

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

In the Matter of)
)
Data Caps in Consumer Broadband Plans) WC Docket No. 23-199
)

**COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These comments are filed in response to a *Notice of Inquiry* released by the Federal Communications Commission on October 15, 2024, soliciting a fact-intensive record regarding the choice by some Internet service providers (ISPs) to establish prices for broadband Internet access service (BIAS) based upon data usage (misleadingly, and perhaps pejoratively, referred to as "data caps" in the *Notice of Inquiry*).¹ In brief, usage-based pricing empowers relatively lighter data consumers to pay less, shrinks digital divides through market-based price differentiation, and efficiently allocates substantial network-upgrade costs among subscribers. Usage-based pricing is a rate-setting choice, and any regulatory restrictions on its use would amount to harmful and most likely unlawful rate regulation of ISPs' services.

We are at least pleased that the Commission majority decided to utilize a *Notice of Inquiry* to investigate this topic rather than proceed, directly and unnecessarily, to a

* These comments express the views of Randolph J. May, President of the Free State Foundation, Andrew Long, Senior Fellow, and Michelle P. Connolly, Ph.D., member of the Free State Foundation's Board of Academic Advisors and Professor of the Practice in the Economics Department at Duke University. Dr. Connolly served two separate terms as Chief Economist for the FCC. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ See generally *Data Caps in Consumer Broadband Plans*, WC Docket 23-199, Notice of Inquiry (released October 15, 2024) (*Notice of Inquiry*).

*Notice of Proposed Rulemaking.*² As these comments demonstrate, usage-based pricing should be acknowledged to be both an indicator and a consequence of robust competition, not viewed as a reason for concern.

Intuitively, without usage-based pricing, we are at an "all you can eat" buffet. Since an extra plate of food or an extra dessert costs you nothing extra, we all end up eating more than normally. This raises the amount of food eaten by the average person at the buffet. In turn, this increases the costs to the restaurant which must then raise the price and/or the price/quality ratio of the buffet. All those who eat at the buffet therefore pay more than if consumers had to pay more for extra trips to the buffet. It also means that those who are lighter eaters are overpaying while heavy eaters are underpaying. If the government told all restaurants that they could only offer "all you can eat" buffets, then light eaters would choose to eat at home far more often.

In economic terms, regulation to prohibit data caps amounts to forcing an ISP to charge a consumer a price of zero for the use of an additional unit of data regardless of how much data the consumer already has used. When consumers incur zero marginal cost for using an additional unit of data, they will consume more data than if they had to pay a positive marginal cost.³ This is true for all consumers of data. Overuse increases the risk/frequency of congestion for a given capacity since each consumer faces zero cost for

² See Randolph J. May, "Don't Initiate a 'Data Cap' Inquiry," *Perspectives from FSF Scholars*, Vol. 18, No. 24 (June 22, 2023), at 1, available at <https://freestatefoundation.org/wp-content/uploads/2023/06/Dont-Initiate-a-Data-Cap-Inquiry-062223.pdf> ("I have serious doubts about whether the initiation of what I'll call a 'Data Cap Inquiry' is a worthwhile use of the Commission's time. In fact, more than anything else, I think it's political theatre inhabiting what, in a somewhat related context, Tim Brennan, a former Chief Economist of the FCC and member of FSF's Board of Academic Advisors, called, if only half seriously, 'an economics free zone.'").

³ A consumer will continue to consume more until the marginal cost paid by the consumer is equal to the marginal benefit to the consumer based on their preferences. With usage-based pricing a consumer stops consuming extra units once the marginal cost they pay is greater than the utility they get from that extra unit of consumption.

consuming additional data and does not internalize the cost this imposes on all data users. This is akin to the "tragedy of the commons" problem.⁴

Finally, since all consumers are consuming more due to zero cost marginal pricing, an ISP must invest more in infrastructure to guarantee both general capacity and local capacity to the consumer. Since the ISP would be prohibited from charging more to high use consumers, it must raise the average price faced by all consumers regardless of whether they are low or high data users. In the end, this means that low data users are subsidizing high data users *if* they decide that they are willing to pay this higher average cost than would be present if the market were allowed to charge based on actual usage.

At the margin, some consumers may decide to not purchase the service if this higher cost pushes the price above either the consumer's willingness or ability to pay. This is the dimension in which such pricing regulation would serve to increase the digital divide. With market-based pricing rather than regulated rates, more consumers will choose to subscribe than otherwise would be the case.

