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

COMMENTS OF USTELECOM AND OPPOSITION TO PETITIONS FOR RECONSIDERATION

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USTelecom – The Broadband Association ("USTelecom") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding[1] and this opposition to petitions for reconsideration in the above-captioned proceedings.[2] USTelecom's members support the open internet. But this proceeding has little to do with the open internet. It is, instead, a misguided attempt to impose unnecessary regulation on a vibrant, competitive marketplace.

I. Introduction and Executive Summary

Since the *2018 Order*[3] took effect, American consumers have benefited from unprecedented broadband investment, availability, and competition. "Broadband speeds in the

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

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

[3] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("*2018 Order*").

U.S. have increased, prices are down, competition has intensified, and record-breaking new broadband builds have brought millions of Americans across the digital divide."[4] ISPs have invested massively in deploying broadband to consumers, including a record $102.4 billion in U.S. communications infrastructure in 2022. As a result of that investment, more Americans are getting connected than ever before. And they have more options than ever before. USTelecom's members continue to dramatically expand their fiber coverage, offering customers ever-increasing, symmetrical speeds in competition with incumbent cable broadband providers. New 5G home internet services, which have already attracted millions of subscribers, provide additional competitive options. In short, broadband has improved spectacularly on every single metric since 2018.

That success refutes the many predictions that the internet would stagnate and fracture without common-carrier classification and the 2015 net neutrality rules.[5] Instead, that success is exactly what the *2018 Order* predicted would follow from returning broadband to a Title I regime: that competition would compel broadband providers to maintain an open internet and invest to provide better service at competitive prices to more Americans. And while the *2018 Order* could not have predicted the COVID-19 pandemic, the internet ecosystem it fostered in the United States passed the pandemic's tests with flying colors. Unlike in Europe and other countries with public utility regimes, Americans could use their internet connections for school, work, healthcare, and entertainment at full speed, without network slowdowns or reductions in video quality.

[4] NPRM at 139 (dissenting statement of Commissioner Carr) (cleaned up).

[5] *See id.* at 136-38 (surveying predictions).

European regulators appear to have learned their lesson: they publicly recognize that their net neutrality rules go too far and harm broadband investment. But the Commission inexplicably seeks to snatch defeat from the jaws of victory: it proposes to derail this trajectory of innovation, investment, and consumer benefits by saddling ISPs with investment-killing common-carrier regulations under a misguided Title II framework. Readopting the "we-know-it-when-we-see-it" general conduct rule, which would enable the Commission to condemn whatever innovations it wishes, will only compound the problem. It is textbook economics that regulatory uncertainty and the potential for regulatory creep undermine investment incentives and stifle innovation. That is especially true here, where guessing wrong as to how the Commission will apply its general conduct standard in the future could potentially subject an ISP to massive forfeiture penalties and Section 208 damages actions.

In addition, while the NPRM properly proposes to forbear from all rate regulation, a future Commission may not exercise such restraint. And despite that forbearance, the general conduct standard can provide a backdoor to other forms of harmful rate regulation, as the Commission's ultimately unfinished 2016 effort to ban certain forms of zero-rating of data and the NPRM's leading questions about data caps show. Similarly, the Commission would again subject ISPs — but not their thousands of traffic exchange partners — to Title II regulation of peering and traffic exchange agreements, including adjudicating disputes as to whether ISPs' proposed interconnection rates, terms, and conditions are appropriate. The threat of future rate regulation will further undermine ISPs' incentives to continue investing in expanding and improving their broadband networks.

In a remarkable departure from the *2015 Order*[6] and earlier Commission precedent, the NPRM also proposes for the first time to require ISPs to get Commission permission under Section 214 before changing or discontinuing legacy broadband offerings. Because that process is unpredictable and fraught with delay, it will stagnate the current, dynamic, competitive marketplace, diverting resources away from innovative services that customers demand. And the need for permission to discontinue service will deter ISPs from making initial investments in new areas with new technologies, knowing the Commission might require them to continue offering service even after that speculative investment turned out to be unprofitable.

The Commission's proposal to slam the brakes on — and reverse — the successes of the past six years also arrives just as new technologies and new federal funding for broadband networks employing those technologies are coming online. The Commission's action is at odds with Congress's decision — despite its awareness of the long-standing net neutrality debate — to appropriate tens of billions of dollars to fund new broadband deployment, adoption, and affordability programs *without* reclassifying broadband as a common-carrier service or authorizing the Commission to do so. Reclassification will hamper the most effective use of the money Congress has appropriated.

The Commission, however, claims that reclassification and net neutrality rules are necessary to prevent ISPs from engaging in conduct that harms consumers or the internet. Indeed, to justify the degree of regulatory intervention the Commission proposes to inject into a thriving ecosystem, the Commission should have to identify serious problems that its Title II regime would solve. But the NPRM does not identify a *single* violation — by any ISP, large or

[6] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*2015 Order*").

small — of the bright-line rules the Commission proposes to re-adopt, nor does it claim that current business practices would violate the general conduct standard. Instead, ISPs have stood by their public commitments not to block, throttle, or engage in paid prioritization. Broadband customers demand it, and ISPs' businesses depend on it. That is because competitive alternatives enable customers to abandon any ISP that attempted to interfere with their ability to use the internet. And USTelecom members support Congress enacting legislation that would enshrine those basic rules of the road into law.

Because any threat to the open internet remains a fantasy, rather than fact, the NPRM offers a series of brand-new reasons why the Commission supposedly needs to subject ISPs to Title II, including various national security, cybersecurity, and network resiliency and reliability concerns. Yet the NPRM's proposed reclassification — which is limited to imposing public utility regulation *only* on mass-market, retail ISPs, while leaving the rest of the internet under Title I, as it always has been — would not come close to addressing any of those concerns even if they had substance. The only conclusion is that the NPRM's novel rationales are makeweights.

For example, malevolent actors regularly target national security agencies, the military, law enforcement, critical infrastructure like power companies, airports, and hospitals, and businesses, whether as part of a ransomware attack, terrorism, or to steal trade secrets and other sensitive information. The proposed reclassification and rules will not give the Commission *any* additional national security or cybersecurity authority to respond to those serious threats. That is because it properly (and unequivocally) leaves the enterprise internet access services *those* customers purchase subject to Title I. But the Commission's late entry into this field, in which it has far less expertise than other agencies and with the apparent intent of imposing prescriptive

regulations, threatens to upend the existing successful "whole-of-government" approach to security. Expert federal agencies such as DHS already work closely with ISPs and other critical infrastructure companies to combat cybersecurity threats, in a unified — rather than balkanized, sector-specific — approach. This constant public-private collaboration is a model of success, not an area that requires Commission intervention.

Similarly, the NPRM suggests that the Commission should be able to dictate the operation of Border Gateway Protocol ("BGP"). That protocol governs the exchange of packets over routers between the many networks that compose the internet. BGP raises complex issues, involving internet networks around the globe, about which the Commission lacks the necessary technical expertise. Yet because the Commission would tell only the mass-market ISPs it proposes to subject to Title II how to implement BGP — thus leaving most network providers' BGP implementation unregulated — what the Commission envisions is an empty regulatory solution.

The NPRM also suggests a host of new, highly prescriptive rules that undermine assurances that the Commission is proposing "targeted, not heavy-handed" action.[7] For example, the NPRM previews a host of new network resiliency and reliability rules that would include "requirements for network upgrades and changes, rules relating to recovery from network outages, and improving [the Commission's] incident investigation and enforcement authority."[8] These proposals threaten to pile on massive additional compliance costs in addition to the significant expenditures that broadband providers already make to protect their networks from natural disasters and cyber threats. Yet ISPs' responses to COVID-19 and natural disasters have

[7] FCC, *Ten Facts About Net Neutrality Protections* at 1, https://bit.ly/3R1wURP.

[8] NPRM ¶ 39.

shown the resiliency of existing networks. The Commission again seeks to impose regulatory solutions in the absence of any demonstrated need for regulation.

In short, the NPRM is a counterproductive distraction from what should be the Commission's overriding policy goal: ensuring that all Americans have access to quality, reliable broadband. But even if there were a plausible policy argument for reversing course despite the enormous successes of the past six years, that argument would lack any statutory basis and the Commission's effort will fail in the courts.[9] As the *2018 Order* explained, broadband internet access is an information service. It offers each of the capabilities that Congress included in the statutory definition of information service, and Congress has twice expressly identified broadband as an information service. The regulatory history against which Congress enacted that definition confirms that offering those capabilities makes broadband an information service. And beyond that, broadband also contains information-processing features such as DNS and caching that remain integral to the customer experience.

Even if a court today were to find statutory ambiguity, it would still reject a Title II classification under the major questions doctrine. Common-carrier regulation of broadband is certainly a "major question" of vast economic and political significance. The internet 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. Indeed, Title II regulation of internet access has been the subject of extensive public and congressional attention in recent decades, including several failed legislative proposals to

[9] *See generally* Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine* (Sept. 20, 2023) ("Verrilli & Gershengorn Paper"), https://www.ustelecom.org/wp-content/uploads/2023/09/MajorQuestionsPaper_September2023-1.pdf.

expressly confer on the Commission the authority it now claims. The major questions doctrine appropriately assumes that, if Congress meant to take such a controversial action as giving the Commission control over a key engine of the economy, Congress would have said so explicitly. Congress has done nothing of the sort. The Commission's unilateral assertion of authority therefore cannot stand.

In sum, the NPRM proposes a legally unsustainable non-solution to a non-problem. Yet in the time it will take the courts to undo the Commission's unlawful arrogation of regulatory power, the internet and consumers will suffer. The uncertainty the Commission's regime will create will deter investment in new broadband networks. Reduced investment will harm consumers — as will the fact that reclassification will upend the existing, uniform FTC privacy regime that currently applies the same rules to consumer data, no matter what entity holds that data. And the Commission's apparent openness to states adopting their own diverging regulatory regimes for interstate broadband internet access — even while Title II applies — will foster the kind of patchwork regulatory regime that Democratic- and Republican-majority Commissions for decades have recognized harms the continued development of the internet. Rather than waste agency resources on this proceeding, the Commission should focus its attention on addressing actual problems, while leaving intact the light-touch regime that has served consumers so well these past six years.

II. Broadband Is an Information Service, and the Commission Has No Authority To Classify It as a Telecommunications Service

A. Broadband Is an Information Service, Not a Telecommunications Service, Under the Plain Text of the Communications Act

Under the Communications Act, the categories of "information service" and "telecommunications service" are mutually exclusive.[10] Because broadband internet access service meets the statutory "information service" definition, it cannot be a telecommunications service.

