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

In the Matter of	)	
Safeguarding and Securing the Open Internet	)	WC Docket No. 23-320
Restoring Internet Freedom	)	WC Docket No. 17-108
Bridging the Digital Divide for Low-Income Consumers	)	WC Docket No. 17-287
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION, CALIFORNIA BROADBAND & VIDEO ASSOCIATION, FLORIDA INTERNET & TELEVISION ASSOCIATION, INDIANA CABLE & BROADBAND ASSOCIATION, MCTA – THE MISSOURI INTERNET & TELEVISION ASSOCIATION, NEW ENGLAND CONNECTIVITY AND TELECOMMUNICATIONS ASSOCIATION, NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., OHIO CABLE TELECOMMUNICATIONS ASSOCIATION, AND TEXAS CABLE ASSOCIATION

Rick C. Chessen
Steven F. Morris
Pamela S. Arluk
Robert N. Rubinovitz
NCTA – THE INTERNET & TELEVISION ASSOCIATION
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001

Matthew A. Brill
Matthew T. Murchison
Charles S. Dameron
Michael H. Herman
Kiley S. Boland
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for NCTA – The Internet & Television Association

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(Additional signatories listed on next page)

Jerome F. Candelaria
CALIFORNIA BROADBAND & VIDEO ASSOCIATION
925 L Street, Suite 850
Sacramento, CA 95814

Charles Dudley
FLORIDA INTERNET & TELEVISION ASSOCIATION
246 East 6th Avenue
Tallahassee, FL 32303

Brock Patterson
INDIANA CABLE & BROADBAND ASSOCIATION
150 W. Market St., Suite 412
Indianapolis, IN 46204

Andy Blunt
MCTA – THE MISSOURI INTERNET & TELEVISION ASSOCIATION
P.O. Box 1895
Jefferson City, MO 65102

Anna P. Lucey
David C. Soutter
Timothy O. Wilkerson
NEW ENGLAND CONNECTIVITY AND TELECOMMUNICATIONS ASSOCIATION
53 State Street, Suite 525
Boston, MA 02109

Marcus W. Trathen
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP
Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601

Counsel for the North Carolina Cable Telecommunications Association, Inc.

David Koren
OHIO CABLE TELECOMMUNICATIONS ASSOCIATION
33 N. 3rd Street
Columbus, OH 43215

Walt Baum
TEXAS CABLE ASSOCIATION
919 Congress Avenue, Suite 1350
Austin, TX 78701

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NCTA – The Internet & Television Association ("NCTA")—along with California Broadband & Video Association, Florida Internet & Television Association, Indiana Cable & Broadband Association, MCTA – The Missouri Internet & Television Association, New England Connectivity and Telecommunications Association, North Carolina Cable Telecommunications Association, Inc., Ohio Cable Telecommunications Association, and Texas Cable Association (collectively, the "State Cable Associations")—submit these reply comments in response to the Notice of Proposed Rulemaking released on October 20, 2023 in WC Docket No. 23-320[1] and the

[1] *See Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking, FCC 23-83 (rel. Oct. 20, 2023) ("*NPRM*").

Public Notice released on October 19, 2023 concerning petitions for reconsideration in WC Docket Nos. 17-108, 17-287, and 11-42.[2]

INTRODUCTION AND SUMMARY

The opening comments in this proceeding confirm that the proposal to subject broadband Internet access service ("broadband" or "BIAS") to common-carrier treatment under Title II of the Communications Act is untenable as a legal matter and misguided as a policy matter. It is the role of Congress, not the Commission, to decide such major policy questions, and NCTA supports congressional action to codify consensus Open Internet principles into law without forcing the square peg of broadband into the round hole of Title II. The *NPRM*'s proposal to reclassify broadband as a Title II telecommunications service is fatally flawed for a number of reasons made clear in the record.

Commenters widely recognize that the *NPRM*'s proposed regulatory approach would not survive judicial review. The record leaves no doubt that the decision whether to subject broadband to common-carrier regulation as a telecommunications service under Title II is a "major question" under the Supreme Court's precedent. Title II proponents are unable to point to any provision of the Act that grants the Commission the clear authorization it would need to regulate broadband under Title II. The record also confirms that the functional attributes of today's broadband offerings make the existing information-service classification even more fitting now than when the Supreme Court upheld that classification in *Brand X*.

The record also vividly illustrates the policy flaws of the *NPRM*'s proposed regulatory approach. A wide array of parties explain that Internet service providers ("ISPs") in today's

[2] *See Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the* RIF Remand Order, WC Docket Nos. 17-108, 17-287, and 11-42, Public Notice, DA 23-996 (rel. Oct. 19, 2023).

competitive marketplace lack any incentive to degrade their services by engaging in non-neutral practices, and the allegations of ISP misconduct predictably dredged up by Title II proponents have been refuted many times over. Title II reclassification also would not advance, and in many cases would undermine, the other supposed rationales for reclassification on the *NPRM*'s laundry list. And there is now copious evidence in the record demonstrating that treating ISPs as common carriers under Title II would damage the well-functioning broadband marketplace, just as the Biden Administration's Broadband Equity, Access, and Deployment ("BEAD") program and other infrastructure investment initiatives are kicking into gear. These flaws would render Title II reclassification arbitrary and capricious under the Administrative Procedure Act ("APA").

The State Cable Associations joining these reply comments share NCTA's concerns regarding the Commission's proposal to reclassify broadband as a telecommunications service under Title II of the Act. In particular, the State Cable Associations, which represent ISPs of various sizes, agree with NCTA that today's broadband marketplace is competitive and would be harmed by the onerous regulatory interventions proposed in the *NPRM*. The State Cable Associations also join NCTA in cautioning that Title II regulation would stifle innovation and investment by ISPs and threaten to deter participation in the BEAD program and similar initiatives, thereby undermining the Biden Administration's broadband access and adoption objectives.

If the Commission nevertheless proceeds to adopt Open Internet rules under Title II despite these legal and policy impediments, it should (1) provide exceptions for reasonable network management; (2) permit usage-based billing and zero-rating; (3) refrain from extending those rules to non-BIAS data services or Internet interconnection and traffic exchange arrangements; (4) avoid drawing unwarranted distinctions between broadband technologies; (5) forbear from all Title II provisions that would authorize the Commission to regulate rates and mandate unbundling, as well

as from other burdensome and ill-fitting provisions of Title II, including Sections 214, 222, and 254(d); and (6) preempt state and local regulation of broadband services and reject proposals to deem any federal framework merely a "floor," as such an approach would only invite states and localities to attempt to override federal policy determinations. These recommendations are all consistent with the Commission's previous determinations when adopting Open Internet requirements, and the justifications for those determinations remain sound. As explained in detail below, advocates of more extreme regulatory intervention—such as bans or other restrictions on usage-based billing plans, zero-rating practices, and paid interconnection agreements—fail to offer any cogent basis for interfering with these well-established, market-driven, and beneficial practices, and they ignore that such intervention plainly would constitute rate regulation, which the *NPRM* has disavowed.

DISCUSSION

I. THE RECORD CONFIRMS THAT RECLASSIFYING BROADBAND UNDER TITLE II WOULD BE UNLAWFUL

A. The Major Questions Doctrine Precludes the Commission from Subjecting ISPs to Common-Carrier Treatment Under Title II

The opening comments highlight a central flaw in the regulatory approach proposed in the *NPRM*: The major questions doctrine prohibits the Commission from subjecting broadband to common-carrier regulation as a telecommunications service under Title II. As NCTA's comments explain in detail, "it is self-evident that such an approach presents a 'major question' of vast political and economic significance, and Congress has not given the Commission the clear authorization it would need to depart from the existing light-touch framework."[3] The Commission

[3] Comments of NCTA – The Internet & Television Association, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) ("NCTA Comments"); *see also id.* at 4-6, 11-38.

has recognized how "major" this question is; the agency's proposed approach would foist burdensome common-carrier treatment on "the most important infrastructure of our time,"[4] and would purportedly decide "the future of the [I]nternet"—and thus "the future of everything"—in doing so.[5] There also is no doubt that the Commission lacks the "clear congressional authorization" required under controlling Supreme Court precedent to assert such sweeping authority by adopting a Title II telecommunications service classification for broadband.[6] To the contrary, Congress has embraced the exact *opposite* classification, by repeatedly enacting statutory provisions characterizing broadband as a Title I information service,[7] and declining to enact numerous bills that would have changed that classification.[8] For these and other reasons set forth in NCTA's comments, any decision by the Commission to reclassify broadband under Title II would present a paradigmatic case for vacatur under the major questions doctrine.

Numerous other commenters agree. There is broad consensus among a variety of academics and legal commentators that the *NPRM*'s proposed approach bears the "hallmark[s] of a regulatory decision that presents major questions" under the Supreme Court's precedents.[9] The

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[4] Chairwoman Jessica Rosenworcel, Remarks at the National Press Club, Washington, D.C., at 1 (Sep. 26, 2023) ("*2023 Rosenworcel Speech*"), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.

[5] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 846 (2018) ("*2018 Order*") (Dissenting Statement of Commissioner Jessica Rosenworcel); *see also NPRM* ¶ 17 (asserting that "BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression").

[6] *See, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

[7] *See* NCTA Comments at 24-27 (discussing provisions in Sections 223, 230, and 231).

[8] *See id.* at 18 & n.51, 27 & n.83 (providing examples).

[9] Comments of Christopher S. Yoo & Justin (Gus) Hurwitz, Univ. of Pa., WC Docket No. 23-320, at 10-14 (filed Dec. 14, 2023) ("Yoo/Hurwitz Comments"); *see also, e.g.*, Comments of Jeffrey Westling, WC Docket No. 23-320, at 11-15 (filed Dec. 14, 2023) ("Westling Comments");

U.S. Chamber of Commerce concurs, explaining that "Title II classification has all the characteristics of a major question," and ticking through an array of evidence demonstrating the economic and political significance of such a decision—including the vast size of the broadband industry ("at least $150 billion" in annual revenues), the massive financial impact of actual or threatened common-carrier treatment on the industry ("rang[ing] from $5 billion to $30-40 billion" annually), and the "frequent[] debate[s]" in Congress and the "millions of comments" filed at the Commission over the years illustrating the intense public focus on the issue.[10] Moreover, a court applying the doctrine would conclude that "[t]he [I]nternet is far too important to the economy and modern life to find that Congress silently intended to give the Commission discretion to subject broadband to a bespoke Title II regime of the agency's own devising."[11]

Comments of Harold Furchtgott-Roth, Kirk R. Arner, and Washington Legal Foundation, WC Docket No. 23-320, at 5 (filed Dec. 12, 2023) ("Furchtgott-Roth/Arner Comments"); Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine* 10-13 (Sept. 20, 2023) ("*Verrilli/Gershengorn Paper*"), https://aboutblaw.com/bazq.

[10] Comments of the U.S. Chamber of Commerce, WC Docket No. 23-320, at 49-61 (filed Dec. 14, 2023) ("U.S. Chamber of Commerce Comments"); *see also* George S. Ford, *Investment in the Virtuous Cycle: Theory and Empirics* 1 (Dec. 12, 2023) ("Ford Paper"), https://phoenix-center.org/pcpp/PCPP62Final.pdf (finding that "the Title II regulatory approach reduced investment by $8.1 billion annually (10%), on average, between 2011 and 2020, or $81.5 billion over ten years, reducing employment in the information sector by about 81,500 jobs and total employment by about 195,600 jobs (many of them union jobs), reducing labor compensation by $18.5 billion annually"; that "Gross Domestic Product ('GDP') has been reduced by $145 billion annually, or $1.45 trillion over ten years"; and that "[t]his evidence suggests that the looming threat of Title II regulation that hangs over the industry, during both the regulatory and deregulatory episodes, is a chronic obstacle to infrastructure investment as periods of lighter regulation are perceived as temporary," a dynamic that "will likely be even worse under the FCC's new Notice of Proposed Rulemaking, which is even more far-reaching than its prior Title II proposals").

[11] Comments of USTelecom and Opposition to Petitions for Reconsideration, WC Docket No. 23-320, at 7 (filed Dec. 14, 2023) ("USTelecom Comments"); *see also id.* at 28-36; Comments of TechFreedom, WC Docket No. 23-320, at 6-7 (filed Dec. 19, 2023); Comments of CTIA, WC Docket No. 23-320, at 75-84 (filed Dec. 14, 2023) ("CTIA Comments"); Comments of the Free State Foundation, WC Docket No. 23-320, at 11-21 (filed Dec. 14, 2023) ("FSF Comments").

Most proponents of Title II tellingly shied away from addressing the major questions doctrine in their comments—and the few that did discuss it offer no cogent basis for concluding that reclassifying broadband would survive judicial review under the doctrine. Leading jurists,[12] former leaders of the Solicitor General's Office,[13] and others[14] have already debunked these parties' central claim that *Brand X* somehow precludes application of the major questions doctrine in this context.[15] As then-Judge Kavanaugh explained in his separate opinion in *U.S. Telecom*, "*Brand X*'s finding of statutory ambiguity is a *bar* to the FCC's authority to classify Internet service as a telecommunications service," as it confirms that "Congress has not *clearly* authorized the FCC" to adopt such a classification.[16] Additionally, as NCTA and others have pointed out, Title II proponents' assertion that the Commission has general "expertise" in the communications arena[17] falls well short of establishing that Congress has *clearly authorized* the agency to reclassify broadband as a telecommunications service.[18]

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[12] *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 425-26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *id.* at 403-04 (Brown, J., dissenting from denial of rehearing en banc).

[13] *See Verrilli/Gershengorn Paper* at 14-15.

[14] *See, e.g.*, USTelecom Comments at 26-28; CTIA Comments at 62-63, 76-77; FSF Comments at 20-21.

[15] *See, e.g.*, Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 23-320, at 8-10 (erratum filed Dec. 15, 2023); Comments of Tejas N. Narechania, WC Docket No. 23-320, at 2-5 (filed Dec. 14, 2023).

[16] *U.S. Telecom*, 855 F.3d at 425-26 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[17] *See* Comments of the California Public Utilities Commission, WC Docket No. 23-320, at 42, 44 (filed Dec. 14, 2023) ("CPUC Comments"); *see also, e.g.*, Comments of Public Knowledge, WC Docket No. 23-320, at 35 (filed Dec. 14, 2023) ("Public Knowledge Comments") (asserting that an agency action can survive review under the major questions doctrine if it falls "within the scope of the agency's expected business and benefit[s] from the agency's experience and expertise").

[18] *See* NCTA Comments at 14; *see also* FSF Comments at 20; *accord Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (making clear that the major questions doctrine applies to agency action

Perhaps sensing that the major questions doctrine poses an insurmountable obstacle to the *NPRM*'s reclassification proposal, Public Knowledge suggests a procedural sleight-of-hand that it claims would allow the Commission to avoid application of the doctrine. Specifically, Public Knowledge portrays the pending petitions for reconsideration of the *2020 Remand Order* as providing a shortcut to reclassifying broadband under Title II—supposedly enabling the Commission to rescind both the *2020 Remand Order* and the *2018 Order* and thereby resurrect the *2015 Order* without triggering the doctrine.[19] But a reviewing court would plainly see through that gambit. For one thing, the major questions doctrine is concerned with the scope of the power asserted by the agency, not the procedural mechanism the agency uses to accomplish its objectives.[20] Common-carrier treatment of broadband under Title II thus presents a major question *regardless* of how the Commission gets there. It is also far from clear that granting petitions to reconsider the *2020 Remand Order* necessarily would result in reconsideration of the *2018 Order* as well; among other problems, the petitions at issue were filed years after the deadline for seeking

with "sweeping" economic or political impact even where the agency claims it is acting on matters within its general "wheelhouse").

[19] *See* Public Knowledge Comments at 2-15.

[20] *See, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (invoking the major questions doctrine on the basis of the "sheer scope of the [agency's] claimed authority"). Even assuming that the Commission could treat the pending petitions for reconsideration as an opportunity to rescind the *2018 Order*, that procedural posture—"considering whether to reverse a 2018 decision reversing [the Commission's] 2015 decision," and thereby "restoring the *status quo ante*," Public Knowledge Comments at 12—would not take this case outside the realm of the major questions doctrine. The Supreme Court's seminal decision in *West Virginia v. EPA* arose in a nearly identical procedural posture, where litigants sought to vacate the EPA's 2019 rescission of its 2015 Clean Power Plan, thereby restoring the *status quo ante* reflected in the 2015 Clean Power Plan. *See West Virginia*, 142 S. Ct. 2602-06. That posture did not prevent the Court from concluding that "this is a major questions case," and that the 2015 Clean Power Plan was in excess of the agency's authority. *Id.* at 2610, 2615-16.

reconsideration of the *2018 Order*,[21] and the period for any *sua sponte* reconsideration of that order has long passed as well.[22] If the Commission were to grant the petitions for reconsideration of the *2020 Remand Order*, the appropriate next step would be to initiate a new rulemaking proceeding to consider alternative regulatory approaches with respect to the remanded issues that were the subject of that order, not to declare the earlier *2018 Order* immediately null and void in its entirety. Granting reconsideration on the three discrete issues addressed in the *2020 Remand Order* could not possibly justify imposing a dramatically more expansive regulatory regime under the APA. And in any event, the *NPRM* provides no notice of such an end-run around the Commission's normal deliberative processes. Pursuing Public Knowledge's suggested procedural path thus would only increase the legal peril for the Commission.

B. Broadband Qualifies as an Information Service Based on Its Functional Attributes

As NCTA has explained, the functional attributes of broadband independently support an information-service classification, because (1) the provision of access to stored content online entails all of the statutory capabilities that define an information service, and (2) broadband providers offer critical information-processing functions that are inextricably intertwined with the telecommunications component but do not separately offer telecommunications to end users.[23]

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[21] *See* 47 C.F.R. § 1.429(d) (providing that a petition for reconsideration in a rulemaking proceeding "shall be filed within 30 days from the date of public notice of such action"). The petitions for reconsideration of the *2020 Remand Order* were filed on February 4 and 8, 2021—nearly three years after the *2018 Order* was published in the Federal Register. *See Restoring Internet Freedom*, 83 Fed. Reg. 7852 (Feb. 22, 2018).

[22] *See* 47 C.F.R. § 1.108 (providing that "[t]he Commission may, on its own motion, reconsider any action made or taken by it within 30 days from the date of public notice of such action").

[23] *See* NCTA Comments at 39-48.

Numerous other commenters—including not only other broadband providers,[24] but also academics,[25] technologists and engineers,[26] and technology companies,[27] among other stakeholders[28]—agree, explaining that today's broadband offerings include the information-processing functions analyzed by the Supreme Court in *Brand X*, as well as a host of new capabilities that further confirm broadband's information-service classification.

In addition to Domain Name System ("DNS") and caching functionalities, which are as integrated (if not more integrated) into broadband today as they were when *Brand X* was decided,[29] NCTA has identified various other information-processing functions that since have been integrated by ISPs into their broadband offerings, including distributed denial of service ("DDoS") mitigation, botnet notification, routing and border gateway protocol ("BGP") security, and artificial intelligence ("AI")-enhanced network management and protection.[30] Commenters have

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[24] *See* Comments of ACA Connects on the Notice of Proposed Rulemaking, WC Docket No. 23-320, at 23-29 (filed Dec. 14, 2023) ("ACA Connects Comments") ("[I]f one 'looks under the hood' today, it is evident that [ISPs] are providing, as part of broadband service, even greater data processing functionalities than before and are continually looking for new, similar opportunities."); CTIA Comments at 48-57; Comments of the Fiber Broadband Association on the Notice of Proposed Rulemaking, WC Docket No. 23-320, at 5-8 (filed Dec. 14, 2023) ("Fiber Broadband Association Comments"); USTelecom Comments at 9-27.

[25] *See* Yoo/Hurwitz Comments at 3-6.

[26] *See* Declaration of Peter Rysavy, Rysavy Research at 5-20 (appended to CTIA Comments) ("Rysavy Declaration"); Comments of Richard Bennett, WC Docket No. 23-320, at 4-6 (filed Dec. 14, 2023).

[27] *See* Comments of ADTRAN, Inc., WC Docket No. 23-320, at 6-9 (filed Dec. 14, 2023) ("ADTRAN Comments").

[28] *See* U.S. Chamber of Commerce Comments at 40-49.

[29] *Cf.* Roger Entner, Don Kellogg & Brett Clark, Recon Analytics, *Broadband Survey Results* 2, Figure 2 (appended to Reply Comments of USTelecom, WC Docket No. 23-320 (filed Jan.17, 2024)) ("Recon Analytics Survey") (finding that more than 90 percent of broadband subscribers use the DNS services provided by their ISPs); Rysavy Declaration at 16 (noting that "major ISPs process trillions of DNS queries every day").

[30] *See* NCTA Comments at 43-44.

identified additional information-processing functionalities that are inextricably intertwined with ISPs' broadband offerings, such as firewalls,[31] malware detection and alerting,[32] spam and content filtering,[33] video optimization,[34] addressing schemes (e.g., IPv4 and IPv6 protocols) and protocol translation,[35] active queue management technologies,[36] and dynamic routing.[37] Each of these components, on its own, is sufficient to render broadband an information service. Collectively, they unequivocally foreclose the Commission's proposal to reclassify the offering as a telecommunications service.

