastructure-and-resilience-508_0.pdf.
[56] *See* 47 U.S.C. § 1601(c).

private providers are constantly updating and upgrading their networks and changing engineering tactics to address threats to the security and integrity of their services. There is no basis for concluding that public utility regulation will sharpen ISPs' abilities to foresee and address threats to their networks. Regulatory intervention would amount to second-guessing ISP engineering decisions and risk diverting limited private financial resources toward the Commission's preferred priorities and away from threats that ISPs, based on their expertise and experience, consider the most pressing.

C. The Proposed Paid Prioritization Ban Is at Odds With the Commission's Ostensible Goal of Promoting Public Safety

Still another reason why the proposed rulemaking is unlikely to benefit public safety is that it includes a ban on paid prioritization arrangements.[57] But if allowed, such arrangements actually can benefit public safety by offering law enforcement and other first responders improved communications capabilities. As the Free State Foundation stated in comments that were quoted in the *RIF Remand Order*:

> Sharing commercial cores and network traffic on an undifferentiated basis with non-public safety users can pose serious risk to the integrity of public safety communications in times of emergency and other peak congestion situations. When networks are congested or at risk of becoming so, providing network preferences for public safety-related data traffic can prevent disruptions of calls and other timely information being sent to and from first responders and other responsible agencies.[58]

Paid prioritization arrangements can provide government agencies responsible for public safety communications with dedicated networks and Quality-of-Service guarantees to ensure higher quality and improved reliability compared to traditional best-efforts networks.

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[57] *See* Notice, at ¶¶ 157-162.

[58] *RIF Remand Order*, at ¶ 55 (quoting Comments of the Free State Foundation, Restoring Internet Freedom, Docket 17-108, *et al*., at 7-8 (April 17, 2020), available at: https://freestatefoundation.org/wp-content/uploads/2020/04/FSF-Mozilla-Remand-Comments-Final-041720.pdf.

The *RIF Order*'s repeal of the *Title II Order*'s ban on paid prioritization arrangements cleared up any confusion regarding the permissibility of such arrangements for public safety purposes. Under the *RIF Order*, paid prioritization arrangements are permissible not only for public safety purposes that unquestionably fit within some pre-designated rule definitions, but other public safety-related functions not so pre-designated. The *RIF Remand Order* reaffirmed this result, based in part on its finding that "even if ISP conduct like paid prioritization were to occur, the record does not reveal likely practical harm to applications used for public safety communications over mass market broadband Internet access service."[59] And in the *RIF Remand Order*, the Commission found that "[c]oncerns expressed by commenters regarding potential adverse effects to public safety as a result of paid prioritization of non-public safety communications appear to be purely hypothetical at this point."[60] Yet despite there being no evidence of harm to public safety following repeal of the *Title II Order*'s ban on paid prioritization arrangements, the Notice favors purely hypothetical concerns.

Moreover, despite the *RIF Remand Order*'s findings that: (1) "the Commission has long recognized and permitted prioritization of public safety communications,"[61] as critically important to protecting life and property; and (2) "nothing in [the Commission's] rules currently prevents service providers from prioritizing public safety communications";[62] and despite the *Title II Order*'s acknowledgements that (3) "in connection with an emergency, there may be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate

[59] *RIF Remand Order*, at ¶ 44.
[60] *RIF Remand Order*, ¶ 56.
[61] *RIF Order*, at ¶ 55.
[62] *RIF Order*, at ¶ 55.

disaster relief and other emergency response efforts, or for other emergency communications";[63] and (4) as well as the *Title II Order*'s acknowledgments that traffic prioritization practices that serve public safety as potentially qualifying under the reasonable network management exception to rules against blocking and throttling as well as the general conduct standard,[64] the Notice does not even appear to directly permit any form of traffic prioritization for serving public safety purposes. And to the extent that such an omission is inadvertent, it might suggest the Commission has not adequately carried out its duty to consider the negative effects that a ban on paid prioritization can have on "promoting safety of life and property through the use of wire and radio communications."[65]

IV. Reclassification of Broadband Services Is Not Necessary to Protect Consumers

The proposed Title II reclassification and imposition of public utility regulation on broadband Internet access services is a paradigmatic solution in search of a problem. The Commission's rulemaking proposal singles out broadband ISPs for regulation in the name of advancing Internet openness, despite the clear evidence that broadband ISPs are not blocking, throttling, or otherwise harming consumers' ability to access lawful content of their choice on the Internet. This is not true of Big Tech platforms, including Alphabet's Google and YouTube, Amazon, Meta's Facebook and Instagram, Microsoft's LinkedIn, and TikTok, where there appears to be a *de facto* consensus that it is permissible to censor speech with which those platforms disagree or which are contrary to certain narratives advanced by federal government agencies or other interests. This *de facto* consensus of ISPs favoring free speech and consumer access to lawful content is expressed in terms of service pledges. Those terms of service are fully

[63] *Title II Order*, at ¶ 302.
[64] *Title II Order*, at ¶ 125 n.284 ("Other forms of traffic prioritization, including practices that serve a public safety purpose, may be acceptable").
[65] 47 U.S.C. 151.

enforceable by the FTC, but Title II reclassification would strip the FTC of jurisdiction and cause Internet subscribers to lose those protections.

A. The Notice Fails to Show That ISPs Are Blocking, Throttling, or Otherwise Harming Consumers' Ability to Access Lawful Content of Their Choice

That the Notice fails to identify any real-world instances of ISPs blocking, throttling, or otherwise interfering with consumers' ability to access lawful Internet content is readily explainable by market economic realities. As the Free State Foundation's comments in the *Restoring Internet Freedom* proceeding stated: "There is industry near-consensus that end user subscribers to broadband Internet access service should not be subject to blocking, substantial degrading, throttling, or unreasonable discrimination by broadband ISPs. This consensus is widely reflected in the service terms that broadband ISPs furnish to their end user subscribers."[66] Since the *RIF Order* was adopted, broadband ISPs have remained effectively unanimous in refusing to block or throttle their subscribers access to lawful content.

The *RIF Order*'s repeal of Title II classification of broadband Internet access service was preceded by failed doomsday predictions that the agency's decision would cause Internet traffic to come to a grinding halt or turn broadband into a luxury for the elite few. Failed predictions of the Internet's doom without public utility regulation call into question any rationales for re-imposing *ex ante* Title II regulation based on deferrals to claimed agency expertise in this regard.

Confounding doom-and-gloom predictions about broadband network bias and an Internet bifurcated into "fast" and "slow" lanes in the absence of public utility regulation, in the years since the 2018 *RIF Order* reclassified broadband as a lightly regulated Title I "information service," broadband Internet network competition and performance have flourished. Importantly,

[66] Comments of the Free State Foundation, Restoring Internet Freedom, WC Docket No. 17-108 (July 17, 2017), at 42 (quoted in *RIFO Order*, at ¶ 141 n.505).

more consumers at the end of 2023 have access to broadband and to more choices among service providers than ever before. Data cited in the Commission's *2022 Communications Marketplace Report* indicates that, as of December 2021, 98.2% of the U.S. population lived in areas with access to broadband services offering speeds of at least 25 Mbps/3 Mbps.[67] And 99.5% of the population living in urban areas had similar access.[68] These figures demonstrate notable progress compared to year-end 2018, when 94.5% of the population had access to at least 25 Mbps/3 Mbps service and 98.5% in urban areas had such access.[69] And for Americans in rural areas, at the end of 2021, 92.3% had access to at least 25 Mbps/3 Mbps service, up significantly from the end of 2018, when just 77.8% in rural areas had such access.[70]

Undoubtedly, even more Americans have access to broadband and choices among competing providers at the end of 2023, as the November 2023 update to the National Broadband Map indicates that unserved homes and businesses have decreased to 7.2 million locations, down from 8.3 million locations according to the May 2023 version of the map.[71] According to the map, there are 115 million total broadband serviceable locations, an increase of 800,000 since May of this year.[72]

Moreover, between the end of 2019 and the end of 2021, fixed terrestrial residential connections with 100 Mbps download speeds increased from about 66.4 million to 82.9 million, up approximately 25%.[73] As of that date, about 64% of households were located in census blocks

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[67] FCC, Communications Marketplace Report, *2022 Communications Marketplace Report*, GN Docket 22-203 (released December 30, 2022), at ¶ 341 (Fig. III.A.1a).
[68] *2022 Communications Marketplace Report*, at ¶ 341 (Fig. III.A.1a).
[69] *2022 Communications Marketplace Report,* at ¶ 341 (Fig. III.A.1a).
[70] *2022 Communications Marketplace Report,* at ¶ 341 (Fig. III.A.1a).
[71] *See* Jessica Rosenworcel, Notes from the FCC: "National Broadband Map 3.0: Thankful for Continued Improvements" (November 17, 2023), available at: https://www.fcc.gov/news-events/notes/2023/11/17/national-broadband-map-30-thankful-continued-improvements.
[72] *See* Jessica Rosenworcel, Notes from the FCC: "National Broadband Map 3.0: Thankful for Continued Improvements."
[73] *2022 Communications Marketplace Report,* at ¶ 16.

with at least two options for services at 100/20 Mbps.[74] Additionally, residential fixed connections in the United States increased from approximately 101.3 million connections in 2018 to over 115.5 million connections in 2021.[75]

Additionally, speeds are even faster than ever before, effectively refuting doom claims about Internet "slow lanes." According to Ookla's Global Speed Index, in October 2023 the median download/upload speeds for fixed broadband was 215/23 Mbps and the median download speed for mobile broadband was 103/9 Mbps.[76] USTelecom's "2023 Broadband Pricing Index" found that, between 2015 and 2023, "download speeds offered in the most popular tier increased by 141.5%, while upload speeds increased by nearly 285%," and that "[i]n the fastest-offered tier, download speeds increased by 117.1%, with upload speeds up by nearly 90%."[77] And HighSpeedInternet.com's Internet speed test shows a national average download speed in 2023 of 171.3 Mbps, up 44% compared to 2022, when the average speed was 119.03 Mbps.[78] This is significantly faster than the reported 2022 national average of 42.86 Mbps.[79]

The increased competitive choices have been enabled by rollouts of next-generation networks – including network technologies that were not in commercial operation when the *RIF Order* was adopted. One of the key developments in broadband service capabilities since early 2018 is strong deployment of high-speed fiber networks. Between the end of 2019 and the end of

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[74] *2022 Communications Marketplace Report*, at ¶ 16.
[75] *2022 Communications Marketplace Report*, at ¶ 30.
[76] Ookla, Speedtest Global Index: United States Median Country Speeds October 2023, available at: https://www.speedtest.net/global-index/united-states#market-analysis.
[77] Arthur Menko, Business Planning, Inc., "2023 Broadband Pricing Index: Broadband Prices Continue to Decline (released by US Telecom on October 11, 2023), at 3, available at: https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf.
[78] *See* Peter Holslin (Rebecca Lee Armstrong, ed.), "The 10 Fastest and Slowest States for Internet Speeds in 2023," HighSpeedInternet.com (November 3, 2023), available at: https://www.highspeedinternet.com/resources/fastest-slowest-internet.
[79] *See* Trevor Wheelwright (Cara Haynes, ed.), "The State of the Internet in 2021: Internet Speeds on the Rise Nationwide," HighSpeedInternet.com (February 1, 2023), available at: https://www.highspeedinternet.com/resources/state-of-the-internet-2021.