1. Broadband Is an Information Service Because It Offers Customers the Capability of Interacting with Information Stored on Computers

a. Broadband "offer[s]" each "capability" that Congress enumerated in Section 153(24): "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11] For example, broadband offers capabilities that enable users to "acquir[e]" and "retriev[e]" information, such as from websites and streaming services.[12] Broadband likewise offers capabilities that enable users to "stor[e]" their data — such as files and photos — on servers in the cloud.[13] Broadband also offers users the capability to "transform[ ]" and "process[ ]" the information they send, including by

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[10] *See*, *e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 41-42 (D.C. Cir. 2019) (recognizing that the two categories "have been treated as mutually exclusive by the Commission since the late 1990s"); *NARUC v. FCC*, 851 F.3d 1324, 1325 (D.C. Cir. 2017) (per curiam) ("The Communications Act, as amended by the Telecommunications Act of 1996, defines two mutually exclusive categories of communication services: 'telecommunications service' and 'information service.' "); *see also* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 36 (1998) ("*Report to Congress on Universal Service*").

[11] 47 U.S.C. § 153(24). *See 2018 Order* ¶ 30; Reply Br. for Fed. Pet'rs at 3, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281) ("FCC *Brand X* Reply") (noting that ISPs "have always been deemed to be solely providers of information services").

[12] *See* Declaration of Peter Rysavy ¶¶ 9-16, 33-38 & fig. 4 (Dec. 7, 2023) ("Rysavy Decl."), https://www.ctia.org/positions/documents/peter-rysavy-declaration.

[13] *See id.* ¶ 3.

translating plain-text URLs into numbers and computer protocols that enable the acquiring, retrieving, and storing of information.[14] And broadband offers users the capability to "generat[e]" their own information and to "mak[e] [that information] available" to others through the numerous mechanisms that exist for sending content to and sharing content with others, including email and messaging, posting on social media sites, and maintaining the user's own webpage.[15]

Congress recognized as much in another provision it enacted contemporaneously with the statutory definition "information services." In Section 230, Congress declared that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other *interactive computer services*, unfettered by Federal or State regulation."[16] And in so declaring, Congress defined the "interactive computer services" that it wanted to remain "unfettered" by such regulation to include any "information service."[17] To avoid any doubt, Congress added that such services "includ[e] specifically a service . . . that provides access to the Internet."[18]

The definition in Section 230(f) is neither "oblique" nor "indirect" in setting forth Congress's classification of internet access as an information service.[19] Section 230 is where Congress articulated its federal policy conclusions about the proper amount of regulation of the internet and internet access services; it is the obvious place for Congress to set forth its

[14] *See id.* ¶ 4.

[15] *See id.* ¶ 3.

[16] 47 U.S.C. § 230(b)(2) (emphasis added).

[17] *Id.* § 230(f)(2).

[18] *Id.*; *see also Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000) (treating AOL — an ISP "that provides Internet access" — as an "interactive computer service" under Section 230).

[19] *Cf. U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 703 (D.C. Cir. 2016) ("*USTelecom I*").

classification of those services. Further, Section 230 authorizes ISPs to assist customers in obtaining "commercially available" tools for "limiting access" to lawful but offensive — or "harmful to minors" — content.[20] It cannot be that Congress both gave broadband providers that authorization to block harmful content *and* permitted the Commission to circumscribe that authorization by classifying broadband as a "telecommunications service" subject to Title II common carriage.[21]

Multiple other provisions of Title II enacted in 1996 along with the "information service" and "telecommunications service" definitions and Section 230, presume that telecommunications services are traditional telephone services only.[22] The degree of forbearance that the NPRM, like the *2015 Order*, recognizes is required *just to make sense of the regime* if applied to broadband further confirms that broadband is an information service.

In addition to that contemporaneous statutory evidence, Congress also has specifically defined "Internet access service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet . . . as part of a package of services offered to consumers."[23] Those are the same capabilities that characterize an "information service" in Section 153. Further, Congress expressly stated that this "Internet access service . . . does not include telecommunications services."[24] Congress made these clear pronouncements —

[20] 47 U.S.C. § 230(d).

[21] Similarly, in another part of the 1996 Act, Congress granted the Commission some authority to identify measures to address obscene and harassing communications, while simultaneously clarifying that compliance with the Commission's measures shall not be "construed to treat interactive computer services" — again, defined to include internet access — "as common carriers or telecommunications carriers." *Id.* § 223(e)(6), (h)(2).

[22] *See id.* §§ 221 (telephone companies), 251 (ILEC obligations), 271 (interLATA services).

[23] *Id.* § 231(e)(4).

[24] *Id.*

internet access service is an information service — in exempting both "telecommunications carrier[s]" and "Internet access service" providers from potential civil penalties for information that third parties distribute over the internet,[25] further confirming that Congress did not consider internet access to be a telecommunications service subject to common carriage.

These neighboring provisions within the Act provide dispositive textual confirmation that broadband offers capabilities that make it an information service. No principle of statutory construction or interpretation could support a reading of broadband to be a "telecommunications service" here, but an "information service" there. Instead, the "normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning."[26]

Furthermore, characterizing broadband as a "telecommunications service" would lead to inconsistencies within the statutory and regulatory scheme. As another commenter reasons, mobile wireless is also immune from common carriage because it unambiguously meets the definition of a Private Mobile Radio Service.[27] And that supports treating wireline, fixed wireless, and satellite broadband as non-common-carrier services, to avoid regulatory inconsistency across competing services offering similar capabilities.[28] In short, classifying broadband as a telecommunications service yields "contradictory and absurd results."[29]

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[25] *Id.* § 231(b)(1)-(2).

[26] *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (cleaned up).

[27] *See generally* CTIA Comments Part IV.A.2 (Dec. 14, 2023).

[28] *See 2018 Order* ¶ 82; *2015 Order* ¶ 403; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶¶ 48-56 (2007); *see also USTelecom I*, 825 F.3d at 724 (acknowledging "the need to avoid a statutory contradiction" between the treatment of wireline and mobile internet access services).

[29] *2018 Order* ¶ 82.

b. The Commission has previously found — and the Supreme Court agreed — that when a user takes advantage of the capabilities that broadband offers to interact with information stored on remote computers — such as "[w]hen an end user accesses a third-party's Web site" — that person is "using the information service provided by the [broadband] company that offers him Internet access."[30] The concurrence in *Mozilla*, acknowledged that *Brand X* "directly controls" on this issue.[31] And the NPRM does not seriously address the foregoing offering of capabilities that are inherent in all broadband internet access services.

The Supreme Court's conclusion in *Brand X* is consistent with the history against which Congress enacted the Communications Act's definitions of "information service" and "telecommunication service." Specifically, Congress carried forward both the pre-Act regime governing the AT&T/Bell breakup (the "Modification of Final Judgment" or "MFJ") that distinguished "information" from "telecommunications" services *and* the pre-Act regime the Commission had created distinguishing between "enhanced" and "basic" services. Because services like broadband were information services under the MFJ and enhanced services under the Commission's regime, Congress's action confirms its intent to carry forward that classification for all such services.

To start, the 1996 Act's definitions of "telecommunications service" and "information service" draw directly from the MFJ's definitions of "telecommunications" and "information service."[32] Specifically, the MFJ prohibited Bell companies from offering (without court

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[30] *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 998-99 (2005).

[31] *Mozilla*, 940 F.3d at 94 (Millett, J., concurring).

[32] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, ¶ 99 ("*Non-Accounting Safeguards Order*"); H.R. Rep. No. 104-458, at 115 (1996) (Conf. Rep.) (" 'Information service' and 'telecommunications' are defined based on the definition used in the Modification of Final Judgment.").

approval) "information services" — a category that included "gateway functions" providing an "interface or connection point between consumers and [third-party] information service providers."[33]

While the MFJ was in effect, the Bell companies sought a waiver to transmit "information services generated by others," including "teleshopping" and "electronic mail." The supervising court partially granted that waiver but, significantly, rejected a threshold argument that no waiver was even needed because such transmissions were not "information services" in the first place.[34] The MFJ court explained that, to the contrary, such transmissions fell within "any fair reading of the term 'information services' " given "the breadth of the information services definition . . . and the inclusion therein of such terms as 'acquiring,' 'transforming,' 'processing,' 'utilizing,' and 'making available.' "[35] Those capacious terms are the same terms Congress chose to use in the 1996 Act to define an "information service."[36] And as the Commission contemporaneously recognized in its *Report to Congress on Universal Service*, Congress thus carried forward the "gateway functions" definition into the 1996 Act's

[33] *United States v. W. Elec. Co.*, 673 F. Supp. 525, 587, 592 (D.D.C. 1987), *aff'd in part, rev'd in part on other grounds, and remanded*, 900 F.2d 283 (D.C. Cir. 1990) (per curiam).

[34] *Id.* at 587, 592, 595.

[35] *Id.* at 587 n.275.

[36] Notably, while the House's definition of "information service" — which ultimately was included in the 1996 Act — closely mirrored the MFJ's definition of that term, *see* H. Rep. No. 104-204, pt. 1, at 46 (1995), the Senate definition was narrower, defining "information service" as "the offering of services that . . . (1) employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information," S. Rep. No. 104-23, at 79-80 (1995). By choosing the broader House version, Congress removed any possible doubt as to the classification of services that ISPs offer. Indeed, as discussed above, the court enforcing the MFJ had already concluded that "gateway" services — akin to the internet access services that ISPs offer — met the nearly identical definition used in those proceedings.

definition of an "information service" as to "functions and services associated with Internet access."[37]

Congress also carried forward into the 1996 Act's definitions of "telecommunications service" and "information service" the Commission's pre-1996 distinctions between "enhanced" and "basic" services. Multiple courts have recognized this. For example, the D.C. Circuit has noted that Congress "borrow[ed] heavily" in the 1996 Act "from" the pre-Act regime's distinction between basic and enhanced services, and that the Communications Act's statutory definitions are the "successor[s]" to the former terms.[38] And the Ninth Circuit has recognized that "information services" is "the codified term for . . . 'enhanced services'" under the pre-1996 regime,[39] and that the 1996 Act reflects Congress's intent "*to preserve*" present regulatory treatment of "the Internet."[40]

"Basic" services included services that, "like telephone service," offered "a pure transmission" capability only[41] — the Commission subjected these to common carriage. In contrast, "enhanced" services included "computer processing" services that "act on the content, code, protocol, and other aspects of the subscriber's information," such as "voice and data

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[37] *Report to Congress on Universal Service* ¶¶ 21, 75 ("Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in our *Computer II* proceeding, and the definitions of 'telecommunications' and 'information service' developed in the Modification of Final Judgment breaking up the Bell system.").

[38] *See USTelecom I*, 825 F.3d at 691.

[39] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

[40] *Howard*, 208 F.3d at 752-53 (emphasis added).