Efforts by Title II proponents to portray broadband as an offering of pure transmission, or to discount broadband's information-processing capabilities as mere "telecommunications management" functions, fall flat. Contrary to the claim of some commenters,[38] "broadband Internet access service [is] fundamentally different than standard telephone service."[39] Indeed, as various commenters explain, broadband's information-processing functions result in a service that differs markedly from the pure transmission offered by telephone service providers.[40]

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[31] *See* Rysavy Declaration at 4.

[32] *See* CTIA Comments at 51.

[33] *See* Comments of Interisle Consulting Group, WC Docket No. 23-320, at 3 (filed Dec. 13, 2023) ("Interisle Comments"); CTIA Comments at 51.

[34] *See* CTIA Comments at 51; Rysavy Declaration at 4, 18.

[35] *See* CTIA Comments at 50-51, 64; Interisle Comments at 3.

[36] *See* Yoo/Hurwitz Comments at 5.

[37] *See id.*

[38] *See, e.g.*, Comments of the Ad Hoc Telecom Users Committee, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023).

[39] *2018 Order* ¶ 51 & n.182.

[40] *See* CTIA Comments at 49 ("Unlike traditional telephone service, users of BIAS do not simply 'dial up' the server they want—very few BIAS users know the precise recipient or source of the data they send and receive, much less how to send or request it in usable formats that networks

Technologist Peter Rysavy observes, for example, that if broadband entailed "simple transmission," then viruses and malware would be delivered unimpeded to all users to which such harmful traffic is addressed.[41] "But instead," ISPs' security systems "process[] the traffic addressed to a user and transform[] it by delivering only . . . the traffic that [they] deem[] safe, making the [I]nternet a safer place for subscribers."[42] ISPs' reliance on protocol translation to "allow[] users to interact with the incredibly diverse array of users and devices that connect to the Internet with different protocols to perform different functions"—such as Internet of Things ("IoT") devices—likewise belies any notion that their service offerings are limited to pure transmission of unaltered information.[43] Such a characterization also is at odds with consumer perceptions, which—to the extent they are relevant to this classification question—confirm that broadband is best understood as a functionally integrated information service. Notably, a recent consumer survey by Recon Analytics reveals that an overwhelming majority of broadband subscribers perceive the service offered by their ISPs to include at least one information-processing capability, whereas only 8 percent perceive the service as solely transmitting their information unaltered from point A to point B.[44]

Moreover, as multiple commenters confirm, DNS, caching, and the other information-processing functions that are inextricably intertwined in ISPs' broadband offerings do not fit within

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can process."); *see also* Fiber Broadband Association Comments at 5-6 (ISPs "are not solely offering transmission service."); ACA Connects Comments at 24-25 ("[T]he Commission concluded that although broadband service contained a 'telecommunications' component . . . the providers were not offering telecommunications service to the public for a fee, either in combination with an information service or solely as a transmission service.").

[41] Rysavy Declaration at 19.

[42] *Id.*; *see also* CTIA Comments at 51 (describing an ISP's parental control feature that "allows users to, at their discretion, limit the content that minors may access").

[43] *See* CTIA Comments at 50-51.

[44] *See* Recon Analytics Survey at 1, Figure 1.

the Act's "telecommunications management" exception.[45] While the *NPRM* suggests that these features provide information-processing capabilities only for "the management of a telecommunications service," such that they fall outside of the Act's definition of "information service," both the Commission and the Department of Justice ("DOJ") expressly acknowledged to the Supreme Court in *Brand X* that DNS and caching are "*not* used 'for the management, control, or operation of a telecommunications network,'" but rather provide "information-processing capabilities . . . used to facilitate the information retrieval capabilities that are inherent in Internet access."[46] This remains as true today as it was then.

In addition, the telecommunications management exception—both as defined by the Act and as applied by the Commission—is limited to capabilities that principally provide utility to service providers, rather than to end users. Specifically, to fall within the scope of the exception, the capabilities used must be ones used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[47] The exception accordingly "has no applicability" to broadband, because the above-mentioned information-processing capabilities do not merely "manage[], control, or operat[e]" ISPs' broadband services, but instead "are part and parcel of the capabilities that the service offers *to consumers*."[48] DNS, for example, is not designed to help broadband providers "manage, control,

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[45] *See* CTIA Comments at 64; Rysavy Declaration at 5-20; USTelecom Comments at 20-22; Yoo/Hurwitz Comments at 4-6.

[46] *See* Reply Brief for the Federal Petitioners at 6 n.2, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281), 2005 WL 640965.

[47] 47 U.S.C. § 153(24).

[48] CTIA Comments at 64 & n.249.

or operate" their service; instead, the primary utility that DNS provides is to consumers.[49] Moreover, a functionality cannot be characterized as mere "telecommunications management" under this exception if it is essential to the user's service experience.[50] At a bare minimum, DNS "is a must" for broadband to function properly.[51] The other functionalities likewise improve the consumer experience in ways that go far beyond mere network management, and are essential features of today's broadband offerings.

II. THE RECORD CONFIRMS THAT TITLE II RECLASSIFICATION IS A SOLUTION IN SEARCH OF A PROBLEM AND WOULD CAUSE SIGNIFICANT HARMS

A. The Opening Comments Demonstrate That ISPs Have Strong Incentives To Preserve Internet Openness

Numerous commenters confirm that ISPs have powerful, market-driven incentives to ensure their services accord with Open Internet norms, and that it would be irrational and counterproductive as a business matter for ISPs to degrade or interfere with their customers' access to the Internet. As NCTA noted in its opening comments, ISPs have no desire "to undermine the value and competitiveness of their services by engaging in blocking, throttling, or other harmful conduct."[52] The U.S. Chamber of Commerce similarly explains that ISPs today operate "in a

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[49] *See* Rysavy Declaration at 11-12 (describing the various benefits that DNS provides to end users, including by "suggest[ing] similar pages" to a user "who has supplied an invalid address").

[50] *See Mozilla Corp. v. FCC*, 940 F.3d 1, 32 (D.C. Cir. 2019) (expounding this interpretation).

[51] *Id.* (internal quotation marks and citations omitted); *see also* USTelecom Comments at 22 ("DNS is integral to accessing and retrieving [I]nternet content — that is, the service ISPs sell and that end users purchase — as well as to improve the customer experience of using the [I]nternet to obtain content.").

[52] NCTA Comments at 64 & n.226 (citing Ford Paper at 11-12); *see also id*. at 2-4, 6, 53-54 & n.192, 72, 98 & n.341; Declaration of Mark Israel, Brian Keating & Allan Shampine ¶ 70 (appended to NCTA Comments) ("Israel/Keating/Shampine Declaration") ("[A]nti-consumer actions by broadband providers would lead to substantial costs in the form of consumer departures.").

competitive broadband market with significant checks on behavior that diminish the need for extensive regulation."[53] And several other commenters similarly point out that the highly competitive broadband market "wards off the need for imposing Title II on BIAS"[54] because ISPs "lack a financial incentive to degrade their customers' service."[55]

These "competitive dynamics," as CTIA recognizes, "ensure Americans enjoy the open Internet experience they demand."[56] Not only would consumers, edge providers, and policymakers immediately call out and respond to an ISP's attempts to "compromise[ ] . . . customers' access to tech companies' content" or engage in other non-neutral practices, but the "robust competition" that characterizes the marketplace ensures that any such attempts would be pointless.[57] The notion

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[53] U.S. Chamber of Commerce Comments at 5 (internal quotation marks and citation omitted); *see also* ACA Connects Comments at 12 ("[C]ompetition in the broadband market is real and increasing – acting as a restraint on the actions of [ISPs] – and consumers and edge providers are reaping its rewards.").

[54] CTIA Comments at 13.

[55] Westling Comments at 2; *see also, e.g.*, USTelecom Comments at 54 (explaining that "blocking, throttling, and paid prioritization were not issues after the Commission's brief Title II classification was reversed" because "it is in ISPs' interest not to engage in such conduct"); Comments of AT&T and Opposition to Petitions for Reconsideration, WC Docket No. 23-320, at 23 (filed Dec. 14, 2023) ("AT&T Comments") ("ISPs lack the . . . incentive to engage in such conduct, particularly . . . given the state of competition."); Comments of Mark Jamison, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) (explaining that Title II was written for conditions where "service providers had a strong incentive and the ability to engage in discriminatory activities," but "[t]hese conditions do not appear to fit today's [I]nternet markets") (internal quotations and citations omitted).

[56] CTIA Comments at 16.

[57] USTelecom Comments at 49-50 & n.194 (explaining that these "dynamics deprive any ISP of the market power necessary to discriminate anticompetitively against any [edge provider]" and "ensure that any [edge provider] can reach any ISP's customers on fair and efficient terms by interconnecting either directly or indirectly with the ISP"); *see also* Comments of WISPA – Broadband Without Boundaries, WC Docket No. 23-320, at 15-17 (filed Dec. 14, 2023) ("WISPA Comments") (noting that smaller ISPs similarly lack incentives to exploit any "gatekeeper role," in particular because the vast majority do not even offer subscription-based content services and "are in no position to try to demand fees from edge providers"). While a few commenters assert

that ISPs have an incentive to degrade consumers' broadband experience makes even less sense where, as ACA Connects notes, ISPs continue to respond to increasing consumer expectations by investing in network expansions and improvements such as new "data processing and other functionalities."[58]

The record also demonstrates that any ISP misconduct would be swiftly punished in the marketplace, including through consumer switching to competitive alternatives and widespread public condemnation. As spelled out in NCTA's opening comments, given that "Americans have more choice in broadband providers today than ever before,"[59] the economic reality is that any ISP that defies Open Internet norms "could expect to lose existing customers and fail to attract new ones."[60] In the words of other commenters, such an ISP "would promptly hemorrhage customers

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that some ISPs may be inclined to prioritize their own services or otherwise discriminate against competing edge providers, *see* Comments of the Writers Guild of America West, Inc. & Writers Guild of America East, WC Docket No. 23-320, at 6 (filed Dec. 13, 2023) ("WGA Comments"); Comments of Philo, Inc., WC Docket No. 23-320, at 3, 6 (filed Dec. 14, 2023), the absence of examples of such discrimination in the wake of the *2018 Order* demonstrates that such concerns are baseless. Rather, broadband providers have every incentive to operate consistently with Open Internet norms and compete for customers on the merits, including through innovative service offerings. *See, e.g.*, Furchgott-Roth/Arner Comments at 9 ("[R]ather than degrade or limit access to competition for [its] traditional cable TV business[,]" Comcast "decided to compete with streamers by creating Peacock. . . . The net result is that streaming viewership today outnumbers cable and antenna TV audiences.").

[58] ACA Connects Comments at 16-17; *see also id.* at 13 (explaining that ISPs "face significant and growing competition, driving them to invest in more robust and reliable infrastructure, roll out innovative services, provide first-in-class customer service, and keep prices reasonable").

[59] NCTA Comments at 89; *see also, e.g.*, Westling Comments at 2 ("If a consumer doesn't like the service a company provides, more than ever the consumer can seek alternatives.").

[60] NCTA Comments at 54-55 & n.197 (quoting Israel/Keating/Shampine Declaration ¶ 70 ("[S]urveys indicate that consumers would switch if they felt their broadband provider started to block, slow down, or impose other restrictions on the content they demanded.")); *see also* Recon Analytics Survey at 2-3, Figure 3 (finding that an overwhelming majority of broadband subscribers are likely to switch ISPs if their current provider blocked, throttled, or prioritized certain content or applications).

and revenues to its rivals"[61] and "would not be in business for long."[62] As CTIA explains, ISPs simply "could not and would not risk their customer bases or their reputations by taking actions that would harm Internet openness."[63] Indeed, "consumer expectations regarding openness have become well-established,"[64] and it is a matter of "broad industry consensus" that preserving Internet openness is critical for avoiding "customer dissatisfaction and negative churn."[65] The severe public backlash that ISPs would face for any non-neutral conduct would complicate both customer retention *and* recruitment; end users and edge providers "would quickly recognize such infractions and call them out . . . quickly and prominently," driving away an ISP's current customers and deterring new signups.[66]

Even proponents of Title II regulation recognize that it is in ISPs' best interests to ensure Internet openness even in the absence of regulatory mandates. For instance, CWA observes that "[b]y agreeing voluntarily to comply with net neutrality, providers have demonstrated it is

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[61] AT&T Comments at 23; *see also, e.g.*, USTelecom Comments at 50 (highlighting that, "because of the intense competition in the broadband market, customers would be able to — and would likely — switch to an alternative broadband provider if" an ISP were to degrade customer access to content); Comments of Ericsson, WC Docket No. 23-320, at 16 (filed Dec. 14, 2023) ("Ericsson Comments") (explaining that ISPs that violate Open Internet principles "risk[] losing customers to the burgeoning competitive market"); Comments of the Taxpayers Protection Alliance, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) ("Taxpayers Protection Alliance Comments") ("[I]t is illogical to think that providers would want to upset their customers . . . when those customers can, in many situations, switch to another provider.").

[62] Fiber Broadband Association Comments at 9.

[63] CTIA Comments at 16.

[64] *Id*. at 10.

[65] Ericsson Comments at 14; *see also* ACA Connects Comments at 16 (explaining that ISPs "avoid practices such as blocking and throttling because their primary mission is to keep customers"); Fiber Broadband Association Comments at 9 ("[ISPs'] incentive is to get consumers to subscribe and then keep them from going to the competition.").

[66] Fiber Broadband Association Comments at 10; *see also* CTIA Comments at 10-11 (noting that "public pressure" in the wake of any non-neutral conduct would be "predictably large" and more than "sufficient to ensure openness").

economically feasible for them to comply with net neutrality and that there is public demand for open [I]nternet practices."[67] It thus should come as no surprise that there is no credible evidence of ISP misconduct in the broadband marketplace. Indeed, as Free Press and other Title II advocates acknowledge, broadband providers today are *already* operating "in line with the expectations contained in the [*NPRM*]" with regard to Internet openness.[68]

Title II proponents nevertheless present a series of "problems" that supposedly necessitate a Title II "solution," but these so-called "examples" of harm or misconduct (1) lack evidentiary support; (2) have already been thoroughly discredited; and/or (3) do not represent actual threats to Internet openness. As an initial matter, many of the allegations in the records are inscrutable, speculative, and/or put forth without any effort to provide factual support, and thus should be rejected out-of-hand.[69] A number of other allegations—such as stale references to Comcast's

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[67] Comments of the Communications Workers of America, WC Docket No. 23-320, at 11 (filed Dec. 14, 2023).

[68] Comments of Free Press, WC Docket No. 23-320, at 47 (filed Dec. 14, 2023) ("Free Press Comments"); *see also* Comments of AARP, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023) ("AARP Comments") (acknowledging that ISPs "understood" the net neutrality "rules and policies" and continued to follow them even in the wake of their repeal); Opening Comments of Center for Accessible Technology and MediaJustice on Notice of Proposed Rulemaking, WC Docket No. 23-320, at 18 (filed Dec. 14, 2023) ("Center for Accessible Technology and MediaJustice Comments") ("Under the current rules and historical practice, broadband providers allow [I]nternet end users to access all . . . content on the [I]nternet.").

[69] *See, e.g.*, Comments of the Electronic Frontier Foundation, WC Docket No. 23-320, at 7-8 (filed Dec. 14, 2023) ("EFF Comments") (declining to offer any evidence or factual support for a collection of allegations of wrongdoing); Public Knowledge Comments at 8 (purporting to support an allegation of price gouging by citing to the same unfounded allegation); Comments of New America's Open Technology Institute, WC Docket No. 23-320, at 72 (filed Dec. 15, 2023) ("New America/OTI Comments") (speculating concern about "the *potential*" for a certain type of offering despite acknowledgment that "it is unclear how this would work in practice") (emphasis added); Comments of Lumen, WC Docket No. 23-320, at 9, 11 (filed Dec. 14, 2023) ("Lumen Comments") (claiming that the interconnection-related concerns underlying certain Charter-Time Warner merger conditions hold true today, without offering any evidence of ISPs' use of interconnection terms to disadvantage edge providers).

efforts in 2007 to remedy the adverse effects on its customers' Internet experience caused by a small number of users who consumed a significant portion of overall network resources by initiating multiple, simultaneous streams of peer-to-peer traffic over BitTorrent[70]—have been addressed ad nauseam and shown *not* to support calls for common-carrier mandates.[71]

Title II proponents also rely on allegations and anecdotes that have nothing to do with Internet openness. As NCTA and others have explained previously, a review of the "47,000 consumer complaints" cited by the National Hispanic Media Coalition[72] shows that "the vast majority of those complaints do not allege anything that even remotely implicates" Open Internet principles, and there is tellingly "no evidence that any of these informal complaints led the Commission to undertake enforcement action against any broadband provider" while its Open Internet rules were in effect.[73] In the same vein, several commenters again point to an incident in 2018 involving an unfortunate mismatch between the Santa Clara County Fire Department's

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[70] *Compare, e.g.*, Comments of Engine, WC Docket No. 23-320, at 4 (filed Dec. 14, 2023), *with, e.g.*, Reply Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 28-29 (filed Aug. 30, 2017) (explaining that "Comcast was attempting to address a significant router design issue . . . that was causing BitTorrent traffic to adversely affect other applications," not for anticompetitive reasons, but to prevent use of BitTorrent from "undermining the Internet experience of other customers"); Harold Feld, *Evaluation of the Comcast/BitTorrent Filing – Really Excellent, Except For the Gapping Hole Around the Capacity Cap*, Wetmachine (Sept. 22, 2008) https://wetmachine.com/tales-of-the-sausage-factory/evaluation-of-the-comcastbittorrent-filing-really-excellent-except-for-the-gapping-hole-around-the-capacity-cap/ (concluding that "Comcast did not block P2P for anticompetitive reasons").

[71] *Compare, e.g.*, Comments of Stephen Renderos, Exec. Dir., MediaJustice, WC Docket No. 23-320, at 7 (filed Dec. 14, 2023) (identifying anecdotes from 2005 (Madison River), 2008 (Comcast-BitTorrent), and 2012 (Google Wallet and AT&T-FaceTime) as examples of conduct requiring rules in 2024), *with, e.g.*, Reply Comments of AT&T Services Inc., WC Docket No. 17-108, at 16-18 (filed Aug. 30, 2017) (addressing each the Madison River, Comcast-BitTorrent, AT&T-Facetime, and Google Wallet anecdotes).

[72] Comments of the National Hispanic Media Coalition, WC Docket No. 23-320, at 7-8 (filed Dec. 14, 2023) ("NHMC Comments").

[73] Opposition of NCTA – The Internet & Television Association and USTelecom to Motion Regarding Informal Complaints, WC Docket No. 17-108, at 3-5 (filed Sep. 28, 2017).

selected data plan and its network needs[74]—which has been "widely debunked as *not* a net neutrality violation and *not* something that even the 2015 Order would have regulated, much less prevented."[75] Other allegations that characterize the ordinary application of congestion management techniques and data allowances as examples of "throttling" similarly fail to represent genuine threats to Internet openness;[76] such practices are not "throttling" as the Commission has defined the term, and the Commission has consistently recognized the importance of allowing ISPs to manage their networks "to address legitimate needs such as avoiding network congestion."[77]

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[74] *See, e.g.*, Comments of the Office of the County Counsel, County of Santa Clara, WC Docket No. 23-320, at 23-24 (filed Dec. 14, 2023) ("County of Santa Clara Comments"); Comments of the Alarm Industry Communications Committee, WC Docket No. 23-320, at 6 (filed Dec. 14, 2023); EFF Comments at 22-23.

[75] NCTA Comments at 50-51; *see also, e.g.*, Reply Comments of Verizon, WC Docket No. 17-108, at 17-18 (filed May 20, 2020) (also noting that "the government petitioners in *Mozilla*—which included Santa Clara—conceded that Santa Clara's complaints did not involve 'net neutrality' violations"); Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 7-8 (filed Apr. 20, 2020); Comments of CTIA, WC Docket No. 17-108, at 19 (filed Apr. 20, 2020).

[76] *Compare, e.g.*, Comments of the American Civil Liberties Union, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023) ("ACLU Comments") (characterizing Cox Communications' efforts to maintain network stability for customers during the COVID-19 pandemic as "punish[ing] heavy broadband users"); *with, e.g.*, Decl. of Guy McCormick in Supp. of Mot. for Prelim. Inj. at 2-4, *Am. Cable Ass'n. v. Becerra*, 2:18-cv-02684 (E.D. Cal. Aug. 5, 2020) (ECF 53-3) ("Occasionally . . . a node will experience unanticipated extraordinary and sustained utilization that negatively affects subscribers served by that node. The COVID-19 crisis in particular has caused such events" that "prompted . . . targeted congestion management practices in a very small portion of [Cox's] network to ensure that customers' experiences in those areas were not materially impaired, especially during this critical time."). Moreover, Free Press's suggestion that ISPs are reluctant to offer lower-priced service tiers for fear of "cannibaliz[ing]" their other offerings ignores the fact that many broadband providers already offer low-cost options to low-income households. *See* Free Press Comments at 46 & n.87; NCTA Comments at 84-85 & nn.288-292.

[77] *See, e.g.*, *Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶ 69 (2015) ("*2015 Order*").