Note that usage-based pricing can take many forms. One form is tiered pricing. For example, an ISP could offer tiered service with one price for usage below a given threshold and a higher price for usage above a given threshold. Consider an extreme "all or nothing" mechanism where if someone subscribes to a lower cost plan with a lower monthly usage threshold, then they get no additional service that month once they have used up all the data. That would amount to an infinitely high marginal price for any extra

⁴ See Garrett Hardin, "Tragedy of the Commons," *Econlib*, available at <https://www.econlib.org/library/Enc/TragedyoftheCommons.html> ("[A] herdsman might ask himself, 'Should I add another animal to my herd?' ... Because the privatized gain would exceed his share of the commonized loss, a self-seeking herdsman would add another animal to his herd. And another. And reasoning in the same way, so would all the other herdsman. Ultimately, the common property would be ruined.").

units of data within their existing service. In this example, the subscriber would have to either begin subscribing to the higher tier plan, switch providers, or stop using data until the next month. In practice, most ISPs typically don't utilize such "all or nothing" mechanisms. If a subscriber to a lower cost, lower data threshold uses up their monthly data allowance, the marginal cost to that subscriber for any additional data can be captured by literally charging for each additional unit of data used beyond the subscription threshold and/or by decreasing the quality of any additional units of data by reducing the speed and/or capacity provided.

Data caps effectively act as a tiered subscription service with an upper limit to the amount of data for which a consumer faces zero marginal cost. Above that limit, the marginal cost in terms of the price to quality ratio increases. This induces the consumer adjust their behavior, reduces overall consumption, and makes it possible for there to be a lower priced subscription.⁵ Regulation to prohibit data caps is the exact same thing as regulation to prohibit tiered subscription plans.

The alternative – where, pursuant to misguided regulatory fiat, broadband ISPs must offer *only* unlimited plans – would lead to higher prices for all subscribers to cover costs, including the costs imposed by the heavy data consumption of those categorized by OpenVault as "power users," "super power users," and "extreme power users," a new category it found it appropriate to create just last year.⁶

⁵ Consumers modify their behavior in response to the understood consequences of additional data consumption which typically increase marginal cost (by imposing a price for more data) and/or decrease the marginal quality (by reducing the speed).

⁶ See Julia King, "U.S. broadband consumption climbs as 'power users' proliferate," *Fierce Network* (February 8, 2024), available at <https://www.fierce-network.com/broadband/us-broadband-consumption-climbs-power-users-proliferate> ("Extreme power users consume, on average, 6.6 TB of downstream and nearly 1 TB of upstream data. That's seven times more downstream and 15 times more upstream data compared to users that consume less than 1 TB monthly."). See also Randolph J. May and Seth L. Cooper, "Stop Converting Internet Service Providers Into Public Utilities," *Perspectives from FSF Scholars*, Vol.

As the Competitive Enterprise Institute's Brian A. Rankin pointed out in a recent blog post, "[i]t's ... curious that the FCC has sudden curiosity about a practice in use for years by internet service providers (ISPs). Usage-based pricing has appeared in FCC orders dating back to 2010, when the Obama FCC spoke favorably of it."⁷ And in an October 23, 2024, White Paper, International Center for Law & Economics scholars concluded that usage-based pricing:

[M]ay help internet service providers (ISPs) to better manage network congestion, ensure fair allocation of network resources, and provide a means for ISPs to recover the large, fixed costs associated with building, maintaining, and upgrading broadband infrastructure – in part, to enable deployment of more capacity for increased data usage. Moreover, usage-based pricing can promote economic efficiency by aligning the costs of broadband consumption with the prices consumers pay, thereby encouraging responsible use of network resources.⁸

As discussed further below, those network infrastructure costs are significant. Fixed broadband ISPs have invested over \$2.2 trillion since 1996 to construct and upgrade their networks, including \$94.7 billion just last year.⁹ Mobile carriers, meanwhile, have spent a total that exceeds \$700 billion, including \$30 billion in 2023.¹⁰

19, No. 40 (November 4, 2024), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2024/11/Stop-Converting-Internet-Service-Providers-Into-Public-Utilities-110424.pdf> ("A ban on [usage-based pricing] plans likely would eliminate a lower-price option valued by many cost-conscious consumers *while leading to higher prices for all.*") (emphasis added).