[41] *Brand X*, 545 U.S. at 976

storage"[42] — these were immune to common carriage.[43] Prior to the 1996 Act, the Commission consistently gave "enhanced service" a broad construction to include any service that would "involve subscriber interaction with stored information," even if a third party stored that information.[44] For example, in addressing the Bell companies' request for interim waiver of the *Computer II* requirements, the Commission explained that "[e]nhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering, such as voice mail, E-Mail, electronic store-and forward, fax store-and-forward, data processing, and gateways to online databases."[45]

While the D.C. Circuit has doubted that "Congress intended" the 1996 Act "to freeze in place the Commission's existing classifications of various services," *USTelecom I*, 825 F.3d at 703, that misses the point. Congress's decision to codify in the 1996 Act the pre-Act regime's *legal standard* for service classification does not invariably determine how that standard applies to any particular service. When that legal standard is applied to broadband, however, only one outcome is possible: broadband is an information service.

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[42] *Id.* at 976-77.

[43] *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶¶ 96-97, 115-123 (1980); *see also Brand X*, 545 U.S. at 976-77.

[44] 47 C.F.R. § 64.702(a); *see also* Memorandum Opinion and Order, *Bell Atlantic Telephone Cos.' Offer of Comparably Efficient Interconnection to Providers of Gateway Services*, 3 FCC Rcd 6045, ¶ 7 (1988); Memorandum Opinion and Order, *North American Telecommunications Ass'n Petition for Declaratory Ruling*, 101 F.C.C.2d 349, ¶ 26 (1985); *see generally* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 97 (1980); *Non-Accounting Safeguards Order* ¶ 107.

[45] Memorandum Opinion and Order, *Bell Operating Cos.' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724, ¶ 1 n.3 (CCB 1995).

2. *Broadband Is Also an Information Service Because It Includes Integrated Information Processing Capabilities*

Even aside from the many capabilities to access and manipulate information stored on remote computers that broadband offers, broadband also is an "information service" because it contains numerous integrated information "processing" capabilities. The Supreme Court recognized in *Brand X* that these capabilities are information services, and ISPs today continue to offer them to their subscribers as integrated and essential components of broadband service.

Domain Name System ("DNS"). Broadband providers use DNS to facilitate the information retrieval that is fundamental to the use of internet services.[46] Specifically, DNS enables click-through access from one web page to another by translating language into data and back again for computer processing and information retrieval.[47] As the Supreme Court explained, in language that is equally true today, "[f]or an Internet user, 'DNS is a must. . . . [N]early all of the Internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer.'"[48] In addition, by enabling an extension called EDNS Client Subnet, or "ECS," ISPs can ensure that their DNS servers resolve a user's requests with the optimal response for that particular end user.[49] And by offering malware protection through DNS, ISPs ensure that customers do not access known harmful sites.

[46] *See* Rysavy Decl. ¶¶ 22-23.

[47] *See id.* ¶ 24.

[48] *Brand X*, 545 U.S. at 999.

[49] *See* Rysavy Decl. ¶ 25. ECS allows an ISP's DNS resolvers to process and transmit a portion of the end user's IP address (the subnet) to authoritative DNS resolvers. ISPs also separately provide information on the geography associated with the subnet (that is, the general area where the end users on that subnet are located), so that the authoritative DNS resolvers can return an IP address specific to that subnet, which points to content located on a server closest to those end users. *See id.*

Consumers lose those benefits if they switch away from the DNS capabilities that ISPs integrate into their broadband offerings to third-party providers' DNS servers.[50]

The overwhelming majority of ISPs' customers use their ISP's own DNS servers. While Judge Millett's concurrence in *Mozilla* notes that OpenDNS and Google were processing more than 180 billion queries daily as of 2015,[51] *individual* ISPs are today processing *more than one trillion* DNS queries daily.[52] In addition, Google and other "Internet of Things" device manufacturers typically hardcode their own chosen DNS settings into devices, bypassing not only the ISP's DNS but also any contrary choice a consumer might make.[53] The DNS these IoT devices use thus says nothing about how subscribers use DNS when using mass-market broadband service to access the internet and the content they want to access — and in that situation, consumers overwhelmingly rely on the DNS provided by their own ISPs.

In any event, to the extent that a small percentage of consumers opt out of an ISP's DNS, that does not undermine the capability offered.[54] The statutory touchstone when classifying services is the capability "offer[ed]."[55] The federal government previously recognized this, explaining to the Supreme Court that "[t]he Act's definition of 'information service' encompasses the 'offering of a *capability*' for retrieving and utilizing information or engaging in various information-processing activities" and that a "subscriber's choice not to utilize certain capabilities does not eliminate that capability or change the underlying character of the service

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[50] *See id.* ¶¶ 28-29.

[51] *Mozilla*, 940 F.3d at 90.

[52] *See id*. ¶ 30. The volume of ISP-resolved DNS queries has been *increasing*, not declining.

[53] *See* M. Hammad Mazhar & Zubair Shafiq, *Characterizing Smart Home IoT Traffic in the Wild* 1-2 (2020), arxiv.org/pdf/2001.08288.pdf.

[54] *See* NPRM ¶ 79; *see also Mozilla*, 940 F.3d at 91 (Millett, J., concurring).

[55] 47 U.S.C. § 153(20).

offering."[56] Nor does the ability of end users to select different DNS servers mean that ISPs do not integrate DNS into the broadband service they offer. Aftermarket vendors commonly offer consumers the ability to change out integrated features in the products they buy. Such vendors offer customers the ability to replace the radio and speakers or even the engines in cars; the hard drives, RAM, and graphics cards in desktop computers; the hand brakes, seat, and pedals on bicycles; and so on. The existence of those aftermarket options does not mean, for example, that car manufacturers do not integrate radios, speakers, and engines into the cars they offer to consumers.

Caching. Broadband providers work closely with content delivery networks ("CDNs") to offer caching capabilities to content providers, which enables the distribution and storage of information closer to end users requesting it.[57] This requires extensive information processing.[58] In *Brand X*, the Supreme Court affirmed as "reasonable" the Commission's finding that internet access service "facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers," which qualifies as "the 'capability for . . . acquiring, [storing,] . . . retrieving [and] utilizing information.'"[59] Further, caching works in conjunction with its ECS offering, enabling the ISP to direct customers to the cached content that optimizes their internet experience.[60] Notably, where an ISP sells caching (i.e., a CDN service), that functionality works only for the ISP's own end-user customers.[61] Again, an ISP's

[56] FCC *Brand X* Reply at 4.

[57] *See* Rysavy Decl. ¶¶ 17-20.

[58] *See id.* ¶ 19.

[59] 545 U.S. at 999-1000.

[60] *See* Rysavy Decl. ¶ 21.

[61] *See id.* ¶ 28.

customers lose the benefits of this integrated offering if they switch to third-party providers, which lack the ability to resolve DNS requests to the cached content.

The NPRM references Judge Millett's concurrence in *Mozilla*, which asserts that "caching has been fundamentally stymied by the explosion of Internet encryption."[62] That is incorrect. Insofar as customers are using their ISP's DNS servers, the ISP will resolve its customers' requests by connecting them with content cached within the ISP's network, whether by the ISP itself or by a third party in cooperation with the ISP.[63] That is true even if the customer is accessing that content by using "HTTPS" — the internet standard for encrypted communications — because the ISP processes the DNS request.[64] While HTTPS is nearly ubiquitous on the internet, it has no effect on the ability of ISPs to optimize their customers' experience by directing them to the closest cached content.[65] The only type of encryption that prevents an ISP from doing so is if the consumer is using a Virtual Private Network ("VPN"), and then only because the VPN integrates its own DNS server that, like all third-party DNS servers, lacks the capability to point customers to the content cached within the ISP's network.[66] A minority of broadband customers currently make use of VPNs, with relatively few using them on a daily basis.[67]

Systems management exception. To avoid the conclusion that DNS and caching render broadband an information service, the NPRM tentatively assigns those capabilities, "when

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[62] 940 F.3d at 87; *cf.* NPRM ¶ 75.

[63] *See* Rysavy Decl. ¶ 21.

[64] *See id.*

[65] *See id.*

[66] *See id.* ¶ 21 n.22.

[67] *See* Michael Kende et al., Analysys Mason, *Evolution of the internet in the U.S. since 2015*, at 26 (Dec. 12, 2023) ("Kende Report"), https://www.analysysmason.com/consulting/reports/internet-evolution-USA-2023 (attached hereto as Exhibit A).

provided with BIAS,"[68] to the "telecommunications system management" exception in the definition of "information service." That statutory exception "encompasses those services that would have qualified as 'adjunct-to-basic' under the *Computer II* regime,"[69] and codifies an *identically worded* MFJ exception to the definition of an "information service." And it excludes from the "information service" definition "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[70]

There is, however, a fundamental flaw with the NPRM's efforts to invoke this exception: DNS and caching are undeniably information services when offered by third parties (like OpenDNS or Akamai). Despite acknowledging as much, the majority in *USTelecom I* stated it was reasonable for the Commission to conclude that when ISPs offer the very same functions they are engaging in "telecommunications management"[71] — a conclusion the NPRM (¶ 75) now echoes. This gambit fails, however, for the simple reason that the Supreme Court foreclosed it in *Brand X*, explaining that "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers," but rather turn on "capabilities" the provider offers via the service at issue.[72] The same capabilities (DNS and caching) cannot be information services in one context, but not in another.

Further, the telecommunications systems management exception is a poor fit for at least three additional reasons. *First*, the predecessor MFJ's exception applied where a provider of

[68] NPRM ¶ 75.

[69] *USTelecom I*, 825 F.3d at 705.

[70] 47 U.S.C. § 153(24).

[71] 825 F.3d at 705-06.

[72] 545 U.S. at 997.

information services could show the "adjunct to basic" exception was necessary to enable the provider to clear a path through the company's network without user interaction for the provider's own network management.[73] Here, by contrast, ISPs do not use DNS or caching to manage their networks, but rather to offer end-user functionalities that are essential to broadband internet access service, as customers know and use it. DNS is integral to accessing and retrieving internet content — that is, the service ISPs sell and that end users purchase — as well as to improve the customer experience of using the internet to obtain content.[74] Indeed, accessing websites would be almost impossible without DNS as consumers would have to know the IP address of every website they would want to visit. *Second*, if DNS were an expendable appendage to broadband (as the NPRM suggests), then DNS *cannot* be part of network management. End users cannot choose to replace components of an actual network management service without provider input, but that is precisely what consumers can do as to DNS, foreclosing application of the exception. *Third*, the Commission and courts have made clear for years that this is a "narrow" exemption limited to voice functionalities that "facilitate use of the basic network without changing the nature of basic telephone service."[75] Here, by contrast, DNS and caching provide access to databases for the purpose of retrieving and storing complex information integral to the broadband service.