Meanwhile, the supposed "blocking" policy briefly announced by a small Idaho ISP was quickly rescinded after the ISP faced overwhelmingly negative backlash[78]—thus *confirming* that the marketplace will swiftly correct any apparent deviations from consensus Open Internet principles and that "consumers will not stand for any other behavior."[79] Finally, as for the interconnection-related allegations in the record,[80] the Commission has consistently and appropriately deemed Internet interconnection and traffic exchange not only to be exempt from Open Internet rules, but wholly distinct from Open Internet considerations,[81] and even leading Title II proponents are forced to admit that "the interconnection markets are functioning well."[82]

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[78] *See* Ericsson Comments at 14 (describing the circumstances of the "example" involving an Idaho ISP).

[79] *Id.* at 15. Notably, the ISP also clarified that it was only offering its customers a "choice" to limit access to certain sites rather than blocking access to those sites on a blanket basis—a practice arguably permitted under the Commission's prior orders. *See* E-mail from Bret Fink, Owner, YourT1Wifi, RE: Invoice #IN 2957 from YourT1Wifi, @yes4yep, X (Jan. 11, 2021), https://twitter.com/yes4yep/status/1348509228374269952/photo/1; *see also Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905, ¶ 143 (2010) ("*2010 Order*") (noting that ISPs were "free . . . to offer . . . 'edited' services" such as "a service limited to 'family friendly' materials" for "users who desire only such content"); *2015 Order* ¶ 222 n.575 (reaffirming the *2010 Order*'s conclusion).

[80] *See, e.g.*, Comments of Scott Jordan & Ali Nikkhah, WC Docket No. 23-320, at 4-5 (filed Dec. 14, 2023) ("Jordan/Nikkhah Comments"); ACLU Comments at 5; Free Press Comments at 133-136. Moreover, while the ACLU and Lumen have suggested that a decade-old interconnection arrangement between Netflix and Comcast somehow violated principles of net neutrality, *see* ACLU Comments at 5 & n.13; Lumen Comments at 7, "Netflix receive[d] no preferential network treatment under the . . . agreement." *Comcast and Netflix Team Up to Provide Customers Excellent User Experience*, Comcast Corp. (Feb. 23, 2014), https://corporate.comcast.com/news-information/news-feed/comcast-and-netflix.

[81] *See, e.g.*, *2015 Order* ¶¶ 30, 206 ("To be clear, . . . we are not applying the open Internet rules we adopt today to Internet traffic exchange.").

[82] Free Press Comments at 68-69.

B. The Record Also Undercuts the *NPRM*'s Other Cited Rationales for Title II Reclassification

As NCTA pointed out in its opening comments,[83] and various commenters agree,[84] the grab bag of additional purported rationales set forth in the *NPRM* for subjecting broadband to Title II mandates are pretextual. None comes close to justifying the burdens and costs of common-carrier obligations, including rate and service-quality regulation, which apply by default to all telecommunications carriers under Title II. To the contrary, injecting common-carrier regulation in the broadband arena would undermine the relevant policy goals, rather than advance them.

National Security and Law Enforcement. While a handful of Title II advocates parrot the *NPRM*'s asserted national security rationale for reclassification,[85] they fail to explain how Title II actually would bolster national security. For example, Free Press repeats the *NPRM*'s claim that "'reclassifying BIAS as a telecommunications service would allow the Commission to use its [S]ection 214 authority to address' national security threats" of the sort it addressed in its recent orders stripping several Chinese carriers of operating authority.[86] But far from supporting reclassification, the fact that the Commission *already* has largely excluded Chinese carriers from the U.S. marketplace by revoking their Section 214 authorizations (which they were required to

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[83] NCTA Comments at 66-83.

[84] *See, e.g.*, USTelecom Comments at 70-92; CTIA Comments at 24-45; NTCA Comments at 17-26; *see also* Reply Declaration of Andrew J. Grotto at 29 ("Grotto Declaration") (appended to Reply Comments of USTelecom) ("Title II reclassification is not necessary to address any of the targeted security steps Congress has directed the FCC to take."); Reply Declaration of Anthony Scott at 4, 6 ("Scott Declaration") (appended hereto).

[85] *See, e.g.*, Free Press Comments at 59, Public Knowledge Comments at 64-65.

[86] Free Press Comments at 59 (quoting *NPRM* ¶ 27 and citing orders revoking Section 214 authority from China Telecom, China Unicom, and Pacific Networks and ComNet).

hold both before and after the *2018 Order*)—and that the D.C. Circuit upheld those rulings[87]—undermines the notion that there is a gap in authority that requires reclassification. To the extent that national security agencies determine that additional action is warranted to prevent such Chinese carriers from participating in IP traffic-exchange or providing broadband services to enterprise or carrier customers—activities the Commission's revocation orders did not fully address—the proposed reclassification of *mass market*, retail broadband services would have no effect on such activities, as other commenters recognize.[88] But other agencies do have appropriate authority to respond to any such threats, without regard to the classification of broadband; among other mechanisms, the Department of Commerce possesses broad authority under its ICTS Supply Chain rule to block or restrict foreign adversaries' participation in the U.S. communications marketplace.[89]

Proponents of Title II regulation likewise fail to acknowledge the array of other tools that enable the Commission and/or national security agencies to address potential national security or

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[87] *See Pacific Networks Corp. and ComNet (USA) LLC v. FCC*, 77 F.4th 1160 (D.C. Cir. 2023); *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256 (D.C. Cir. 2022).

[88] *See, e.g.*, USTelecom Comments at 75; CTIA Comments at 31; NTCA Comments at 69.

[89] *See, e.g.*, USTelecom Comments at 71-72; Comments of the Ad Hoc Broadband, Carrier and Investor Coalition, WC Docket No. 23-320, at 9 (filed Dec. 14, 2023); Comments of the Information Technology Industry Council, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) ("Information Technology Industry Council Comments"); Scott Declaration at 6 (noting the Commerce Department's "very broad authority to prohibit or condition a wide range of transactions and uses of services"); Grotto Declaration at 25. The Department of Justice (as Chair of the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector) filed comments in an unrelated proceeding last year, in support of proposals to expand reporting and oversight of foreign ownership interests in applications for international Section 214 authorizations. *See* Letter of Devin A. DeBacker, Chief, Foreign Investment Review Section, National Security Division of the U.S. Department of Justice to Marlene H. Dortch, Secretary, FCC, IB Docket No. 23-119 (filed Apr. 12, 2023). But that proceeding did not raise the issue of reclassifying broadband as a Title II service, and DOJ did not make any such proposal.

law enforcement threats involving the provision of information services like broadband. These tools include the Commission's longstanding application of the Communications Assistance for Law Enforcement Act to broadband equipment; the restrictions on broadband equipment on the Covered List, pursuant to the Secure and Trusted Communications Act of 2019 and the Secure Equipment Act of 2021; the review of transactions involving broadband providers by the Committee on Foreign Investment in the United States and/or Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector; and export, trade, and government-contracting restrictions under the Export Administration Regulations, the Chinese Military-Industrial Complex Companies List, Section 889 of the National Defense Authorization Act of 2019, and other statutes and rules.[90] Parties championing broadband reclassification do not even attempt to show that such tools are inadequate, let alone that Title II would enable the Commission to fashion effective responses to any governmental concerns.

The record confirms that reclassifying broadband not only is unnecessary to address purported gaps in the federal government's national security framework, but also would be counterproductive in many respects. Several commenters agree with NCTA that the whole-of-government approach developed by Congress and Executive Branch agencies would be frustrated if the Commission were to impose sector-specific requirements in the interest of safeguarding national security (or, as discussed below, cybersecurity).[91] As Verizon notes, "[t]he Commission's assertion that its supporting role in protecting national security and law enforcement supplies a basis for reclassifying broadband — an assertion made *without* any clear statutory authority —

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[90] *See* NCTA Comments at 70-71; *see also, e.g.*, USTelecom Comments at 71-74; CTIA Comments at 32-33; Comments of Verizon and Opposition to Petitions for Reconsideration, WC Docket No. 23-320, at 11-12 (filed Dec. 14, 2023) ("Verizon Comments"); Information Technology Industry Council Comments at 3.

[91] *See* NCTA Comments at 67-71.

would upend the whole-of-government approach that Congress designed and agencies with superior expertise have implemented."[92] The Reply Declarations submitted by Tony Scott and Andrew Grotto further demonstrate, based largely on their experience as senior officials in the Obama Administration, that treating broadband as a common-carrier service is neither necessary nor beneficial from the standpoint of national security.[93] As both experts explain, Congress has given the Commission discrete responsibilities in addressing national security and law enforcement issues, but it has looked to other agencies—including the Department of Homeland Security ("DHS"), the Department of Defense ("DOD"), and DOJ—to play the lead roles in those arenas. "None" of the *NPRM*'s "proposed oversight mechanisms depend[s] on the classification of broadband or would be rendered more effective if broadband were reclassified as a telecommunications service";[94] to the contrary, Title II reclassification could "undermine the effective and collaborative public-private partnership . . . on national security . . . and law enforcement initiatives, with deleterious effects on those relationships and the national interests they have advanced over the past decades."[95]

Cybersecurity. For many of the same reasons, cybersecurity policy would be hampered, rather than advanced, by Title II regulation. As with national security, proponents of Title II

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[92] Verizon Comments at 13; *see also, e.g.*, CTIA Comments at 24-30; USTelecom Comments at 71-76.

[93] *See generally* Scott Declaration; Grotto Declaration. Mr. Scott served as Chief Information Officer for the Obama Administration, and has held the same position for several leading companies in the technology sector and more broadly. Mr. Grotto served as Senior Director for Cyber Policy on the National Security Council from 2015 to 2017 and Senior Advisor for Technology Policy to Commerce Secretary Penny Pritzker from 2013 to 2015; he also served on the staff of the Senate Select Committee on Intelligence, as the designee of Senators Sheldon Whitehouse (D-RI) and Kent Conrad (D-SD).

[94] Scott Declaration at 6.

[95] Grotto Declaration at 1-2; *see also id.* at 31-32 (explaining how the Commission's status as an independent agency could further "complicate and slow agency action and industry agility").

regulation make no serious attempt to argue that the federal interest in promoting cybersecurity bolsters the case for regulating broadband as a Title II telecommunications service. While most proponents of increased regulation simply ignore the issue, EPIC et al. posit that market forces have failed to "correct for" unspecified "cybersecurity deficiencies," and further suggest that Title II would "enable the Commission to require fundamental minimum cybersecurity practices."[96] But even apart from their failure to identify any relevant cybersecurity deficiencies *attributable to ISPs*, these commenters overlook the array of effective oversight mechanisms that are already in place today.

Congress and the Executive Branch have taken pains to develop a comprehensive regime grounded in public-private partnerships and backed by well-coordinated federal oversight led by the Cybersecurity & Infrastructure Security Agency ("CISA"), which is part of DHS. CISA serves as the government's "operational lead for federal cybersecurity and the national coordinator for critical infrastructure security and resilience," and spearheads "the national effort to understand, manage, and reduce risk to [the nation's] cyber and physical infrastructure."[97] As NCTA explained in its opening comments,[98] and other parties further confirm,[99] the relevant organizations and processes through which industry participants collaborate with CISA include the National Security Telecommunications Advisory Committee ("NSTAC"), the Communications Sector Coordinating Council ("CSCC"), and National Coordinating Center for Communications, Information Sharing

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[96] Comments of the Electronic Privacy Information Center, Public Knowledge, Consumer Federation of America, and Demand Progress Education Fund, WC Docket No. 23-320, at 4, 17 (filed Dec. 14, 2023) ("EPIC et al. Comments").

[97] CISA, About, https://www.cisa.gov/about.

[98] NCTA Comments at 74-76.

[99] *See, e.g.*, CTIA Comments at 25, 29-30; USTelecom Comments at 76-81; Verizon Comments at 13-15; AT&T Comments at 18-20.

and Analysis Center ("C-ISAC"). As several parties argue, there is no need for the Commission's expanded involvement in these interagency processes or public-private partnerships, and nothing in Title II would facilitate the Commission's increased participation in any event.[100] Instead, as the Reply Declarations of Obama Administration veterans Tony Scott and Andrew Grotto explain, the Commission's reliance on Title II to assert new responsibilities and impose new sector-specific requirements "on a subset of entities in a complex ecosystem would threaten to impede the coordinated, whole-of-government approach Congress has taken pains to establish,"[101] which "foster[s] valuable collaboration and quickly produce[s] innovative approaches—an advantage, compared to an adversarial regulatory proceeding."[102]

Using Title II to impose cyber regulation on mass-market broadband services also would be fatally underinclusive, as such rules would fail to address the practices of dominant tech platforms, cloud providers, IP transit and peering providers, or providers that operate in the enterprise and wholesale carrier marketplace that may present significant security-related risks.[103]

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[100] *See, e.g.*, CTIA Comments at 29 (explaining that while the *NPRM* "claims that Title II classification will enable [the FCC] to better complete its 'responsibilities' and 'task[s]' under [Presidential Policy Directive 21 ("PPD-21")]," "that assertion misconstrues PPD-21, which . . . did not actually authorize the Commission to do anything other than partner with other agencies and industry on these issues").

[101] Scott Declaration at 3-4 (explaining that while the Commission "plays an important role in coordinating with" cybersecurity agencies, reclassification "would hamper, rather than improve, public-private cooperation" and "would not improve the FCC's or other agencies' or providers' abilities to address or deter [cyber] threats" or "provide the FCC additional or unique capabilities to detect, prevent, or enforce against such threats").

[102] Grotto Declaration at 34; *see also id. at* 32 (cautioning that, as an independent agency, the Commission would "not be subject to regular input and coordination . . . through" the Office of the National Cyber Director and the National Security Council, thereby impeding "important coordination" that is "particularly vital" on matters of cybersecurity).

[103] *See* Scott Declaration at 3 ("The growth of cloud computing, the shift to conducting business from remote locations and mobile devices, the increasing interconnection between third-party software service providers and their clients, the exponential proliferation of [IoT] devices, the

Relatedly, as USTelecom notes, "the key entities that would play a role in increasing BGP security include transit ISPs and 'edge' Autonomous Systems, i.e., the infrastructure owned and operated by large entities such as corporations, government agencies, utilities, and universities that own and control their own IP space."[104] Thus, cyber rules that apply solely to mass-market ISPs would be ineffective and destructive to the cohesiveness of the regulatory scheme.[105] Indeed, the irony of the *NPRM*'s call for such regulation is that it would recreate the very type of Balkanization that prompted Congress to enact the Cybersecurity Information Sharing Act, which led to more centralized oversight via CISA.

Moreover, contrary to the unsupported assertion by EPIC et al. that Title II would authorize national cyber standards, neither those commenters nor any other party explain what specific authority in Title II would empower the Commission to adopt such requirements. In fact, nothing in Title II provides any such authority. In short, the *NPRM*'s references to cybersecurity cannot justify the proposed reclassification of broadband services.

Public Safety and Network Reliability/Resiliency. The record also undercuts the proposition that Title II is necessary to improve public safety or network reliability/resiliency. To

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emergence of artificial intelligence . . . as a key business operations tool, and the prevalence of cyber-physical systems have all combined to multiply the breadth of attack surfaces that pose cyber risk threats, and intensified the potential magnitude and impact of such attacks.").

[104] USTelecom Comments at 78-79; *see also* Scott Declaration at 4 ("The important issue of BGP security underscores why Title II authority is a poor fit for advancing security in the Internet arena. Reclassification of broadband would not enable the FCC to resolve BGP vulnerabilities because unilateral action by a single country's regulator will not prevent misrouting or hijacking of data traffic. Furthermore[,] a command-and-control regulatory fix as envisioned by the [Commission] won't work because the actions needed to resolve these issues necessarily require collaboration with a broad ecosystem of Internet-related entities, not just ISPs.").

[105] CISA, for example, is "better equipped to ensure consistent and coordinated oversight" than the Commission because it "does not draw any distinctions among participants in the Internet ecosystem." Scott Declaration at 3.

be sure, "broadband plays an important role in promoting public safety."[106] Yet while Title II proponents suggest that the increasing importance of broadband networks to public safety is sufficient without more to justify the imposition of common-carrier regulation,[107] such parties fail to identify any concrete ways in which Title II actually would improve public safety.[108] As a threshold matter, Title II proponents largely ignore that public safety entities overwhelmingly rely on enterprise-class, dedicated Internet access services, not the mass-market services at issue in the *NPRM*.[109] They also overlook that the current light-touch regulatory regime benefits public safety users by allowing broadband providers to prioritize their critical traffic in emergency situations without risking enforcement action for engaging in "non-neutral" practices.[110]

Moreover, insofar as the *NPRM* vaguely hints at new requirements the Commission might consider under Title II, those examples fall flat. For instance, while the *NPRM* mentions Wireless Emergency Alerts and public safety prioritization programs,[111] reclassification would not enable

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[106] USTelecom Comments at 83.

[107] *See, e.g.*, AARP Comments at 13-15; Comments of the Benton Institute for Broadband & Society, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023); Comments of the Consumer Federation of America, WC Docket No. 23-320, at 57 (filed Dec. 14, 2023) ("Consumer Federation of America Comments"); Public Knowledge Comments at 6, 8, 62-63.

[108] *See* Comments of the American Consumer Institute, WC Docket No. 23-320, at 6-7 (filed Dec. 11, 2023) ("American Consumer Institute Comments") (explaining that the *NPRM* does not specify any problems with public safety or explain how stricter regulation would solve such problems); Comments of the Digital Progress Institute, WC Docket No. 23-320, at 15 (filed Dec. 14, 2023) ("Digital Progress Institute Comments") (same).

[109] *See, e.g.*, USTelecom Comments at 83; CTIA Comments at 36; FSF Comments at 21.

[110] *See* NCTA Comments at 72 (citing John Hendel, *VA Asking California if Net Neutrality Law Will Snag Veterans' Health App*, Politico (Mar. 24, 2021), https://www.politico.com/states/california/story/2021/03/24/va-asking-california-if-net-neutrality-law-will-snag-veterans-health-app-1369440); Digital Progress Institute Comments at 14 (noting that the prohibition against paid prioritization would foreclose benefits associated with prioritization of public safety communications); FSF Comments at 27-28 (same).

[111] *See NPRM* ¶ 35.

the Commission to compel additional provider participation, given that the WARN Act makes clear that such participation is voluntary.[112] And while commenters like the County of Santa Clara argue that consumers *receive* public safety communications through mass-market broadband connections[113]—supposedly justifying increased regulation—the increased investment and innovation fostered under the current light-touch regulatory regime has made networks more reliable than ever before, as the Commission concluded in the *2020 Remand Order*.[114] Indeed, the exemplary performance of broadband networks during the COVID-19 pandemic, when network demands unexpectedly spiked, confirms that such "success was achieved due to the significant investment that would not have been possible in a heavily regulated environment."[115]

With respect to network reliability and resiliency, proponents of reclassification again invoke Title II as a cure-all without any actual showing that increased regulation is necessary or would deliver net benefits.[116] These parties overlook the reality that broadband providers "are promoting resiliency and reliability through investment in preparedness, service continuity, rapid restoration in the face of a disaster, and resiliency by design—all in the absence of common carrier regulation of BIAS."[117] Broadband providers have invested billions in their networks to ensure they have sufficient capacity during emergencies, and "to harden broadband networks and restore

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[112] *See* Digital Progress Institute Comments at 15.

[113] *See* County of Santa Clara Comments at 17.

[114] *See Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, Order on Remand, 35 FCC Rcd. 12328, ¶¶ 33-35 (2020) ("*2020 Remand Order*").

[115] USTelecom Comments at 83; *see also* Ford Paper at 5-6.

[116] *See, e.g.*, Free Press Comments at 57-59; Consumer Federation of America Comments at 57.

[117] CTIA Comments at 37.

operations quickly when they are impacted by catastrophic events."[118] In addition, the Commission's Mandatory Disaster Response Initiative "requires that facilities-based wireless providers work collaboratively to maintain services, including data services, during disaster and other emergency events through roaming and mutual aid obligations."[119] As AT&T aptly concludes, given broadband providers' market-driven investments in network reliability and resiliency and existing Commission initiatives, "[n]ew oversight and new reporting requirements would be not only needless, but affirmatively counterproductive."[120] Although increased regulation is not warranted, the Commission recently concluded that it already possesses the requisite authority—outside of Title II—to expand its outage reporting requirements to broadband providers,[121] thereby undermining any claim that reclassification is necessary to achieve that objective.

Privacy. Several parties buy into the *NPRM*'s suggestion that Title II regulation might enable the Commission to adopt broadband-specific privacy rules, but they generally ignore that Congress specifically forbade the Commission from establishing such a framework under the Congressional Review Act ("CRA").[122] Moreover, Title II proponents that do mention the CRA disapproval resolution make no effort to explain how any new broadband privacy "rules" the

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[118] USTelecom Comments at 81-82.

[119] CTIA Comments at 38.

[120] AT&T Comments at 29.

[121] *See Resilient Networks et al.*, PS Docket No. 21-346 et al., Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC-CIRC2301-01, ¶ 68 (rel. Jan. 4, 2024) (asserting that "the statutory provisions cited in the 2016 *Notice* considering outage reporting for BIAS provide the Commission with authority to require such reporting").

[122] *See, e.g.*, AARP Comments at 9-11; ACLU Comments at 8; Consumer Federation of America Comments at 58-60.