⁷ Brian A. Rankin, "The FCC's curious curiosity about broadband data caps," *Competitive Enterprise Institute* (October 29, 2024), available at <https://cei.org/blog/the-fccs-curious-curiosity-about-broadband-data-caps/>. See also *Preserving the Open Internet; Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, Report and Order (released December 23, 2010), at ¶ 72 ([P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users.").

⁸ Eric Fruits, Kristian Stout, and Geoffrey A. Manne, "The Economics of Broadband Data Caps and Usage-Based Pricing," *International Center for Law & Economics* (October 23, 2024), available at <https://laweconcenter.org/resources/the-economics-of-broadband-data-caps-and-usage-based-pricing/>.

⁹ See USTelecom | The Broadband Association (USTelecom), "2023 Broadband Capex Report" (October 18, 2024), available at https://ustelecom.org/wp-content/uploads/2024/10/UST-1376-CAPEX-Report_2024_4-as-of-Oct-4.pdf.

¹⁰ See CTIA Press Release, "U.S. Wireless Data Use Skyrockets, Passing 100T Megabyte Milestone, CTIA Annual Survey Finds" (September 10, 2024), available at <https://www.ctia.org/news/u-s-wireless-data-use-skyrockets-passing-100t-megabyte-milestone-ctia-annual-survey-finds>.

Importantly, the decision by an ISP to establish – as well as publicize, in both competitive marketing materials and disclosures already required by Commission regulation¹¹ – a price for a certain amount of data that may be consumed over a defined period of time (as well as any consequences, such as additional charges or slower speeds, that may result if additional data is consumed) is an exercise in rate setting. Because the FCC's May 2024 *Safeguarding and Securing the Open Internet Order* has not yet gone into effect, BIAS therefore continues to be classified as a Title I "information service" not subject to the rate-regulation provisions of Title II. Should the FCC, against the odds, persuade the court of appeals that reclassification is both the "best reading" of the statute and not a "major question" to be resolved by Congress, its suggestion that Section 257 (or some other broadly worded statute) might provide it with the authority to regulate rates likely would not prevail in a post-*Chevron* doctrine appellate environment.¹²

Stepping back, however, there are two glaring red flags in Chairwoman Rosenworcel's Statement on the *Notice of Inquiry*. The first is that, in the most detailed example cited, it is the "multiple texts and emails" received that is the target of the consumer's ire. This is a feature, not a bug. The consumer's ISP is providing the information that the consumer needs to assess their current usage and the appropriate tier of service to which they should subscribe.

¹¹ See, e.g., *Notice of Inquiry* at n.42 (acknowledging that "the *Broadband Labels Order* requires BIAS providers to disclose any charges or reductions in service for any data used in excess of the amount included in the plan, and to 'identify the increment of additional data, e.g., "each additional 50GB," if applicable, and disclose any additional charges once the consumer exceeds the monthly data allowance."').

¹² Recall that Chairwoman Jessica Rosenworcel has committed not to rely on Sections 201 and 202, with "no 'hidden asterisks'" Daniel A. Lyons, "New York Tests FCC's 'No Rate Regulation' Pledge," *AEI* (May 29, 2024), available at <https://www.aei.org/technology-and-innovation/new-york-tests-fccs-no-rate-regulation-pledge/>.

The second is Chairwoman Rosenworcel's suggestion that there are no marginal costs associated with higher data consumption: "We know that during the pandemic many fixed and mobile internet service providers refrained from enforcing or imposing data caps, *suggesting that our networks have the capacity to meet consumer demand without these restrictions*" (emphasis added).¹³ A brief recent history lesson is in order.

During the pandemic, an extraordinary event that inspired exceptional responses from both individuals and corporations,¹⁴ then-Chairman Ajit Pai called upon ISPs to take the Keep Americans Connected Pledge.¹⁵ Over 800 ISPs and trade associations did so. He also "called on broadband providers to relax their data usage limits in appropriate circumstances." ISPs responded to such an extent that the Commission created a specific webpage highlighting the "companies that went above & beyond."¹⁶

Critically, however, ISPs were able to respond to the pandemic-provoked overnight jump in data traffic only as the result of a long history of anticipatory network upgrades. As NCTA – The Internet & Television Association (NCTA) contemporaneously explained, "[b]y investing over \$170 billion in infrastructure between 2011-2020, cable providers continually upgraded broadband networks and added capacity, increased speeds and enhanced reliability to stay ahead of consumer demand."¹⁷

¹³ Statement of Chairwoman Jessica Rosenworcel, *Notice of Inquiry*.