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[73] *See United States v. W. Elec. Co.*, 1989 WL 119060, at *1 (D.D.C. Sept. 11, 1989); Notice, Dep't of Justice, *United States v. Western Electric Company, Inc., and American Telephone & Telegraph Company*; Competitive Impact Statement in Connection with Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982).

[74] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 37 (2002) (regarding DNS); *see also* FCC *Brand X* Reply at 5-6 & n.2 (similar).

[75] *E.g.*, Memorandum Opinion and Order, *North American Telecommunications Ass'n Petition for Declaratory Ruling*, 101 F.C.C.2d 349, ¶ 28 (1985).

3. Broadband Is Not a Telecommunications Service

Because broadband is an information service — and the categories of information service and telecommunications service are mutually exclusive — broadband cannot also be a telecommunications service. Moreover, broadband fails the Communications Act's definition of "telecommunication service" in multiple respects.

The Act defines that phrase as the "offering of telecommunications for a fee directly to the public," with "telecommunications" defined as the transmission "between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[76] Click-through capabilities, DNS, and caching — each integrated into broadband — are not the transmission of information to points of the end user's choosing.[77] While the end user — or the end user's applications or Internet of Things device — specifies information the end user wants to retrieve, it is the ISP, through its DNS servers and offering of caching (either directly or in cooperation with third parties) to content providers, that determines the point to which the end user's communication is directed. As a result, broadband providers will direct different customers seeking the same information to different points, without the customer making any choice at all. Further, broadband users often receive information *not* "of the user's choosing" — e.g., the display advertising on a web page — and transmissions virtually never occur "without change in the form or content," such as content filtering or video optimization.[78]

The NPRM's remaining arguments that broadband is a "telecommunications service" under the Communications Act are meritless.

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[76] 47 U.S.C. § 153(50), (53).

[77] *See Brand X*, 545 U.S. at 1000; *see also* FCC *Brand X* Reply at 5.

[78] *See* Rysavy Decl. ¶¶ 34-36 (providing other examples).

First, the NPRM notes that broadband providers advertise the speed of the services they offer, suggesting that shows consumers perceive broadband to be a telecommunications service.[79] But advertising neither dictates the statutory classification of a service generally nor does it suggest — in the context of broadband latency specifically — that ISPs are not also "offering" information processing capabilities as part of the service, or even that consumers do not perceive the offering of such capabilities. ISPs do not regularly advertise those aspects of broadband that offer the capabilities of an "information service" because the public today understands that those capabilities (e.g., the capabilities to "retrieve" content from social media websites and apps or email hosts) are the *point* of the service. In contrast, when the first ISPs were trying to explain to potential customers what they could do with internet access services, commercials highlighted the information-processing capabilities.[80] In all events, the Commission bases its assertions about consumer perception, purporting to know the minds of hundreds of millions of U.S. broadband users, on conjecture, not empirical evidence.

Second, the NPRM's reliance on the Commission's former regulation of DSL as a "basic" service subject to common carriage rests on a fundamental analytical error.[81] The Commission did not impose common-carrier regulation on the internet access service that telephone companies and third-party ISPs provided to customers over the last-mile DSL connection running from a customer's premises to the telephone company's network. Instead, common-carrier regulation only applied to that last-mile, copper-wire connection from the end-user access point to the DSL provider, which legacy common carrier telephone companies sold to

[79] *See* NPRM ¶ 19.

[80] *See* AOL Commercial (1998), https://www.youtube.com/watch?v=U80qAYUq6vg (explaining that AOL "is the Internet" and enables customers to use instant messaging, email, key word searches, and parental controls).

[81] NPRM ¶ 69.

both unaffiliated and affiliated ISPs.[82] When an unaffiliated ISP without last-mile facilities purchased that common-carrier DSL service, it used that service as an input into its own retail offering of broadband internet access, which was (1) equivalent to what broadband ISPs provide today and (2) an information service.[83]

Third, the NPRM cites Judge Millett's *Mozilla* concurrence, which errantly posits that broadband cannot be an information service because it facilitates access to some information one can also access through traditional telephony, which is a telecommunications service. *See* 940 F.3d at 93. Traditional telephony is a telecommunication service because its core capability is to complete person-to-person telephone calls, that is, to provide transmission (and not more) between specific points of the end user's choosing. The fact that a consumer can use traditional telephony to access information services (like voice mail) does not change or override that core capability. The core capabilities that broadband offers, in sharp contrast to traditional telephony, involve interacting with *stored data* on remote computers. Congress focused on that very distinction when defining "information service."

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[82] *See* Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶¶ 8-11 (1998) (describing the last-mile DSL service at issue as "an interstate data special access service that provides a high speed access connection between an end user subscriber and an ISP by utilizing a combination of the subscriber's existing local exchange physical plant (*i.e.*, copper facility), a specialized DSL-equipped wire center, and transport to the network interface where the ISP will connect to GTE's network"); Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 74 (2005) (describing "a tariffed wireline broadband DSL service that enables . . . independent ISPs" to sell internet access), *pet. for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *id.* ¶ 103 (reclassifying as a non-common carrier service DSL sold "as a wholesale input to ISPs"); *id.* ¶ 105 (noting that the FCC, until this order, had "required facilities-based providers of wireline broadband Internet access service to separate out a telecommunications transmission service [i.e., DSL] and make that service available *to competitors* [i.e., third-party ISPs] on a common carrier basis").

[83] *See* Br. for Resp'ts EarthLink et al. at 15-16, 25-26, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281) ("EarthLink *Brand X* Br.").

Indeed, even when internet access occurred over phone lines (i.e., dial-up service), the phone service remained a telecommunications service — but the internet access service was an information service (even when offered by the same company or an affiliate of the company selling the phone service). The Commission has never classified, and does not now propose to classify, this dial-up internet service (without an integrated last-mile connection) as a "telecommunications service," even though it provides the same end-user function as broadband, i.e., interacting with stored data to retrieve content for delivery to a consumer. It is illogical to classify differently two services offering the same basic functionality from a consumer's perspective, especially when the Commission has emphasized that services should be classified based on the consumer-perceived functions they provide.[84] The Commission cannot have it both ways.

Finally, the NPRM asserts that *Brand X* supports the Commission's authority to classify broadband as a telecommunications service.[85] The Commission is wrong to read *Brand X* to hold that the Act is ambiguous as to the proper classification of broadband (whether it is an information service or a telecommunications service), and that the Commission therefore has the authority to decide between those two classifications. But even if the Commission were right, that ambiguity would mean the Commission lacks authority to make the major policy decision to subject broadband to Title II regulation.

Brand X involved an effort by ISPs that lacked facilities connecting to end-users' homes to compel cable broadband providers to sell them that connection on regulated terms as

[84] *See* NPRM ¶ 11 ("The Commission had determined that consumer perception of broadband Internet access service supported classifying it as a telecommunications service . . . ."); *id.* ¶ 16 ("[C]lassification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today.").

[85] *See id.* ¶ 81.

"telecommunications services." Importantly, those ISPs (e.g., EarthLink and Brand X) were *not* arguing that their own internet access service was common-carrier "telecommunications service" or that the FCC should classify that service as such. Instead, they argued,[86] the federal government agreed,[87] and all the Justices accepted that the retail internet access service that they and the cable companies were selling were "information services" under the Communications Act.[88]

Thus, the disagreement in *Brand X* was whether the cable broadband providers *also* offered — in addition to the internet access information service — a *separate* "telecommunications service" in the form of a high-speed transmission link from the cable company's network to a customer's home.[89] As to that disagreement, the Supreme Court found that "offering" as used in the 1996 Act does not "unambiguously" answer whether cable companies are offering two separate, bundled services — an "information service" (internet access) and a "telecommunications service" (high-speed connection from the customer's house to the cable network across that last mile) — or one, integrated information service (internet access that includes the high-speed connection).[90]

But even if the Commission were correct that *Brand X* found that the Communications Act is ambiguous about the proper classification of broadband internet access service, that

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[86] *See* EarthLink *Brand X* Br. at 29 (describing the respondents as "independent Internet service providers (ISPs) that are in business to sell information services to residential and business customers").

[87] *See* FCC *Brand X* Reply at 3 (noting that ISPs, like respondents, "have always been deemed to be solely providers of information services").

[88] *See Brand X*, 545 U.S. at 987; *see also id.* at 1008-09 (Scalia, J., dissenting).

[89] *See* EarthLink *Brand X* Br. at 29 (explaining that, as "independent ISPs," the respondents were seeking "to purchase th[at] transmission link" from cable companies to sell their internet access service to customers over those links).

[90] *See Brand X*, 545 U.S. at 989-90 (referring to "common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product").

ambiguity would not grant the Commission authority to resolve that ambiguity by classifying broadband as a common-carrier service. That is because, as then-Judge Kavanaugh explained, the "net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful."[91] As explained below, the major questions doctrine provides an equally sufficient basis on which reviewing courts will reject any Commission effort to subject broadband to Title II.[92]

B. To the Extent the Communications Act Is Ambiguous, the Major Questions Doctrine Forecloses Common-Carrier Regulation of Broadband

1. Recent Major Questions Doctrine Cases Will Form the Background for Review of the Commission's Title II Order

A series of recent Supreme Court cases have confirmed that the "major questions doctrine" precludes agency attempts to regulate certain particularly important subjects without an explicit grant of authority from Congress.[93] This doctrine will prevent courts that would otherwise follow *USTelecom* and *Mozilla* in finding the Communications Act ambiguous from construing that ambiguity to allow that the Commission to regulate broadband as a public-utility, common-carrier, telecommunications service. As the Supreme Court explained in *West Virginia*, the major questions doctrine has developed to "address[ ] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[94]

To accomplish these ends, the major questions doctrine requires Congress to "speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political

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[91] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) ("*USTelecom II*") (Kavanaugh, J., dissenting from denial of reh'g en banc).

[92] *See generally* Verrilli & Gershengorn Paper.

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

[94] *Id*. at 2609.

significance."[95] As then-Judge Kavanaugh has explained, "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity[,] . . . an *ambiguous* grant of statutory authority is not enough."[96] Rather, "Congress must *clearly* authorize an agency to take such a major regulatory action."[97]

By imposing this clear-statement rule, the major questions doctrine effectively reverses the presumption under *Chevron* for major rules of vast economic and political significance.[98] In such cases, statutory ambiguity will not be construed to reflect Congress's implicit delegation of policymaking authority to the agency. Instead, Congress must clearly authorize the policymaking authority that the agency is seeking to assert, or else the rule is unlawful.

2. Whether To Regulate Broadband as a Common-Carrier Service Presents a Major Question

The major questions doctrine forecloses the Commission's proposal to rely on purported ambiguities in the Communications Act to impose common-carrier regulation on broadband because the agency purports to assert authority of "vast 'economic and political significance'" without express authorization from Congress.[99] In 2017, then-Judge Kavanaugh reached this very conclusion following an extensive analysis of the *2015 Order* under the Supreme Court's major questions doctrine as it existed then. He correctly recognized that the *2015 Order* was "one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States," that it would "affect every Internet service provider, every

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[95] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (cleaned up).