Commission might adopt could circumvent that resolution.[123] The bar posed by the CRA resolution is dispositive as a legal matter,[124] but in any event these commenters fail to show that imposing sector-specific privacy rules would advance the public interest. Leading members of Congress have made crystal clear that consumers are best served by technology-neutral legal standards that apply across the Internet ecosystem, to ISPs and non-ISPs alike.[125] By contrast, proponents of Title II regulation all fail to explain how consumers would benefit if the Federal Trade Commission ("FTC") were stripped of its jurisdiction over broadband providers, resulting in the bifurcation of federal oversight of the privacy practices of participants in the Internet ecosystem—which would occur immediately if this Commission were to follow through on its proposal to impose common-carrier regulation.[126]

Accessibility. In what is now a familiar pattern, the handful of Title II advocates that address disabilities access make no effort to explain why common-carrier regulation is necessary or would be beneficial in the broadband arena. In particular, they fail to recognize that Congress already enacted a statute—the 21st Century Communications and Video Accessibility Act

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[123] *See, e.g.*, EPIC et al. Comments at 15; Free Press Comments at 60-61.

[124] Notably, reclassifying broadband as a telecommunications service and declining to forbear from Section 222 would be prohibited by the 2017 CRA resolution even *absent* any further Commission rulemaking action adopting new broadband privacy rules. That is because (1) the Commission's recently adopted *2023 Data Breach Order* already subjects telecommunications service providers to data breach requirements that are substantially similar to the 2016 broadband data breach requirements invalidated by the CRA resolution; and (2) reclassifying broadband as a telecommunications service would instantly render ISPs subject to those requirements. *See Data Breach Reporting Requirements*, WC Docket No. 22-21, Report and Order, FCC 23-111 (rel. Dec. 21, 2023) ("*2023 Data Breach Order*"). Leaving aside whether the *2023 Data Breach Order* itself complies with the CRA resolution, there is no question that the combination of that order and a Title II reclassification order in this proceeding would run afoul of that resolution by impermissibly subjecting ISPs to the very requirements Congress disapproved.

[125] *See* NCTA Comments at 78 n.268 (quoting congressional statements).

[126] *See id.* at 65-66 (citing 15 U.S.C. § 45(a)(2), which deprives the FTC of jurisdiction over common carriers).

("CVAA")—to ensure that IP-enabled services are accessible to persons with disabilities.[127] Nothing in the record demonstrates that accessibility needs are not being met through the combination of market forces and the Commission's CVAA rules, much less that Title II would result in net benefits.

Universal Service. Title II proponents fail to rebut the conclusions of the *2020 Remand Order*, which made clear that the Commission may support broadband networks and services under the various Universal Service Fund ("USF") support mechanisms, including Lifeline, regardless of regulatory classification.[128] Indeed, broadband networks and services are receiving billions of dollars in USF support annually, belying any argument that reclassification is necessary to enable such support. The Commission also should reject calls to add broadband revenues to the USF contribution base by reclassifying broadband as a common-carrier telecommunications service and declining to forbear from Section 254(d).[129] As NCTA has explained in the relevant USF proceedings, imposing a large tax on broadband would hamper the paramount national objective of expanding broadband adoption, especially among low-income consumers.[130] Instead,

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[127] *See, e.g.*, Public Knowledge Comments at 54; Center for Accessible Technology and MediaJustice Comments at 9-12; CPUC Comments at 28-32.

[128] *2020 Remand Order* ¶¶ 83-103.

[129] *See, e.g.*, ACLU Comments at 15; Comments of National Consumer Law Center et al., The Affordable Broadband Groups, WC Docket No. 23-320, at 2-4 (filed Dec. 14, 2023); Comments of the National Digital Inclusion Alliance & Common Sense, WC Docket No. 23-320, at 3-4 (filed Dec. 14, 2023); New America/OTI Comments at 37-40; Comments of INCOMPAS, WC Docket No. 23-320, at 53-57 (filed Dec. 14, 2023) ("INCOMPAS Comments"); CPUC Comments at 12; Comments of Next Century Cities, WC Docket No. 23-320, at 12-13 (filed Dec. 14, 2023).

[130] *See, e.g.*, Comments of NCTA – The Internet & Television Association, WC Docket No. 21-476, at 19 (filed Feb. 17, 2022) ("2022 NCTA Comments") (explaining that assessing contributions on broadband services would undermine broadband adoption); *see also* Chairwoman Jessica Rosenworcel, Responses to Questions for the Record at 29, U.S. House of Representatives Energy & Commerce Subcommittee on Communications and Technology Hearing on "Oversight of President Biden's Broadband Takeover," Nov. 20, 2023 ("Rosenworcel QFR Responses"),

the Commission should work with Congress to develop a broad-based assessment mechanism that includes large tech platforms and others that derive enormous value from broadband networks.[131]

Robocalls and Robotexts. Few Title II proponents even mention preventing robocalls and robotexts as a justification for reclassification, and those that do ignore the Commission's significant existing authority to address such matters under the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act ("TRACED Act") and the Telephone Consumer Protection Act ("TCPA").[132] Yet, again, there is no demonstration that there is any gap in existing authority or that Title II would fill it in an effective and beneficial manner.[133] To the contrary, the Commission has touted its successful measures to combat robocalls and robotexts.[134] Indeed, an assertion that the Commission is hamstrung by the classification of broadband as an information service would make no sense given that the classification of broadband has no bearing on the regulation of unwanted voice calls or texts.

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https://www.congress.gov/118/meeting/house/116602/witnesses/HHRG-118-IF16-Wstate-RosenworcelJ-20231130-SD156164.pdf ("[The FCC's USF report to Congress] described the data on record regarding reforms that would broaden the contribution base to include assessment on consumer broadband. The record reflected that this approach would increase consumer broadband bills by $5.28–$17.96 per month. I believe this is an unacceptable increase in the financial burden on consumers.").

[131] *See* 2022 NCTA Comments at 21-24; *see also* Rosenworcel QFR Responses at 29 ("Other parties proposed requiring edge providers to contribute based on their digital advertising revenues. Digital advertising generates billions of dollars of revenue and is expected to continue to be a growth area. The record reflected that this approach may have a minimal or zero cost impact on consumers. For this reason, I am intrigued by this proposition and believe it deserves further study.").

[132] *See, e.g.*, CPUC Comments at 34; EPIC et al. Comments at 13-14; Comments of the National League of Cities, WC Docket No. 23-320, at 1-2 (filed Dec. 14, 2023).

[133] *See* Verizon Comments at 16-17 (explaining that no such gap exists).

[134] *See Targeting and Eliminating Unlawful Text Messages, et al.*, Second Report and Order, Second Further Notice of Proposed Rulemaking in CG Docket Nos. 02-278 and 21-402, and Waiver Order in CG Docket No. 17-59, FCC 23-107, ¶¶ 7-13 (rel. Dec. 18, 2023) (describing the Commission's multi-pronged approach to preventing unwanted and unlawful robocalls and robotexts).

MTEs. Promoting competition in multiple tenant environments ("MTEs") is another issue that received little attention from Title II proponents,[135] and they fail to demonstrate any problem that would justify the imposition of common-carrier regulation. They ignore the reality that broadband-only providers represent a tiny portion of the marketplace,[136] and also overlook the Commission's existing ancillary authority to take further action in that arena, if necessary, even with respect to broadband-only providers.[137]

Pole Attachments. Similarly, advocates invoking access to poles as a justification for reclassification erroneously assume that there are a significant number of broadband-only providers seeking pole attachments, when in fact the evidence demonstrates the opposite, as noted above.[138] In any event, such commenters fail to offer any evidence that the relative handful of broadband-only providers in the marketplace face significant difficulties in obtaining pole attachments at reasonable rates as a result of broadband's information-service classification.[139]

Free Expression and Digital Equity. Finally, Title II proponents addressing free expression and digital equity largely do so in conjunction with other supposed rationales discussed

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[135] *See, e.g.*, AARP Comments at 11-13; Public Knowledge Comments at 51-52; Free Press Comments at 56-57.

[136] *See* NCTA Comments at 80 n.274 (citing estimates that cable providers, wireline telephone providers, and fixed wireless providers account for about 96 percent of the broadband marketplace); *see also* CTIA Comments at 43 (arguing that "separate regulation of broadband-only providers would not make any identifiable difference").

[137] *See* NCTA Comments at 82 n.278.

[138] *See, e.g.*, Free Press Comments at 55-56; Public Knowledge Comments at 47-48; INCOMPAS Comments at 18-21.

[139] *Cf., e.g.*, USTelecom Comments at 88 (highlighting that the *NPRM* "cites no evidence" of broadband-only providers being "prevent[ed] . . . from obtaining just and reasonable pole attachment rates"); CTIA Comments at 41-42 (noting that the Commission, in the *2018 Order*, "found that the limited number of broadband-only providers that exist have not encountered significant pole attachment challenges").

above, and fail to identify any independent benefits that would result from reclassification.[140] The interest in free expression overwhelmingly militates in favor of the existing light-touch regime, not increased government control,[141] and Congress has addressed digital equity in the broadband marketplace in a targeted fashion in a separate statute.[142] These rationales accordingly provide no support for broadband reclassification under Title II.

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The Consumer Federation of America is wrong when it suggests that the Commission can satisfy its legal burden in this proceeding simply by positing that Title II might deliver unspecified benefits and is unlikely to cause harm.[143] Rather, the Commission must provide a "more substantial justification" where, as here, "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[144] In all events, the Commission must provide "good reasons" to depart from the well-functioning, light-touch regime.[145] The *NPRM* does not supply such reasons by pointing to a hodgepodge of interests unrelated to the Open Internet policies that animated previous calls for common-carrier regulation, and the record is likewise devoid of

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[140] *See, e.g.*, Free Press Comments at 70-74; Public Knowledge Comments at 53-54; ACLU Comments at 3-4; NHMC Comments at 2-5.

[141] *See, e.g.*, Center for Individual Freedom Comment Opposing Proposed Rule "Safeguarding and Securing the Open Internet," WC Docket No. 23-320, at 3-6 (filed Dec. 14, 2023) ("Center for Individual Freedom Comments").

[142] *See* NCTA Comments at 82-83.

[143] *See* Consumer Federation of America Comments at 57.

[144] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[145] *Fox Television Stations,* 556 U.S. at 515.

evidence that any of those other interests would be advanced by the imposition of Title II regulation.

C. Subjecting ISPs to Common-Carrier Regulation Would Harm the Well-Functioning Broadband Marketplace

As NCTA explained in its opening comments,[146] and as the Israel/Keating/Shampine Declaration powerfully confirms,[147] today's broadband marketplace is more competitive than ever before. A remarkable array of commenters agree.[148] Large and small ISPs alike describe the

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[146] *See* NCTA Comments at 49-50, 89-91.

[147] *See* Israel/Keating/Shampine Declaration ¶¶ 23-71.

[148] *See, e.g.*, ACA Connects Comments at 9-21; American Consumer Institute Comments at 8-10; Comments of Americans for Tax Reform and Digital Liberty, WC Docket No. 23-320, at 2 (filed Dec. 15, 2023) ("Americans for Tax Reform and Digital Liberty Comments"); AT&T Comments at 4, 8-9; Center for Individual Freedom Comments at 6; Comments of Thomas A. Schatz, President, Citizens Against Government Waste, WC Docket No. 23-320, at 7-8 (filed Dec. 14, 2023) ("CAGW Comments"); Comments of Comcast Corporation, WC Docket No. 23-320, at 18-28 (filed Dec. 14, 2023) ("Comcast Comments"); Comments of Consumer Action for a Strong Economy, WC Docket No. 23-320, at 1 (filed Dec. 14, 2023) ("Consumer Action for a Strong Economy Comments"); CTIA Comments at 13-17; Digital Progress Institute Comments at 3-4; FSF Comments at 8, 30-35, 38-42; GSMA response to the FCC notice of proposed rulemaking (NPRM) on Safeguarding and Securing the Open Internet, WC Docket No. 23-320, at 4-5 (filed Dec. 13, 2023); Comments of the Heritage Foundation, WC Docket No. 23-320, at 2 (filed Dec. 14, 2023); Comments of the Information Technology and Innovation Foundation, WC Docket No. 23-320, at 3-4, 7-8 (filed Dec. 14, 2023) ("Information Technology and Innovation Foundation Comments"); Comments of the International Center for Law & Economics, WC Docket No. 23-320, at 5-6, 9-18 (filed Dec. 14, 2023) ("International Center for Law & Economics Comments"); Comments of the R Street Institute, WC Docket No. 23-320, at 7 (filed Dec. 14, 2023) ("R Street Institute Comments"); Taxpayers Protection Alliance Comments at 3; Comments of the Texas Public Policy Foundation, WC Docket No. 23-320, at 2 (filed Dec. 14, 2023) ("Texas Public Policy Foundation Comments"); Comments of Scott Wallsten, Sarah Oh Lam & Thomas Lenard, WC Docket No. 23-320, at 3, 6-7 (filed Dec. 14, 2023); Comments of the United States Hispanic Chamber of Commerce, WC Docket No. 23-320, at 1-2 (filed Dec. 14, 2023) ("U.S. Hispanic Chamber of Commerce Comments"); Comments of the United States Hispanic Chamber of Commerce, National LGBT Chamber of Commerce, US Black Chambers, Inc., & the National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship, WC Docket No. 23-320, at 1-2 (filed Dec. 14, 2023) ("U.S. Hispanic Chamber of Commerce et al. Comments"); USTelecom Comments at 40-43; Westling Comments at 2; Yoo/Hurwitz Comments at 6-7; Comments of 5G Americas, WC Docket No. 23-320, at 5 (filed Dec. 14, 2023) ("5G Americas

increasingly competitive environment in which they operate,[149] as well as the ways in which such vibrant competition benefits consumers.[150] AT&T, for example, emphasizes that the United States "boasts far greater facilities-based broadband competition than most other jurisdictions," and that "this competition will become even more intense in the coming years."[151] USTelecom similarly proffers substantial evidence showing that "[c]ompetition has intensified significantly in recent years, leading to more consumer choices and lower switching costs," and notes that increases in network investments, speeds, and coverage, coupled with sharp reductions in broadband prices, all are "hallmark[s] of a competitive market."[152] A number of ACA Connects members likewise highlight the robustly competitive nature of the broadband marketplace.[153] "Because of this dynamic," Massillon Cable TV (an Ohio ISP) explains, it "must be responsive to customer

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Comments"); Declaration of Jason Hansen, Chief Tech. Officer, Conway Corp. ¶¶ 6, 8 (appended to ACA Connects Comments) ("Conway Declaration"); Declaration of Patrice Carroll, CEO, ImOn Communications ¶¶ 11, 13, 17 (appended to ACA Connects Comments) ("ImOn Declaration"); Declaration of Katherine Gessner, President, Massillon Cable TV Inc. ¶¶ 9-11, 14 (appended to ACA Connects Comments) ("Massillon Cable TV Declaration"); Declaration of Chris Kyle, VP, Indus. Affairs & Regul., Shenandoah Telecomm. ¶¶ 9-10 (appended to ACA Connects Comments) ("Shentel Declaration"); Declaration of Dick Sjoberg, CEO, Sjoberg's Inc. ¶ 10 (appended to ACA Connects Comments) ("Sjoberg Declaration").

[149] *See, e.g.*, AT&T Comments at 4, 8-9; Comcast Comments at 18-28; Conway Declaration ¶¶ 6, 8; ImOn Declaration ¶¶ 11, 13, 17; Massillon Cable TV Declaration ¶¶ 9-11, 14; Shentel Declaration ¶¶ 9-10; Sjoberg Declaration ¶ 10.

[150] *See, e.g.*, AT&T Comments at 23; Comcast Comments at 29-33; Conway Declaration ¶¶ 6, 8; ImOn Declaration ¶¶ 11, 17; Massillon Cable TV Declaration ¶¶ 10-11, 14; Shentel Declaration ¶ 10; Sjoberg Declaration ¶ 10.

[151] AT&T Comments at 9; *see also* CTIA Comments at 17 ("90% of net broadband adds in 2022 were by fixed wireless providers.").

[152] USTelecom Comments at 37-45.

[153] *See* Conway Declaration ¶¶ 6, 8; ImOn Declaration ¶¶ 11, 13, 17; Massillon Cable TV Declaration ¶¶ 9-11, 14; Shentel Declaration ¶¶ 9-10; Sjoberg Declaration ¶ 10.

demands, develop innovative and competitive services, and invest in [its] network."[154] Shentel, which "ha[s] seen a significant uptick [in competition] over the past four years," similarly observes that such "[c]ompetition . . . has put downward pressure on [its] pricing."[155]

Increasingly, this competition is coming in the form of new and expanded fixed wireless broadband offerings,[156] enabled by the "nearly ubiquitous availability of 5G."[157] Ericsson and others observe that, "[i]n the first two years that 5G [fixed wireless broadband] has been available, it has captured over 6 percent of the U.S. home BIAS market, with over 7 million subscribers," and that such offerings "accounted for over *90 percent* of U.S. home broadband net additions in 2022."[158] These figures leave no doubt that 5G-based fixed wireless broadband already represents "'a [competitive] threat to' wired broadband."[159] Even ardent proponents of the Commission's proposal to subject broadband to Title II's common-carrier regulatory framework are forced to concede that the rapid rise of 5G fixed wireless availability continues to be a competitive game-

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[154] Massillon Cable TV Declaration ¶ 10; *see also* Conway Declaration ¶ 8 (describing how "intense competition" drives the company to "evolve [its] offerings to better meet and exceed . . . customer demands and expectations").

[155] Shentel Declaration ¶¶ 9, 10.

[156] *See* AT&T Comments at 9.

[157] Comments of the T-Mobile USA, Inc., WC Docket No. 23-320, at 12 (filed Dec. 14, 2023) ("T-Mobile Comments").

[158] Ericsson Comments at 6 (emphasis added); *see also* 5G Americas Comments at 5 (noting that fixed wireless "has been a major 5G success story and accounted for 90% of net broadband additions in 2022"); ACA Connects Comments at 15-16 ("[I]n the past quarter alone, Comcast lost approximately 18,000 subscribers, Altice over 30,000, and Breezeline over 9,000, and fixed 5G providers added about 1,000,000 subscribers.").

[159] Ericsson Comments at 7 (quoting Monica Alleven, *T-Mobile, Verizon FWA Pose Competitive Threat to Cable, Fiber – Analyst*, Fierce Wireless (July 19, 2023), https://www.fiercewireless.com/wireless/t-mobile-verizon-fwa-pose-competitive-threat-everybody-analyst).

changer in the industry.[160] And this burgeoning competition from fixed wireless offerings is over and above the growing array of options consumers now enjoy from wireline, mobile wireless, satellite, and other providers.[161]

The record also demonstrates that the current light-touch regulatory approach to broadband continues to foster enormous investments in broadband networks, enabling providers to deliver ever-increasing speeds at ever-declining prices.[162] Under the Commission's current "balanced . . . approach" to broadband regulation, ISPs have invested "trillions of dollars . . . to upgrade and expand coverage of their . . . networks."[163] "In 2022 *alone*, capital expenditures by Comcast, Charter, AT&T, T-Mobile, and Verizon totaled more than $70 billion."[164] The record is replete with other examples of significant capital outlays that ISPs have made or are planning to make,[165] and of how such investments are paying dividends for America's consumers, including in the form

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[160] *See, e.g.*, Free Press Comments at 43.

[161] *See* Israel/Keating/Shampine Declaration ¶¶ 36-47.

[162] *See, e.g.*, AT&T Comments at 3, 11-14; Comments of Business Roundtable, WC Docket No. 23-320, at 1 (filed Dec. 13, 2023) ("Business Roundtable Comments"); Center for Individual Freedom Comments at 2; CAGW Comments at 7-9; Comcast Comments at 3, 29-39; Consumer Action for a Strong Economy Comments at 1; Comments of the Administrative Law Clinic at the Antonin Scalia Law School, WC Docket No. 23-320, at 4-5 ("George Mason University Antonin Scalia Law School Administrative Law Clinic Comments"); CTIA Comments at 13-15; Information Technology Industry Council Comments at 2; T-Mobile Comments at 12-15; Comments of the Telecommunications Industry Association, WC Docket No. 23-320, at 2-4 (filed Dec. 14, 2023); U.S. Chamber of Commerce Comments at 6-12; U.S. Hispanic Chamber of Commerce Comments at 1; U.S. Hispanic Chamber of Commerce et al. Comments at 1; USTelecom Comments at 37-40; 5G Americas Comments at 4; ImOn Declaration ¶ 6; Shentel Declaration ¶¶ 5-7; *see also* NCTA Comments at 86-91.

[163] ACA Connects Comments at 2.

[164] Comcast Comments at 34.

[165] *See, e.g.*, AT&T Comments at 3; T-Mobile Comments at 11-15; Verizon Comments at 4-7; Conway Declaration ¶ 4; ImOn Declaration ¶¶ 3, 6; Massillon Cable TV Declaration ¶ 4; Shentel Declaration ¶¶ 5-6; Declaration of James Gleason, President & CEO, Vexus Fiber, LLC ¶ 6 (appended to ACA Connects Comments) ("Vexus Fiber Declaration").

of dramatically increasing speeds and rapidly declining prices.[166] Indeed, the positive impacts of the existing light-touch framework are borne out by the Commission's own data, which reveal that the most popular tier of broadband service in 2015 "was, in nominal terms, 37 percent cheaper (while offering 142 percent faster speeds) in 2023 than it was in 2015, on an average-subscriber-weighted basis," and that "the highest-speed tier in 2015 was nearly 40 percent cheaper (while offering speeds that were more than twice as fast) on an average-subscriber-weighted basis in 2023."[167]

The opening comments also confirm that Title II reclassification would needlessly jeopardize this well-functioning marketplace. Other parties join NCTA in cautioning the Commission that imposing utility-style regulation on ISPs would dampen investment, decrease service quality, and hinder innovation.[168] As the studies discussed in NCTA's opening comments

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[166] *See, e.g.*, American Consumer Institute Comments at 10-12; Americans for Tax Reform and Digital Liberty Comments at 2-4; Center for Regulatory Freedom Comments Regarding FCC's Notice of Proposed Rulemaking Regarding Safeguarding and Securing the Open Internet, RIN 2023-23630, WC Docket No. 23-320, at 11-12 (filed Dec. 14, 2023); Comments of Adam Brandon, President & Jason Pye, Pol'y Advisor, FreedomWorks, WC Docket No. 23-320, at 3 (filed Dec. 14, 2023) ("FreedomWorks Comments"); International Center for Law & Economics Comments at 6, 13-15, 23; T-Mobile Comments at 12; U.S. Chamber of Commerce Comments at 6-12.