¹⁴ See generally Andrew Long, "ISPs, FCC Rise to COVID-19 Challenge: Congress Can, Too," *Perspectives from FSF Scholars*, Vol. 15, No. 24 (May 13, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/05/ISPs-FCC-Rise-to-COVID-19-Challenge-Congress-Can-Too-051320.pdf>.

¹⁵ See "Keep Americans Connected," available at <https://www.fcc.gov/keep-americans-connected>.

¹⁶ See "Companies Have Gone Above and Beyond the Call to Keep Americans Connected During Pandemic," available at <https://www.fcc.gov/companies-have-gone-above-and-beyond-call-keep-americans-connected-during-pandemic>.

¹⁷ "Responding to COVID-19: Keeping America Connected," available at <https://www.ncta.com/covid-19-overview>. See also "How Broadband Networks Fared During the Internet's Biggest Stress Test Ever" (August 10, 2021), available at <https://www.ncta.com/whats-new/how-broadband-networks-fared-during-the-internets-biggest-stress-test-ever> ("This success can be attributed to the cable industry's two decades of investing in and consistently building, upgrading, and expanding broadband networks all over the country.

Moreover, NCTA emphasized that "[a]s internet traffic began to surge, cable providers *worked around the clock* to add capacity where needed" (emphasis added).¹⁸

As Free State Foundation Director of Policy Studies Seth Cooper detailed in a recent *FSF Blog* post,¹⁹ massive investments in network infrastructure continue to this day. Citing the *2023 USTelecom Capital Expenditure Report*,²⁰ Mr. Cooper wrote that "[c]apital expenditures by U.S. broadband providers totaled \$94.7 billion in 2023" and "U.S. broadband providers have invested over \$2.2 trillion in network infrastructure since 1996."²¹ According to CTIA, mobile carriers have spent more than \$700 billion in total, and over \$30 billion in 2023 alone.²²

Thus, ISPs were able to rise to the COVID-19 challenge thanks to trillions of dollars of forward-looking investment designed to retain and attract subscribers in an increasingly competitive marketplace. The notion underlying Chairwoman Rosenworcel's casual suggestion that additional network usage imposes no marginal costs simply is at

The cable industry alone pours nearly \$20 billion of private capital every year into improving the speeds and capacity of broadband networks; the number for all American broadband providers is \$80 billion annually.").

¹⁸ "Responding to COVID-19: Keeping America Connected," available at <https://www.ncta.com/covid-19-overview>.

¹⁹ See Seth L. Cooper, "U.S. Broadband Providers Made Strong Capital Expenditures in 2023," *FSF Blog* (October 18, 2024), available at <https://freestatefoundation.blogspot.com/2024/10/us-broadband-providers-made-strong.html>.

²⁰ USTelecom, "2023 Broadband Capex Report" (October 18, 2024), available at https://ustelecom.org/wp-content/uploads/2024/10/UST-1376-CAPEX-Report_2024_4-as-of-Oct-4.pdf ("Investment this past year reflects a range of activities, including expansion of fiber deployments, integration of fiber and mobile networks, increased rural broadband construction, and network capacity additions to keep pace with advances in artificial intelligence and other applications that are fueling rising bandwidth demands among consumers and across the economy.") (emphasis added).

²¹ Seth L. Cooper, "U.S. Broadband Providers Made Strong Capital Expenditures in 2023," *FSF Blog* (October 18, 2024), available at <https://freestatefoundation.blogspot.com/2024/10/us-broadband-providers-made-strong.html>.

²² See CTIA Press Release, "U.S. Wireless Data Use Skyrockets, Passing 100T Megabyte Milestone, CTIA Annual Survey Finds" (September 10, 2024), available at <https://www.ctia.org/news/u-s-wireless-data-use-skyrockets-passing-100t-megabyte-milestone-ctia-annual-survey-finds>.

odds with not only the facts on the ground, but also the widely accepted economic reality that broadband networks are subject to capacity constraints that affect costs.²³

II. Usage-Based Pricing Benefits Consumers

Usage-based plans, which include a finite amount of data for a lower price than an "all-you-can-eat" option, provide consumers with choice. More choice is a positive attribute – not to mention a "hallmark" of a competitive marketplace like that which exists for BIAS throughout virtually the entire United States.²⁴