[96] *USTelecom II*, 855 F.3d at 421 (Kavanaugh, J., dissenting from denial of reh'g en banc).

[97] *Id.*

[98] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 477-78 (2021), administrativelawreview.org/wp-content/uploads/sites/2/2001/11/73.3-Sunstein_Final.pdf.

[99] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

Internet content provider, and every Internet consumer," and that "[t]he economic and political significance of the rule is vast," thus bringing it within the scope of the major questions doctrine.[100]

That analysis applies *a fortiori* to the current NPRM. Canvassing the Supreme Court's major questions cases, then-Judge Kavanaugh identified several factors that required application of the major questions doctrine to the Commission's *2015 Order*. Each of those factors applies just as well today as it did then.

First, the scope of the authority asserted in the NPRM is tremendous. By subjecting broadband to common-carrier regulation, the proposed rule would "fundamentally transform[ ] the Internet" by "wrest[ing] control of the Internet from the people and private Internet service providers and giv[ing] control to the Government."[101] The NPRM's new explanations about the centrality and importance of broadband to all walks of modern society — including national security — merely add to those that then-Judge Kavanaugh cited in *USTelecom II*. And the Commission's arguments in the NPRM that the pandemic has made broadband service essential to modern life only further underscore the significance of its claimed authority to subject that service to common-carrier regulation. The Supreme Court has consistently applied the major questions doctrine where an agency asserts such an "unprecedented power over American industry."[102]

Second, the proposed rules threaten to upset vested interests throughout the communications industry. Today, as in 2015, "[t]he financial impact of the rule — in terms of

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[100] *USTelecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of reh'g en banc).

[101] *Id.* at 423.

[102] *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion).

the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business — is staggering."[103] Indeed, the threat (and brief imposition) of Title II on broadband has reduced industry investment by about $90 billion and cost about 215,000 jobs — harms that will be further exacerbated if the Commission adopts the heavy-handed regulatory scheme proposed in the NPRM.[104] The Supreme Court has consistently found " 'reason to hesitate before concluding that Congress' meant to confer such authority . . . over 'a significant portion of the American economy.' "[105]

Third, "Congress has been studying and debating net neutrality regulation for years," and "has considered (but never passed) a variety of bills relating to net neutrality and the imposition of common-carrier regulations on Internet service providers."[106] Congress has entertained, and declined to enact, more than a dozen such proposals.[107] Most recently, in July 2022, Congress considered and rejected the Net Neutrality and Broadband Justice Act of 2022, which would have amended Section 153(53) of the Communications Act to specify that "telecommunications service" includes "the offering of broadband internet access service."[108] These bills and their

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[103] *USTelecom II*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of reh'g en banc).

[104] *See* George S. Ford, *Investment in the Virtuous Circle: Theory and Empirics*, Phoenix Ctr. Pol'y Paper No. 62, at 1 (Dec. 2023) ("Ford Paper"), https://phoenix-center.org/pcpp/PCPP62Final.pdf (estimating that industry investment over the period 2011-2020 has been about $90 billion below expectations, costing the nation about 90,000 information-sector jobs and 215,000 total jobs, as a result of regulatory uncertainty surrounding potential Title II classification of broadband).

[105] *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000), and *Utility Air*, 573 U.S. at 324).

[106] *USTelecom II*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of reh'g en banc).

[107] *See*, *e.g.*, H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011); S. 3703, 112th Cong. (2012); H.R. 2666, 114th Cong. (2016); S. 4676, 117th Cong. (2022).

[108] S. 4676, 117th Cong., 2d Sess., § 2 (2022).

explicit provisions for common-carrier regulation of broadband indicate that the existing statutory framework does not already authorize such regulation.

And the broadband legislation that Congress *has* passed reflects the same assumption. For instance, in 2021, Congress actually *enacted* the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), which establishes a framework for broadband that includes low-income and deployment subsidies, consumer protection rules, and price transparency requirements — but it did so without imposing, or even making reference to, Title II regulation. And, in establishing the Broadband Equity Access and Deployment Program, Congress *prohibited* NTIA from imposing rate regulation on the broadband offerings Congress's $42.5 billion appropriation will fund.[109] This congressional record — trying and failing to subject broadband to broad common carriage, and instead establishing a framework for funding and regulating broadband entirely outside of Title II — gives rise to a strong inference that Title II classification goes "beyond what Congress could reasonably be understood to have granted."[110]

Fourth, and finally, "[t]he public has also focused intensely on the net neutrality debate," as exemplified by the fact that the NPRM leading to the *2015 Order* generated "some 4 million comments . . . , apparently the largest number (by far) of comments that the FCC ha[d] ever received about a proposed rule."[111] All of the above facts bring the major questions doctrine to bear because "[a] decision of such magnitude and consequence" on a matter of "earnest and

[109] Section 60105(h)(5)(D) begins: "No regulation of rates permitted."

[110] *West Virginia*, 142 S. Ct. at 2609.

[111] *USTelecom II*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of reh'g en banc).

profound debate across the country" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[112]

Then-Judge Kavanaugh's analysis rejecting the *2015 Order* under the major questions doctrine applies wholesale to the current NPRM, which likewise claims the expansive authority to subject broadband to public utility, common carrier regulation as a telecommunications service. If anything, the current NPRM implicates the major questions doctrine even more directly than the *2015 Order*, which unlike the NPRM did not propose to assert sweeping authority to address national security, cybersecurity, and other wide-ranging issues. Effective implementation of these substantially broader proposals would require the FCC to assert ancillary authority over the *entire* internet, not merely the mass-market, retail broadband services that it proposes to classify as telecommunications services.

Because the NPRM's proposal to regulate broadband as a public utility, common carrier, telecommunications service falls squarely within the major questions doctrine, courts must reject the assertion of such authority unless the Commission can "point to 'clear congressional authorization' for the authority it claims."[113] But the Commission cannot do so. Congress did not clearly delegate the authority to subject broadband to common-carrier regulation. Indeed, the NPRM makes no claim to have found such express authority. The major questions doctrine therefore forecloses the authority the NPRM asserts.

3. The NPRM's Efforts To Evade the Major Questions Doctrine Fail

The NPRM suggests several reasons why the major questions doctrine might not apply, but none of them has merit. *First*, the NPRM (¶ 81) suggests that *Brand X* held that the

[112] *West Virginia*, 142 S. Ct. at 2616; *id.* at 2620 (Gorsuch, J., concurring) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006)).

[113] *West Virginia*, 142 S. Ct. at 2595 (quoting *Utility Air*, 573 U.S. at 324).

Communications Act confers the authority it claims here. As explained above, it did not. *Brand X* answered a different question, and everyone involved in that case — all the Justices, the Commission, and those challenging and defending the Commission's decision — agreed that internet access is an information service.[114] And for the same reasons, Judges Srinivasan and Tatel were wrong to conclude, in responding to then-Judge Kavanaugh in *USTelecom II*, that *Brand X* addressed "whether the [Commission] clearly has authority under the Act to" subject broadband to common-carrier regulation, let alone that the Court "definitively . . . answered that question yes."[115]

But even if the Commission were correct that, in *Brand X*, the Court held that the Communications Act is ambiguous about the proper classification of broadband, that ambiguity would not give the Commission the authority it has asserted here. As explained above, the major questions doctrine requires clarity, not ambiguity, for an agency to assert authority of vast economic and political significance. And subjecting broadband to common-carrier regulation is a claim of such authority. The Supreme Court's more recent holdings since *Brand X* make clear that in such "extraordinary cases," the agency's asserted authority requires "clear congressional authorization," and a "merely plausible textual basis" for that authority is not enough.[116]

Second, the NPRM (¶ 82) also points to the prior common-carrier regulation of the DSL "transmission component" of internet access service. But, as shown above, that requirement was limited to the high-speed, last mile, transmission connection from a customer's premises to the

[114] *See* FCC *Brand X* Reply at 3 (noting that ISPs "have always been deemed to be solely providers of information services").

[115] 855 F.3d at 385 (Srinivasan, concurring in denial of reh'g en banc).

[116] *West Virginia*, 142 S. Ct. at 2609. Further, *Brand X* approved a Commission determination that broadband internet access is a single, integrated, information service, and thus did not need to address whether the major questions doctrine would prevent the Commission from subjecting that service to Title II, common-carrier regulation.

telephone company's network — the regulated common-carrier service did not provide access to the internet. Instead, internet access was provided as an information service by a separate company (including affiliates of the telephone company). Common-carrier regulation of DSL thus does not remotely approach, nor even resemble, the power of "vast economic and political significance" that the FCC proposes to assert here.[117]

Third, and finally, the possibility that the Commission will forbear from exercising the full extent of its asserted Title II authority does not allow it to escape the major questions doctrine. To begin with, the NPRM already identifies numerous common-carrier regulations that the FCC intends to impose on broadband even with forbearance.[118] But more importantly, the application of the major questions doctrine depends not simply on the direct effects of a challenged rule, but also on the underlying claim of authority, even if not fully exercised. For example, in *West Virginia*, the Court applied the doctrine even though the Clean Power Plan shifted power generation only incrementally, in part because the EPA had asserted the "highly consequential power" to "announc[e] what the market share of coal, natural gas, wind, and solar must be."[119] The Commission therefore cannot evade major questions scrutiny by purportedly "tailoring" an action to make "extravagant" assertions of authority appear more "reasonable."[120]

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[117] *Utility Air*, 573 U.S. at 324 (cleaned up).

[118] *See*, *e.g.*, NPRM ¶¶ 164, 156, 176.

[119] 142 S. Ct. at 2609, 2613 n.4; *see also id.* at 2612 ("[O]n this view of EPA's authority, it could go further, perhaps forcing coal plants to 'shift' away virtually all of their generation — *i.e.*, to cease making power altogether.").

[120] *Utility Air*, 573 U.S. at 324-25.