[167] Israel/Keating/Shampine Declaration ¶¶ 66.

[168] *See* NCTA Comments at 91-93; *see also, e.g.*, ACA Connects Comments at 6, 40-45; ADTRAN Comments at 25, 27; AT&T Comments at 25-26, 30-31; Business Roundtable Comments at 1; Center for Individual Freedom Comments at 2-3; CAGW Comments at 6-8; Comcast Comments at 4-5; Consumer Action for a Strong Economy Comments at 2-3; Comments of the Competitive Enterprise Institute, WC Docket No. 23-320, at 4, 17 (filed Dec. 14, 2023); CTIA Comments at 18, 35, 97-99; Fiber Broadband Association Comments at 10-11; FSF Comments at 48-54, 56-59; FreedomWorks Comments at 1, 3; George Mason University Antonin Scalia Law School Administrative Law Clinic Comments at 2; Comments of the Hispanic Leadership Fund, WC Docket No. 23-320, at 2 (filed Dec. 12, 2023) ("Hispanic Leadership Fund Comments"); Comments of Jennifer Huddleston, WC Docket No. 23-320, at 1, 3 (filed Dec. 14, 2023); Information Technology and Innovation Foundation Comments at 4-5, 10; International Center for Law & Economics Comments at 5, 24-32; Comments of the James Madison Institute and Other

make clear, such concerns are not merely theoretical.[169] The real-world consequences of subjecting ISPs to burdensome, common-carrier-style regulation also are illustrated by the European experience, in which "heavy-handed ex-ante and ex-post regulation" of broadband has led "to a weaker connectivity ecosystem, with negative effects on investment and innovation."[170]

It thus comes as no surprise that large and small ISPs alike warn that adoption of the *NPRM*'s proposed regulatory approach would deter them from introducing new products and services and/or proceeding with planned network investments. For example, AT&T notes that, under the proposed Internet Conduct Standard, "the de facto requirement to seek non-binding (and slow-in-coming) 'advice' from Commission staff before undertaking any conceivably controversial business practice would slam the brakes on innovation," and that "[a]ny ISP would rather stick to traditional business practices than play this mother-may-I game, which would take months (at minimum) to complete and offer scant assurance no matter what the answer."[171] Conway, an Arkansas broadband provider, likewise expresses concern about the breadth and ambiguity of the proposed Internet Conduct Standard, which would "make [the company] think

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Free Market Organizations, WC Docket No. 23-320, at 3 (filed Dec. 12, 2023); Comments of the National Association of Manufacturers, WC Docket No. 23-320, at 1-2 (filed Dec. 14, 2023); NTCA Comments at 27-28; R Street Institute Comments at 2, 7; Taxpayers Protection Alliance Comments at 2, 4; T-Mobile Comments at 20, 49-50; U.S. Chamber of Commerce Comments at 15-19; USTelecom Comments at 54-59, 61-64; Verizon Comments at 7; Westling Comments at 5-6; 5G Americas Comments at 4-5, 6-7, 8-10, 12-13; ImOn Declaration ¶ 16; Shentel Declaration ¶ 12; Israel/Keating/Shampine Declaration ¶¶ 72-86.

[169] *See* NCTA Comments at 91-94.

[170] Comments of the European Telecommunications Network Operators' Association, WC Docket No. 23-320, at 1 (filed Dec. 14, 2023); *see also* Americans for Tax Reform and Digital Liberty Comments at 5; Comments of Patty Judge, Co-Founder, Focus on Rural America, and Former Lieutenant Governor, Iowa, WC Docket No. 23-320, at 2 (filed Dec. 13, 2023); Furchtgott-Roth/Arner Comments at 8; Texas Public Policy Foundation Comments at 3-4; USTelecom Comments at 38.

[171] AT&T Comments at 26.

twice about developing new services or functionalities or undertaking legitimate responses to competitors."[172] Vexus Fiber likewise cautions that, because "the limits of [the Internet Conduct Standard] are not clearly defined, . . . its adoption can be expected to chill legitimate competitive activity and innovation."[173] For its part, Shentel explains that "[r]egulation that affects the rates, terms, and conditions of [its] broadband service offerings or imposes other service or deployment obligations would . . . significantly impact[] the return-on-investment model that Shentel utilizes to invest in [its] network," and in "particular[] deter [the company] from investing in build outs in new rural and semi-rural communities where the economics are already challenging."[174] Iowa-based ImOn similarly notes that "[b]ecause it would increase compliance costs and the overall uncertainty of [its] business, the proposed Title II regulation will make it more costly to provide service and lead to lower investment."[175]

A number of commenters specifically highlight the harms to infrastructure investment that would result from reclassifying broadband under Title II, detailing how those harms would seriously undermine the Biden Administration's signature BEAD program and related policy priorities.[176] For instance, the U.S. Hispanic Chamber of Commerce and a group of like-minded

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[172] Conway Declaration ¶ 10.

[173] Vexus Fiber Declaration ¶ 13.

[174] Shentel Declaraton ¶ 12.

[175] ImOn Declaration ¶ 16; *see also* Sjoberg Declaration ¶ 12 ("The additional costs imposed by the imposition of . . . Title II regulation and the proposed [O]pen [I]nternet rules creates uncertainty for the financial health of the company in the eyes of lenders. Once broadband services are regulated, even if many Title II obligations are initially subject to forbearance, there will be increased overhead and the potential for greater intervention by the [Commission] and possibly . . . state regulators, making it more difficult and expensive . . . to borrow money.").

[176] *See, e.g.*, AT&T Comments at 7; Comments of the Advanced Communications Law & Policy Institute at New York Law School, WC Docket No. 23-320, at 4, 14-15 (filed Dec. 14, 2023) ("ACLP Comments"); CAGW Comments at 10-11; CTIA Comments at 5-6; Ericsson Comments

associations note that "[t]he new networks built with BEAD funds can finally close the digital divide if there is broad private participation in the program and costs are kept in check," but warn that Title II reclassification may well imperil those goals.[177] The groups explain that "[b]roadband providers that are interested in applying for these funds must not only navigate complex requirements in each state, but also budget for their own matching funds and their costs of operating these networks over the long term," and that "[a]sking [them] to make these decisions at the same time as the Commission imposes sweeping new utility regulation of broadband may well be a deterrent to applying."[178] According to WISPA, such impacts will be felt acutely by smaller ISPs, which "may have reviewed compliance costs for participating in the BEAD program and decided they were manageable," but "will have to reassess that decision if Title II regulations are re-imposed."[179] Indeed, "[g]iven that such costs are highly variable and difficult to calculate precisely, it is inevitable that a certain number of smaller service providers who might otherwise have competed for BEAD grants will now decide not to do so."[180]

At a minimum, the New York Law School's Advanced Communications Law & Policy Institute ("ACLP") predicts, Title II reclassification could cause participants to "pull back on their proposed matches of [program] grants, thereby increasing the amount of [federal] funding needed

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at 20-21; Hispanic Leadership Fund Comments at 3-4; R Street Institute Comments at 7; U.S. Hispanic Chamber of Commerce et al. Comments at 1-3; WISPA Comments at 24-26.

[177] U.S. Hispanic Chamber of Commerce et al. Comments at 2.

[178] *Id.*; *see also* ACLP Comments at 14 ("[T]he negative impacts of Title II regulation on broadband investment" could result in "less robust participation in [the BEAD program] by ISPs that are unwilling or unable to risk scarce private capital on projects . . . in high-cost areas.").

[179] WISPA Comments at 25.

[180] *Id.*; *see also* Ford Paper at 4 ("While telecommunications providers continue to invest billions annually in their networks, regulatory excess is a deterrent to infrastructure investment at the margin.").

for projects."[181] ACLP also warns that because the BEAD program has been "devised . . . to reflect the current [light-touch] regulatory framework for broadband," Title II reclassification would necessitate considerable modifications to "key aspects of the . . . program," including relevant rules and guidance issued by NTIA.[182] These changes would "cause significant administrative delays" and "upend core terms and conditions included in subgrantee contracts," risking to delay the distribution of BEAD funding "by months, if not years."[183] The record thus leaves no doubt that, far from advancing efforts to bridge the digital divide, Title II reclassification would imperil the significant progress being made in this area by undermining the effectiveness of the BEAD program and other initiatives that aim to couple private investment with government support to expand broadband access and adoption.[184]

Some proponents of Title II regulation suggest that such harms must be illusory because ISPs themselves have embraced Open Internet principles.[185] But they miss the fundamental point that ISPs oppose reclassifying broadband *not* because it would result in the imposition of bright-line Open Internet rules, but instead because it raises a host of other serious problems. Among

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[181] ACLP Comments at 14; *see also* NCTA Comments at 85-86.

[182] ACLP Comments at 14.

[183] *Id.* ("The confusion created by the imposition of an entirely new regulatory framework would only be compounded by the legal wrangling that will inevitably ensue" if the Commission proceeds as proposed in the *NPRM*.).

[184] Notably, reports prepared after the unsuccessful Broadband Technology Opportunities Program found that the NTIA's "ungainly" administration of the program through onerous selection criteria and the like significantly diminished the efficiency of the program—likely explaining why for-profit providers were so underrepresented among participants. *See, e.g.*, Sarah Oh, Technology Policy Institute, "Using Reverse Auctions to Stretch Broadband Subsidy Dollars: Lessons from the Recovery Act of 2009," at 4-6, Table A1 (Jan. 2021), https://techpolicyinstitute.org/wp-content/uploads/2021/03/Oh-Reverse-Auctions-Lessons-from-BTOP-Jan-2021.pdf.

[185] *See, e.g.*, Free Press Comments at 4 (noting ISPs' "embrace of basic openness principles" and suggesting that Title II regulation "is good for ISPs").

other concerns, those bright-line rules would be accompanied by the vague, overbroad, investment-chilling Internet Conduct Standard and the extremely broad scope of Sections 201 and 202 from which the Commission has said it will not forbear, and the Commission is unlawfully proposing to impose sector-specific privacy regulations on ISPs under Section 222 (notwithstanding Congress's rejection of such regulation in the 2017 CRA Resolution).[186] The Commission also is proposing to go well beyond the *2015 Order* in various respects, including by subjecting ISPs to burdensome entry and exit regulation under Section 214 and opening the door to additional mandates touching on national security, cybersecurity, resiliency, and other subject areas. And even the forbearance the Commission intends to grant, such as from rate regulation or unbundling requirements, would be incomplete and could be rescinded at any time.[187]

Meanwhile, claims by Free Press and others that the Commission's prior Title II classification of broadband had no negative effect on broadband investment are fundamentally flawed. Free Press contends that "broadband deployment and investment increased to historic levels following the [Commission]'s 2015 vote to restore Title II" before declining after adoption of the *2018 Order*.[188] This extraordinary claim requires extraordinary proof—and Free Press's slapdash discussion of market trends comes nowhere close to demonstrating the investment effects it claims. An appropriately rigorous economic analysis would address the complexities of attempting to quantify the effects of regulation on investment—e.g., by consistently accounting

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[186] *See supra* at 31-32.

[187] *See* NCTA Comments at 97-99 (noting that "potential for the Commission to reimpose provisions from which it previously forbore limits ISPs' ability to rely on such forbearance" and supporting congressional action to codify durable and appropriately tailored Open Internet rules); *id.* at 3 (noting that the regulation proposed in the *NPRM* would "go far beyond Internet openness goals"); *id.* at 20-23 (explaining how the limited forbearance proposed does not come close to mitigating the harms of Title II regulation).

[188] Free Press Comments at 7.

for the fact that investment decisions in this marketplace often are made years in advance, and by employing statistical controls to isolate and filter out other factors that can influence investment levels. In other words, the analysis also would include a "counterfactual" assessment—that is, a comparison of actual investments to expected investments absent the regulatory change at issue, given that the relevant question is not how investment levels changed in absolute terms over time, but instead what level of investment would have occurred *but for* that regulatory change.[189] Free Press does none of these things. Instead, its analysis falsely equates the timing of *deployment* with the timing of *investment decisions*—overlooking that the former invariably occurs well after the latter, sometimes lagging by several years, given the time it takes to design the network, procure the necessary equipment, undergo the permitting process, and take all the other steps involved in network deployment.[190] And in failing to apply statistical techniques to filter out other influences on broadband investment, Free Press offers no counterfactual analysis to show what ISPs' investment levels would have been but for the Title II regime under which they were forced to operate.

By contrast, the studies that *do* analyze the data with appropriate rigor starkly contradict Free Press's findings, and conclude that imposing Title II regulation on broadband would impede

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[189] *See* Declaration of Mark A. Israel, Allan L. Shampine & Thomas A. Stemwedel ¶ 104 (appended to Comments of AT&T Services, Inc., WC Docket No. 17-108 (filed July 17, 2017)) ("[E]ven an increase in investment could reflect reduction in the investment that would have occurred without regulation.").

[190] *See 2018 Order* ¶ 92 (acknowledging that "companies may take several years to adjust their investment plans" in response to regulatory shifts). Free Press's analysis likewise fails to properly account for the significant role that upgrades to existing networks, which are considerably less capital intensive than new deployments, play in increasing the availability of higher-speed broadband services. *See* Free Press Comments at 113-114, 125.

ISPs' investment in their networks.[191] Dr. George Ford has found, for instance, that "the persistent prospect of Title II policy" already results in investment shortfalls of $8.1 billion, job losses of more than 81,000 and 195,000 in the information sector and economy-wide, respectively, and approximately $18.5 billion in lost wages—*each year*.[192] And Ford further concludes that "this will likely be even worse under the FCC's new Notice of Proposed Rulemaking, which is even more far-reaching than its prior Title II proposals."[193] These findings are consistent with established economic principles and research, as well as the Commission's own assessments, establishing that imposing heavy-handed regulation on dynamic industries like broadband will tend to "deter investment," "impose direct costs that make deployment more costly," "limit expected future revenues, making deployment less likely," and "increase risk because of uncertain interpretation and enforcement and the possibility of regulatory creep."[194]

The record also reflects deep concern regarding the harmful impact of Title II reclassification on the well-functioning marketplace for Internet interconnection and traffic exchange.[195] This "marketplace has always functioned efficiently," USTelecom explains, "in part

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[191] *See supra* at Section II.C; *see also, e.g.*, Ford Paper at 16-27; George S. Ford, *Infrastructure Investment After Title II* (Nov. 1, 2018), https://ssrn.com/abstract=3299059; George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis* (Apr. 25, 2017), https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf; Joshua D. Wright & Thomas W. Hazlett, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 "Open Internet" Order* (Oct. 26, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859570.

[192] Ford Paper at 5; *see also id.* at 22-23.

[193] *Id.* at 1.

[194] Israel/Keating/Shampine Declaration ¶ 74; *see also 2018 Order* ¶ 89 ("The mechanisms by which public utility regulation can depress investment by the regulated entity are well-known in the regulatory economics literature.").

[195] *See, e.g.*, USTelecom Comments at 93-94; Interisle Comments at 8-9.

because there are many routes into and out of any broadband ISP's network."[196] Yet without "addressing any legitimate concern, the Commission's proposal has the potential to distort" this "well-functioning marketplace" "by imposing regulatory obligations on one set of players"—ISPs—"but not their counterparties."[197] Such an approach "would allow application and content providers (which the *NPRM* correctly notes include companies as large as, if not larger than, the ISPs)," as well as cloud providers and content delivery networks ("CDNs"), "to use the threat of seeking regulatory intervention to tilt negotiations in their favor, destabilizing the Internet traffic exchange marketplace in a way that would likely only require further regulatory interventions in the future."[198] Putting a thumb on the scale by subjecting only ISPs' interconnection practices to scrutiny under Title II thus would impede efficient traffic-exchange arrangements and encourage regulatory gamesmanship by counterparties.[199]

Additionally, the notion that Title II merely represents a benign "duty to deal" and does not constitute "utility regulation" is both wrong and beside the point.[200] To be sure, a duty to deal (on regulated terms and conditions) is one feature of Title II—specifically Section 201(a).[201] But Title II in general, and even Sections 201 and 202 on their own, subject telecommunications service providers to a wide array of other heavy-handed obligations, including rate and service-quality regulation—the hallmark of utility-style regulatory treatment. Moreover, while Free Press

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[196] USTelecom Comments at 93; *see also* NCTA Comments at 55-56.

[197] USTelecom Comments at 94.

[198] *Id.*

[199] Indeed, such a result would provide yet another reason why the Commission's reclassification decision would be arbitrary and capricious. *See infra* at Section II.D.

[200] *See* Free Press Comments at 10-12.

[201] 47 U.S.C. § 201(a).

asserts that common-carriage principles may also apply in competitive markets,[202] it ignores that (a) the Commission may not compel providers to operate as common carriers absent a finding of market power,[203] and (b) the degree of regulation to which competitive carriers are exposed pales in comparison to vague and overbearing mechanisms like the Internet Conduct Standard, which would threaten ISPs with massive liability despite the absence of any clear notice of what conduct may be deemed unlawful.

Notwithstanding Free Press's attempt to characterize the *NPRM*'s proposed approach as merely a light-touch form of common carriage, the proposal would regulate broadband "on par with water [and] power" utilities.[204] Further confirming this transformational objective, the *NPRM* proposes a slew of requirements traditionally reserved for public utilities—such as entry and exit requirements[205]—and leaves the door ajar to impose others—such as rate regulation.[206] In all events, whatever features of common carriage its proponents prefer to highlight, the record reflects that the sort of regulatory regime proposed by the Commission is appropriate only for monopoly or near-monopoly utilities,[207] and clearly establishes that such treatment of broadband would cause

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[202] *See* Free Press Comments at 12, 63.

[203] *See, e.g.*, *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21585 ¶¶ 9-11 (1998) (explaining that a provider that does "not have market power" "should not be regulated as a common carrier"), *aff'd sub nom.*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

[204] Press Release, FCC, *FACT SHEET: FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules* (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf.

[205] *See NPRM* ¶¶ 27-28, 99.

[206] *See id.* ¶ 105.

[207] *See, e.g.*, Comcast Comments at 5-13.

significant harms without any counterbalancing policy benefits, as described above and in NCTA's opening comments.[208]

D. These Policy Deficiencies Also Would Render Title II Reclassification Arbitrary and Capricious

The absence of any credible evidence of harmful conduct by ISPs, the lack of any other cogent policy rationale for reclassification, and the detrimental impact of reclassification on the broadband marketplace, as well as the unjustified singling out of ISPs for utility regulation, all confirm that subjecting broadband providers to common-carrier treatment under Title II would be arbitrary and capricious under the APA. In addition to NCTA,[209] numerous other commenters in the opening round describe why the APA represents a significant legal impediment to the *NPRM*'s reclassification proposal.[210] As the International Center for Law & Economics explains, while the Commission's proposal purports to be "rooted in the presumption of ISPs' 'incentive and ability' to engage in practices that threaten [I]nternet openness," it in fact "rest[s] on speculative foundation, rather than any substantive record of violations," which alone is fatal to the *NPRM*'s proposed regulatory approach under the APA.[211]

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[208] *See supra* at Section II.B-.C; NCTA Comments at 83-86.

[209] *See* NCTA Comments at 48-56.

[210] *See, e.g.*, CTIA Comments at 46 (The Commission's proposal "is arbitrary and capricious, jettisons the detailed findings that the Commission made in the [*2018 Order*] without adequate justification, and fails to grapple with the serious reliance interests engendered by the Commission's existing light-touch regulatory approach."); Information Technology and Innovation Foundation Comments at 9 ("[T]he Commission proposes to change policy . . . to a Title II classification based on unfounded factual claims about the state of the broadband marketplace and the relationship of its proposal to the outcomes it seeks."); USTelecom Comments at 36-54, 70-92.

[211] *See* International Center for Law & Economics Comments at 6-7 (asserting that "[t]he mere possibility of ISPs engaging in deleterious conduct does not, in itself, warrant imposing onerous rules that could impede investment in innovative business models"); *see also* ADTRAN Comments at 3 ("The result [of the Commission's proposed rules] will be to deter investment and

None of the other purported policy rationales for Title II reclassification fares any better. With respect to each such rationale in the *NPRM*, "[e]ither there is no need for Commission intervention in the area, or Title II reclassification would not grant the Commission authority to help solve the purported problem, or both."[212] As USTelecom observes, "[t]he only reasonable conclusion that can be drawn is that these reasons are contrivances intended to support expansive and unprecedented Commission regulation and to justify a reclassification that otherwise has no support."[213] USTelecom is not alone in expressing skepticism towards the *NPRM*'s veritable grab bag of newly minted policy justifications, with several other commenters also questioning the

innovation in broadband services. And all of this is without the *NPRM* citing any evidence of actual problems in the last fifteen years."); CTIA Comments at 10-12.

