

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

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

**REPLY COMMENTS OF  
THE FREE STATE FOUNDATION\***

**I. Introduction and Summary**

We file these reply comments in the so-called "data caps" docket to amplify calls to abandon this inquiry and oppose those comments that advocate extending it.<sup>1</sup> As even those who appear to champion this suggested unjustified regulatory interference concede, the Federal Communications Commission lacks statutory authority to interfere with rate-setting decisions in the competitive marketplace for broadband Internet access services (BIAS). On its own, this compels a prompt end to this proceeding.

Critically, however, the record also reaffirms that usage-based options are a boon to cost-conscious consumers, innovative customer-acquisition efforts that differentiate via *lower* prices. And that usage-based offerings, tailored as they are to those unwilling or unable to pay the premium associated with unlimited data packages, further the key policy objective of expanding the broadband subscriber base.

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\* These comments express the views of Randolph J. May, President of the Free State Foundation, and Andrew Long, Senior Fellow. 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.

<sup>1</sup> See generally *Data Caps in Consumer Broadband Plans*, WC Docket 23-199, Notice of Inquiry (released October 15, 2024) (*Notice of Inquiry*). See also Comments of ACA Connects on the Notice of Inquiry, *Data Caps in Consumer Broadband Plans*, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024), at 1 ("Because the Commission lacks ... authority, and any attempt to regulate data caps would do more harm than good, the Commission should abandon this inquiry.").

By railing against what they claim are efforts aimed at "maximizing profits" and "boosting revenues" that ISPs realize from usage-based options and other pricing practices, parties such as Free Press, Public Knowledge, and others necessarily concede, if only implicitly, that what they really want is rate regulation. This is because there is no way for the FCC to determine whether an ISP's profits or revenues are reasonable without conducting a full-blown rate case.

And, of course, the Commission lacks the legal authority to engage in rate regulation of ISPs' charges. And there certainly is no public policy justification for prohibiting ISPs from earning the revenues and realizing the profits required to make the investments in their networks that consumers demand. Indeed, just the opposite.

## **II. By All Accounts, the FCC Lacks Statutory Authority to Regulate Rates**

We explained in our initial comments that any Commission attempt to restrict broadband providers' ability to employ usage-based pricing would constitute rate regulation.<sup>2</sup> That BIAS remains a Title I "information service" immune to the FCC's Title II authority to regulate rates set forth in Sections 201 and 202 of the Communications Act of 1934, as amended (the Act) – authority that in any event Chairwoman Jessica Rosenworcel promised not to invoke, *ex ante* or *ex post*, "no asterisks." And that, in the wake of *Loper Bright Enterprises v. Raimondo* and the demise of the *Chevron* doctrine, the Commission would face long judicial odds should it attempt to rely on some other statutory provision, such as Section 257 of the Act or Section 706 of the Telecommunications Act of 1996.<sup>3</sup>

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<sup>2</sup> See generally Comments of the Free State Foundation, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*FSF Comments*), available at <https://freestatefoundation.org/wp-content/uploads/2024/11/FSF-Comments-Data-Caps-in-Consumer-Broadband-Plans-111424.pdf>, at 12-14.

<sup>3</sup> See generally *id.* at 12-16.

Other commenters offered similar critiques. For example, NCTA – The Internet & Television Association (NCTA) rebutted the suggestion in the *Notice of Inquiry* that the D.C. Circuit's decision in 2019's *Mozilla v. FCC* supports reliance on Section 257 to regulate rates, pointing out that the court "upheld the use of section 257 as statutory authority only for the transparency rule" and its "analysis does not support using section 257 for a different – and much broader – regulatory purpose."<sup>4</sup>

USTelecom – The Broadband Association (USTelecom) rejected the notion that the Commission could rely upon Section 706, explaining that "[e]ven assuming Section 706 is a source of rulemaking authority, it is implausible that the Commission acting to limit price competition by regulating usage-based plans somehow *encourages* infrastructure investment or competition – a minimum showing necessary to invoke Section 706 if it confers independent authority."<sup>5</sup>

CTIA – The Wireless Association® (CTIA) highlighted that "the NOI, in a single paragraph, lists no fewer than 16 different statutory provisions and asks if any provide 'legal authority to promulgate rules in this area'" but "engages in no analysis and offers no rationale for why any of the provisions offer legal support to regulate usage-based data plans" as the *Loper Bright* Supreme Court decision requires.<sup>6</sup>

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<sup>4</sup> Comments of NCTA – The Internet & Television Association (NCTA), Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*NCTA Comments*), at 13. *See also FSF Comments* at 16 ("[A]bsent *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. ").