To be sure, usage-based plans typically provide for consequences, either in the form of additional charges or slower speeds, should a subscriber exceed their monthly data allotment. Those consequences form the basis for usage-based plans' lower prices. Nevertheless, for the price-sensitive subset of consumers unwilling or unable to pay the higher price – say, \$X – for unlimited data, the option to instead pay a lower price – \$X-Y – for a limited amount of data and still be able to spend a substantial amount of time

²³ See also Randolph J. May, "Don't Initiate a 'Data Cap' Inquiry," *Perspectives from FSF Scholars*, Vol. 18, No. 24 (June 22, 2023), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2023/06/Dont-Initiate-a-Data-Cap-Inquiry-062223.pdf> (pointing out "that there is never a frank acknowledgment by those who support FCC (or congressionally) compelled elimination of data caps that, aside from government subsidies providing support for some consumers, the costs of providing broadband service, in one way or another, must be recovered from an Internet service provider's users.")

²⁴ See Brian A. Rankin, "The FCC's curious curiosity about broadband data caps," *Competitive Enterprise Institute* (October 29, 2024), available at <https://cei.org/blog/the-fccs-curious-curiosity-about-broadband-data-caps/> ("With cable, fiber, mobile, fixed wireless, and improving satellite options, the broadband marketplace is more competitive than ever. A hallmark of a competitive marketplace is differentiation in products, including through different pricing structures. Usage-based pricing is part of that differentiation."). See also Randolph J. May and Seth L. Cooper, "Stop Converting Internet Service Providers Into Public Utilities," *Perspectives from FSF Scholars*, Vol. 19, No. 40 (November 4, 2024), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2024/11/Stop-Converting-Internet-Service-Providers-Into-Public-Utilities-110424.pdf> ("Rapid deployment of fiber, cable, 5G-enabled fixed wireless, and next-generation satellites have fostered increasing competition – and increasing consumer choice."). As the *Notice of Inquiry* points out, any remaining unserved locations eventually should be connected to BEAD program-subsidized networks. Those locations uniquely will not have competitive options, or at least options recognized by NTIA, but the BEAD program rules prohibit usage-based plans. See *Notice of Inquiry* ¶ 9 ("To participate in the BEAD program, grant recipients must ensure that subgrantees 'do[] not impose data usage caps' on any plans offered over a network funded by the program.").

online is a clear gain.²⁵ As Daniel Lyons, a Professor at Boston College Law School and a Member of the Free State Foundation's Board of Academic Advisors, wrote in 2016, "[c]onsumers benefit from having a variety of broadband access models from which to choose."²⁶

Such usage-based plans thereby expand the number of people subscribed to broadband services and further shrink any remaining digital divides.²⁷ As coauthor to these comments Randolph May, Free State Foundation President, wrote in June 2023, "properly understood, and properly constructed, usage-sensitive pricing may be especially beneficial to lower-income consumers who are lighter users to the extent that they may avail themselves of less costly plans than otherwise would be available under mandated 'one size fits all' unlimited data offerings."²⁸

III. Usage-Based Pricing Allows ISPs to Recover Costs Equitably

Broadband networks are expensive. Not just to construct, but to maintain and upgrade. As detailed above, fixed broadband ISPs have invested over \$2.2 trillion since 1996 to construct and upgrade their networks, including \$94.7 billion just last year.²⁹

²⁵ See, e.g., Masha Abarinova, "Are data caps actually an issue? Not really, says OpenVault," *Fierce Network* (October 25, 2024), available at <https://www.fierce-network.com/sponsored/broadband-nation-expo-2024-executive-interviews> ("[A]ccording to OpenVault CEO Mark Trudeau, data caps aren't really that big of a deal, because they're usually set high enough that most consumers are unlikely to exceed the limit."). Incidentally, the *Notice of Inquiry* cites OpenVault data multiple times. See, e.g., *Notice of Inquiry* ¶¶ 3, 19.

²⁶ Daniel A. Lyons, "Usage-Based Pricing, Zero Rating, and the Future of Broadband Innovation," *Perspectives from FSF Scholars*, Vol. 11, No. 1 (January 4, 2016), at 5, available at <https://freestatefoundation.org/wp-content/uploads/2019/06/Usage-Based-Pricing-Zero-Rating-and-the-Future-of-Broadband-Innovation-123015.pdf>.