[212] USTelecom Comments at 70; *see also* CTIA Comments at 36-45 ("The Commission's 'everything but the kitchen sink' list of possible policy rationales for reclassifying BIAS are not any more convincing than its proposal to justify Title II based on national security and cybersecurity considerations."); NTCA Comments at 66-78 (explaining why Title II reclassification is not necessary to safeguard national security or public safety, or for consumer protection and privacy purposes); Verizon Comments at 15-18 ("The [*NPRM*] raises a hodgepodge of other purported regulatory gaps, but . . . these fare no better than the previous few.").

[213] USTelecom Comments at 70; *see also* CTIA Comments at 21 ("With no sound basis to assert that Internet openness demands regulation, the [*NPRM*] concocts a series of other, similarly unconvincing rationales.").

Commission's expertise to regulate in certain areas,[214] and others cautioning that its intervention would impede, rather than advance, the stated policy objectives.[215]

As NCTA has explained, the *NPRM*'s proposed regulatory approach is arbitrary and capricious for another reason: its myopic focus on ISPs to the exclusion of other entities in the Internet ecosystem, such as dominant tech platforms, which are frequently accused of engaging in non-neutral practices, and cloud providers.[216] USTelecom, CTIA, and other parties likewise point out that the *NPRM* "makes no attempt to grapple with the[se] . . . marketplace dynamics," noting

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[214] *See, e.g.*, Comments of Dr. Eric W. Burger, WC Docket No. 23-320, at 7 (filed Dec. 14, 2023) ("The concept [that] the Commission might review cyber plans is not credible. . . . [T]he Commission today has but a handful of engineers that are versed on the Internet and cybersecurity."); FSF Comments at 24-25 ("The Commission is the wrong agency to be addressing national security and public safety concerns in the manner set forth in the [*NPRM*]. Executive Branch agencies such as the Department of Defense, the Department of Homeland Security, and the Department of Justice already have national security powers and expertise to address security issues in the communications sector."); Verizon Comments at 8 ("[M]ost of these alleged gaps fall outside of the Commission's bailiwick, relating only tangentially to the Commission's core charge to regulate interstate and international communications."); Scott Declaration at 6-7; Grotto Declaration at 24-25 ("Most federal authorities, programs, and expertise for cybersecurity and national security come from agencies other than the FCC, . . . [which] has explicitly noted its need to rely on the national security judgments and determinations of other 'expert' agencies.").

[215] *See, e.g.*, CTIA Comments at 28 ("[T]here appears to be serious risk that the Commission is poised to cease respecting the boundaries that define its proper security role in a manner that would upend the effective, whole-of-government and public-private framework that exists today."); Verizon Comments at 8 ("Many other arms of the federal government can and do oversee those areas, and there is no reason to think that reclassifying broadband will do more to help than to hinder that whole-of-government approach."); WISPA Comments at 93 ("Unlike the FTC, . . . the Commission's enforcement power does not include the ability to seek refunds for injured customers and it is limited to conduct going back only one year. Reclassifying broadband as a Title II service would remove the government's ability to provide injured customers with restitution for their privacy-related injuries."); Scott Declaration at 2-4; Grotto Declaration at 29-38 ("Reclassification of BIAS under Title II . . . would profoundly disrupt – and curtail – work in collaborative initiatives.").

[216] *See* NCTA Comments at 56-61.

that this serious shortcoming compounds the arbitrariness of the *NPRM*'s proposals.[217] Free State Foundation, for instance, urges "the Commission [to] recognize that singling out broadband ISPs for stringent privacy restrictions would be arbitrary and capricious because ISPs do not uniquely possess personal information," and indeed that dominant tech platforms "are by far the largest collectors of personal consumer data, not ISPs."[218] Even Title II proponents warn of the "gatekeeper" power of dominant tech platforms,[219] implicitly recognizing that the *NPRM*'s exclusive focus on broadband providers is problematic. And the FTC notably has grown more concerned with "the practices of Cloud Computing Providers and their impact on end users, customers, companies, and other businesses across the economy," and has opened an investigation into those providers' "market power, business practices affecting competition, and potential security risks."[220] All of these considerations underscore the substantial hurdles the Commission would face in attempting to defend the *NPRM*'s proposed regulatory approach under the APA.

To be clear, as explained in the opening round, NCTA is not suggesting that the Commission *should* impose net neutrality-type regulations on dominant tech platforms, cloud providers, CDNs, or other entities.[221] Instead, the Commission's failure to provide a cogent explanation for singling out ISPs for Open Internet mandates undermines the agency's stated

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[217] USTelecom Comments at 50-53; *see also, e.g.*, CTIA Comments at 19-21; FSF Comments at 29-30, 44-45; FreedomWorks Comments at 2; International Center for Law & Economics Comments at 7.

[218] FSF Comments at 44-45.

[219] *See, e.g.*, Consumer Federation of America Comments at 32; Comments of Home Telephone Company, Inc., WC Docket No. 23-320, at 17 (filed Dec. 14, 2023).

[220] *Solicitation for Public Comments on the Business Practices of Cloud Computing Providers*, Fed. Trade Comm'n (Mar. 22, 2023), https://www.ftc.gov/policy/studies/submit-comment-cloud-computing-request-information.

[221] *See* NCTA Comments at 59.

regulatory goals. Notably, the rationale for excluding these entities *cannot* be that the Commission lacks jurisdiction over them and yet retains jurisdiction over ISPs. NCTA has shown that large platform providers, cloud providers, and other entities in the Internet ecosystem frequently make use of their own broadband transmission facilities to deliver Internet content, and thus that any assertion of jurisdiction over ISPs would extend to such entities as well.[222] And even if the Commission nevertheless were to conclude that it lacks jurisdiction over these entities, it would need to explain why it is not proposing to coordinate with the FTC to address the transparency, openness, and other concerns raised with respect to these entities. In all events, as noted in NCTA's opening comments, "[i]f there are doubts as to the Commission's jurisdiction over such entities, that provides yet another key reason to defer to Congress so it can devise a more comprehensive framework for the Internet ecosystem."[223]

III. ANY FEDERAL OPEN INTERNET FRAMEWORK SHOULD REFLECT CERTAIN KEY PRINCIPLES

If the Commission were to adopt Open Internet rules notwithstanding the legal and policy impediments noted above and in NCTA's initial comments, it should (1) provide exceptions for reasonable network management; (2) permit usage-based billing and zero-rating; (3) refrain from extending those rules to non-BIAS data services or Internet interconnection and traffic exchange arrangements; (4) avoid drawing unwarranted distinctions between broadband technologies; (5) forbear from all Title II provisions that would authorize the Commission to regulate rates and mandate unbundling, as well as from other onerous Title II requirements including Sections 214,

[222] *See* Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 21-25 (filed July 17, 2017).

[223] NCTA Comments at 6.

222, and 254(d); and (6) ensure the primacy of federal regulation and national uniformity by making clear that any new requirements constitute a ceiling, not merely a floor.

A. Any Open Internet Mandates Should Include Exceptions for Reasonable Network Management

If the Commission adopts bright-line conduct rules in spite of the overwhelming legal risks and policy harms associated with its proposed reliance on Title II, those rules should be carefully tailored to ensure that ISPs can continue to provide quality broadband service to users, including those with unique network needs. In the 2010 and 2014-15 rulemakings, the Commission incorporated into its Open Internet mandates an exception for reasonable network management. Any new rules that the Commission adopts should afford ISPs and their subscribers at least the same amount of flexibility.

In the *2010 Order*, the Commission "permitted exceptions for 'reasonable network management' practices to the no-blocking and no unreasonable discrimination rules."[224] And in the *2015 Order*, it retained a "reasonable network management" exception to the "no-blocking, no-throttling rule, and the no-unreasonable interference/disadvantage standard."[225] These exceptions, the Commission explained, were "necessary for broadband providers to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks."[226] The availability of such exceptions to any Open Internet conduct rules remains essential today. It is particularly important to ensure that ISPs

[224] *2015 Order* ¶ 214; *see also 2010 Order* ¶¶ 80-92.

[225] *2015 Order* ¶ 215.

[226] *Id.*

retain the flexibility to detect and deter the flow of malicious and unlawful traffic and the use of malicious and unlawful devices on their networks, as NCTA explained in its opening comments.[227]

This includes addressing the threat of malicious and unlawful traffic from unsecured or compromised devices. Today, a significant threat to safe and secure broadband access is the constant flow of malicious and unlawful traffic over the Internet, facilitated by the exponential growth in the use of connected devices with weak or non-existent security.[228] As the Commission recently explained in its Notice of Proposed Rulemaking to establish a voluntary cybersecurity labeling program for smart devices, "[t]he proliferation of consumer IoT devices has opened the door to cyberattacks on consumer products that can have serious privacy and national security consequences, ranging from theft of personal information to disruption of critical infrastructure."[229] Cyberattacks can also result in the theft of confidential customer data, which the Commission recently found could impose myriad harms on subscribers including "financial

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[227] *See* NCTA Comments at 76 n.260.

[228] As Commissioner Starks has noted, "every minute, bad actors—at times backed by nation states, including Russia and China—probe our broadband networks for weakness and launch potentially crippling cyberattacks." *NPRM*, Statement of Commissioner Geoffrey Starks, at 2.

[229] *Cybersecurity Labeling for Internet of Things*, PS Docket No. 23-239, Notice of Proposed Rulemaking, FCC 23-65 ¶ 4 (rel. Aug. 10, 2023) ("*Cybersecurity Labeling NPRM*"). CISA has reported that Russian cyber actors are exploiting large numbers of small office home office ("SOHO")/residential routers worldwide to enable espionage and intellectual property theft. CISA, "Russian State-Sponsored Cyber Actors Targeting Network Infrastructure Devices," Alert Code TA18-106A (Apr. 20, 2018), https://www.cisa.gov/news-events/alerts/2018/04/16/russian-state-sponsored-cyber-actors-targeting-network-infrastructure ("CISA 2018 Alert"). More recently, CISA warned that "[m]alicious cyber actors continue to exploit default passwords" on Internet-exposed systems, and "[y]ears of evidence have demonstrated that relying upon thousands of customers to change their passwords is insufficient." CISA, "Secure by Design Alert: How Manufacturers Can Protect Customers by Eliminating Default Passwords" (Dec. 15, 2023), https://www.cisa.gov/sites/default/files/2023-12/SbD-Alert-How-Software-Manufacturers-Can-Protect-Customers-by-Eliminating-Default-Passwords-508c_0.pdf. While the CISA Alert specifically mentions the threat to operational technology (OT) products, the Alert goes further to "urge every technology manufacturer to eliminate default passwords in the design, release, and update of all products." *Id.*

harm, . . . identity theft, theft of services, potential for blackmail, [and] the disclosure of private facts."[230] Malicious and unlawful traffic can take any number of forms: from botnets hijacking network devices to carry out cyberattacks and other criminal schemes; to DDoS attacks on network elements and key Internet infrastructure; to malware designed to flood consumers' inboxes with spam, defraud advertisers on a massive scale through "click fraud" and ransomware, hack into consumers' accounts and steal their sensitive personal information, or even engage in surveillance of critical infrastructure.[231]

ISPs need flexibility to manage their networks and the devices attached to them to prevent these types of harm to their networks and their subscribers. Other commenters explain that the Commission should avoid adopting "a narrowly defined reasonable network management exception that would expose operators' security practices to constant enforcement scrutiny."[232] NCTA agrees that it would be ill-advised for the Commission to adopt a narrow view of what constitutes reasonable management to deter and address cyberthreats and other malicious traffic.

Broadband providers have powerful incentives to identify and prevent the transmission of malicious and unlawful traffic on their networks and the devices connected to them. First and foremost, they want to ensure that their subscribers can enjoy the safe and secure online experience

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[230] *2023 Data Breach Order* ¶ 55.

[231] Indeed, it is estimated that there were more than 1.5 billion attacks against IoT devices in just the first six months of 2021, and it is anticipated that there will be more than 25 billion IoT devices in use by 2030. *See Cybersecurity Labeling NPRM* ¶¶ 1, 4.

[232] CTIA Comments at 101; *see also* WISPA Comments at 48 (proposing to define "reasonable network management" to include "responding proactively . . . to address cybercrime (e.g., malware, distributed denial-of-service attacks)"); Comments of WTA – Advocates for Rural Broadband, WC Docket No. 23-320, at 1 (filed Dec. 14, 2023) (emphasizing that rural broadband providers will continue to need flexibility "to block cyberattacks, robocalls and similar unlawful traffic to protect their networks and customers"); *cf.* AT&T Comments at 11, 18 (highlighting the steps AT&T has taken to "address the vast majority of cyberattacks" it faces "automatically through the sophisticated tools that it has deployed").

they expect. Those incentives are heightened by the fact that ISPs bear the risks of cyberattacks directly, as IoT botnets and other forms of malware attack ISPs' network infrastructure. As the entities that connect end users to the Internet, ISPs are also well-positioned to implement cost-effective measures to detect and deter malicious and unlawful traffic. On routers that they provision to end users, ISPs can detect malicious traffic originating from compromised devices at the router-level and block that malicious traffic before it reaches the broader Internet ecosystem.[233] The Commission should make clear that "reasonable network management" encompasses ISP efforts to address malicious and unlawful traffic throughout their networks, whether that traffic enters through end-user routers and modems or middle-mile facilities.[234]

By clarifying that "reasonable network management" encompasses policies to detect and deter malicious and unlawful traffic, including by addressing the threats from unsecured or compromised devices, the Commission can empower ISPs to prevent serious harms to mass-market consumers and advance the Commission's cybersecurity goals. Empowering ISPs to adopt and implement reasonable policies to detect and deter malicious and unlawful traffic is fully

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[233] For instance, the routers that Charter provisions have pre-set security settings that undergo regular software updates to ensure that each device is up to date and well-protected. Charter's newest Advanced Home Wi-Fi routers also include enhanced administrative security settings that enable customers to manage their home network with a unique credential rather than a traditional default administrative password. Charter's Spectrum Security Shield, installed on its Advanced Wi-Fi routers, protects customers from inadvertently visiting harmful websites, prevents known bad-actor IP addresses from connecting to customers' home devices, monitors for unusual connection activity, and isolates compromised in-home devices so they cannot participate in DDoS attacks.

[234] Such efforts are critical given the fact that, as CISA has observed, "few network devices—especially SOHO and residential-class routers—run antivirus, integrity-maintenance, and other security tools that help protect general purpose hosts." CISA 2018 Alert. In describing the risks of such equipment, CISA also noted that "[m]anufacturers build and distribute these network devices with exploitable services, which are enabled for ease of installation, operation, and maintenance. Owners and operators of network devices do not change vendor default settings, harden them for operations, or perform regular patching." *Id.*

consistent with Commission precedent regarding reasonable network management and the recognition that the benefits of net neutrality are available solely for "lawful" traffic.[235]

B. Any Open Internet Framework Should Continue To Permit Usage-Based Billing and Zero-Rating

The Commission also has appropriately refrained from imposing any categorical restrictions on usage-based billing options, which "enhance[] end-user control by charging customers based on the data they actually use, without interfering with the consumer's ability to reach the Internet content of his or her choice."[236] That policy should continue. The Commission correctly concluded in the *2010 Order* that "prohibiting 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."[237] Any bans on usage-based billing would be particularly harmful to consumers who are light Internet users, and who therefore would suffer disproportionately from any price increases associated with such subsidization.[238] Moreover, in declining renewed proposals for a flat ban on

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[235] *See, e.g.*, *2010 Order* ¶ 80 (recognizing that "a flourishing and open Internet requires robust, well-functioning broadband networks"); *id.* ¶ 92 (finding that broadband providers must have "flexibility to experiment, innovate, and reasonably manage their networks" because the Commission does not "presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future"); *see also Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064 ¶ 140 (2009).

[236] *See* Daniel A. Lyons, *Innovations in Mobile Broadband Pricing*, 92 Denver Univ. L. Rev. 453, 466 (2015).

[237] *See 2010 Order* ¶ 72.

[238] *See* Geoffrey Manne & Ian Adams, "In Defense of Usage-Based Billing," Truth on the Market (July 13, 2020), https://truthonthemarket.com/2020/07/13/in-defense-of-usage-based-billing/.

usage-based billing in 2015, the Commission appropriately observed that the practice "may benefit consumers by offering them more choices over a greater range of service options."[239]

A handful of commenters urge the Commission to reverse these prior determinations and to proscribe certain forms of usage-based billing, with some commenters (such as Prof. Scott Jordan) even suggesting (erroneously) that the usage-based billing practices of fixed ISPs are somehow inherently unreasonable.[240] These arguments fail for a number of reasons. For one thing, any Commission ruling that limits an ISP's ability to engage in usage-based billing would constitute rate regulation of broadband services. There is no question that regulatory restrictions on usage-based billing—whether through outright prohibitions, *ex ante* determinations that certain pricing models for usage-based billing are unreasonable, or case-by-case enforcement action against a particular ISP's usage-based billing model—would contravene the Commission's proposed "forbear[ance] from all provisions of Title II that would permit Commission regulation of BIAS rates,"[241] as well as the Chairwoman's and Commissioners' unanimous commitments to not engage in rate regulation of broadband service.[242]

These claims also overlook that usage-based billing is a well-accepted pricing model used for communications services and for the sale of most other categories of goods and services, like food and gasoline. Such consumption-based pricing equitably and efficiently ensures that consumers who use goods or services the most pay more, without having to raise prices for all

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[239] *2015 Order* ¶ 153.

[240] *See, e.g.*, Comments of Scott Jordan, WC Docket No. 23-320, at 32-38 (filed Dec. 14, 2023) ("Jordan Comments"); Public Knowledge Comments at 8 (alleging that ISPs' application of data allowances amounted to "price gouging").

[241] *NPRM* ¶ 105.

[242] *See, e.g.*, *2023 Rosenworcel Speech* at 5 ("They say [the *NPRM*] is a stalking horse for rate regulation. Nope. No how, no way. We know competition is the best way to bring down rates for consumers.").

consumers across the board. Indeed, the notion that requiring very heavy users of a service to pay more than light users is grounded in longstanding notions of proportionality and fairness,[243] and cannot credibly be described as pernicious.[244] It would be irrational in the extreme to prohibit some or all ISPs from engaging in usage-based billing—and thereby reduce consumer choice and drive up the baseline prices that all users pay—in the absence of any plausible harm to competition, Internet openness, or access to broadband caused by such practices. Prof. Jordan's claims regarding usage-based billing by fixed ISPs also suffer from various other flaws, including his reliance on woefully outdated information about industry practices and available service plans (drawn primarily from a paper he wrote *seven years ago containing data well over a decade old*),[245] and his erroneous assumption that the marginal cost pricing he proposes for usage-based billing

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[243] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 12460 ¶ 30 (1997) ("[T]raditionally, shared facilities are priced on a usage-sensitive basis . . . . We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities."); *WATS-Related and Other Amendments of Part 96 of the Commission's Rules*, Notice of Proposed Rulemaking, 1986 FCC LEXIS 4188 ¶ 18 (1986) ("[I]t seems reasonable to impose proportionately more costs on those who make use of traffic-sensitive exchange facilities, such as common transport and end-office switching, during peak periods, since it is peak-period usage that causes exchange carriers to make additional investment in such facilities."); *MTS and WATS Market Structure*, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 F.C.C.2d 135 ¶ 60 (1982) ("Whichever system of allocating non-traffic sensitive plant is selected, it seems reasonable to expect interexchange carriers to compensate exchange carriers for traffic sensitive costs on a traffic sensitive basis.").

[244] Title II advocates have recognized in the past that connecting usage levels to prices can help mitigate subsidization of the small percentage of subscribers representing the heaviest data users. *See, e.g.*, Gigi Sohn, *Time Warner Steps Up to the Plate on Bandwidth Usage: Updated*, Public Knowledge (Jan. 17, 2008), https://publicknowledge.org/time-warner-steps-up-to-the-plate-on-bandwidth-usage-updated/.

[245] *See* Jordan Comments at 32-38 (relying almost exclusively on Scott Jordan, *A Critical Survey of the Literature on Broadband Data Caps*, Telecomm. Policy, vol. 41, issue 9 (Oct. 2017)).

makes sense in an industry with large fixed costs.[246] And given the robust and growing competition in the marketplace, including between and among wireline and wireless ISPs, it would be particularly irrational to put a thumb on the scale by adopting different usage-based billing rules or presumptions for different types of ISPs.

The Commission also should reject calls from some commenters to prohibit zero-rating practices.[247] In 2015, the Commission declined to ban zero-rating outright and observed that "new [zero-rated] service offerings, depending on how they are structured, could benefit consumers and competition."[248] The Commission also pointed to record evidence showing that "these business models increase choice and lower costs for consumers," and that such arrangements "also support continued investment in broadband infrastructure and promote the virtuous cycle."[249] These findings are no less true today, as various parties confirm.[250] Moreover, as is the case with usage-based billing, any Commission ruling that curtails zero-rating practices would "necessarily

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[246] *Id.* at 36-38 (claiming that "[t]he purpose of a data cap is to recover costs associated with heavy usage if and only if the overage charge is related to the cost that a broadband provider incurs for the capacity required to carry the incremental traffic over the data cap").