<sup>5</sup> Comments of USTelecom – The Broadband Association (USTelecom), Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*USTelecom Comments*), at 6.

<sup>6</sup> Comments of CTIA, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*CTIA Comments*), at 7. *See also id.* ("The Supreme Court's decision in *Loper Bright* reinforces that agency assertions of authority must be rooted firmly in authority granted by Congress.") (citation omitted), *id.* at 7-8 ("The NOI also offers a host of irrelevant authority addressed to topics such as broadcast television and audio, multichannel video programming service, and specific obligations of certain telecommunications carriers under the 1996 Act.") (citation omitted).

Tellingly, even those supportive of the Commission's endeavor acknowledged, if only by omission, that the agency does not have the statutory authority to take regulatory action. Free Press contended that the agency has "ample authority" under various statutory provisions, including Section 706, to *collect data*.<sup>7</sup> (With respect to Section 706 we agree, which is why we have argued *in the context of the FCC's annual Section 706 report* that to determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," it should "undertake a 'fact-intensive analysis of actual consumer needs.'"<sup>8</sup>) Should the FCC seek to restrict usage-based billing, however, Free Press conceded that "[t]he Commission's authority ... would squarely fall under its Title II powers"<sup>9</sup> – powers which it presently does not possess. Public Knowledge, *et al.*, meanwhile, chose to dodge the question of statutory authority.<sup>10</sup> So, too, did Consumer Reports.<sup>11</sup>

### **III. Usage-Based Offerings Are Equitable and Pro-Consumer**

In our comments, we argued that usage-based pricing allows broadband ISPs (1) to create lower-cost options tailored to price-sensitive consumers' needs, (2) to increase the number of broadband subscribers and thereby shrink digital divides, and (3) to allocate equitably network

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<sup>7</sup> See Comments of Free Press, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*Free Press Comments*), at 44.

<sup>8</sup> Comments of the Free State Foundation, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 24-214, Notice of Inquiry (filed October 7, 2024), available at <https://freestatefoundation.org/wp-content/uploads/2024/10/FSF-Comments-Section-706-Inquiry-100724.pdf>, at 13.

<sup>9</sup> *Free Press Comments* at 45.

<sup>10</sup> See Comments of Public Knowledge, the Open Technology Institute at New America, Benton Institute for Broadband & Society, and National Consumer Law Center on behalf of its low-income clients, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*Public Knowledge, et al. Comments*), at 11 (urging the FCC to "find sources of legal authority to regulate or ban data caps in the public interest" without identifying any such sources).

<sup>11</sup> See generally Comments of Consumer Reports, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024) (*Consumer Reports Comments*).

maintenance and upgrade costs to the heaviest users of data.<sup>12</sup> Already there is ample record evidence to support these assertions.

USTelecom, for example, in its comments wrote that:

[T]he Commission asks if usage-based plans 'help to lower costs to make broadband more affordable to low-income users' and whether usage-based plans 'allow low-income consumers who use less data to purchase less-expensive plans and avoid subsidizing the consumers who use more data[.]' The answer to both questions is a resounding 'yes.' The costs of maintaining and operating broadband networks are high and usage-based plans 'inherently place more of the costs on heavier users.'"<sup>13</sup>

CTIA, meanwhile, explained in its comments that "[c]onsumers can choose to save money buying wireless data 'a la carte' rather than 'all you can eat.' And some consumers would decline service entirely if low-cost usage-based options were not available. These plans thus make broadband more affordable for more people, including seniors and low-income individuals."<sup>14</sup>

And NCTA responded to the *Notice of Inquiry* by (1) reminding the Commission that "setting prices based on the amount of usage is common across the economy, and prohibiting this accepted practice would only reduce choice for consumers and drive-up prices;"<sup>15</sup> (2) explaining that "[b]ecause networks must be upgraded to ensure that they have the capacity to accommodate increased usage over time, usage-based pricing allows for the heaviest users to pay a larger share for usage of the network and lighter users to pay less;"<sup>16</sup> and (3) pointing out that "NCTA members offering usage-based plans also offer an option for unlimited data consumption,"<sup>17</sup> an

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<sup>12</sup> See generally *FSF Comments* at 2-5, 9-11.