2021, "residential fiber-to-the-premises (FTTP) connections increased from 16.3 million to 24.2 million, a 49% increase in two years."[80] Also, between 2017 and 2021, total U.S. households with access to FTTP increased from 29.3% to 44.7%, and rural households with FTTP access increased from 16% to 28%.[81] And, undoubtedly, there are many more FTTP connections at the end of 2023. Indeed, the Fiber Broadband Association reports that 51.5% of primary residences now have access to fiber broadband services.[82]

Another development in broadband capabilities since early 2018 is widespread DOCSIS 3.1 cable technology upgrades. Between the end of 2019 and the end of 2021, residential cable connections climbed from 67.1 million to 71.8 million.[83] And cable operators are now at the early stages of DOCSIS 4.0 network upgrades across their geographic footprints, which will deliver high-capacity bandwidth and multi-gigabit speeds.[84] Also, Charter Communications is continuing to expand its footprint into new territories with buildouts enabled by Rural Digital Opportunity Fund (RDOF) subsidy grants.[85]

The most momentous development in the broadband market since early 2018 is the launch and rapid expansion of wireless 5G networks. The dramatic impact of 5G network service rollouts on the broadband market competition and the expansion of consumer service choices cannot be understated. Mobile 5G networks provide a genuine wireless-only option for broadband service, dramatically outperforming prior generations of mobile wireless services.

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[80] *2022 Communications Marketplace Report*, at ¶ 20.
[81] *2022 Communications Marketplace Report*, at ¶ 355.
[82] *See* Masha Abarinova, "More than 50% of U.S. homes now have access to fiber, FBA says," *FierceTelecom* (December 11, 2023), at: https://www.fiercetelecom.com/broadband/more-50-us-homes-now-have-access-fiber-fba-says.
[83] *2022 Communications Marketplace Report*, at ¶ 23.
[84] *See, e.g.,* Masha Abarinova, "Comcast turns up DOCSIS 4.0 speeds in Atlanta," *FierceTelecom* (November 14, 2023), at: https://www.fiercetelecom.com/broadband/comcast-turns-docsis-40-speeds-atlanta?utm_medium=email&utm_source=nl&utm_campaign=FT-NL-FierceTelecom.
[85] *See, e.g.,* Julia King, "Charter adds 63k subscribers in Q3, eyes more rural builds," *FierceTelecom* (October 27, 2023), at: https://www.fiercetelecom.com/broadband/charter-adds-63k-subscribers-q3-eyes-more-rural-builds.

Mobile 5G capabilities include speeds and capacity sufficient to support common consumer uses – including social media, HD video streaming, and live two-way videoconferencing – dramatically outperforming prior generations of mobile wireless services.

When the *RIF Order* was adopted, commercial 5G mobile networks were not in operation. The overall rate of nationwide 5G network deployment by the three major mobile broadband ISPs – AT&T, T-Mobile, and Verizon – is 42% faster than 4G networks.[86] And by the end of 2022, the three nationwide wireless providers had sunset their 3G networks in order to repurpose more mid-band spectrum for their growing 5G networks. Indeed, T-Mobile's 5G service coverage now extends to 330 million Americans, or 98% of the population,[87] and it plans to expand 5G coverage to 99% of the population by 2026.[88] Meanwhile, Verizon's 5G network covered 200 million people in the first quarter of this year, with plans to cover 250 million people by the end of 2024.[89] And AT&T reportedly expects to cover 200 million people or more with 5G services by the end of the year.[90] Other market competitors, including C Spire, US Cellular, DISH Wireless, Xfinity Mobile, and Spectrum Mobile also offer 5G mobile services.

Additionally, rapid deployments of 5G networks have facilitated market entry by wireless providers into the fixed residential broadband market. The nationwide rollout of 5G fixed wireless access (FWA) services now gives Americans a new facilities-based competitor for fixed broadband. Whereas there were zero mass-market retail 5G FWA subscribers at the start of 2018,

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[86] *See* Comments of CTIA, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 GN Docket No. 22-69 (June 30, 2022), at 4.
[87] *See* Jeff Moore, "T-Mobile 5G covers 98% of U.S. population, other countries lag – Moore" *FierceWireless* (October 26, 2023), at: https://www.fiercewireless.com/5g/t-mobile-5g-covers-98-us-population-other-countries-lag-moore?utm_medium=email&utm_source=nl&utm_campaign=FT-NL-FierceWireless
[88] Comments of T-Mobile USA, Inc., Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (May 16, 2022), at 3-4.
[89] *See* Moore, "T-Mobile 5G covers 98% of U.S. population, other countries lag – Moore" *FierceWireless*
[90] *See* Linda Hardesty, "AT&T reports 468,000 postpaid phone net adds in Q3 2023," (October 19, 2023), at: https://www.fiercewireless.com/wireless/att-reports-468000-postpaid-phone-net-adds-q3-2023

as of the third quarter of 2023, Verizon reportedly has 2.7 million FWA subscribers and T-Mobile reportedly has 4.2 million FWA subscribers.[91] Also, "the telecom industry has been adding fixed wireless access (FWA) subscribers at a clip of between 900,000 and 1 million per quarter over the past five quarters" with similar results expected for the fourth quarter of 2023 and the first quarter of 2024.[92] And the real significance of 5G FWA lies in its expansion of the overall broadband market. It is reported that "FWA has claimed more than 80% of industry broadband adds in the U.S. over the last six quarters," as Recon Analytics found that nearly 20% of FWA subscriber additions are new to broadband service.[93]

Another increasingly competitive choice for Americans is satellite broadband service. Aside from widely available broadband satellite offerings by ViaSat and HughesNet with advertised speeds of 25/3 Mbps, the *2022 Communications Marketplace Report* acknowledged "the rapid expansion of LEO [low earth orbit] satellite constellations and the emergence of new players in the commercial satellite industry," including services offered by OneWeb and Starlink.[94] LEO satellite deployments now enable more users to access broadband with better capacity and speeds, as well as with improved latency over prior generations of satellite service.

The performance of U.S. broadband networks in successfully accommodating dramatic spikes in Internet traffic during the 2020-2021 lockdowns constitutes another intractable counterfactual to the Notice's empty narrative about the need for tighter government controls

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[91] *See* Masha Abarinova, "Verizon gains 72,000 Fios subs in Q3, total broadband base surpasses 10M," *FierceTelecom* (October 24, 2023), available at: https://www.fiercetelecom.com/broadband/verizon-gains-72000-fios-subs-q3-total-broadband-base-surpasses-10m?utm_medium=email&utm_source=nl&utm_campaign=FT-NL-FierceTelecom; Dan Meyer, "T-Mobile 5G FWA soars, takes $471M job cut charge," sdxcentral (October 25, 2023), available at: https://www.sdxcentral.com/articles/news/t-mobile-5g-fwa-soars-takes-471m-job-cut-charge/2023/10/.

[92] Linda Hardesty, "Fixed wireless expands the overall broadband market," *FierceWireless* (Nov. 21, 2023), at: https://www.fiercewireless.com/wireless/fixed-wireless-expands-overall-broadband-market.

[93] Hardesty, "Fixed wireless expands the overall broadband market," *FierceWireless.*

[94] *2022 Communications Marketplace Report*, at ¶ 200, ¶ 401.

over broadband networks to prevent unspecified future anticompetitive harms.[95] In 2018, almost no one would have predicted that everyday Americans would be made subject to stay-at-home orders and, in consequence, they would dramatically ramp up use of network capacity through heavy usage of social media, online video delivery services, and live two-way videoconferencing services. Despite myriad other negative effects of government-imposed lockdowns, including labor shortages and supply chain problems, next-generation network infrastructure deployments continued and American consumers enjoyed significantly improved capabilities as well as better pricing options. By contrast, in several European countries that apply public utility-like restrictions on broadband networks, network speeds slowed, service providers engaged in throttling of content such as Netflix, and users were urged to reduce their Internet usage.

B. ISPs Have Economic Incentives to Ensure Subscribers Have Access to the Lawful Content of Their Choice

Both the Commission's failure to identify any real-world instances of ISPs blocking, throttling, or otherwise harming consumers ability to access lawful Internet content and the dramatic improvement in Internet network performance following repeal of Title II regulation are readily explainable by economic realities of today's broadband marketplace. Broadband ISPs have strong financial incentives to provide consumers widespread access to lawful content.[96] More specifically, ISPs have unmistakably obvious incentives to maximize returns on their network investments by retaining existing subscribers and by adding new subscribers. Annual capital investments in network facilities by broadband ISPs are enormous, with USTelecom

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[95] *See RIF Remand Order*, at ¶ 36 (observing U.S. broadband networks' abilities to handle "unprecedented increases in traffic" and "shift in usage patterns" during lockdowns). For further discussion of U.S. broadband network performance during lockdowns, *see also* Seth L. Cooper, "The FCC Should Reaffirm Its Successful Internet Freedom Policy: Broadband Consumers are Better Off Now Than Three Years Ago," *Perspectives from FSF Scholars*, Vol. 15, No. 55 (October 21, 2020), available at: https://freestatefoundation.org/wp-content/uploads/2020/10/The-FCC-Should-Reaffirm-Its-Successful-Internet-Freedom-Policy-102120.pdf.