Indeed, the broad extent of the Commission's proposed forbearance — while appropriate as a policy matter, *see infra* Part VII[121] — demonstrates that Congress never intended Title II to apply to a service like broadband. The Commission's attempt to cobble together from Title II a scheme of regulation for the internet is exactly the sort of legislative effort that Congress alone may undertake. And the fact that the current Commission plans to forbear *differently* from how the *2015 Order* exercised that forbearance authority only further underscores how unlikely it is that Congress would have ceded this major policy question to agency discretion. Thus here, as in *West Virginia*, the proposed forbearance "does not so much *limit* the breadth of the Government's claimed authority as *reveal* it."[122]

III. Reclassification of Broadband as a Telecommunications Service Would Be Arbitrary and Capricious

A. The NPRM's Reasons for Concluding That Broadband Should Be Regulated as a Title II Service Are Arbitrary and Capricious

1. The NPRM Does Not Identify Any Harms Occurring as a Result of the 2018 Order — Instead, the Internet Continued To Flourish

This rulemaking comes at a time when it is needed the least. Broadband has flourished under the *2018 Order*'s light touch, Title I regime — the regime that has governed broadband for almost the entirety of its existence. Rapidly increasing investment has led to the expansion of coverage and capabilities, and intense competition has resulted in more innovation and lower prices, benefiting consumers.[123] Thanks to the light-touch regime, which propelled investment, America's broadband providers were able to withstand unprecedented challenges of the COVID-

[121] Although the NPRM proposes to forbear from most of Title II, it also suggests a host of new regulatory mandates that go well beyond the *2015 Order* and that underscore the vast economic and political significance of the Commission's proposed reclassification. *See infra* Part III.B.

[122] 142 S. Ct. at 2612.

[123] *See* Ford Paper at 7-13 (explaining the "virtuous circle of innovation" that has characterized the internet's growth).

19 pandemic and outperform their counterparts in Europe and other countries that have public utility regimes for broadband.

In an attempt to fix what is not broken, the NPRM ignores or minimizes the successes since 2018 and proposes a drastic change that would subject broadband to common-carrier Title II regulation. In seeking to impose such regulation, the NPRM does not identify any instance of any ISP engaging in blocking, throttling, paid prioritization, or other conduct since 2018 that the NPRM's proposed rules would have prohibited. The conspicuous absence of a problem emphasizes that there is no need for the bright-line conduct rules or the general conduct standard that the NPRM proposes.

a. The Internet Has Continued To Flourish Since 2018

The significant growth that broadband providers have achieved on multiple fronts since 2018 showcases the positive effects of the Title I regime and undermines the NPRM's asserted need for change.

Investment. Since 2018, private sector investment in broadband has increased dramatically. In 2022, America's broadband industry invested a record $102.4 billion in U.S. communications infrastructure, which represents a 21-year high for investment and a 19% year-over-year increase.[124] Last year alone, investment was $22.4 billion higher than investment in 2018.[125] The rapid investment growth reflects the industry's continuing commitment to advancing connectivity, including by expanding fiber deployments, integrating fiber and mobile

[124] USTelecom, *2022 Broadband Capex Report: Broadband Providers Invested $102.4B in Communications Infrastructure Last Year* (Sept. 8. 2023), https://www.ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf.

[125] *Id.*

networks, increasing rural broadband construction, and expanding network capacity.[126] These improvements are making broadband networks faster and more widely available.

Growing investment in broadband in the U.S. stands in sharp contrast to flagging investment in broadband in Europe, which has a prescriptive regulatory system of the type the NPRM proposes to reimpose.[127] Recognizing that the slowing investment is a problem, EU Commissioner Thierry Breton recently has identified "a dire need to redefine the DNA of the EU's telecom regulations, suggesting loosening the regulation of telecom operators."[128] In an attempt to find a solution, Mr. Breton has recently proposed to "organize a roundtable with the European financial sector to 'restore the appetite' to invest in the telecommunications infrastructure."[129] No such restoration is needed in the United States. Relatedly, the UK's communications regulator (Ofcom) has recently recognized the need to roll back some of the UK's net neutrality rules, which derived from the EU's rules prior to Brexit. Ofcom noted that the internet "has changed significantly since [the EU's] net neutrality rules were introduced" in 2016, including the development of "large content providers" and "other providers" like Apple and Google that "hold gatekeeper positions and control the content accessed by consumers."[130]

Cost. The amount most consumers are paying for broadband service has decreased, even before accounting for new federal subsidies. From 2022 to 2023, adjusted for inflation, the price

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[126] *Id.*; *see also* Declaration of Mark Israel, Bryan Keating & Allan Shampine ¶¶ 60-63 (Dec. 14, 2023) ("Israel et al. Decl.") (attached to NCTA Comments (Dec. 14, 2023)).

[127] *See* Israel et al. Decl. ¶¶ 87-88.

[128] Théophane Hartmann, *Breton's view of EU geopolitics in the telecom sector vis-à-vis China, US*, EURACTIV (Oct. 12, 2023), https://www.euractiv.com/section/digital/news/bretons-view-of-eu-geopolitics-in-the-telecom-sector-vis-a-vis-china-us/.

[129] Mathieu Pollet, *EU finally answers telecom industry's call for help*, Politico Pro (Oct. 27, 2023), https://www.politico.eu/article/telecom-industry-cry-for-help-fall-eu-ears/.

[130] Ofcom, *Net Neutrality Review* 4-5, 18, 33 (Oct. 26, 2023), https://www.ofcom.org.uk/__data/assets/pdf_file/0017/270260/Statement-Net-Neutrality-Review.pdf.

of providers' most popular broadband speed tier dropped by 18.1%,[131] and the price of providers' fastest speed tier option dropped by 6.5%.[132] That decrease is consistent with the long-term trend of broadband price decline.[133] Since 2015, real broadband prices have dropped by more than half.[134] The U.S. weighted average nominal price for the most popular speed tiers by subscription has decreased by 37% over the past eight years, and the weighted average price for the fastest speed tiers has decreased by 38.6%.[135] When accounting for inflation, the decreases in real prices for these services are 54.7% and 55.8%, respectively.[136] The declining cost of consumer broadband stands in marked contrast to the rising cost of other essential consumer goods and services, which have increased during the same period by approximately 28%.[137]

Speed. While the cost of broadband has been declining, the speeds customers are receiving have been increasing.[138] Since 2015, the download speeds offered in providers' most popular tier increased by 141.5% while upload speeds increased by nearly 285%.[139] And in the fastest-offered tier, download speeds increased by 117.1% with upload speeds going up by nearly 90%.[140] In fact, U.S. average fixed broadband speeds are now more than 300% faster than they were in 2017.[141] The Commission's data show that the weighted average download speed was

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[131] Arthur Menko, *2023 Broadband Pricing Index*, USTelecom, https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf ("*2023 Broadband Pricing Index*").

[132] *Id.*

[133] *See* Israel et al. Decl. ¶¶ 65-68 & fig. 13.

[134] *2023 Broadband Pricing Index*; *see also* Israel et al. Decl. ¶ 66.

[135] *2023 Broadband Pricing Index*.

[136] *Id.*

[137] *Id.*

[138] *See* Israel et al. Decl. ¶ 34 & fig. 9.

[139] *2023 Broadband Pricing Index.*

[140] *Id.*

[141] NCTA, *Broadband Facts & Stats*, https://www.ncta.com/broadband-facts.

62.9 Mbps in September 2017.[142] And Ookla reports that the median download speed for fixed broadband in the United States increased from 134.10 Mbps in 2021 to 189.48 Mbps in 2022.[143] In July 2023, the median U.S. download speed was 205.2 Mbps, up from 159.7 Mbps at the same time in 2022.[144] Speeds continue to increase, as evidenced by a median download speed of 215.72 Mbps in October 2023.[145] The combination of rising speeds and declining cost has translated into an approximately 80% drop over the past eight years in the real price per megabit for the most popular and fastest service offerings.[146] As a result of these changes, consumer purchasing power has grown.

Coverage and Competition. The broadband marketplace is robustly competitive, and that competition is intensifying as new providers enter the marketplace and existing providers expand and upgrade their networks to compete for customers.[147]

Output has massively expanded: The number of broadband subscriptions has increased significantly since 2017. For example, the number of residential fixed broadband connections with at least 100 Mbps downstream and 20 Mbps upstream increased by approximately 28.9 million users (262%) between the end of 2017 and the end of 2021 (the latest date for which the

[142] Engineering & Technology, FCC, *Ninth Measuring Broadband America: Fixed Broadband Report* at 10 (Aug. 2020).

[143] Josh Fomon, *The Speedtest Global Index Shows These Countries Sped Forward for Internet Experience in 2022*, Ookla (Jan. 4, 2023), https://www.ookla.com/articles/global-index-internet-speed-growth-2022.

[144] NCTA, *Broadband Facts & Stats*, https://www.ncta.com/broadband-facts.

[145] Speedtest, *Speedtest Global Index: Median Country Speeds October 2023*, https://www.speedtest.net/global-index.

[146] *2023 Broadband Pricing Index*.

[147] Bryan Keating, *An Economic Analysis of Mobile Wireless Competition in the United States* ¶¶ 6-24; 59-64 (Dec. 11, 2023) ("Keating Paper"), https://www.ctia.org/news/compass-lexecon-competition-report.

Commission has released information).[148] And the number of residential fixed broadband connections with at least 25 Mbps downstream and 3 Mbps upstream increased by more than 33.3 million users (48%) between the end of 2017 and the end of 2021.[149] According to the Commission's December 2022 Fabric data, 91% of U.S. locations have access to at least one fixed broadband provider offering 100/20 Mbps service, 85% have access to at least one such provider offering 1 Gbps service, and 94% of U.S. locations have access to at least one fixed broadband provider offering at least 25/3 Mbps service.[150] These increases in output are the hallmark of a competitive market.[151]

Competition has intensified significantly in recent years, leading to more consumer choices and lower switching costs. As explained above, the industry has been investing, and continues to invest, massively in ramping up fiber deployment.[152] Verizon, for example, has invested billions in its Fios network, a "wide-scale, all-fiber deployment to bring new broadband competition" that is expected to pass 18 million homes by the end of 2025.[153] Similarly, AT&T "has already deployed fiber-based broadband to about 24 million locations across 21 states and is

[148] *See* Indus. Anal. Div., Off. of Econ. & Anal., FCC, *Internet Access Services: Status as of December 31, 2021*, at 23 fig. 25 (Aug. 2023).

[149] *Id.* at 21 fig. 21.

[150] Israel et al. Decl. ¶ 25 & fig. 1.

[151] *See Chicago Pro. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996).

[152] Israel et al. Decl. ¶ 29 ("Providers continue to roll out fiber to new locations, with one report estimating that they would add, in 2023, 'between 6.5 million and 7 million new locations – at a minimum.'") (citing Diana Goovaerts, *Here's how much fiber US operators are planning to build in 2023*, Fierce Telecom (Feb. 24, 2023), https://www.fiercetelecom.com/broadband/heres-how-much-fiber-us-operators-are-planning-build-2023).