<sup>13</sup> *USTelecom Comments* at 3.

<sup>14</sup> *CTIA Comments* at 4. See also *id.* (pointing out that "usage-based plans facilitate the offering of Lifeline-supported mobile plans at no cost to eligible consumers, as providers design those plans to meet the Commission's minimum standards that expressly permit usage allowances").

<sup>15</sup> *NCTA Comments* at 1.

<sup>16</sup> *Id.* at 3. See also *USTelecom Comments* at 3 ("The costs of maintaining and operating broadband networks are high and usage-based plans 'inherently place more of the costs on heavier users.'" (citation omitted)).

<sup>17</sup> *NCTA Comments* at 2.

undeniably inconvenient fact for those claiming that broadband ISPs are forcing consumers, especially lower-income consumers, to buy usage-based packages in order to profit from overage charges.<sup>18</sup>

Regarding profits, proponents of Commission interference with broadband pricing decisions – again, rate regulation – malign broadband ISPs' motives for investing trillions of dollars,<sup>19</sup> including \$125 billion spent on wireline and wireless networks just in 2023.<sup>20</sup> But private investment and a rational desire to realize a return on the risky allocation of capital has been the primary driver of broadband connectivity in the United States from Day One. And specifically with respect to usage-based billing, "a provider's ability to increase the return on its investment by offering additional pricing plans enhances consumer welfare by increasing the incentive for providers to make network investments," as NCTA noted in its comments.<sup>21</sup> Again, concomitantly, any FCC restriction that has the effect of reducing a broadband provider's return on investment or profit necessarily constitutes rate regulation.

Lastly, we note that critics of usage-based pricing opined in their comments that it is not their preferred method to manage networks (not that they have any experience doing so).<sup>22</sup> But as Christopher Yoo pointed out in his submission, "[t]he need for data caps follows from the fact

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<sup>18</sup> See, e.g., *Public Knowledge, et al. Comments* at 6 ("Data caps have a negative impact on all consumers but the effects are felt most acutely in low-income households."); *Consumer Reports Comments* at 10 ("[L]ow-income consumers who struggle to afford broadband will naturally feel the pain of a cap more fiercely.").

<sup>19</sup> See, e.g., *Free Press Comments* at 2-3 ("In this Comment, we document the evolution of cap-and-fee pricing in the U.S. broadband market and discuss how this evolution has always served the ISPs' primary goal: profit maximization."); *Consumer Reports Comments* at 1 (claiming that "data caps are primarily a tool [] used to extract additional revenue from consumers").

<sup>20</sup> See *FSF Comments* at 5 ("Fixed broadband ISPs have invested over \$2.2 trillion since 1996 to construct and upgrade their networks, including \$94.7 billion just last year. Mobile carriers, meanwhile, have spent a total that exceeds \$700 billion, including \$30 billion in 2023.") (citations omitted).

<sup>21</sup> *NCTA Comments* at 3.

<sup>22</sup> See, e.g., *Public Knowledge, et al. Comments* at 2 claiming that "data caps do not effectively manage network congestion"), *Free Press Comments* at 32 (questioning whether "cap-and-fee pricing is the right tool for managing network congestion").

that the Internet is subject to congestion."<sup>23</sup> He went on to explain how usage-based offerings represent a practical, effective way to address that congestion:

The central problem with unmetered bandwidth usage is that it sets the price of incremental Internet usage at zero. This encourages users to increase their usage whenever they receive the slightest benefit from doing so, even when those benefits are smaller than the increase in congestion cost their usage imposes on other users. The standard way to address this problem is to give users the incentive to rationalize their bandwidth consumption by setting the price of incremental usage equal to the congestion costs caused by that use. When strict usage metering is too expensive to deploy or too difficult for consumers to accommodate in real time, charging fixed amounts for bundles of bandwidth can accomplish much the same result....<sup>24</sup>

#### **IV. Conclusion**

For the foregoing reasons, and without delay, the Commission should terminate this proceeding.

Respectfully submitted,

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<sup>23</sup> Comments of Christopher S. Yoo, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024), at 2 (citations omitted).

<sup>24</sup> *Id.* at 3 (citations omitted). *See also* Comments of Competitive Carriers Association, Data Caps in Consumer Broadband Plans, WC Docket 23-199, Notice of Inquiry (filed November 14, 2024), at 2 (reporting that its "members emphasize that they consider broadband consumer data caps relevant and useful technical network management tools").