[96] *See RIF Order*, at ¶ 87 ("economic incentives, including competitive pressures, support Internet openness").

reporting $102.4 billion in capital expenditures for 2022, up from $86 billion in 2021 and $79.4 billion in 2020.[97] And CTIA reported an annual record of nearly $39 billion in capital expenditures by wireless providers last year, up from $35 billion in 2021.[98] Indeed, capital investment has increased each year going back to 2017, when annual wireless investment totaled $26 billion.[99]

By offering subscribers access to whatever lawful Internet content they want, broadband ISPs enhance the perceived value of their services and thereby increase demand, subscribership, and opportunities for financial returns and profits. As the *RIF Order* recognized, "[t]he content and applications produced by edge providers often complement the broadband Internet access service sold by ISPs, and ISPs themselves recognize that their businesses depend on their customers' demand for edge content."[100]

On the flip side, broadband ISPs lack financial incentives and ability to block, throttle, or otherwise harm consumer access to lawful Internet content. Blocking or throttling access to edge content that constitutes complementary goods for Internet access service most likely would reduce the perceived value of the service for actual and potential subscribers and thereby reduce consumer demand for the services of an ISP that engages in such conduct. Any attempt by an ISP to harm its own subscribers for short-sighted financial gain would substantially reduce its good will with subscribers and potential subscribers.

Additionally, it is unlikely that ISPs have the ability to extract short term-financial gains by engaging in unreasonable discrimination or anticompetitive conduct for purposes of

[97] *See* USTelecom, "2022 Broadband CapEx Report: Broadband Providers Invested $102.4B In Communications Infrastructure Last Year."
[98] *See* CTIA, 2022 Annual Survey Highlights (July 25, 2023), at 4.
[99] *See* CTIA, 2022 Annual Survey Highlights (July 25, 2023), at 4.
[100] *RIF Order*, at ¶ 117.

promoting content that they own or in which they have a business stake. The Commission's proffered concerns about broadband ISPs favoring their own or their preferred content over other content to the detriment of subscribers are not supported by any concrete examples and is based entirely on generalized speculations.

Moreover, many ISPs have little or no content offerings and thus little or no opportunity to push their content on subscribers in an unreasonably discriminatory manner. This fact also undermines the basis for the Commission's blanket assumption regarding broadband ISPs' incentive and ability to unreasonably discriminate.[101] And with respect to those ISPs who do have vertically integrated content, their affiliated content faces strong competition from large edge content companies with market capitalizations and market shares for online content that far exceed anything belonging to major ISPs. Major online edge companies like Alphabet, Amazon, and Apple have experienced no difficulty in looking out for themselves and competing. Past speculations about anticompetitive harm arising from broadband ISPs' ownership of online video services as a basis for regulatory intervention have not proved to be correct. The Notice's claims that public utility regulation is necessary to prevent future unspecified harms effectively rehash the predictive mistakes made by the Commission in the past proceedings.

The effective competition that broadband ISPs face from market rivals makes it unlikely that ISPs could generate any short-term or long-term financial gain by unreasonably discriminating in favor of their preferred online content or engaging in anticompetitive conduct that would harm access to other content. ISPs that engage in such tactics would risk losing existing and potential subscribers to their market competitors. The agency concluded correctly in the *RIF Order* that the market is competitive.[102] And, as observed earlier, the competitiveness of

[101] *See* Notice, at ¶ 125.
[102] *See, e.g., RIF Order*, at ¶¶ 28-29.

the broadband Internet access services market has increased since early 2018 due to expansion of fiber, rapid nationwide deployment of 5G mobile and 5G FWA services, DOCSIS 3.1 upgrades, new offerings by hybrid cable mobile virtual network operator (cable MVNO) services, and next-generation LEO satellite broadband offerings.

C. The Department of Justice and Federal Trade Commission Have Antitrust Enforcement Powers to Address Anticompetitive Conduct, and the FTC Has Authority to Enforce ISP Pledges Not to Block, Throttle, or Otherwise Harm Consumers

Importantly, the Commission's transparency rule and FTC enforcement jurisdiction provide enforceable consumer protections that constrain the ability of broadband ISPs to surreptitiously engage in blocking, throttling, or any other type of harmful anticompetitive conduct – even assuming they wanted to do so. Under the transparency rule, ISPs must publicly disclose their network management practices in their terms of service and file those service terms with the Commission.[103] And in the event that an ISP failed to disclose any blocking or throttling practices, the ISP would be subject to enforcement actions by the FTC. Although the Notice appears to downplay the FTC's enforcement jurisdiction over ISP service terms, the FTC has authority to enforce those terms against ISPs and thereby prevent and discourage anticompetitive harm against consumers.[104]

The Notice similarly downplays the importance of antitrust enforcement by the Department of Justice and/or the FTC to protect consumers from anticompetitive harms.[105] Antitrust law is premised on consumer welfare, not protecting competitors from competition. The *ex post* approach provided by antitrust enforcement is disciplined by microeconomic insights, requires factual evidence of actual market power problems or consumer harms, and

[103] *See RIF Order*, at ¶ 215.
[104] *See RIF Order*, at ¶¶ 141-142 (consumer protection enforcement by the FTC).
[105] *See RIF Order*, at ¶¶ 143-154 (antitrust enforcement by the DOJ and FTC).

clearly puts the burden of proof on complainants. That targeted case-by-case approach is particularly fitting given the competitiveness of the broadband market.

D. The Broadband Market's Competitiveness Undermines the Virtuous Cycle Theory and the Case for Public Utility Regulation

When markets are dynamic and competitive, the optimal approach for promoting future innovation, investment, and consumer welfare is, at most, a light-touch regulatory policy. Given the dynamism and competitiveness of the broadband market, the light-touch policy adopted in the *RIF Order* is the policy best fit to promote future innovation, investment, and consumer welfare. Any significant alteration to this market-oriented policy generally ought to be predicated on the finding of demonstrated threat of an abuse of market power and a concomitant threat of consumer harm.

However, the proposed rulemaking is unsupported by findings of market power and it cites no evidence of consumer harm. The lack of any connection in the Notice between the proposed imposition of public regulation and market power is unsurprising given the broadband market is effectively competitive. Instead, the Commission exhumes the repealed *Title II Order*'s flawed application of the "virtuous cycle" theory to justify imposition of public utility regulation on broadband Internet access service.[106] The supposed key insight of the theory is that broadband ISPs control the point of Internet access between edge content providers and consumers. According to the Notice, ISPs' power as "gatekeepers" gives broadband ISPs "the incentive and the ability" to harm consumers by blocking content or discriminating against content providers.[107]

[106] *See, e.g.*, Notice, at ¶ 150, ¶ 163.
[107] Notice, at ¶ 125.

But the virtuous cycle theory all but amounts to the standard economic analysis of the incentives of a monopolist or a firm in a highly-concentrated market to restrict output and/or substantially run up prices. For this theory to be applicable, a broadband ISP must have a large market share and it must have some protection from new firms entering the market to compete against it. Conversely, if an ISP does not have a large market share and it faces existing competition, then any attempts it might make to extract high and inefficient returns and/or restrict service outputs will be ineffective because subscribers will switch to a competing provider. Moreover, if there is reasonable potential for market entry by other providers, then even a monopolist will recognize that attempts to impose inefficient service charges will give potential competitors more incentive to enter the market and take its customers.

Notably, the Notice's lack of any finding that broadband ISPs possess market power – and its implication that any such finding is unnecessary[108] – means that the Notice failed to provide factual support for a necessary condition for its virtuous cycle theory to furnish a basis for imposing public utility regulation on broadband ISPs. Indeed, as described earlier, the facts show that broadband ISPs have no economic incentive or ability to benefit economically from blocking, throttling, or otherwise unreasonably discriminating against content. According to the Commission's own report data, 99% of U.S. consumers enjoy a choice among competing mobile and fixed broadband ISPs. Additionally, since early 2018 there has been broadband market entry – by mobile 5G broadband providers, FWA providers, and fiber providers, as well as by LEO satellite providers and cable broadband providers in rural areas.

The Notice's "gatekeeper" analysis also cannot reasonably rely on the blanket position that mobile and fixed broadband services are not substitutes in all cases.[109] Dismissal of intermodal

[108] *See* Notice, at ¶ 127.
[109] *See Title II Order*, at ¶ 123 (internal quote omitted).

competition is unjustifiable given market evidence of cross-platform competition and mobile/fixed substitution. Market research and industry insights regarding mobile-only broadband usage and 5G FWA competition with other fixed platforms indicates that many consumers consider different fixed and mobile broadband platforms to be close or potential substitutes.[110]

Given the Commission's proposal to reimpose the repealed *Title II Order* rules almost verbatim, the Notice reasonably may be read to imply that the agency once again is relying upon the *Title II Order*'s false narrative that consumer "switching costs" – *i.e.*, time or money spent switching from one provider to another – are too high and creating monopoly power even when multiple broadband ISPs offer access in a given area.[111] But there is ample evidence that broadband providers offer inducements, such as early termination fee (ETF) buyouts, to switch providers that reduce or eliminate switching costs for many subscribers.[112] And evidence of subscriber churn indicates that consumers are not being unduly prohibited from switching and that ISPs do not possess monopoly or market power.

E. Reclassification Will Create a Gap in Privacy Protections for Broadband Subscribers

In its Notice, the Commission tentatively concludes that reclassifying broadband Internet access services as Title II "telecommunications services" would "support efforts to safeguard consumers' privacy and data security."[113] But this makes no sense. Reclassification of broadband

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[110] *See, e.g.*, Hardesty, "Fixed wireless expands the overall broadband market," *FierceWireless* (reporting on New Street Research's findings that "[i]n addition to general market expansion, FWA subs come from traditional cable and telco providers"); Masha Abarinova, "Charter CFO touches upon fiber, FWA competition," *FierceTelecom* (December 6, 2023)(reporting on perceptions about FWA competition with cable broadband), available at: https://www.fiercetelecom.com/broadband/charter-cfo-touches-upon-fiber-fwa-competition?utm_medium=email&utm_source=nl&utm_campaign=FT-NL-FierceTelecom.

[111] *See Title II Order*, at ¶ 81; *Title II Order*, at ¶ 123.

[112] For further discussion of mobile ISP offers to incentivize switching, *see* Comments of the Free State Foundation, Restoring Internet Freedom, WC Docket No. 17-108 (July 17, 2017), at 28-30.

[113] Notice, at ¶ 41.

services would have the effect of reducing privacy protections for subscribers to broadband services.