²⁷ See *id.* ("Forcing [heavier and lighter users] into a one-size-fits-all access plan could be detrimental to both and could increase the digital divide, as some cost-conscious customers would reject an unlimited plan at the unlimited price yet would be willing to pay a smaller price for limited monthly access.").

²⁸ Randolph J. May, "Don't Initiate a 'Data Cap' Inquiry," *Perspectives from FSF Scholars*, Vol. 18, No. 24 (June 22, 2023), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2023/06/Dont-Initiate-a-Data-Cap-Inquiry-062223.pdf>.

²⁹ See USTelecom | The Broadband Association (USTelecom), "2023 Broadband Capex Report" (October 18, 2024), available at https://ustelecom.org/wp-content/uploads/2024/10/UST-1376-CAPEX-Report_2024_4-as-of-Oct-4.pdf.

Mobile carriers, meanwhile, have spent a total that exceeds \$700 billion, including \$30 billion in 2023.³⁰ Usage-based pricing allows broadband providers to require those who wish to be able to use more network capacity to pay for that choice, rather than forcing all subscribers to cover the costs (that is, to pay more³¹) imposed by a relatively small subset of extremely heavy data users.³² This encourages more efficient use of network resources, which are not unlimited or cost-free. As the Commission led by President Obama-appointed Chairman Julius Genachowski recognized in 2010, this is a desired outcome:

[P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks. The framework we adopt today does not prevent broadband providers from asking subscribers who use the network less to pay less, and subscribers who use the network more to pay more.³³

Usage-based plans, by contrast, cater to those price-conscious consumers who prefer "a form of usage-sensitive pricing – price discrimination, if you will – not uncommon with

³⁰ See CTIA Press Release, "U.S. Wireless Data Use Skyrockets, Passing 100T Megabyte Milestone, CTIA Annual Survey Finds" (September 10, 2024), available at <https://www.ctia.org/news/u-s-wireless-data-use-skyrockets-passing-100t-megabyte-milestone-ctia-annual-survey-finds>.

³¹ See Randolph J. May and Seth L. Cooper, "Stop Converting Internet Service Providers Into Public Utilities," *Perspectives from FSF Scholars*, Vol. 19, No. 40 (November 4, 2024), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2024/11/Stop-Converting-Internet-Service-Providers-Into-Public-Utilities-110424.pdf> ("A ban on [usage-based pricing] plans likely would eliminate a lower-price option valued by many cost-conscious consumers *while leading to higher prices for all.*") (emphasis added).

³² See Julia King, "U.S. broadband consumption climbs as 'power users' proliferate," *Fierce Network* (February 8, 2024), available at <https://www.fierce-network.com/broadband/us-broadband-consumption-climbs-power-users-proliferate> (reporting that, according to OpenVault, as of February 2024, the average broadband subscriber consumed 641 GB per month – compared to "extreme power users," who "consume, on average, 6.6 TB of downstream and nearly 1 TB of upstream data." That is an order of magnitude that exceeds 1,000.).

³³ *Preserving the Open Internet; Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, Report and Order (released December 23, 2010), at ¶ 72.

respect to the provision of services where the amount of usage ultimately is related to cost incurrence."³⁴

IV. Usage-Based Pricing Constitutes Rate Regulation

As Commissioner Brendan Carr noted at the top of his Dissenting Statement, "[i]n its decision to reinstate utility-style, Title II controls on the Internet, the FCC promised to forbear from all forms of price controls – namely, both *ex ante* and *ex post* rate regulation."³⁵ He likely was referring to the commitment Chairwoman Rosenworcel made in 2022 before the House Committee on Energy and Commerce Subcommittee on Communications and Technology "that there aren't any hidden asterisks in [my] statement when [I] say, 'no rate regulation.'"³⁶

The reason that Commissioner Carr dissented from the adoption of the *Notice of Inquiry* then, is that to him it represents another step in the "inexorable march towards rate regulation" because "[p]rohibiting customers from choosing to purchase plans with data caps – which are more affordable than unlimited ones – necessarily regulates the service rates they are paying for."³⁷ And yet a search of the text of the *Notice of Inquiry* for the phrase "rate regulation" yields zero results.

³⁴ Randolph J. May, "Don't Initiate a 'Data Cap' Inquiry," *Perspectives from FSF Scholars*, Vol. 18, No. 24 (June 22, 2023), at 2, available at <https://freestatefoundation.org/wp-content/uploads/2023/06/Dont-Initiate-a-Data-Cap-Inquiry-062223.pdf>.