[247] *Cf.* Public Knowledge Comments at 76-82; Comments of the Digital Inclusion Alliance of San Antonio, WC Docket No. 23-320, at 2 (filed Dec. 13, 2023); EFF Comments at 15-16; WGA Comments at 7-8. Notably, some of these commenters use "zero-rating" in a manner that goes well beyond the Commission's traditional understanding of the term, to describe practices that have nothing to do with the delivery of Internet content—including when describing Comcast's treatment of Stream TV transmissions. *See, e.g.*, WGA Comments at 5; EFF Comments at 7. As Comcast made clear when Stream TV was available, "Stream TV is not an online or over-the-top ('OTT') video service delivered over the Internet; rather, it is a Title VI *cable* service that, just like all of Comcast's other cable services, is delivered to customers' homes over Comcast's private, managed network over Comcast's cable systems, and is subject to and abides by all the regulatory requirements that apply to other Title VI cable services." Opposition of Comcast Corp., MB Docket No. 10-56, GN Docket No. 14-28, at 1 (filed Mar. 14, 2016).

[248] *2015 Order* ¶ 152.

[249] *Id.* ¶ 151.

[250] *See, e.g.*, CTIA Comments at 102-03; Westling Comments at 4-5; Furchtgott-Roth/Arner Comments at 8-9; FSF Comments at 54-56, 59-60.

constitute[] rate regulation"—and thus would run afoul of Chairwoman Rosenworcel's no-rate-regulation pledge and the *NPRM*'s proposed forbearance from any form of rate regulation—because it would prevent ISPs from applying "a rate charge of $0" to certain data "when a subscriber's usage exceeds his or her monthly data allotments."[251] The Commission should refrain from seeking to micromanage ISPs' service offerings in this manner.

C. Any Open Internet Rules Should Not Extend to Non-BIAS Data Services or to Internet Interconnection and Traffic Exchange

Consistent with the Commission's past practice, any bright-line rules that the Commission might adopt should not extend to non-BIAS data services. In the *2015 Order*, the Commission explained that "treating non-BIAS data services differently than broadband Internet access service . . . will continue to drive additional investment in broadband networks and provide end users with valued services without otherwise constraining innovation."[252] This approach is even more imperative today, as the kinds of bandwidth-intensive devices and applications that may benefit from non-BIAS data services, such as individually negotiated, dedicated, or otherwise-tailored offerings, play an increasingly important role in keeping Americans connected. For example, countless Americans have relied on connected care devices, such as heart rate monitors, to continue accessing important medical care during the COVID-19 pandemic.[253] Moreover, services that "provide schools with curriculum-approved applications and content" have proven indispensable to the millions of students and teachers that relied on remote learning.[254] Although such devices

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[251] FSF Comments at 46-47; *see also* CTIA Comments at 101-03.

[252] *2015 Order* ¶ 211.

[253] *See id.* ¶ 208 (explaining that "connectivity bundled with . . . heart monitors . . . would . . . be considered other data services to the extent . . . provided by broadband providers over last-mile capacity shared with broadband Internet access service").

[254] *Id.*

and applications often use, or are provided over, the public Internet, it is critical that the Commission allow the marketplace to evolve if these or similar bandwidth-intensive offerings require quality-of-service guarantees or if other factors militate in favor of offering separate, non-BIAS data services. The Commission thus can and should simply define non-BIAS data services as any broadband-enabled offerings *other than BIAS*. And in keeping with its longstanding approach, the Commission should reject calls to establish new mechanisms for heavily scrutinizing non-BIAS data services[255]—particularly given the complete absence of any evidence of harm stemming from such services.

Additionally, any federal Open Internet regime should not apply to the dynamic and thriving marketplace for Internet interconnection and traffic exchange. As the *NPRM* observes, "the best approach with respect to Internet traffic exchange is to 'watch, learn, and act as required' but to not intervene with prescriptive rules."[256] For most of the Internet's existence, peering and other traffic-exchange agreements for Internet traffic were never subject to industry-specific regulation—and the marketplace functioned exceedingly well, marked by dramatically declining prices, an explosion in new and innovative services and apps, and the absence of any threat to competition or consumer welfare.[257] The *2015 Order*'s decision to apply Title II oversight to negotiations for Internet interconnection and traffic exchange, and to allow complaints *only* by entities negotiating with ISPs and not by ISPs themselves, significantly distorted this well-functioning marketplace.[258] When the Commission returned to its pre-2015 approach in 2018 by

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[255] *See* Public Knowledge Comments at 67-72.

[256] *NPRM* ¶ 187.

[257] *See 2018 Order* ¶¶ 163-73; *see also, e.g.*, Ev Ehrlich, Progressive Policy Inst., *A Brief History of Internet Regulation* at 13 (Mar. 2014), http://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Ehrlich_A-Brief-History-of-Internet-Regulation1.pdf.

[258] *See 2015 Order* ¶¶ 194-206.

"freeing Internet traffic exchange arrangements from burdensome government regulation" and "allowing market forces to discipline this emerging and competitive market," it correctly observed that there is "no evidence" of anticompetitive conduct by ISPs and that "competitive pressures in the market for Internet traffic exchange mitigate the risk" of any such conduct in the future.[259]

A few commenters urge the Commission to return to the 2015 approach and subject ISPs to the threat of complaints in the Internet interconnection context—resurrecting worn-out claims that ISPs have a "terminating access monopoly" that they abuse by extracting anticompetitive "tolls" from edge providers and transit providers.[260] But the Commission has dispelled this notion,[261] and even fervent Title II supporters are compelled to admit that there is no evidence of any harmful conduct in today's interconnection marketplace.[262] As the Israel/Keating/Shampine Declaration confirms, "[g]iven burgeoning consumer choice and the precipitous decline in interconnection pricing, it is clear that no terminating access monopoly exists in the broadband marketplace"—nor is there any "evidence of market failure" that could conceivably warrant regulatory oversight of ISPs' interconnection practices.[263] Rather, the "many routes into and out of any broadband ISP's network" ensure that "application and content providers need not even

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[259] *2018 Order* ¶¶ 168, 170.

[260] *See, e.g.*, INCOMPAS Comments at 38-46; Lumen Comments at 5-25; Public Knowledge Comments at 60-61, 82-87; Jordan/Nikkhah Comments at 4-9; New America/OTI Comments at 9-10.

[261] *See 2018 Order* ¶¶ 135-136.

[262] *See, e.g.*, Free Press Comments at 68-69 ("Our current sense is that the interconnection markets are functioning well.").

[263] Israel/Keating/Shampine Declaration ¶ 57; *see also* Dr. Michael Kende et al., Analysis Mason, Evolution of the Internet in the U.S. Since 2015, at 28, attached as Exh. A to USTelecom Comments (filed Dec. 14, 2023) ("Kende Report") (explaining that there is "no evidence that any provider has acted as a gatekeeper, to force any interconnection conditions that require regulation to avoid or undo").

deal with an ISP directly to reach the ISP's end users," and instead can "choose transit services offered by one or more of the ISP's peers (and, for many ISPs, the ISP's own transit providers)," not to mention CDN services and other options for conveying content to an ISP's end users.[264]

The mere fact that some interconnection agreements involve payment in one direction or the other certainly does not warrant regulatory intervention. As the Commission is well aware, paid interconnection arrangements have been around for decades[265] and are the efficient result of commercial negotiations in scenarios where the exchange of traffic or economic value is significantly out of balance—in either direction.[266] While Prof. Jordan and graduate student Ali Nikkhah proffer an economic "model" that they claim supports taking the unprecedented step of restricting paid interconnection,[267] their model relies heavily on incorrect assumptions, including the notion that all ISPs are monopolists[268]—an analytical shortcut that is inconsistent with clear marketplace evidence, as Compass Lexecon and others have shown, and that wholly undermines the validity of their conclusions. Moreover, limiting paid interconnection by ISPs would increase ISPs' costs and in turn impose upward pressure on retail broadband rates, in exchange for reducing

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[264] USTelecom Comments at 93.

[265] *See, e.g.*, *2010 Order* ¶ 67 n.209 (acknowledging the existence of paid interconnection arrangements and making clear that the Commission did "not intend [its] rules to affect existing arrangements for network interconnection, including existing paid peering arrangements").

[266] *See* Kende Report at 6, 9 (noting the prevalence of commercially negotiated "paid peering" arrangements where "traffic flows between the parties are substantially asymmetric"); *see also* Stanley M. Besen & Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to "Mesh": Implications for Government Regulation* 26 (July 11, 2012), https://ssrn.com/abstract=2104323 ("In some cases, a CDN can even send traffic over the ISP's own paid transit connections, in which case the ISP pays for the traffic.").

[267] *See* Jordan/Nikkhah Comments at 4 (citing Ali Nikkhah & Scott Jordan, *A Two-Sided Model of Paid Peering*, Telecomm. Policy, vol. 46, issue 8 (Sept. 2022) ("2022 Jordan/Nikkhah Paper")).

[268] *See* 2022 Jordan/Nikkhah Paper at 8 (stating that they "model a single monopoly ISP" in analyzing paid interconnection).

interconnection-related costs for large online platforms and other entities—an outcome that bears no rational connection to any legitimate public interest goal. It also goes without saying that proposals to prohibit or restrict paid interconnection arrangements run counter to Chairwoman Rosenworcel's no-rate-regulation pledge. Accordingly, if the Commission adopts new conduct rules, it should maintain its hands-off approach to the Internet interconnection and traffic exchange marketplace.

D. Any Open Internet Regime Should Avoid Drawing Unwarranted Distinctions Among Broadband Technologies

Any federal framework also should apply consistently to all ISPs and should avoid distorting the marketplace by subjecting fixed wireline, fixed wireless, mobile wireless, and/or other broadband service technologies to different rules and/or carve-outs.[269] Although the *2010 Order* distinguished between fixed and mobile broadband services and adopted different rules for each,[270] the Commission appropriately recognized in the *2015 Order* that such distinctions are untenable given the state of the broadband marketplace.[271] Consistent with the Commission's 2015 recognition that there is no justifiable rationale for regulating similarly situated providers differently, any federal framework should ensure that any Open Internet mandates apply on a competitively and technologically neutral basis going forward.

The rationale that compelled the Commission to impose the same rules to fixed and mobile service providers in the *2015 Order*—that "mobile broadband networks [were] faster, more

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[269] *See NPRM* ¶¶ 60-61.

[270] *See 2010 Order* ¶¶ 94-96.

[271] *See 2015 Order* ¶¶ 86-88 ("Today, we find that changes in the mobile broadband marketplace warrant a revised approach. . . . We conclude that it would benefit the millions of consumers who access the Internet on mobile devices to apply the same set of Internet openness protections to both fixed and mobile networks.").

broadly deployed, more widely used, and more technologically advanced [in 2015] than they were in 2010"[272]—unquestionably holds true today and with even greater force. Indeed, with the burgeoning deployment of 5G networks, the accelerating convergence of wireline and wireless broadband services leaves no doubt that divergent requirements for such offerings would distort competition and undermine the public interest.

Based on these parity-related principles, the Commission should refrain from recognizing special carve-outs for particular broadband technologies—such as a blanket determination that 5G "network slicing" will be treated as a non-BIAS data service or that network slicing within a BIAS service constitutes reasonable network management. Network slicing "involves creating customized, software-defined, virtual networks—or 'slices'—that are each logically separated and individually optimized to meet the specific needs of each application."[273] Network slicing should not be used to provision a BIAS offering or to transmit services, applications, or content consumers access utilizing a BIAS service in a manner that circumvents the proposed Open Internet rules. The record indicates that optimization enabled through network slicing would enable a wireless provider to "establish separate slices for mobile broadband and fixed wireless traffic,"[274] which would fall within the consumer-facing, mass-market broadband services that would be subject to any future Open Internet rules. Accordingly, it would be inappropriate for the Commission to issue a blanket determination that *every* use of network slicing automatically triggers the carve-out for non-BIAS data services, given that a 5G wireless provider may well use slices in its network to provision one or more BIAS offerings or to transmit services, applications, or content accessed

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[272] *2015 Order* ¶ 88.

[273] T-Mobile Comments at 5.

[274] *Id.* at 9

by consumers utilizing such wireless provider's BIAS service. Rather than making broad declarations that any use of network slicing represents "reasonable network management," the Commission instead should consider that issue on a case-by-case basis, as it does with other ISPs' network management practices, on a competitively and technologically neutral basis.

It would be particularly irrational—and legally indefensible—to draw distinctions in the Commission's rules or exceptions between fixed wireline and fixed wireless providers, given the pervasive and growing head-to-head competition between such types of providers today.[275] While the Commission previously found that application of the reasonable network management exception may take account of "the additional challenges involved in *mobile* broadband network management" to "accommodat[e] mobility" and address "the changing location of users" in the mobile context,[276] this rationale is inapplicable to fixed wireless broadband.[277] Accordingly, to ensure full and fair competition between wireline and wireless broadband providers, the Commission should make clear that any prohibition or restriction on blocking, throttling, or paid prioritization of particular content, applications, or services, or classes of content, applications, or services, in the new rules applies equally and uniformly to fixed wireline and fixed wireless services, and any reasonable network management or other exception is not applied more flexibly for one service than the other.

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[275] *See supra* at 39-40; *see also, e.g.*, Israel/Keating/Shampine Declaration ¶¶ 25-35.

[276] *2015 Order* ¶ 223 (emphasis added).

[277] *See id.* ¶ 223 n.576 (citing AT&T's assertion that the "unique challenges presented by mobile users and the unpredictable demands placed on mobile networks due to the inherent mobility of their users require a robust set of tools that can be used to mitigate the impact of potential congestion on consumers' experience with a network"); *id.* ¶ 223 n.578 (citing CTIA's assertion that "as channel conditions degrade (such as when a mobile user moves toward the periphery of a cell site) '[e]ven to preserve a given data rate, the user may need 36 times more radio resources'").

E. The Commission Should Mitigate the Harms of Reclassification by Granting Broad Forbearance from Title II's Requirements and Restrictions

As NCTA explained in its opening comments,[278] most of Title II's requirements and restrictions were intended for legacy monopoly telephone companies and services and plainly are unsuitable for today's broadband marketplace. The resultant harms cannot be fully addressed through forbearance because the measures the Commission would leave in place would inflict significant damage, and the Commission could seek to reimpose any requirement or restriction from which it previously forbore at any time, thereby limiting ISPs' ability to meaningfully rely on such relief. Nevertheless, if the Commission reclassifies broadband as a telecommunications service, it should seek to mitigate the harms that reclassification inevitably would entail by granting broad forbearance from Title II of the Act, including all provisions in Title II that would permit the Commission to regulate broadband rates and impose unbundling requirements on ISPs, as well as other burdensome and ill-fitting provisions including Sections 214, 222, and 254(d).

In particular, if the Commission is to make good on the *NPRM*'s disavowal of any form of rate regulation, it is not enough merely to assert in the abstract that the Commission is "forbear[ing] from applying [S]ections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for BIAS."[279] The Commission must forbear from specific statutory language in those provisions—most notably Section 201(b)'s directive that all "charges" be "just and reasonable,"[280] and Section 202(a)'s provision addressing "unjust or unreasonable discrimination in charges."[281] Failing to do so would leave statutory language in place enabling the Commission to engage in the

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[278] *See* NCTA Comments at 94-98.

[279] *NPRM* ¶ 105.

[280] 47 U.S.C. § 201(b).

[281] *Id.* § 202(a).

very kind of rate regulation that the *NPRM* has explicitly disclaimed.[282] For the same reason, the Commission must do more than generally pledge not to impose unbundling requirements on ISPs and instead should forbear specifically from the unbundling mandates in Section 251(c)[283]—on top of the other provisions in Section 251 from which the Commission appropriately forbore in the *2015 Order*.[284]

The Commission's proposals to subject broadband providers to burdensome entry and exit regulation under Section 214 and impose sector-specific privacy regulations under Section 222 are just as problematic. The *NPRM*'s proposal not to forbear from applying Section 214 to ISPs—a marked departure from, and expansion of, the *2015 Order*—is squarely at odds with the goals of "permissionless innovation," as it would enable the Commission to impose unfunded buildout mandates on ISPs, or to compel ISPs to seek approval before launching a new service, engaging in transfer-of-control or assignment transactions, or even discontinuing an outdated service.[285] And the proposal not to forbear from Section 222 would provide the Commission with authority to regulate the privacy practices of broadband providers (and *only* broadband providers), notwithstanding Congress's rejection of such sector-specific regulation in its 2017 CRA

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[282] *See supra* notes 241-242. For the avoidance of doubt, in forbearing from rate regulation, the Commission should specify that "rate" means the amount charged by, or the pricing methodology of, a broadband provider for the delivery of broadband Internet traffic, including but not limited to the monthly or other base price, data use charge, promotional discount, or any other fee or charge. The Commission also should specify that "regulation" means, with respect to a rate, the use by the Commission of rulemaking, adjudication, or enforcement authority to establish, declare, or review the reasonableness or lawfulness of such rate, whether by prescribing such rate in advance or by adjudicating on a case-by-case basis, and whether for retail or wholesale service.

[283] *See* 47 U.S.C. § 251(c); *see also* NCTA Comments at 96-97.

[284] *See 2015 Order* ¶¶ 513-14.

[285] *See* NCTA Comments at 22, 94-95.

Resolution.[286] To avoid inflicting such harms on ISPs and flouting congressional directives, the Commission must forbear from Sections 214 and 222 of the Act if it reclassifies broadband as a telecommunications service under Title II.

As discussed above, the Commission also should reject some commenters' calls to decline to forbear from Section 254(d) of the Act and thereby add broadband revenues to the USF contribution base immediately following Title II reclassification.[287] Even some Title II proponents like Free Press warn that "expanding the USF contribution burden to BIAS could result in a massive . . . wealth transfer from consumers," a "shift" that "would . . . be regressive, overburdening low-income consumers that are more sensitive to price increases than business or other consumers."[288] "This potential major upheaval . . . is why it is imperative for the Commission to forbear from 'immediately requir[ing] new universal service contributions associated with' BIAS" if it reclassifies broadband as a telecommunications service under Title II.[289]

F. The Commission Should Ensure Uniformity by Making Clear That Any New Rules Will Serve as a Ceiling, Not Merely as a Floor

Finally, if the Commission decides to adopt rules, it should heed Chairwoman Rosenworcel's call for a "uniform legal framework [that] applies to the whole country."[290] As NCTA and a number of other commenters explain, it is well-settled and a matter of longstanding bipartisan consensus that broadband is a jurisdictionally interstate service that should be subject to

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[286] *See id.* at 96.

[287] *See supra* at 33-34.

[288] *See* Free Press Comments at 66-67.

[289] *Id.* at 67.

[290] *NPRM*, Statement of Chairwoman Jessica Rosenworcel, at 2.

predominantly federal oversight.[291] The Commission historically has refrained from preempting generally applicable state laws—such as prohibitions against fraud—"so long as the administration of such general state laws does not interfere with federal regulatory objectives."[292] And it likewise has acknowledged that states validly exercise certain "functions expressly reserved to them under the Act," such as responsibility for designating eligible telecommunications carriers; jurisdiction over poles, ducts, conduits, and rights-of-way where reverse preemption has been invoked under Section 224(c); and authority to establish state universal service policies consistent with Section 254 and the Commission's rules.[293] But the Commission has also recognized that state and local

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[291] *See* NCTA Comments at 99-102; *2015 Order* ¶ 431 ("With respect to broadband Internet access services, the Commission has previously found that, '[a]lthough . . . broadband Internet access service traffic may include an intrastate component, . . . broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes.'"); *see also, e.g.*, ACA Connects Comments at 47-48; CTIA Comments at 103-112; U.S. Chamber of Commerce Comments at 63-65; USTelecom Comments at 97-98.

[292] *2018 Order* ¶ 196; *see also 2015 Order* ¶¶ 431-33.

[293] *2018 Order* ¶ 196. If broadband is reclassified as a telecommunications service, the Commission should reaffirm that this would not permit state or local franchising authority regulation of broadband. 47 C.F.R. § 76.43; *see 2015 Order* ¶ 433 n.1285 (clarifying that Title II classification does not justify franchise requirements for broadband). As implemented under the Commission's "mixed-use rule," federal law bars franchising authorities from regulating common carrier or information services. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd. 19633 ¶ 17 (2007) ("*Second 621 Order*") (citing 47 U.S.C. §§ 522(7)(C)), *recon. denied*, 30 FCC Rcd. 810 ¶ 15 (2015); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 34 FCC Rcd. 6844 ¶¶ 72-74 (2019) (extending the *Second 621 Order*'s mixed-use rule to information services pursuant to 47 U.S.C. § 544(b)(1) and codifying the rule), *aff'd in relevant part*, *City of Eugene v. FCC*, 998 F.3d 701, 7014-16 (6th Cir. 2021); *id*. ¶ 66 (reaffirming "application of the rule to incumbent cable operators that are also common carriers") (citing *Montgomery County v. FCC*, 863 F.3d 485, 493 (6th Cir. 2017)); *see also Comcast of Oregon II, Inc. v. City of Beaverton*, 609 F. Supp. 3d 1136, 1155-56 (D. Or. 2022) (holding that the rule preempts franchising authority regulation of broadband whether classified as an information service or a telecommunications service).

governments should *not* be permitted to develop separate Open Internet rules or other measures that directly regulate the provision of broadband service.[294]

Some Title II advocates nevertheless argue that any framework the Commission establishes in this proceeding should be a "floor" rather than a ceiling, allowing states to impose significantly more burdensome regulations on broadband service, even where the Commission expressly declines to adopt such regulations.[295] While a Title II regime would inflict significant harms, a federal common-carrier framework paired with distinct state requirements layered on top would compound the damage. The Commission should see these proposals to establish a regulatory "floor" for what they are—a hedge by the most extreme proponents of regulatory intervention, who will undoubtedly encourage states to pursue whatever regulatory measures they cannot persuade this Commission to adopt.