Although Congress has yet to pass a comprehensive statute addressing online privacy, the FTC currently has statutory authority to address privacy-related concerns of broadband subscribers, as well as the institutional competence and track record to do so.[114] In a March 2016 address given while serving as Acting Chairman of the FTC, Maureen K. Ohlhausen explained that "the FTC is the primary privacy and data protection agency in the U.S., and probably the most active enforcer of privacy laws in the world."[115] And the *RIF Order* cited Ms. Ohlhausen's observation that the FTC had "brought over 500 enforcement actions protecting the privacy and security of consumer information, including actions against ISPs and against some of the biggest companies in the Internet ecosystem."[116]

The FTC uses case-by-case investigations and can bring enforcement actions to stop harms to consumer privacy, including broadband ISP violations of terms of service regarding subscribers' privacy. FTC investigations and enforcement matters draw upon a wealth of institutional knowledge regarding consumer privacy expectations. The FTC's Bureau of Consumer Protection includes a Division of Privacy and Identity Protection. This Division works closely with the FTC's other divisions, including economists in the agency's Bureau of Economics as well as its investigative staff in field offices across the country, which also have expertise in consumer protection matters.

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[114] 15 U.S.C. § 45(a)(1). *See also RIF Order*, at ¶¶ 41-42.
[115] Maureen K. Ohlhausen, Commissioner, U.S. Federal Trade Commission, "Privacy Regulation in the Internet Ecosystem," Free State Foundation Eighth Annual Telecom Policy Conference (March 23, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/941643/160323fsf1.pdf.
[116] *RIF Order*, at ¶ 182.

However, Title II reclassification would remove the FTC's privacy oversight of broadband ISPs because the FTC Act prohibits the agency from regulating common carriers.[117] And because the FCC lacks general jurisdictional authority over broadband ISP privacy practices, Title II reclassification would reduce privacy protections for broadband subscribers. Indeed, the agency's authority over broadband privacy is further precluded by Congress's March 2017 repeal of the Commission's 2016 *Broadband Privacy Order*.[118] Under the Congressional Review Act, the Commission is now prohibited from imposing broadband privacy regulation "in substantially the same form" as the 2016 order.[119]

Furthermore, the Notice mistakenly relies on Section 222 as a source of authority for overseeing broadband ISPs' privacy and data protection practices.[120] Section 222 is limited to customer proprietary network information (CPNI) – a narrow category specific to the voice communications context. CPNI addresses telecommunications providers' collection and use of individualized subscriber information regarding the time and length of calls, phone numbers called, and consumer voice billing when such information "is made available to the carrier by the customer solely by virtue of the carrier-customer relationship."[121] The Notice does not substantiate the implied claim that reclassifying broadband under Title II and invoking Section 222 would confer meaningful protections on broadband subscribers.

Moreover, the Commission should recognize that singling out broadband ISPs for stringent privacy restrictions would be arbitrary and capricious because ISPs do not uniquely possess personal information. There is a diversity of personal data collection that takes place

[117] *See* 15 U.S.C. §§ 44, 45(a)(2); 47 U.S.C. § 153(51).
[118] *See* S.J.Res.34, 115th Cong. (2017), at: https://www.congress.gov/bill/115th-congress/senate-joint-resolution/34.
[119] 5 U.S.C. §§801(b)(2).
[120] *Id*. at ¶ 42.
[121] 47 U.S.C. § 222(h)(1)(A).

across the Internet ecosystem and which is beyond the Commission's jurisdictional limits. Alphabet (Google and YouTube) Apple, Amazon, Meta (Facebook and Instagram), Microsoft, TikTok, and other major Internet companies are by far the largest collectors of personal consumer data, not ISPs. Moreover, there are readily available ways for broadband subscribers to reduce significantly the amount of data that broadband ISPs collect about them, including use of virtual private network (VPN) services. Reportedly a third or more Americans use VPNs.[122]

Consumer online privacy should be protected by equal rules under a single enforcement authority.[123] Retaining FTC authority over broadband ISPs' privacy practices is consistent with such an approach. The Commission also can call on Congress to adopt a national framework for online privacy protection that will apply equally to broadband ISPs and edge providers.

V. Title II Reclassification Would Be Harmful to Innovation, Investment, and Consumer Access to Broadband Services

The Commission's proposed rulemaking would cause harm to innovation, investment, and consumer access to broadband through rate regulation in one form or another, institution of vague regulatory standards, and unwarranted restrictions on efficient and innovative service offerings.

A. The Proposed Regulation Would Make Harmful Rate Regulation Unavoidable

Rate regulation would be bad for consumers and for the country. Government controls on the prices that broadband Internet service providers can charge consumers would undermine the

[122] *See, e.g.,* Rohit Shewale, "25+ VPN Statistics in 2023 (Usage, Demographics & Trends)" demandsage (November 19, 2023), available at: https://www.demandsage.com/vpn-statistics/.

[123] For further discussion of the need for a national comprehensive data privacy framework and the downsides of conflicting state data privacy laws, *see, e.g*., Andrew Long, "Most States Compound the Dreaded Privacy 'Patchwork" Problem," *Perspectives from FSF Scholars*, Vol. 18, No. 31 (July 24, 2023), available at: https://freestatefoundation.org/wp-content/uploads/2023/07/More-States-Compound-the-Dreaded-Privacy-Patchwork-Problem-072423.pdf; Andrew Long, "In 2023, the Congressional Privacy Impasse Could Reach Its Breaking Point," *Perspectives from FSF Scholars*, Vol. 18, No. 6 (February 3, 2023), available at: https://freestatefoundation.org/wp-content/uploads/2023/02/In-2023-the-Congressional-Privacy-Impasse-Could-Reach-Its-Breaking-Point-020323.pdf.

service providers' market freedom to exercise their own best judgments about the value of their service offerings in relation to their competitors and to seek returns on their network investments. Any Commission-imposed restrictions on rates likely would undermine much-needed future private investment in infrastructure upgrades and new deployments to unserved and underserved Americans.

Despite disavowals of rate regulation by members of the Commission, support for Title II reclassification constitutes support for rate regulation of ISP services in a handful of ways. First and foremost, Title II *is* a rate regulation regime because the key provisions in Sections 201(b) and 202(a) provide that "all charges" must be "just and reasonable" and that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges."[124] Section 208(a) states that "[if]…there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of."[125]

Second, the Commission's proposed ban on paid prioritization necessarily involves rate regulation because it effectively sets a rate of $0 for delivering data with quality-guaranteed service over last-mile broadband networks.

Third, the proposal to subject network interconnection to regulatory intervention is rate regulation because the Commission necessarily would become involved in reviewing rates that broadband ISPs charge for peering or transit service.

Finally, any curtailment or modification of "free data" mobile broadband plans – sometimes also called "sponsored data" or "zero-rating" plans – necessarily constitutes rate regulation because it involves the Commission restricting usage categories that are subject to a rate charge of $0 when a subscriber's usage exceeds his or her monthly data allotments. The

[124] 47 U.S.C. § 201(b); 47 U.S.C. § 202(a).
[125] 47 U.S.C. § 208(a).

proposed Title II reclassification decision poses the specter of a Commission-level ban on free data plans. The Wheeler FCC found that certain free data plans were inconsistent with the *Title II Order* dictates,[126] and the Notice indicates that the Commission is now considering whether or not to ban them.[127]

The self-contradiction inherent in claiming to oppose rate regulation while simultaneously supporting Title II regulation cannot be escaped by suggesting "rate regulation" refers only to agency ratemaking proceedings that impose direct controls on retail prices. That claim would depend on acceptance of an arbitrarily narrow incorrect definition of rate regulation. The Notice and continuing debate over broadband network regulation show that "rate regulation" comes in many different forms.

The *Restoring Internet Freedom Order* recognized correctly the likely harm to investment posed by the prospective use of those provisions when it repealed the Title II regulation. As the *RIF Order* observed, "the *Title II Order* did not forbear from *ex post* enforcement actions related to subscriber charges, raising concerns that *ex post* price regulation was very much a possibility."[128] Concerns about *ex post* rate regulation would loom large if the Commission adopts its proposed rulemaking. In such a scenario, the Commission would have a positive duty to consider complaints that rates charged by broadband ISPs violate Sections 201(b) or 202(a).

Unfortunately, the Notice treads the exact same path toward *ex post* rate regulation as the *Title II Order*. The Commission proposes "to forbear from applying sections 201 and 202 to

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[126] *See* FCC (Wireless Telecommunications Bureau) "Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services" (released January 11, 2017); FCC (Wireless Telecommunications Bureau), Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services, Order (released February 3, 2017) (rescinding January report).
[127] *See* Notice, at ¶ 167.
[128] *RIF Order*, at ¶ 101.

BIAS insofar as they would support adoption of *ex ante* rate regulations for BIAS."[129] But the Commission otherwise is not forbearing from "[S]ections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide."[130] FSF Board of Academic Advisors member Daniel Lyons' critiqued the *Title II Order*'s half-baked attempt to avoid rate regulation through partial forbearance, explaining that "[t]he statutory language simply does not allow the Commission to be a disinterested observer of communications rates as Chairman Wheeler suggests. Rather, it not only invites but demands that the Commission intervene in the market, at least upon request, to pass judgment regarding whether individual carrier rates are just and reasonable."[131] That same critique is fully applicable to current proposed rulemaking.

B. The Proposed General Conduct ("Catchall Backstop") Standard Is Vague and Would Harm Innovation and Reduce Consumer Choice

In its Notice, the Commission proposes to re-establish a vague and open-ended "general conduct" standard for addressing alleged anticompetitive concerns in the broadband Internet access services market. The proposed standard is "to operate as the catch-all backstop" to the prohibitions contained in the three bright-line rules:

> *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*.[132]

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[129] Notice, at ¶ 104. *See also id*. at ¶ 97.
[130] Notice, at ¶ 103 (citing *Title II Order*, at ¶ 456).
[131] Daniel A. Lyons, "Title II Reclassification *Is* Rate Regulation," *Perspectives from FSF Scholars*, Vol. 10, No. 12 (February 25, 2015), available at: https://freestatefoundation.org//wp-content/uploads/2019/06/Title-II-Reclassification-Is-Rate-Regulation-022515.pdf.
[132] Notice, at ¶ 165 (italics in original).