³⁵ Dissenting Statement of Commissioner Brendan Carr, *Notice of Inquiry*, at 1.

³⁶ See Daniel A. Lyons, "New York Tests FCC's 'No Rate Regulation' Pledge," *AEI* (May 29, 2024), available at <https://www.aei.org/technology-and-innovation/new-york-tests-fccs-no-rate-regulation-pledge/> (noting "Chairwoman Jessica Rosenworcel's earlier commitment to Congress that there would be no broadband rate regulation (and no 'hidden asterisks' in that commitment)."). See also Hearing Transcript, "Connecting America: Oversight of the FCC," House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce (March 31, 2020), at 120, available at <https://docs.house.gov/meetings/IF/IF16/20220331/114545/HHRG-117-IF16-Transcript-20220331.pdf> ("Rosenworcel: There is no asterisks.").

³⁷ Dissenting Statement of Commissioner Brendan Carr, *Notice of Inquiry*, at 1.

In other contexts, particularly regarding the billing practices of traditional, regulated multichannel video programming distributors, the FCC has gone to great, and often tortured, lengths to characterize clear efforts to regulate rates as ... something else.³⁸ (Incidentally, so, too, has the National Telecommunications and Information Administration (NTIA) in its rules for, and oversight of, the \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) program.³⁹) Here, however, no amount of linguistic legerdemain can distract from the fact that any restriction on usage-based pricing constitutes rate regulation – a scenario foretold by coauthor Randolph May, Free State Foundation President, when the Rosenworcel Commission first initiated the so-called *Safeguarding and Securing the Open Internet* proceeding in September of last year:

And don't believe for an FCC minute that the Chairwoman Rosenworcel and her Democrat majority colleagues intend to foreclose rate regulation of ISPs' offerings. These actions may not be called "rate regulation" but rather prohibitions on usage-based pricing or free data applications, or some such. The effect will be rate regulation.⁴⁰

Regarding existing usage-based subscriptions, a ban on overage charges would set the rate for additional data at \$0. Going forward, a ban on new usage-based plans would

³⁸ See, e.g., Comments of the Free State Foundation, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405, Notice of Proposed Rulemaking (released December 14, 2023), at 4, available at <https://freestatefoundation.org/wp-content/uploads/2024/02/FSF-Comments-Cable-Operator-and-DBS-Provider-Billing-Practices-010524.pdf> (arguing that "the proper application of the relevant statutory provisions reveals these proposals to be impermissible rate regulation masquerading as 'customer service requirements.'").

³⁹ See, e.g., Andrew Long, "Virginia Flags NTIA's Impermissible Pressure to Regulate Broadband Rates," *Perspectives from FSF Scholars*, Vol. 19, No. 6 (February 15, 2024), at 3, available at <https://freestatefoundation.org/wp-content/uploads/2024/02/Virginia-Flags-NTIAs-Impermissible-Pressure-to-Regulate-Broadband-Rates-021524.pdf> ("NTIA rejected the [Virginia Office of Broadband's (VOB)] proposed approach because it failed to identify 'an exact price or formula.' As the VOB's letter points out, however, '[t]his would have the effect of attempting to regulate the rate of BEAD-funded low-cost broadband service' in defiance of the IIA's prohibition of explicit 'rate regulation.'").

⁴⁰ See Seth L. Cooper, "PRESS RELEASE: FCC Proposing to Reimpose Net Neutrality Regulations Is Foolhardy," *FSF Blog* (September 26, 2023), available at <https://freestatefoundation.blogspot.com/2023/09/press-release-fcc-proposing-to-reimpose.html>.

amount to an obligation to offer BIAS *only* on an "all-you-can-eat" basis, thereby dictating both the terms and the price. As Commissioner Nathan Simington argued by analogy in his Dissenting Statement, "*in a world of regulated unlimited coffee, either the cost of coffee drinks will rise, or the bottom lines of cafés will suffer*. What is that called? *Rate regulation*" (emphasis in original).⁴¹

V. The FCC Lacks Statutory Authority to Interfere With Usage-Based Billing

As explained above, any effort by the FCC to restrict the use of usage-based billing would constitute rate regulation. The legal authority of the Commission to do so, however, at present is at best an open question, and in reality, is unlikely to be upheld.