Such advocates attempt to downplay the risks of their proposed approach by claiming that conflict preemption would continue to apply on a case-by-case basis.[296] But their cramped conception of "inconsistency" makes clear that states would have free rein. For example, while paying lip service to the notion that broadband would be governed "principally . . . by a federal framework," Public Knowledge suggests that states nevertheless should be free to "go beyond this framework" if their laws are not "inconsistent."[297] That is oxymoronic: If this Commission were

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[294] *See 2018 Order* ¶ 194 (recognizing that "allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates"); *see also 2015 Order* ¶ 433 (noting the Commission's "firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme" adopted by the Commission).

[295] *See, e.g.*, CPUC Comments at 8; Public Knowledge Comments at 96-103.

[296] *See, e.g.*, Public Knowledge Comments at 98.

[297] *Id.*

to reject a categorical prohibition (e.g., by refusing to ban data caps, usage-based billing, or zero rating)—rightly finding such measures overly restrictive—then any state law that "go[es] beyond" the federal framework by imposing additional restrictions in those areas necessarily would conflict with that determination.[298] That is why the Commission determined in its *2015 Order* that states could not disturb its "carefully tailored regulatory scheme" by regulating more *or* less stringently.[299] Any approach that treats the Commission's rules as a floor to which state or local governments could add incremental measures would inherently create "inconsistency" with federal law, and accordingly should be rejected.

CONCLUSION

The opening comments confirm that the Commission should maintain the existing Title I regulatory framework that has been successfully applied for virtually the entirety of the Internet's existence, and that has produced tremendous results and benefits for consumers, competition, investment, and innovation.

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[298] *See, e.g., Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.").

[299] *2015 Order* ¶ 433; *see also id.* ¶ 432 (noting that, under Section 10(e), a "'State commission may not continue to apply or enforce any provision' from which the Commission has granted forbearance" (quoting 47 U.S.C. § 160(e)).

Respectfully submitted,

/s/

Matthew A. Brill
Matthew T. Murchison
Charles S. Dameron
Michael H. Herman
Kiley S. Boland
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for NCTA – The Internet & Television Association

Marcus W. Trathen
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP
Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601

Counsel for the North Carolina Cable Telecommunications Association, Inc.

David Koren
OHIO CABLE TELECOMMUNICATIONS ASSOCIATION
33 N. 3rd Street
Columbus, OH 43215

Walt Baum
TEXAS CABLE ASSOCIATION
919 Congress Avenue, Suite 1350
Austin, TX 78701

Rick C. Chessen
Steven F. Morris
Pamela S. Arluk
Robert N. Rubinovitz
NCTA – THE INTERNET & TELEVISION ASSOCIATION
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001

Jerome F. Candelaria
CALIFORNIA BROADBAND & VIDEO ASSOCIATION
925 L Street, Suite 850
Sacramento, CA 95814

Charles Dudley
FLORIDA INTERNET & TELEVISION ASSOCIATION
246 East 6th Avenue
Tallahassee, FL 32303

Brock Patterson
INDIANA CABLE & BROADBAND ASSOCIATION
150 W. Market St., Suite 412
Indianapolis, IN 46204

Andy Blunt
MCTA – THE MISSOURI INTERNET & TELEVISION ASSOCIATION
P.O. Box 1895
Jefferson City, MO 65102

Anna P. Lucey
David C. Soutter
Timothy O. Wilkerson
NEW ENGLAND CONNECTIVITY AND TELECOMMUNICATIONS ASSOCIATION
53 State Street, Suite 525
Boston, MA 02109

January 17, 2024

EXHIBIT A

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 ANTHONY SCOTT

January 17, 2024

I. Executive Summary:

Reclassifying broadband as a Title II service would not meaningfully advance national security or cybersecurity goals and could instead undermine or slow down current and urgent cybersecurity activities that are already underway. Due to the complexity of today's cyber challenges, reclassification would not — and cannot — address other parts of the national security and cybersecurity environment that would be required for an effective and comprehensive solution on these important issues. Instead, imposing common carrier regulation would shift the agency's focus from collaboration and coordination to prescriptive regulation and enforcement, which in my experience is the wrong approach in the national security and cybersecurity arena.

The FCC's assertion of expanded authority also is at odds with Congress's preference for a whole-of-government approach led by agencies with more specialized national security and cybersecurity expertise, including the Cybersecurity & Infrastructure Security Agency (CISA) within the Department of Homeland Security (DHS). It is both unnecessary and counterproductive for the FCC to pursue Title II reclassification to achieve the cited objectives.

In over 40 years as a senior IT leader in both the private and public sectors,[1] I have learned that cybersecurity work is extremely challenging when viewed from an operational perspective

[1] I served as Federal Chief Information Officer (CIO) for the US government under President Obama; Chief Information Officer and Senior Vice President at VMware, Inc.; Chief Information Officer and Corporate Vice President at Microsoft; Chief Information Officer and Senior Vice President at The Walt Disney Co.; Chief Technology Officer at General Motors Corp.; and Vice President of Operations at Bristol-Meyers Squibb Co. I am currently the CEO of Intrustion, Inc., a leading provider of cybersecurity and network monitoring services. I have been asked by NCTA – the Internet & Television Association to share my views on the NPRM's suggestion that reclassifying broadband under Title II is necessary for national security and cybersecurity reasons. The views expressed in this submission are my own.

because of the complexity of hardware and software supply chains, and because evolving and constantly morphing threats come from an expanding set of threat actors whose asymmetrical capabilities far exceed those on the defensive side. In addition, the changing regulatory environment has added both cost and complexity to the work that cybersecurity professionals must manage. To be most effective in protecting national security and cybersecurity on a national scale, private sector and government cybersecurity actors must perform their work in a collaborative environment that aligns policy, governance, law enforcement, operational activities, and regulatory action in a strong and cohesive way.

From a practical perspective, government and private sector IT and security teams have to be agile and must be able to respond quickly to threats, business innovations, and national priorities. The more diffused the regulatory environment, the more difficult this task becomes from a cost, timing, and effectiveness point of view. National security and cybsersecurity considerations are sensitive and require trusted communications between companies and government; I have been part of those discussions at senior levels of government in classified and other settings. Rather than adding a separate regulatory framework, the FCC would better serve its national security and cybersecurity goals through its efforts in federal interagency cybersecurity planning, coordination, and response activities.[2]

II. Title II Regulation Would Undercut Congress's Directives to CISA/DHS and Other Ongoing Efforts to Address Growing Cyber Threats.

After many years of confusing and fragmented responsibility for aspects of cybersecurity across many branches of government, Congress created the Cybersecurity & Infrastructure Security Agency (CISA), a full-fledged agency within DHS, as a part of the Cybersecurity and Infrastructure Security Agency Act of 2018. One of the most successful outcomes of this consolidation has been the recognition, emergence, and growth of Information Sharing and Analysis Centers (ISACs) focused on various sectors of our economy, including ISACs specifically focused on the Communications, Information Technology, and Small Broadband sectors. These ISACs both work with private sector entities and coordinate with the government on emerging threats, response, and recovery operations. In contrast, the FCC as a practical matter lacks many of the protections Congress has provided to CISA to foster information sharing, such as the Critical Infrastructure Information Act of 2002's Protected Critical Infrastructure Information (PCII) Program and the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), just to name a couple. The PCII Program promotes information sharing between the private sector and CISA by protecting the confidentiality of sensitive information about critical infrastructure, including through codified procedures addressing the receipt, validation, handling, storage, and use of such information.[3] CIRCIA calls for regulations that will enable covered entities to securely report cyber incidents and

[2] NPRM ¶ 30.

[3] *See* 6 C.F.R. Part 29; Protected Critical Infrastructure Informaiton (PCII Program), https://www.cisa.gov/resources-tools/programs/protected-critical-infrastructure-information-pcii-program.

ransomware payments to CISA, with the intent of developing more uniform, government-wide procedures.[4] Congress did not envision FCC participation in these mechanisms and did not authorize the FCC to provide comparable protections for information by participating companies.

This ongoing collaboration between CISA and the private sector goes far beyond mass market broadband services that are the subject of the FCC's NPRM. Mass-market services constitute only one facet of the interconnected and dynamic set of critical infrastructure entities. CISA's collaborative work extends to and includes cooperation with managed service providers and other cybersecurity operations pertaining to critical infrastructure entities that are rightly the government's primary cybersecurity concerns. The FCC's proposed reclassification of broadband under Title II would unnecessarily add confusion, potential conflict, and delayed response to these ongoing cybersecurity issues.

Importantly, CISA's parent agency, DHS, serves as the sector-specific agency for both the Communications Sector and the Information Technology sector, and thus can address vital cyber defense threats and issues affecting the online ecosystem in a holistic manner – in contrast to the FCC, whose authority extends only to a fraction of the entities within a highly interdependent ecosystem. The growth of cloud computing, the shift to conducting business from remote locations and mobile devices, the increasing interconnection between third-party software service providers and their clients, the exponential proliferation of Internet of Things (IoT) devices, the emergence of artificial intelligence (AI) as a key business operations tool, and the prevalence of cyber-physical systems have all combined to multiply the breadth of attack surfaces that pose cyber risk threats, and intensified the potential magnitude and impact of such attacks. Holistic approaches to cybersecurity are essential to reduce the likelihood that cyber defense measures successfully implemented in some segments of the ecosystem will be negated by gaps and unaddressed vulnerabilities in others. In this current context, the FCC's authority over only a limited subset of the digital landscape is problematic.

In particular, the FCC's proposal is not only limited to broadband access services (as distinct from cloud services, IP transit services, content delivery networks, data centers, and the like), but would apply only to "mass market" services, a category that does not include services provided to enterprise or carrier customers. CISA, by contrast, does not draw any distinctions among participants in the Internet ecosystem and is accordingly better equipped to ensure consistent and coordinated oversight. The FCC's imposition of new rules on a subset of entities in a complex ecosystem would threaten to impede the coordinated, whole-of-government approach Congress has taken pains to establish.

As an experienced private sector and government CIO and technology leader, I can attest to the fact that the government increasingly relies upon the private sector for information technology, research, innovation, IT operations, and human capital, as well as to provide a critical resource for defending the nation's most important assets in the event of cybersecurity threats and incidents. Although the FCC plays an important role in coordinating with CISA and other

[4] *See* Cyber Incident Reporting for Critical Infrasturcture of 2022 (CIRCIA), https://www.cisa.gov/topics/cyber-threats-and-advisories/information-sharing/cyber-incident-reporting-critical-infrastructure-act-2022-circia.

agencies, its assertion of additional regulatory authority (again, over one type of service provider) would hamper, rather than improve, public-private cooperation.

III. Reclassifying BIAS Under Title II Would Not Enhance the Government's Ability to Deter, Prevent, or Enforce Against Cyber Attacks

The nature of the vast majority of cybersecurity threats is such that reclassifying BIAS under Title II, as this NPRM proposes, is both unnecessary and unavailing. It would not improve the FCC's or other agencies' or providers' abilities to address or deter those threats. Most cybersecurity attacks rely on vulnerabilities based on human behavior (phishing, social engineering, insider threats) and/or software-based flaws (unpatched vulnerabilities, malware, zero-day, SQL injection, etc.). Reclassification of BIAS would not provide the FCC additional or unique capabilities to detect, prevent, or enforce against such threats. The fact that some of these threats may technically travel over broadband networks is not a unique or exclusive conveyance mechanism, nor is there a substantive connection to cause and effect to justify reclassifying BIAS under Title II.

Furthermore, as noted above, the FCC's NPRM does not cover all parts of U.S. networks or the associated equipment that is used in the provision of BIAS, so it is hard to see how the FCC, by reclassifying and regulating BIAS, could address network hardware, software and non-network devices, interconnections, IXC, PoPs, and other inputs to U.S. communications networks. Imposing new regulation that applies only to a limited subset of the relevant actors would detract from preparedness and incident response, rather than improving our security posture, because subjecting service providers to overlapping and potentially inconsistent requirements undermines the effectiveness of the Government's oversight and interaction with the private sector.

The drawbacks of such limits on the FCC's authority are compounded by the global nature of cyber threats, and the resultant need to meet them with collective and coordinated action domestically and abroad. For example, most botnet attacks originate from outside the United States, meaning that effective action to reduce such threats requires government leadership to foster globally scaled solutions and international cooperation. The FCC is neither designed nor authorized to engage in the kind of sustained multilateral coordination and collaboration on a global scale that is necessary to develop and implement effective international solutions to key global cyber defense issues.

The important issue of BGP security underscores why Title II authority is a poor fit for advancing security in the Internet arena. Reclassification of broadband would not enable the FCC to resolve BGP vulnerabilities because unilateral action by a single country's regulator will not prevent misrouting or hijacking of data traffic. Furthermore a command-and-control regulatory fix as envisioned by the NPRM won't work because the actions needed to resolve these issues necessarily require collaboration with a broad ecosystem of Internet-related entities, not just ISPs. Nation-states are not the only bad actors; transnational criminal organizations and cyber criminals also use variety of tactics and tools to engage in malicious behavior, supporting espionage, intellectual property theft, unauthorized persistent network access, etc., all of which are beyond the proposed BGP regulatory capabilities proposed by the FCC. Notably, CISA filed

comments in response to the FCC's Notice of Inquiry on BGP emphasizing that "it is incumbent on the Federal government and its partners to identify a coordinated approach to examine the impact of [potential security] measures before going down any particular path," and that the FCC in particular should "work with its partners to examine all potential solutions and what authorities it can bring to bear to mitigate this critical task."[5] As explained above, reclassifying broadband under Title II would likely inhibit (rather than improve) public-private cooperation and inter-agency coordination, and therefore would fail to meet CISA's objectives.

The nature of the common-carrier regulatory framework the NPRM proposes to impose would further exacerbate these concerns about an expanded role for the FCC. Asserting Title II authority over broadband would inevitably result in new regulatory mandates and a significantly increased focus on enforcement penalties. Under the existing Title I classification, the FCC as noted plays a valuable coordinating role with industry and other agencies but does not impose prescriptive regulation or impose forfeitures based on asserted non-compliance. Shifting to such a model would supplant the more cooperative approach that CISA has fostered and the gains that flow from effective public-private coordination.

As a former federal CIO and private sector CIO, I have firsthand experience with the importance of capable, responsive, and experienced government counterparts. Security risks in internet routing, IP address blocking, and other areas identified by the agency in the NPRM are fundamentally operational activities and rely on the managing, governing, and sharing of actionable information in a timely fashion.

CISA staff, DoD, and law enforcement, along with a substantial pool of private sector personnel have the longstanding relationships, appropriate clearances, as well as policy, and governance expertise to effectively engage with the intelligence community and other law enforcement agencies to address cyber threats and cyber actors. Increased top-down regulation under Title II would be inconsistent with the existing model under CISA's aegis.

In addition, the uncertain legal foundation associated with Title II militates against relying on such authority to address cybersecurity (or national security) concerns. I understand that BIAS has been classified as an information service under Title I during most of the Internet's existence, except for a brief period (from 2015-17) when the FCC asserted Title II authority, before reverting to the information-service classification at the start of 2018. The classification decisions in 2015 and 2018 were subject to judicial appeals, and I understand that any new attempt to reclassify BIAS under Title II is likely to be challenged in court. Against that backdrop, any cybersecurity or national security policy could change under new FCC leadership or a court could strike down a classification decision that is a prerequisite to a certain type of regulation (i.e., under Title II). In contrast, neither CISA nor any other agency in the security space relies on authority that in any way hinges on the classification of BIAS. That provides another important reason to defer to CISA's leadership and to refrain from grounding security rules in Title II.

[5] Reply Comments of the Cybersecurity and Infrastructure Security Agency, PS Docket No. 22-90, at 5-6 (filed June 28, 2022), https://www.fcc.gov/ecfs/document/10707962804139/2.

IV. National Security

In its proposal, the FCC has raised a number of national security concerns it aspires to address. However, Congress has relied principally and deliberately on other agencies and interagency processes — including DOJ, DHS, DOD, NSA, CFIUS, and others — to address national security threats involving communications networks and equipment, given that those agencies have the relevant expertise. For example:

- The Department of Commerce has very broad authority to prohibit or condition a wide range of transactions and uses of services under the Information and Communications Technology Supply Chain Rule (ICTS Rule).
- The Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments in the U.S. communications sector, including foreign investments in companies that operate broadband networks or manufacture broadband equipment.
- The Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector reviews applications for international Section 214 authorizations for potential national security issues and already considers the provision of broadband in doing so.
- Under Section 889 of the National Defense Authorization Act of 2019, all federal agencies are subject to limits on their ability to procure covered telecommunications or equipment from specified foreign entities that are deemed to pose national security risks. Federal contractors likewise must ensure that they do not use such covered equipment or services.The Commerce Department's Bureau of Industry and Security enforces Export Administration Regulations.

None of these oversight mechanisms depends on the classification of broadband or would be rendered more effective if broadband were reclassified as a telecommunications service. Notably, the FCC's proposal to reclassify *mass market* broadband services would do nothing to address national security identified threats associated with carriers like China Telecom and China Unicom; those carriers do not provide mass market services at all. Notwithstanding the FCC's revocation of their Section 214 authorizations, national security agencies have expressed concerns about those providers' continued participation in IP traffic-exchange in the enterprise and wholesale marketplace. But the exchange of IP traffic and the provision of private carrier services or information services would be entirely unaffected by reclassifying mass market broadband services under Title II. In other words, broadband reclassification would not plug the gaps associated with China Telecom and China Unicom cited in the NPRM.

To the extent additional restrictions are warranted, the Commerce Department could prohibit or condition Chinese carriers' involvement in IP traffic-exchange or the provision of private carrier or information services under its ICTS Supply Chain rule. That broad rule in no way depends on the classification of services deemed to pose national security concerns. Even more importantly, the Department of Commerce can exercise authority cohesively over a more diverse and complex set of concerns relating to the sourcing and oversight of ICT infrastructure, and can influence international policy through NIST and other mechanisms.

V. Congressional Mandates

When Congress has intended a specific network security role for the FCC, it has made that role clear and targeted in enacted statutes, such as the Secure and Trusted Communications Networks Act and the Secure Equipment Act. Although Congress has envisioned a role for the FCC in addressing national security concerns, Congress made clear that the Commission's role is both defined and limited to administering the Secure and Trusted Communications Networks Reimbursement Program. The Executive Branch likewise has delegated discrete, bounded authority to the Commission in connection with national security in issuing submarine cable landing licenses, while affirmatively obligating the Commission first to obtain approval from the Secretary of State and advice from other executive agencies.

The FCC has suggested that national security agencies have asked the FCC to assert broader authority to combat foreign threats. But the issues those agencies raised had nothing to do with broadband classification. In particular, DOJ (as Chair of the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, and in consultation with DOD and DHS) filed comments in an unrelated FCC proceeding supporting proposals to expand reporting and oversight of foreign ownership interests in applicants for international Section 214 authorizations.[6] That proceeding did not propose to reclassify broadband under Title II, and neither DOJ nor any other agency has argued that such reclassification is necessary to facilitate their national security requests; the FCC can take all the actions it proposed (and that the national security agencies support) — including obtaining updated information on current international Section 214 authorization holders, requiring periodic reviews of existing authorization holders, and lowering the reporting threshold (from 10% to 5%) for foreign interests — without reclassifying broadband.

Although the FCC maintains the "Covered List" of telecommunications equipment that is deemed to pose national security threats, it has described its own role as ministerial, as all "determinations" regarding such threats must be made by national security agencies with the relevant expertise.

In turn, the threat determinations by other agencies control whether foreign entities are barred from obtaining equipment certifications under the Secure Equipment Act or receiving USF support under the Secure and Trusted Networks Act. Those mechanisms already cover broadband equipment and services pursuant to the authority expressly delegated by Congress.

VI. Conclusion

Reclassifying BIAS as a Title II service is neither necessary nor beneficial to the federal government's collective efforts to secure our nation's ICT infrastructure against cybersecurity and national security threats. Congress has thoughtfully and intentionally vested CISA, DOD, DOJ, Commerce, Treasury, and State with the authority and mandate to lead on these issues. Neither Congress nor any of these expert federal agancies have identified gaps in federal

[6] *See* Letter of Devin A. DeBacker, Chief, Foreign Investment Review Section, National Security Division of the U.S. Department of Justice to Marlene H. Dortch, Secretary, FCC, IB Docket No. 23-119 (Apr. 12, 2023).

authority or capabilities on these matters that would be effectively addressed by reclassifying broadband as a Title II service. And in fact, as explained above, reclassifying broadband under Title II could have the *opposite* effect intended by the FCC — by adding unnecessary costs and complexity to the work that cybersecurity and national security professionals must manage, and by undermining the public-private collaborative approach to addressing cybersecurity and national security risks and concerns that Congress and leading federal agencies have established and successfully implemented for many years.