But as Senior Judge Stephen Williams explained in his 2016 dissenting opinion in *US Telecom v. FCC*: "All of these terms—'unreasonably,' 'interfere,' and 'disadvantage'—are vague ones that increase uncertainty for regulated parties."[133]

The vague standard is to be applied on a case-by-case basis,[134] and in each case the Commission says it will determine whether an ISP's course of conduct violates the standard based on its weighing of seven factors: (1) end user control; (2) competitive effects, (3) consumer protection; (4) effect on innovation, investment, or broadband deployment; (5) free expression; (6) application agnostic; and (7) standard practices.[135] Yet, as Judge Williams observed, "these factors themselves are vague and unhelpful at resolving the uncertainty."[136] Indeed, the proposed elusive factors are of unclear meaning and they are not tied to any safe harbors, ascertainable economic theory, or legal precedents that would provide predictable application.

The *Title II Order* set forth short descriptions of the purported meanings of those same seven factors. And it appears the Commission will readopt those same descriptions, even though they exacerbate the vagueness problem. For example, the *Title II Order* stated that a practice allowing end-user control is less likely to violate the standard but "user control and network control are not mutually exclusive" and "many practices will fall somewhere on a spectrum from more-end-user-controlled to more broadband provider controlled."[137] However, "there may be practices controlled entirely by broadband providers nonetheless satisfy" the standard.[138] Also, in

[133] *US Telecom v. FCC*, 825 F.3d at 755 (Williams, S.J., dissenting).
[134] Notice, at ¶ 166.
[135] Notice, at ¶ 166.
[136] *US Telecom v. FCC*, 825 F.3d at 755 (Williams, S.J., dissenting).
[137] *Title II Order*, at ¶ 139.
[138] *Title II Order*, at ¶ 139.

purporting to explain the "application agnostic" factor, the *Title II Order* stated that practices that "do[] not differentiate in treatment of traffic, or if it differentiates in treatment of traffic without reference to the content, application, or device" will likely not violate the standard. But it noted that "there do exist circumstances where application-agnostic practices raise competitive concerns, and as such may violate our standards to protect the open Internet."[139] Go figure!

Additionally, the listed factors regarding effects of network management practices on competition as well as on innovation, investment, or broadband deployment are unhelpful because they are not tethered to any clearly ascertainable economic theory to provide predictable and consistent application. The *Title II Order* rejected antitrust-like market power analysis of competitive conduct,[140] and the Notice does not appear to view the matter differently. And there are no common law or agency precedents that directly inform or cabin the meaning of what constitutes "unreasonable interference" and "unreasonably disadvantage."

Moreover, the list of factors that define unreasonable interference/disadvantage is "non-exhaustive."[141] The Commission may include any additional factors that the agency might later conjure up in the midst of enforcement proceedings. And the Commission accords itself freewheeling authority to place relative weight on all factors as it chooses in light of the "totality of the circumstances" in the course of case-by-case adjudications.[142] Subjecting broadband providers to liability in enforcement proceedings for practices that are contrary to previously unannounced factors would be contrary to the fundamental rule of law principle that one should be able to know what the law is and be able to conform one's conduct to it. And notably absent

[139] *Title II Order*, at ¶ 139.
[140] *See Title II Order*, at ¶ 11 n.12 (stating that "these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential").
[141] Notice, at ¶ 166.
[142] *See* Notice, at ¶ 166.

among the listed factors in the Notice and among the descriptions of those same factors in the *Title II Order* are knowledge requirements, numerical thresholds, or other bright-line safe harbors to limit their scope and provide legal certainty.

The Notice does ask whether the rules should recognize certain practices as permissible under its standard, such as "free data" or "zero-rated" plans and "sponsored data" plans that enable mobile wireless subscribers to access certain online services without such access counting toward their monthly data plan allotments.[143] Such plans benefit consumers by offering them access to online content at no added cost, and they have been adopted by many consumers. Yet even if the newly-constituted Commission's majority later declares free and sponsored data plans to be permissible, such a declaration would only go partway in alleviating the ambiguities of the proposed general conduct standard.

Also, the proposed "reasonable network management" exception does not reduce legal uncertainty regarding the general conduct standard.[144] Indeed, the exception would apply narrowly. The *Title II Order* stated that "[f]or a practice to even be considered under this exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network management justification rather than other business justifications."[145] The line between technical network and other business justifications is by no means clear, but the Commission proposes to follow the *Title II Order*'s approach. Moreover, under that order, the agency apparently did not consider differential services to be based primarily on technical justifications. Thus, "a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has

[143] *See* Notice, at ¶ 167.
[144] *See* Notice, at ¶ 188.
[145] *Title II Order*, at ¶ 216.

subscribed… will not be considered under this exception."[146] Not surprising nor helpful for ISPs seeking regulatory certainty, that order also stated that "some network practices may have a legitimate network management purpose, but also may be exploited by a broadband provider" and thus prohibited under the vague standard.

According to the Notice, the Commission also is considering whether to reestablish an advisory opinion process for the Enforcement Bureau to declare whether specific types of conduct comply with the rule or not.[147] But advisory opinions would have no controlling legal effect and do not bind the Commission. In other words, those opinions do not provide ISPs with certainty about whether their conduct complies with the general conduct standard or not.

The harmfulness of this vague "general conduct" standard will be turbocharged by the pro-regulatory bias of the *Title II Order*'s enforcement standards that the Commission presumably intends to reimpose. Given the elasticity of scope and weight of the "general conduct" standard's non-exhaustive factors, it would be easy for a complaining party to make – according to the Commission's judgment – a *prima facia* case of a violation of the general conduct standard. Once *prima facie* cases are made, the broadband provider "must show that they are in compliance with the rules."[148] Furthermore, in that order the Commission acknowledged that "[w]e retain our authority to shift the burden of production" onto broadband providers when the agency deems it appropriate to do so in enforcement proceedings.[149] This burden-shifting authority was not original to the 2015 *Title II Order*'s enforcement rules, but a carryover from the 2010 *Open Internet Order*.[150] That history indicates that such burden-shifting

[146] *Title II Order*, at ¶ 216.
[147] *See* Notice, at ¶ 190.
[148] *Title II Order*, at ¶ 252.
[149] *Title II Order*, at ¶ 252.
[150] *See 2010 Open Internet Order*, at ¶ 157.

would be part of any rules that the Commission may later adopt based on its draft notice. The compound effect of reestablishing and combining the "general conduct" standard's ambiguous terms along with the *Title II Order*'s enforcement procedures means that ISPs will bear the burden of justifying their conduct in all but the most frivolous cases. Thus, vague standards combined with burden-shifting rules will allow the Commission to ban or restrict ISP practices based on little more than agency predilection rather than a clear showing of harm according to knowable rules. And as Judge Williams observed, application of Section 207 of the Communication Act would further increase uncertainty by making broadband providers subject to agency complaints or lawsuits brought by "[a]ny person claiming to be damaged by any common carrier."[151]

In *US Telecom v. FCC*, D.C. Circuit Court of Appeals upheld the *Title II Order*'s general conduct standard and rejected a Fifth Amendment Due Process Clause challenge based on the vagueness doctrine.[152] The doctrine "requires the invalidation of laws [or regulations] that are impermissibly vague" because regulated parties should know what is required of them so they may act accordingly" and so that "those enforcing the law do not act in an arbitrary or discriminatory way."[153] The D.C. Circuit panel's majority concluded that the general conduct factors and descriptions satisfied vagueness concerns. However, if the Commission reimposes the general conduct standard, the Supreme Court might reach a different conclusion on the due process issue of vagueness, or it might view the imposition of a vague "catch-all backstop" in conjunction with other public utility regulation as a reason why the proposed rulemaking constitutes a major rule requiring a clear statement of authorization by Congress.

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[151] *US Telecom v. FCC*, 825 F.3d at 756 (Stephens, S.J., dissenting) (citing 47 U.S.C. § 207).
[152] *US Telecom v. FCC*, 825 F.3d at 736.
[153] *US Telecom v. FCC*, 825 F.3d at 736 (*quoting FCC v. Fox Television*, 567 U.S. 239, 253 (2012).

In any event, the assurances of two out of three judges in *US Telecom v. FCC* that the "general conduct" standard isn't legally vague will provide no added certainty or consolation to broadband providers if the Commission decides to reimpose the "catch-all backstop." Broadband ISPs have finite economic resources, and they base their business decisions on known financial opportunities as well as knowable risks of loss. The general conduct standard poses serious risks of loss due to legal and regulatory uncertainty. Thus, the safer course for ISPs is to avoid investment or innovation in service offerings that could conceivably be challenged under the vague "general conduct" standard. Thus, to avert such harm to innovation, investment, and consumers choices among new types of service offerings, the Commission should not adopt its proposed "general conduct" standard.

C. The Proposed Rulemaking Would Jeopardize or Eliminate Access to "Free Data" and Similar Plan Options

In the Notice, the Commission indicates that it is considering whether or not to ban "free data" plans.[154] The Commission should not ban "free data" plans, and any regulation that would restrict or chill ISPs' offering of such plans would harm consumers by depriving them of choices they find beneficial.

"Free data" plans, or "sponsored data" or "zero-rated" plans, are consumer-friendly offerings that allow consumers to have unlimited access to specific websites or applications without such access counting towards monthly data caps or thresholds. Through these plans, social media services or streaming music service providers pay a portion of the costs of data traffic related to their applications, encouraging consumers to use their apps by providing cost savings. Low-income consumers especially benefit from accessing "free data" without paying a monetary fee.

[154] *See* Notice, at ¶ 166.

Consumers widely perceive free data plans as complements to plans with data thresholds or caps, since free data plans enable consumers to access certain websites or content without the traffic counting against the data allotments of their service plans. Unlimited data plans are viewed as substitutes to free data plans and data caps, particularly for consumers who use a lot of traffic. These substitutable options spur consumer demand and usage and allow for an efficient allocation of data usage based on consumer preferences.

In addition to benefitting consumers in the short-term by providing free data usage and enticing value-conscious consumers to increase their usage, free data plans promote long-term investment by mobile broadband ISPs. When consumers are free to choose the type of mobile plan that best fits their preferences their demand for services increases. Increased demand spurs additional content offerings from edge providers, thus increasing the financial incentive for ISPs to make network investments. And to the extent that edge providers benefit from covering a portion of the costs of data traffic associated with consumer usage of their content or applications, consumers enjoy a valuable discount while broadband ISPs can obtain increased returns on investment and draw from those increased returns to upgrade networks or deploy in underserved areas.