As of the day that we submit these comments, the FCC's May 2024 *Safeguarding and Securing the Open Internet Order* still has not yet gone into effect. The United States Court of Appeals for the Sixth Circuit on August 1, 2024, issued a stay of the final rule pending judicial review "[b]ecause the broadband providers have shown that they are likely to succeed on the merits and that the equities support them."⁴²

Moreover, the Sixth Circuit's *per curiam* opinion concluded that "[n]et neutrality is likely a major question requiring congressional authorization" and that "[t]he Communications Act likely does not plainly authorize the Commission to resolve this signal question."⁴³ BIAS therefore continues to be classified as a Title I "information

⁴¹ Dissenting Statement of Commissioner Nathan Simington, *Notice of Inquiry*, at 1.

⁴² Order, United States Court of Appeals for the Sixth Circuit (filed August 1, 2024) (*per curiam*), available at <https://docs.fcc.gov/public/attachments/DOC-404438A1.pdf>.

⁴³ *Id.* See also *West Virginia v. EPA*, 597 U. S. ___ (2022), available at https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf ("To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to "clear congressional authorization" when they claim the power to make decisions of vast "economic and political significance."").

service" not subject to the rate regulation provisions set forth in Sections 201 and 202 of the Communications Act.⁴⁴

Although the majority in *Safeguarding and Securing the Open Internet Order* found it "in the public interest to forbear from applying sections 201 and 202 insofar as they would permit the adoption of such rate regulations for BIAS in the future," it also "conclude[d], as the Commission did in 2015, that the section 10 criteria are not met with respect to forbearance from section 201 and 202 in full."⁴⁵

Professor Lyons, expressing a view shared by Commissioner Carr regarding New York's Affordable Broadband Act,⁴⁶ wrote in May of this year that "the FCC's subsequent actions have cast some doubt on the strength of that commitment."⁴⁷ Regardless, a favorable decision from the Sixth Circuit would be necessary before the FCC could, in the words of Commissioner Carr, "start[] down the path of directly regulating rates."⁴⁸

Separate from the open regulatory classification issue, it is doubtful that the Commission has the legal authority to restrict usage-based billing. The *Notice of Inquiry* suggests that Section 257, or perhaps some other broadly worded statutory provision such as Section 706, might empower the FCC to interfere with ISPs' choice to engage in usage-based billing. (Mind you, any such action could not rely upon Sections 201 and

⁴⁴ See 47 U.S.C. §§ 201, 202.

⁴⁵ *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-320, 17-108, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration (April 25, 2024), at ¶ 373.

⁴⁶ See generally Dissenting Statement of Commissioner Brendan Carr, *Safeguarding and Securing the Open Internet Order*.

⁴⁷ Daniel A. Lyons, "New York Tests FCC's 'No Rate Regulation' Pledge," *AEI* (May 29, 2024), available at <https://www.aei.org/technology-and-innovation/new-york-tests-fccs-no-rate-regulation-pledge/>. See also Dissenting Statement of Commissioner Brendan Carr, *Notice of Inquiry*, at 1 ("The first crack in this commitment [not to regulate BIAS rates] emerged immediately when the agency allowed New York's price control law to move forward without the Commission stating the obvious – New York's law is plainly preempted by the Communications Act and FCC precedent.").

⁴⁸ Dissenting Statement of Commissioner Brendan Carr, *Notice of Inquiry*, at 1.

202, as the Rosenworcel Commission is unwilling to concede that the imposition of any restrictions on usage-based billing would constitute rate regulation and, beyond that, has committed not to act pursuant to those statutes.) Consequently, Section 257 likely would not carry the day in a post-*Chevron* doctrine appellate environment when the agency must rely on the "best reading" of the statute, not one that is merely a permissible one among others.⁴⁹ The *Notice of Inquiry* references the fact that the D.C. Circuit found Section 257 provided sufficient authority for the reporting requirement set forth in the *Restoring Internet Freedom Order*.⁵⁰ But, now, absent *Chevron* deference, it's doubtful that a reviewing court would agree that Section 257 authorizes the much bigger lift that is the regulation of rates for BIAS through a ban or limitation on usage-based billing.

VI. Conclusion

For the foregoing reasons, the Commission should recognize that usage-based pricing generates substantial consumer benefits and terminate this proceeding.

Respectfully submitted,

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⁴⁹ See *Loper Bright Enterprises v. Raimondo*, 603 U. S. ___ (2024), available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.... [C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

⁵⁰ See *Notice of Inquiry* at n.89.