[153] *See* Verizon Comments at 3, GN Docket No. 22-69 (Feb. 21, 2023) (citing Verizon, *Fiber Optic Network*, https://www.verizon.com/about/our-company/high-speed-broadband).

investing billions annually to connect millions of additional locations."[154] Brightspeed is planning to spend $2 billion in private capital to deploy fiber to 50% of its footprint.[155] And Consolidated Communications added over 400,000 fiber passings in 2022, with an ultimate goal of 1.6 million fiber passings.[156] Other players in this space are also aggressively deploying high-speed broadband. For example, Google has recently started rolling out a 20 Gbps fiber service.[157] Additionally, 5G fixed wireless access providers are now offering options for home broadband that compete directly with existing offerings from wireline, cable, and satellite providers.[158]

And while the NPRM states that "fixed and *mobile* services have not proven to be substitutable,"[159] it ignores the capabilities that fixed wireless broadband offers, as well as their increasing popularity and availability.[160] In fact, 5G fixed wireless access is growing so rapidly that it accounted for 90% of the net new broadband subscriptions in 2022, compared to only 20% in 2021.[161] Roughly 62% of Americans can receive 5G coverage at or above 100 Mbps at

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[154] AT&T Comments at 2, GN Docket No. 22-69 (Feb. 21, 2023) (citing AT&T, 4Q 2022 AT&T Inc. Earnings Call Tr. (Jan. 25, 2023), https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2022/4Q22/4q22-earnings-t-usq-transcript-2023-01-25.pdf).

[155] Joan Engebretson, *New CEO Shares Brightspeed's Origin Story and How the Company Plans to Invest That $2B in Its Network*, telecompetitor (Dec. 4, 2023), https://www.telecompetitor.com/new-ceo-shares-brightspeeds-origin-story-and-how-the-company-plans-to-invest-that-2b-in-its-network/.

[156] Diana Goovaerts, *Consolidated targets return to revenue growth in '24*, Fierce Telecom (Feb. 28, 2023), https://www.fiercetelecom.com/broadband/consolidated-targets-return-revenue-growth-24.

[157] Nick Saporito, *Try out 20 Gig – tell us how you will use ALL. THAT. SPEED.*, GoogleFiber (May 15, 2023), https://fiber.google.com/blog/2023/05/try-out-20-gig-tell-us-how-you-will-use.html.

[158] Keating Paper ¶¶ 25-33; Israel et al. Decl. ¶¶ 31-34 & fig. 7, 41-47.

[159] NPRM ¶ 128 (emphasis added).

[160] In all events, many consumers rely solely on a mobile broadband subscription. Israel et al. Decl. ¶¶ 36-40.

[161] *See* Leichtman Rsch. Grp. Press Release, *About 3,500,000 Added Broadband from Top Providers in 2022* (Mar. 2, 2023), https://leichtmanresearch.com/about-3500000-added-broadband-from-top-providers-in-2022/; *see also* Keating Paper ¶ 25; Israel et al. Decl. ¶¶ 31-32 & fig. 7.

home.[162] Further, Starlink and other satellite internet services have been increasing speeds and reducing latency.[163] Starlink's average download speed increased from 89.38 Mbps to 129.64 Mbps from 2022 to 2023, upload speed increased from 10 Mbps to 15 Mbps, and latency decreased by 10ms.[164]

The Commission's own data show the number of households with access to two or more providers for fixed broadband services at 25/3 Mbps increased from approximately 68% at the end of 2018 to approximately 90% at the end of 2021.[165] And the number of households with access to two or more providers for fixed broadband services at a speed of or above 100/20 Mbps increased from 51.4% at the end of 2018 to 68.2% at the end of 2021.[166] That means that most consumers are able to switch between wired, fixed broadband providers even apart from their ability to switch to 5G home broadband services. And data show that they do switch. Each year, approximately 20% of fixed broadband customers change providers.[167]

The data above demonstrate that the broadband industry is as competitive as ever. And while the NPRM asserts that Title II regulation is "critical" to ensuring that "competition can flourish,"[168] it is clear that competition has in fact flourished without Title II.

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[162] Broadbandnow, *The True State of High-Speed 5g Coverage in the United States: 5G Map*, https://broadbandnow.com/national-5g-coverage-map.

[163] *See* Israel et al. Decl. ¶¶ 41-47.

[164] Jessica Dine & Joe Kane, *The State of US Broadband in 2022: Reassessing the Whole Picture*, Info. Tech. & Innovation Found. (Dec. 5, 2022), https://itif.org/publications/2022/12/05/state-of-us-broadband-in-2022-reassessing-the-whole-picture/; Brian Westover, *Starlink Speed: How Much Faster Is Elon's Satellite Internet in 2023 vs. 2022?*, PC (May 17, 2023), https://www.pcmag.com/news/starlink-speed-tests-2023-vs-2022.

[165] 2022 Communications Marketplace Report, *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, ¶ 57 fig. II.A.28 & Appx. B-2 (rel. Dec. 30, 2022).

[166] *Id.*

[167] *Id.* ¶ 44 (providing monthly churn numbers that annualize to approximately 20%).

[168] NPRM ¶ 3.

Quality. The progress the U.S. broadband industry has made in recent years is highlighted by the ability of ISPs to withstand the unprecedented challenges of the COVID-19 pandemic and outperform their public-utility-regulated counterparts in other countries. During the pandemic, U.S. fixed broadband download speeds exceeded speeds in the EU and the OECD countries by a wide margin. Based on speed tests conducted from March 2 to June 7, 2020, the U.S. mean download speed was 138 Mbps while the weighted mean download speeds in the EU, EU-4 (Germany, France, Italy, and Spain), and OECD were 102 Mbps, 106 Mbps, and 89 Mbps, respectively.[169] Overall, the global mean download speed was 75 Mbps.[170] The superior performance of U.S. providers is explained by much larger investment in broadband, higher prevalence of fiber and cable networks, and lighter regulations.[171] As a result of this superior performance, American consumers were able to use their internet service for school, work, healthcare, and entertainment at full speed, while regulation-heavy Europe imposed speed limits on services such as Netflix[172] and encouraged users "to make responsible use of the Internet with settings that reduce data consumption."[173]

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[169] Anna-Maria Kovacs, *U.S. broadband networks rise to the challenge of surging traffic during the pandemic*, Georgetown Univ., at 3 (June 2020), https://georgetown.app.box.com/s/8e76udzd1ic0pyg42fqsc96r1yzkz1jf.

[170] *Id.*

[171] *Id*. at 7-9.

[172] Thomas W. Hazlett, *The Pandemic That Didn't Break the Internet*, City J. (May 7, 2020), https://www.city-journal.org/article/the-pandemic-that-didnt-break-the-internet.

[173] BEREC and European Commission, *Joint Statement from the Commission and the Body of European Regulators for Electronic Communications (BEREC) on coping with the increased demand for network connectivity due to the COVID-19 pandemic* at 1 (Mar. 19, 2020), https://www.berec.europa.eu/en/document-categories/berec/others/joint-statement-from-the-commission-and-the-body-of-european-regulators-for-electronic-communications-berec-on-coping-with-the-increased-demand-for-network-connectivity-due-to-the-covid-19-pandemic; *see also* Josh Taylor, *Australian government asks Netflix and Stan to reduce data to avoid broadband overload*, Guardian (Mar. 20, 2020), https://www.theguardian.com/media/2020/mar/20/australian-government-asks-netflix-and-stan-to-reduce-data-to-avoid-broadband-overload; Israel et al. Decl. ¶ 92; Kende Report at 15.

The ability of U.S. broadband providers to outperform their counterparts in other countries is consistent with the U.S. leading the EU on three critical connectivity metrics: consumer broadband infrastructure deployment, broadband adoption, and facilities-based competition.[174] In 2020, fixed broadband coverage in the U.S. of at least 25/3 Mbps was at 91% in rural areas and 98% in all areas, and in the EU, fixed broadband coverage of at least 25/3 Mbps was at 60% in rural areas and 87% in all areas.[175] With respect to adoption, 92% of U.S. households in 2020 had a fixed broadband subscription, while only 77% of EU households had such subscriptions.[176] And 95% of households in all U.S. areas and 83% in U.S. rural areas had two or more facilities-based competing providers, while, in the EU, only 45% of households in all areas and 11% in rural areas did.[177]

These successes — largely achieved in the absence of Title II regulation — emphasize that the rules the NPRM proposes were not needed for broadband to flourish and are not needed for it to continue to grow and offer American consumers a world-leading service.

b. The NPRM Does Not Identify Any Harms Occurring as a Result of the 2018 Order

The NPRM's inability to identify any action in recent years by any ISP that the proposed net neutrality rules would have prohibited emphasizes that these rules remain a solution in search of a problem. In reality, ISPs have no economic incentive to engage in blocking, throttling, or

[174] USTelecom, *US vs. EU Broadband Trends 2012-2020*, https://www.ustelecom.org/wp-content/uploads/2022/04/USTelecom-US-EU-Broadband-Trends-2012-2020.pdf.

[175] *Id.* at 3; *see also* Israel et al. Decl. ¶ 89 & fig. 14.

[176] USTelecom, *US vs. EU Broadband Trends 2012-2020*, at 7, https://www.ustelecom.org/wp-content/uploads/2022/04/USTelecom-US-EU-Broadband-Trends-2012-2020.pdf.

[177] *Id.* at 5.

paid prioritization, and do not engage in them. Additionally, ISPs' ability to engage in such conduct is severely limited by other market players.

Economic Incentives. ISPs have strong economic incentives to ensure that their subscribers can reach the content they seek. Broadband as a business is characterized by enormous sunk costs and comparatively low incremental (per-customer) costs, which creates intense competition for consumers.[178]

In particular, it costs much more for an ISP to deploy broadband facilities to a geographic area — which typically requires buying fiber and electronic equipment and then paying work crews to deploy it — than to serve individual customers in that area once the network is up and running. As a result, broadband rivals have strong incentives to compete fiercely to gain and retain customers even as prices fall because, whenever they lose a customer, they save minimal costs but lose significant revenues.[179] It is for precisely this reason that the Commission has concluded that even two competitors can be sufficient to ensure effective competition.[180] This economic dynamic keeps every broadband provider intensely focused on keeping its customers satisfied — and thus on meeting customer expectations for full access to the open internet. Indeed, a Consumer Reports survey indicates that "71% of U.S. households would switch" to a competing ISP if "their provider were to try to block, slow down," or impose other restrictions

[178] Israel et al. Decl. ¶¶ 48-50.

[179] *See id.* ¶ 49; *accord* Timothy J. Tardiff, *Changes in Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications*, 4 Int'l Econ. & Econ. Pol'y 109 (2006); Dennis L. Weisman, *When Can Regulation Defer to Competition for Constraining Market Power? Complements and Critical Elasticities*, 2 J. Competition L. & Econ. 101, 102 (2007) ("[P]rice increases that produce even small reductions in demand can generate large losses in contribution to joint and common costs because the firm's revenues decline much more than the costs it can avoid. It is in this manner that high margins can serve to discipline the [de]regulated firm's pricing behavior.").

[180] Report and Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459, ¶ 120 (2017) ("*Business Data Services Report*").

on the content they sought.[181] A rational provider would therefore not engage in the conduct the NPRM's bright-line rules and general conduct standard seek to prohibit.