The regulatory uncertainty caused by the *Title II Order*'s general conduct standard and the Wheeler FCC's investigation of free data plans effectively halted new offerings for unlimited data plans.[155] But the Pai FCC' rescission of the Wheeler FCC's report and the *RIF Order*'s repeal of the *Title II Order* provided a market climate hospitable to innovative "free data plans."[156] And there is no evidence in the Notice of anyone being harmed by the offering of such

[155] *See* FCC (Wireless Telecommunications Bureau) "Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services" (released January 11, 2017).
[156] *See* FCC (Wireless Telecommunications Bureau), Wireless Telecommunications Bureau Report: Policy

plans. Accordingly, the Commission should not risk the elimination of "free data plans" by reimposing public utility regulation and the vague "general conduct" standard. The existing policy of market freedom should be retained to the benefit of consumers. Or at the most, the Commission should analyze future complaints involving innovations like "free data" plans under a commercially reasonable standard such as the one addressed later in these comments.

D. The Proposed Paid Prioritization Ban Would Harm Innovation and Reduce Consumer Choice

The Commission's proposal to impose an outright ban on paid prioritization arrangements would result in the elimination of pro-innovation and pro-consumer market arrangements that are commonplace throughout our economy.[157]

Evidence from other markets, including priority U.S. mail delivery options, U.S. TSA priority airline screening options, sports stadiums offering luxury boxes, and airlines offering first class seating, demonstrate that paid prioritization arrangements developed free from regulatory restriction generally result in increased capital investment, innovation, and benefit consumers. In view of the broadband market's competitiveness and the lack of any showing of likely harm, the Commission should not impose any blanket prohibition on ISPs' freedom to individually negotiate agreements to prioritize specific data traffic for compensation when other data traffic is not impaired or degraded.

Some specialized services for dedicated users require a high level of end-to-end reliability. The benefits from video phone calls and video streams, for example, are reduced when traffic congestion causes transmission delays on networks offering only "best efforts" broadband Internet services. Paid prioritization agreements that provide Quality-of-Service (Qos)

Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services, Order (released February 3, 2017) (rescinding January report); *RIF Order*, at ¶ 158.

[157] *See* Notice, at ¶ 158.

guarantees could improve the performance of those applications and therefore increase the perceived value of such services. At least some innovative edge providers have expressed interest in paying broadband ISPs for some form of ensured faster delivery in order to deliver a higher satisfaction consumer experience.

Consumers are likely to benefit from specialized services providing QoS guarantees that include data traffic priority arrangements negotiated between broadband ISPs and edge providers. Entrants in online services markets may seek such agreements for purposes of enhancing their competitiveness in online markets against Big Tech behemoths like Alphabet, Apple, Amazon, Meta, or Microsoft. And future web applications are less likely if their developers cannot be assured that they will have access to fast and stable Internet connections, as investors may be unwilling to risk investing in new applications absent prioritized data connections. The Notice's proposed absolute ban on paid prioritization agreements may well prevent these and other future services from developing at all. Also, as explained elsewhere in these comments, and as the *RIF Remand Order* rightly recognized, traffic prioritization – including paid prioritization arrangements – can provide enhanced support for law enforcement, first responders, and other emergency services.[158]

Importantly, paid prioritization agreements do not require the impairment or degradation of the broadband connections of Internet users who are not parties to such agreements. Email traffic, web surfing, most file downloading, and many other applications lose little or none of their value if their transmission is not prioritized. Further, lower-income consumers might prefer premium services in exchange for the opportunity to choose more affordable services that are enabled by paid priority agreements. By receiving higher payments for service from more

[158] *RIF Remand Order*, at ¶ 55. *See also id*. (*quoting* Comments of the Free State Foundation, Restoring Internet Freedom, WC Docket No. 17-108, at 7-8).

intensive users, pricing arrangements such as prioritized traffic deals can enable lower prices for users of standard services.

Unfortunately, the Commission wrongly proposes to constrain broadband ISPs' freedom to charge edge providers based on their relative usage of ISP network facilities. As Commissioner Simington astutely has observed, the proposal "prevents last-mile ISPs from being able to charge large originators of traffic, like streaming platforms, any transit fees, the desirability of which is a question of pure economics, not free speech" and "it makes any attempt by ISPs to use their immense infrastructure to provide enhanced services, like edge computing that could compete with Big Tech cloud services, legally suspect and therefore less likely to be undertaken."[159]

The Notice rehashes the *Title II Order*'s factually uncorroborated and entirely speculative scenario that allowance of paid prioritization arrangements would divide the Internet into "fast lanes" for those that pay tolls for fast access and "slow lanes" for those that don't.[160] And it repeats the unfounded claim that such arrangements would cause ISPs to reduce investments in their own network capacity and maximize profits by extracting payments from edge providers competing for their limited capacity.[161] But the *Title II Order* offered no evidence that these conjectured harms were occurring. Nor did it find that broadband ISPs had market power – a necessary requisite for the virtuous cycle theory to have any plausible validity.

Moreover, Tim Brennan, a former Chief Economist of the FCC and member of FSF's Board of Academic Advisors, has offered straightforward explanation for why the *Title II*

[159] FCC Commissioner Simington, Statement: "Simington Statement on Title II NPRM" (September 27, 2023), at: https://docs.fcc.gov/public/attachments/DOC-397287A1.pdf.
[160] Notice, at ¶ 158.
[161] Notice, at ¶ 158.

Order's purported economic reasoning for imposing a ban on paid prioritization arrangements was "irrelevant":

> In arguing against "paid prioritization," the FCC cited articles on what economists call "price discrimination" to suggest possible harms when a broadband provider charges different prices to content providers that compete with each other. But paid prioritization isn't price discrimination; it's charging higher prices for better service. These price discrimination articles are relevant only if there is no cost to providing better service, such as guaranteed speeds or minimal transmission gaps. The only way this can be done at no cost is that the existing capacity can provide the best service anyone would ever want at any time – that is, that capacity can never be congested. While counterintuitive, especially for wireless, some nonetheless believe this premise.[162]

Rather than return to the *Title II Order*'s "economics-free zone," the Commission should affirm the freedom of broadband ISPs to experiment with various pricing models that reflect relative cost and value considerations, including paid prioritization arrangements. And to the extent the Commission believes that some sort of added oversight is needed, it should analyze future complaints involving paid prioritization arrangements under a commercially reasonable standard such as the one outlined below.

VI. The FCC Does Not Have Authority Under the Constitution to Restrict Broadband ISPs' First Amendment Speech Under a "Use It or Lose It" Theory

Beyond the other legal problems with the Commission's proposal to regulate broadband ISPs like common carriers under Title II, the agency's proposal raises significant issues under the First Amendment. In contravention of the Supreme Court's 1994 decision in *Turner Broadcasting v. FCC*, the proposed rulemaking would burden broadband ISPs First Amendment rights to make editorial decisions regarding whether, what, and how content is transmitted through their networks – including editorial decisions involving paid priority arrangements and

[162] Tim Brennan, "Is the Open Internet Order an 'Economics-Free Zone'?", *Perspectives from FSF Scholars*, Vol. 11, No. 22 (June 28, 2016), at 2, available at: http://www.freestatefoundation.org/images/Is_the_Open_Internet_Order_an_Economics_Free_Zone_062816.pdf

free and sponsored data offerings – absent any showing of market power to justify the regulatory intrusion. Although the D.C. Circuit's 2016 decision in *US Telecom v. FCC* upheld similar restrictions contained in the *Title II Order*, First Amendment considerations raised by then-Judge Kavanaugh in his 2017 opinion dissenting from the denial of *en banc* rehearing have merit and should prompt the Commission to withdraw its proposal or at least opt for a less intrusive regulatory approach.

The Commission's proposal would significantly burden ISPs' rights to make editorial judgments relating to content transmitted through their networks. Those restrictions go beyond bright-line prohibitions on blocking or degrading of content – which are things that ISPs do not do. The agency's proposed prohibitions on offering paid prioritization arrangements – even if according priority to certain content does not discernably impair transmission of non-prioritized content – amount to restriction on ISPs' editorial judgment regarding speech content. As then-Commissioner Robert McDowell pointed out in dissenting from the *Title II Order*: "[W]hat are acts such as providing quality of service (QoS) management and content filters if not editorial functions?"[163] There also is a content-filtering and editorial aspect to offerings of free and sponsored data plans. Yet the proposed prohibitions on ISPs acting in any way that "unreasonably disadvantages" – according to the proposed bright-line rules and vague general conduct standard – certain content over other content based on its purported source or content effectively impairs the editorial judgment of ISPs.

In its Notice, the Commission claims that its proposed regulation satisfies First Amendment scrutiny, based largely on the *Title II Order*'s characterization of broadband ISPs as

[163] *Open Internet Order* ("Dissenting Statement of Commissioner Robert M. McDowell"), at 26.

"conduits of speech."[164] According to this view, broadband ISPs seemingly lack First Amendment speaker interests when they are providing broadband Internet access services.

But it is highly doubtful that a private actor's First Amendment rights disappear entirely or at least shrink to a level of constitutional insignificance upon deciding to offer broadband Internet access services. Supreme Court and lower court decisions recognize that First Amendment protections apply to those engaged in editorial and other speech activities using modern mass media technologies such as cable TV companies and ISPs.[165] Thus, as private actors, broadband ISPs possess freedom of speech rights in making editorial judgments about whether, what, and how content is transmitted through speech communication networks. Those rights include freedom from providing compelled speech.

The Notice's request for comment on whether or to what extent ISPs engage in content moderation, curation or other controls on content is premised on what then-Judge Kavanaugh criticized in his *US Telecom* dissent as the Commission's "use it or lose it" theory of First Amendment rights.[166] He said that the "use it or lose it" theory "finds no support in the Constitution or precedent."[167] And "the fact that the Internet service providers have not been aggressively exercising their editorial discretion does not mean that they have no *right* to exercise their editorial discretion."[168]

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[164] Notice, at ¶ 214 (*citing Title II Order*, at ¶¶ 544-548).
[165] *See, e.g.*, *Turner Broadcast System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994). *See also, e.g., Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[166] *See* Notice, at ¶ 216; *id*. at ¶ 216 fn.661 (cites to *Title II Order*, at ¶ 549); *US Telecom v. FCC*, 855 F.3d at 429 (Kavanaugh, J., dissenting from denial of rehearing *en banc*). See also *US Telecom v. FCC*, 825 F.3d 674, 743 (D.C. Cir. 2016) (stating that "a broadband provider does not—and is not understood by users to—"speak" when providing neutral access to internet content as common carriage").
[167] *US Telecom v. FCC*, 855 F.3d at 429 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[168] *US Telecom v. FCC*, 855 F.3d at 429 (Kavanaugh, J., dissenting from finial of rehearing *en banc*). *See also* Notice, at ¶ 216; *Title II Order*, at ¶ 549.

In other words, even though broadband ISPs function primarily as intermediaries of speech communication, this does not mean that they forfeit all free speech protections in making editorial decisions. Indeed, even if an ISP does not exercise control over content transmitted through its networks to the maximum extent by blocking, throttling, or otherwise unreasonably discriminating against content that it disfavors, this does not mean that the ISP, as a matter of constitutional right, must forswear offering traffic prioritization arrangements or quality of service guarantees that might offer preferences to certain content without impairing or degrading the access to non-preferred content.

Judges Srinivasan and Tatel surely are correct in their 2017 joint opinion concurring from denial of rehearing *en banc* in *US Telecom v. FCC* that "[t]he First Amendment does not give an ISP the right to present itself as affording a neutral, indiscriminate pathway but then conduct itself otherwise."[169] And under the *RIF Order,* ISP terms of service pledges to not block, throttle, or otherwise harm subscriber access to lawful content are enforceable against ISPs by the FTC, or in some cases by state attorneys general. However, the proposed rulemaking seeks to impose on broadband ISPs an idiosyncratic definition of neutrality that goes beyond what ISPs have pledged to do or not do. That is, the Commission's proposed rulemaking purports to speak definitively about the terms under which ISPs are offering service rather than respect ISPs' freedom to speak for themselves in defining terms of service. But under the First Amendment, an ISP likely does have the right to present itself as offering a neutral, indiscriminate pathway while qualifying the meaning of that offering to include certain traffic priority, speed, pricing, content, or other terms.

[169] *US Telecom v. FCC*, 855 F.3d at 390 (Srinivasan, J., and Tatel, J., concurring in denial of rehearing *en banc*).

Moreover, the Commission's belief that its proposed regulation is likely to be upheld as content-neutral and subject to intermediate First Amendment scrutiny is questionable.[170] Under the intermediate scrutiny test, the government's regulation impacting protected free speech interests must promote a "substantial governmental interest" that is unrelated to the suppression of free expression and that does not burden substantially more speech than is necessary to further that interest.[171] As Judge Kavanaugh explained:

> Applying intermediate scrutiny, the *Turner Broadcasting* Court held that content-neutral restrictions on a communications service provider's speech and editorial rights may be justified if the service provider possesses "bottleneck monopoly power" in the relevant geographic market. *Id.* at 661, 114 S.Ct. 2445; *see also id.* at 666-67, 114 S.Ct. 2445; *Turner Broadcasting II*, 520 U.S. 180, 117 S.Ct. 1174 (controlling opinion of Kennedy, J.). But absent a demonstration of a company's market power in the relevant geographic market, the Government may not interfere with a cable operator's or an Internet service provider's First Amendment right to exercise editorial discretion over the content it carries. *See Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *Cablevision Systems Corp. v. FCC* , 597 F.3d 1306, 1323 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).[172]

Although the Commission's proposed rulemaking appears to consider existence of market power irrelevant to its authority and rationale for imposing public utility regulation on broadband ISPs, the existence of market power does appear to matter for First Amendment purposes according to Supreme Court's 1994 *Turner Broadcasting v. FCC* decision.

In its 2016 decision in *US Telecom v. FCC*, the D.C. Circuit panel's majority determined that the *Turner Broadcasting System v. FCC* posed no obstacle to the Commission's public utility regulation under the 2015 *Title II Order*.[173] And Judges Srinivasan and Tatel, in their 2017

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[170] Notice, at ¶ 215.
[171] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. at 662; *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989); *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).
[172] *US Telecom v. FCC,* 855 F.3d at 431-432 (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (footnote omitted).
[173] *US Telecom v. FCC,* 825 F.3d 674, 739-744 (D.C. Cir. 2016).

concurring opinion, determined that, while the cable service context in which *Turner* was decided is distinguishable from the Internet access service context, the underlying legal issue question as to the applicability of *Turner* is a matter of constitutional law, not simply a matter of statutory interpretation. Accordingly, the judicial views expressed in *US Telecom v. FCC* on the First Amendment free speech implications of imposing common carrier regulation on broadband ISPs are not likely to be the final word on the matter.

If the Commission proceeds to adopt its regulatory proposal without making any concomitant findings of market power, and if then-Judge Kavanaugh's view of *Turner* is correct, then the proposal would fail First Amendment intermediate scrutiny. Even presuming that protection of access to diverse viewpoints constitutes a plausible substantial government interest to support its proposed rulemaking, the agency would face difficulty showing that a regulatory approach that outright prohibits data prioritization or other network management practices or places the burden on broadband ISPs of justifying such practices does not "burden substantially more speech than is necessary to further the government's legitimate interests."[174] As Judge Kavanaugh explained, "absent some market dysfunction, Government regulation of the content carriage decisions of communications service providers is not *essential* to furthering those interests, as is required to satisfy intermediate scrutiny."[175] Furthermore, it is not difficult to identify ways by which the Commission could limit the reach of its proposed regulation, including by retaining Title I status for broadband Internet access services and adopting a focused conduct standard, with the particulars knowable in advance, that requires showing of market power before engaging in regulatory intervention.

[174] *Turner*, 512 U.S. 662 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).
[175] *US Telecom v. FCC*, 855 F.3d at 433 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

Furthermore, the Commission ought not be confident that its proposal would survive First Amendment scrutiny for supposedly being "voluntary" and for permitting broadband ISPs to opt out of the rule by providing "edited services."[176] As Judge Kavanaugh wrote:

> If that description were really true, the net neutrality rule would be a simple prohibition against false advertising. But that does not appear to be an accurate description of the rule. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5682 ¶ 187 (2015) (imposing various net neutrality requirements on an Internet service provider that "provides the capability" to access "all or substantially all" content on the Internet) (italics omitted). It would be strange indeed if all of the controversy were over a "rule" that is in fact entirely voluntary and merely proscribes false advertising.[177]

And insofar as the Notice's provisions regarding allowance of "non-BIAS data services" or "specialized services" or some other provisions of a final rulemaking includes edited services and characterizes the rule as voluntary,[178] such provisions likely would be overshadowed by the ominous language in the Notice that the Commission will continue "closely monitoring" those types of services and that the Commission is "especially concerned" that such services may undermine the agency's policy goals.[179] In view of the vast powers that the Commission proposes to assume over broadband ISPs under Title II, as well as the agency's framing of specialized services, the Commission's proposal appears pointedly designed to deter ISP from "volunteering."

VII. If the FCC Determines It Possesses Authority to Regulate Broadband Services Under Section 706, It Should Adopt a Commercial Reasonableness Standard

Although the Major Questions Doctrine poses a likely insurmountable barrier to the Commission's proposal to impose public utility regulation on broadband Internet access services,

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[176] *US Telecom v. FCC*, 855 F.3d at 390 (Srinivasan, J. and Tatel, J., concurring in denial of rehearing *en banc*). *See also Title II Order*, at ¶ 556.
[177] *US Telecom v. FCC*, 855 F.3d at 430 n.8 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[178] *See* Notice, at ¶¶ 64-65.
[179] *See* Notice, at ¶ 65.

a less intrusive option is available that stands a better chance of being upheld in court. Court 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. In the event that Commission decides to forge ahead with a new regulation, a standard based on what is "commercially reasonable," if properly implemented, may allow the Commission to enforce a regulatory backstop against discriminatory ISP practices that does not result in agency overreach, while also ensuring flexibility for competing broadband ISPs to meet consumer demands.

A commercial reasonableness standard should be implemented through a complaint process that is adjudicated on a case-by-case basis. The Commission should adopt procedural rules that confer on broadband ISPs a presumption of reasonableness, and those rules should require that any prohibition or sanction the Commission proposes with respect to an ISP's conduct be based on findings, supported by clear and convincing evidence, that the ISP possesses market power and that the practice subject to the complaint caused consumer harm.

The Commission's 2011 *Data Roaming Order* and the D.C. Circuit's 2012 *Cellco Partnership v. FCC* decision upholding the order provide guideposts the agency can follow in establishing a commercial reasonableness standard that fits today's competitive broadband market. The Commission can adopt a set of specific factors for determining acceptable conduct, provided that those factors are stated with sufficient clarity to enable broadband ISPs to reasonably predict whether a particular course of conduct is commercially reasonable.

A. The FCC May Have Limited Authority Under Section 706 and Limited Ancillary Authority to Oversee ISP Practices on a Case-by-Case Basis

In its Notice, the Commission proposes to reinterpret Section 706 as a grant of affirmative authority to regulate broadband Internet access services.[180] As Free State Foundation scholars have explained in comments submitted in prior proceedings,[181] we believe that Section 706 is best understood as source of guidance for the Commission's exercise of its express authority under other statutory provisions. Thus, we believe the *RIF Order*'s interpretation of Section 706 as a hortatory provision was correct.[182] Nonetheless, the Notice correctly cites to decisions by the D.C. Circuit and the Tenth Circuit that have affirmed prior agency interpretations of Section 706 as affirmative grants of authority – albeit based on a deferential standard of review that may no longer be valid.[183] Although those judicial decisions characterize the Commission's affirmative grant of authority under Section 706 as limited,[184] it may be sufficient to support Commission oversight of broadband ISPs according to a light-touch regulatory framework that does not impose common carrier obligations.

Moreover, in conjunction with Section 706, the Commission also may have limited Title I ancillary authority to oversee broadband ISP practices pursuant to a light touch framework that does not impose common carrier obligations. In upholding the *Cable Modem Order*'s classification of broadband Internet access service as an "information service," the Supreme

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[180] *See* Notice, at ¶ 194.
[181] *See, e.g.*, Comments of the Free State Foundation, Restoring Internet Freedom, WC Docket No. 17-108 (July 17, 2017), at 33-37; Comments of the Free State Foundation, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion ("Section 706 Report"), GN Docket No. 11-121 (September 6, 2011) available at: https://freestatefoundation.org//wp-content/uploads/2019/08/Section-706-Comments-090611-Final.pdf.
[182] *RIF Order*, at ¶¶ 267-283.
[183] *See* Notice, at ¶ 194 n.620 (*citing Verizon v. FCC*, 740 F.3d 623, 635-642(D.C. Cir. 2014); *In re FCC 11-161*, 753 F.3d 1015, 1049-54 (10th Cir. 2014); *US Telecom*, 825 F.3d at 733-734 (D.C. Cir. 2016). *See also Verizon v. FCC*, 740 F.3d at 637, 641 (describing Section 706(a) and 706(b) as ambiguous).
[184] *See, e.g., Verizon v. FCC*, F.3d at 639.

Court in *Brand X* stated, in *dicta*, that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[185] At the same time, the D.C. Circuit's decision in *Comcast v. FCC* rejected the Commission's prior "leaping from *Brand X*'s observation that the Commission's ancillary authority may allow it to impose some kinds of obligations on cable Internet providers to a claim of plenary authority over such providers."[186] The D.C. Circuit rejected the Commission's invocation of ancillary authority to regulate broadband Internet access services because the "the Commission had identified no grant of statutory authority to which the *Comcast Order* was reasonably ancillary."[187] The Commission could not rely upon Section 706 as the statutory basis for the agency to ground any putative exercise of ancillary authority over broadband Internet access services because the Commission previously had determined, in its then-binding *Advanced Services Order*, that Section 706 did not constitute an independent grant of authority.[188] However, if the Commission decides to adopt its proposal to reinterpret Section 706 as an affirmative grant of authority, then the agency may have plausible grounds for claiming that adoption of a light-touch framework for broadband Internet services is reasonably ancillary to its authority under Section 706 to promote timely deployment of broadband services.

If the Commission decides to claim Section 706 authority – or Section 706 *and* Title I ancillary authority – over ISP practices, we urge that the exercise of any such authority be circumscribed and light touch. The most likely way to achieve this is by adoption of a properly defined "commercial reasonableness" standard that requires convincing evidence of market power and consumer harm as a predicate for imposition of a regulatory sanction.

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[185] 545 U.S. at 996.
[186] *Comcast v. FCC*, 600 F.3d at 650.
[187] *Comcast v. FCC*, 600 F.3d at 661 (quoted in *Verizon v. FCC*, 740 F.3d at 632).
[188] *Comcast v. FCC*, 600 F.3d at 658.

B. A Commercial Reasonableness Standard Should Be Enforced According to Deregulatory Presumptions on a Case-By-Case Basis

A "commercial reasonableness" standard should reflect both the limited nature of the Commission's assumed Section 706 authority over the broadband market and the competitive nature of the market. The Commission historically has applied a presumption of reasonableness to wireless service providers under Section 201 and 202 of the Communications Act.[189] In view of the innovative and competitive conditions in today's broadband market that offer consumers choices among service offerings, the same sort of deregulatory presumption of reasonableness should be applied to ISPs. That is, the commercial reasonableness standard should operate upon the presumption that broadband ISPs behave in ways that foster competition and enhance consumer welfare. At the same time, the commercial reasonableness standard should permit the presumption to be rebutted by the proffering of actual evidence of anticompetitive conduct. Absent clear and convincing evidence of market failure and consumer harm, the broadband ISPs' practices would be deemed commercially reasonable. The rebuttable presumption – which effectively is an evidentiary presumption – should favor marketplace freedom as a baseline principle.

The Commission should enforce the commercial reasonableness standard through case-by-case adjudication rather than by a set of *ex ante* substantive rules. And the standard should be applied according to procedural rules requiring the filing of an individual complaint by a party alleging actual harm to initiate an adjudication. To be considered by the Commission, a complaint would need to allege that a specified broadband ISP practice is unreasonable *and* provide evidence of consumer harm or evidence of market failure caused by the practice

[189] *See* 47 U.S.C. § 201(b) (prohibiting unjust or unreasonable "charges, practices, [or] classifications); id. at § 202(a) (prohibiting "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services").

specified. In conducting the adjudication, the evidentiary burden of rebutting the presumption of reasonableness would rest on the complainant. Adopting such procedural rules will help prevent abuse of the adjudicatory process and regulatory overreach.

C. The Commercial Reasonableness Standard Should Be Based on Market Power and Consumer Harm

The commercial reasonableness standard should incorporate requirements for findings of market power and consumer harm. Both concepts are rooted in microeconomic analysis and oriented to the protection of consumer welfare, not competitor interests. The underlying premise of an analytical standard based on market power findings and consumer harm is that competitive markets are most suited to enhancing consumer welfare and encouraging investment and innovation. At the same time, such a standard would restrict particular ISP practices in particular circumstances where such conduct has actual or likely anticompetitive or anti-efficiency effects that undermine the welfare of consumers. And by making affirmative findings of market power and consumer harm prerequisites for government intervention, the commercial reasonableness standard would prevent the Commission from regulatory overreach or arbitrariness.

The Commission should therefore draw on antitrust insights in developing and applying its commercially reasonable standard. Based on the record established and an analysis of the relevant factors, the Commission would only prohibit broadband ISPs from engaging in "commercially unreasonable" practices determined to constitute an abuse of substantial, non-transitory market power and that cause demonstrable harm to consumers. Thus, the Commission would focus, *post hoc*, on specific allegations of consumer harm in the context of a particular practice in a particular marketplace context.

D. Precedent Supports a Commercial Reasonableness Standard

The *Data Roaming Order* (2011) is an agency precedent that provides apparent support for a commercial reasonableness standard to govern broadband Internet access services. In that order, the Commission adopted a rule requiring "providers of commercial mobile-data services to offer data roaming agreements to other such providers on commercially reasonable terms and conditions, subject to certain limitations."[190] Under the rule, mobile data service providers are permitted to "negotiate the terms of their roaming arrangements on an individualized basis,"[191] and they similarly are permitted to tailor roaming agreements to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[192] Additionally, the order established an arbitration process for resolving disputes arising out of data-roaming negotiations.[193] The Commission's commercial reasonable standard was based on list of sixteen factors that "relate to public interest benefits and costs of [an] arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare and whether a particular data roaming offering is commercially reasonable" along with a catch-all factor for "other special or extenuating circumstances" factor.[194]

In *Cellco Partnership v. FCC*, the D.C. Circuit upheld the commercial reasonableness standard adopted in the *Data Roaming Order*.[195] The court concluded that the standard did not

[190] *Data Roaming Order*, at ¶ 1.
[191] *Data Roaming Order*, at ¶ 42.
[192] *Data Roaming Order*, at ¶ 45.
[193] *Data Roaming Order*, at ¶ 74.
[194] *Data Roaming Order*, at ¶ 86; *Cellco Partnership v. FCC* (2012) 700 F.3d 534, 548 (D.C. Cir. 2012)(upholding 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)).
[195] The D.C. Circuit upheld the data roaming rule based on the Commission's authority under Title III of the Communications Act of 1934, and the court did not reach the issue of whether Section 706 or the Commission's Title I ancillary authority supported the rule. *See Cellco Partnership v. FCC*, 700 F.3d at 541.

constitute common carriage regulation because the data roaming rule offered mobile providers more freedom than the "just and reasonable" standard for common carriers, including "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market" and "room left for individualized negotiation" in making agreements.[196]

Drawing on market power and consumer harm principles articulated above, the Commission ought to follow the approach in the *Data Roaming Order* by identifying more specific factors in identifying the "commercial reasonableness" of broadband ISP practices. The presence of any specific factors could be considered by the Commission in deciding whether a complaint is supported by enough evidence to rebut the deregulatory presumption. Under a commercial reasonableness standard, such factors could include whether a broadband ISP engages in blocking or throttling of legal content.

Importantly, specific factors set out by the Commission must be articulated clearly to enable broadband ISPs to reasonably determine whether a contemplated course of conduct would be deemed acceptable under the standard. Additionally, the commercial reasonableness standard must be implemented by the Commission in a sufficiently flexible way to allow ISPs to engage in individualized negotiations that are responsive to the differentiated demands of their customers in an evolving marketplace environment. In keeping with marketplace flexibility and responsiveness to differentiated consumer demands, the specific factors to be established by the Commission should not prohibit or restrict free or sponsored data plans, volume-based pricing plans, or paid prioritization arrangements (also known as differential services). As discussed elsewhere in these comments, such offerings may promote competition and offer benefits to consumers. A party filing a complaint alleging violation of the commercially reasonable conduct

[196] *Cellco Partnership v. FCC,* 700 F.3d at. at 548.

standard would have opportunity to proffer evidence that such an offering, plan, or practice was tied to the ISP's market power and that it amounted to anticompetitive conduct.

However, the Commission should depart the *Data Roaming Order* insofar as that order failed to broadly apply a presumption of reasonableness outside the context of signed agreement terms. As previously explained, the competitive conditions in the broadband market, as well as the lack of any evidence of anticompetitive conduct and consumer harm in the market, warrant the presumption that broadband ISPs' network management practices are reasonable.

VIII. Congress Should Adopt New Legislation If the FCC Concludes It Needs to Have Authority Over Broadband

After two decades of back-and-forth fighting and litigating regulation of broadband Internet access services at the Commission and in the courts, it would be appropriate for Congress to enact a law regarding the regulatory status of broadband ISPs and permissible or prohibited practices. In our view, the authority of the FCC should be narrowly-circumscribed and should require clear and convincing evidence of market failure and consumer harm before the imposition of any sanctions in a case-by-case adjudication. In light of the rapidly changing, dynamic nature of the Internet, and the competitive market that exists among broadband ISPs, any such "net neutrality" law should avoid absolute bans on ISPs practices, even ones on which there may be seeming consensus now.

The law should instead favor a standard requiring a convincing showing of market power and consumer harm. In other words, Congress should not adopt rules that, inevitably, will have the effect of deterring investment and innovation by virtue of being overly rigid or prescriptive. The legislative framework should be based on case-by-case adjudications of filed complaints and include a presumption of commercial reasonableness that is rebuttable by clear and convincing

evidence of market power and consumer harm – all of which are components of the commercially reasonable standard articulated elsewhere in these comments.

There are different ways such legislation might be drafted consistent with those core principles. In any event, enactment of legislation establishing Commission authority over broadband ISP practices according to a circumscribed commercially reasonable standard would provide considerable predictability for broadband Internet service providers. A significant degree of predictability and certainty in the legal regime are critical to promoting innovation and investment and also essential to maintaining the rule of law.

IX. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein. To ensure that innovation and investment in broadband networks continue to benefit Americans and rapidly deploy to those who are unserved and underserved, the Commission should preserve the policy of Internet freedom that defines broadband services as light-touch regulated Title I information services.

Respectfully submitted,

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