In addition, it is recognized that "acquiring a new customer is anywhere from five to 25 times more expensive than retaining an existing one."[182] And the real prospect of existing customers switching to a new provider presents a significant threat to an ISP's business. ISPs' practices confirm this. For instance, the availability of discounts to customers, often offered through "save desks," shows broadband companies' efforts to retain customers.[183] Recognizing consumers' ability to easily switch to a different provider and the detriment that would cause to their existing provider, *Consumer Reports* recommends "threaten[ing] to go to a competitor," for example, as a way of obtaining a discount from a broadband company.[184]

The competition that USTelecom's ISP members face can come from multiple directions. Foremost, USTelecom's members frequently deploy networks in competition with incumbent cable companies. To be able to compete with the cable companies and win customers requires the ability to offer a superior alternative, such as end-to-end fiber. In many areas, ISPs also face

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[181] *71% of U.S. households would switch from providers that attempt to interfere with Internet*, Consumer Reps. (Feb. 18, 2014), https://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm; *see also* Israel et al. Decl. ¶ 70.

[182] Amy Gallo, *The Value of Keeping the Right Customers*, Harv. Bus. Rev. (Oct. 29, 2014), https://hbr.org/2014/10/the-value-of-keeping-the-right-customers.

[183] Nicholas Maechler et al., McKinsey & Company, *From touchpoints to journeys: Seeing the world as customers do* (Mar. 4, 2016), http://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/fromtouchpoints-to-journeys-seeing-the-world-as-customers-do#/ ("In economic terms, a retained customer delivered significantly greater profitability than a newly acquired customer over two years. Churn, due to pricing, technology, and programming options, was an increasingly familiar problem in this hypercompetitive market. So was retention. The common methods for keeping customers were also well known but expensive — tactics like upgrade offers and discounted rate plans, or 'save desks' to intercept defectors."); *see also* Israel et al. Decl. ¶ 70.

[184] *CR's Guide to Getting Better Internet Without Busting Your Budget*, Consumer Reps. (July 13, 2021), https://www.consumerreports.org/internet/getting-better-internet-without-busting-your-budget/.

competition from other fiber broadband providers or municipal broadband networks. They also face competition from 5G mobile services. New 5G fixed wireless offerings provide a competitive alternative to all of these wireline offerings, and customers are increasingly relying solely on wireless connectivity for their broadband needs.[185] Recognizing the threat that 5G fixed wireless poses, cable companies are already running ads urging customers not to switch.[186]

Unable to identify evidence of any relevant market failure, the NPRM resorts to an abstract "gatekeeper" economic theory that has no practical application in the broadband context. Eschewing a factual analysis based on over two decades of real marketplace experience, the NPRM instead theoretically speculates that each ISP, no matter how small, possesses "gatekeeper" power over the entities seeking access to its end users.[187] As used here, the term "gatekeeper" is shorthand for the concept of a "terminating access monopoly,"[188] which refers to the putative "monopoly" that any broadband provider, large or small, supposedly derives from its ability to provide the "service" of terminating traffic to its own subscribers. These concepts are meaningless in the broadband context and provide no basis for the proposed rules.[189]

The "terminating access monopoly" concept first arose in the 1990s and early 2000s when small competitive local exchange carriers ("CLECs") began assessing inefficiently high terminating access charges on interconnecting interexchange carriers ("IXCs") for the delivery of

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[185] Keating Paper ¶¶ 25-33.

[186] *See* iSpot.tv, *XFINITY TV Spot, 'We've Become Nocturnal' Featuring Judy Greer* (Oct. 27, 2022), https://www.ispot.tv/ad/2ByJ/xfinity-weve-become-nocturnal-featuring-judy-greer; *see also* Xfinity, *Connect 4x as many devices with Xfinity over T-Mobile Home Internet*, https://www.xfinity.com/compare/xfinity-vs-t-mobile-5g-home-internet; Israel et al. Decl. ¶ 71.

[187] NPRM ¶¶ 123, 151.

[188] *See 2015 Order* ¶ 80 n.130; *see also* Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905, ¶ 24 & n.66 (2010).

[189] *See* Israel et al. Decl. ¶¶ 51-57.

long-distance calls. Because the IXCs did not have a direct relationship with the called party, they had no means of passing on termination fees to those customers to constrain CLECs' behavior.[190] And because CLECs were new entrants with small market shares, some speculated that they could impose these excessive charges only because of a market failure associated with their "bottleneck" control of access to their end users.[191] As the Commission ultimately acknowledged, however, this "CLEC access charge" problem arose not from a market failure, but from the application of Title II regulation itself — specifically, from tariffing, mandatory interconnection, and geographic-averaging requirements.[192]

The broadband marketplace, however, is not susceptible to the same phenomenon for at least two independent reasons. *First*, no broadband ISP can "tariff" the "service" of providing access to its end users, and no backbone or other third-party network has any regulatory obligation to interconnect with any ISP, let alone pay whatever rates the ISP might wish to charge for access to its users.[193] And if an ISP imposed unreasonable interconnection fees or compromised its customers' access to tech companies' content, those companies would have

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[190] *Id.* ¶ 52.

[191] Noel D. Uri, *Monopoly power and the problem of CLEC access charges*, 25 Telecomms. Pol'y, 611, 613 (2001).

[192] *See* Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 16 FCC Rcd 9923, ¶ 1 (2001) ("[W]e limit the application of our tariff rules to CLEC access services in order to *prevent use of the regulatory process* to impose excessive access charges[.]") (emphasis added). In particular, the Commission's Title II rules (i) entitled a CLEC to tariff its termination rates unilaterally; (ii) compelled IXCs to interconnect with the CLEC and hand off all terminating traffic bound for its customers; and (iii) required those IXCs to pay the tariffed termination rates in the process, no matter how objectionably high they might be. In addition, Section 254(g) precluded these IXCs not only from sending the bill to the called parties (i.e., to the CLEC's end users), but also from passing the inflated termination charges through to the specific calling parties who placed these particular calls. The net result of these Title II regulations was to make the CLECs' subscribers completely indifferent to the level of these termination charges — and thus to preclude any market response to them. *See* Israel et al. Decl. ¶ 52.

[193] *See* Israel et al. Decl. ¶ 53.

ample competitive responses: for example, they could pass the fees through to their customers on an explicitly ISP-specific basis or inform their customers that specific ISPs are degrading their access to content.[194] And because of the intense competition in the broadband market, customers would be able to — and would likely — switch to an alternative broadband provider if that were to happen.

Second, robust competition in the peering and transit marketplaces, combined with multiple points of entry into any ISP's network, ensure that any application or content provider can reach any ISP's customers on fair and efficient terms by interconnecting either directly or indirectly with the ISP (e.g., via the ISP's own peers or transit partners).[195] Those dynamics deprive any ISP of the market power necessary to discriminate anticompetitively against any application or content provider.

The increased competition since 2018, accompanied by the continued increases in broadband deployment and speed, as well as cost declines, all confirm that ISPs' incentive is to win more customers. Degrading the user experience by, for example, blocking or throttling content would contradict that objective. The NPRM's failure to identify any instances of such undesirable conduct in recent years is therefore unsurprising because ISPs have no economic incentive to engage in it.

Power of Big Tech. While the NPRM repeats the old claims about ISPs having "the incentive and ability to engage"[196] in harmful conduct, it ignores marketplace changes that severely limit that theoretical ability (if it ever existed). The internet of today contains numerous

[194] Given the enormous power enjoyed by many application or content providers, they could also discipline any broadband provider that sought to impose unreasonable fees by threatening to no longer deliver content to the providers' customers due to those charges. *See id.*

[195] Kende Report at 6-9; Israel et al. Decl. ¶¶ 54-57.

[196] NPRM ¶ 126.

Big Tech companies, such as Apple, Alphabet, Amazon, Meta, TikTok, and Netflix. Those global companies have larger customer bases and larger market capitalization than any ISP. And they are far more likely to have the power to dictate terms to ISPs than ISPs are to them.

For example, Comcast, one of the country's largest wireline broadband providers, has approximately 32.3 million domestic broadband customers,[197] Verizon has 10.3 million fixed broadband subscribers,[198] and AT&T has over 8 million fiber subscribers.[199] By contrast, Apple has 135.97 million iPhone users in the United States alone, and millions more throughout the globe.[200] In 2022, YouTube had 25.5 million paying subscribers in the U.S. alone and hundreds of millions watching its ad-supported videos.[201] Facebook has 243.5 million domestic users, and TikTok has 150 million users in the United States.[202] As to market capitalization, Meta's market capitalization exceeds $800 billion, while Alphabet's exceeds $1.7 trillion.[203] In comparison,

[197] Comcast, *Comcast Report 2nd Quarter 2023 Results* (July 27, 2023), https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-2nd-quarter-2023-results.

[198] Verizon, *Verizon reports strong 3Q results momentum, raises free cash flow guidance* (Oct. 24, 2023), https://www.verizon.com/about/news/verizon-reports-strong-3q-results-momentum-raises-free-cash-flow-guidance.

[199] AT&T, AT&T 3Q23 Highlights (2023), https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2023/3q-2023/3Q23_Highlights.pdf.

[200] Rohit Shewale, *32 iPhone User Statistics: Sales, Usage & Revenue (2023)*, Demandsage (Sept. 25, 2023), https://www.demandsage.com/iphone-user-statistics.

[201] Statista, *Number of YouTube Premium subscribers in the United States from 2020 to 2024*, https://www.statista.com/statistics/1261865/youtube-premium-subscribers/.

[202] Rohit Shewale, *68 Facebook Statistics – Users, Revenue & AI Usage (2023)*, Demandsage (Aug. 11, 2023), https://www.demandsage.com/facebook-statistics/; *46 TikTok Statistics In 2023 (Users, Creators and Revenue)*, Wallaroo (Nov. 22, 2023), https://www.demandsage.com/tiktok-user-statistics/.

[203] Companies Market Cap, Meta, https://companiesmarketcap.com/meta-platforms/marketcap/; and Alphabet, https://companiesmarketcap.com/alphabet-google/marketcap/ (last visited Dec. 8, 2023).

Comcast's market capitalization is approximately $165 billion, Verizon's market capitalization approximately $160 billion, and AT&T's about $120 billion.[204]

The Big Tech giants effectively function as the gateway to information on the internet, affecting what users see when they search for information, shop for goods, seek out news, and look for entertainment options. The Big Tech companies' algorithms — and the choices they make about what information to promote and what information to demote — affect which content users see and, thereby, influence where they go on the internet.[205] Indeed, while the NPRM lacks any examples of ISPs engaging in blocking or throttling, social media companies have reportedly been caught throttling user-posted links to other, competing platforms.[206] Additionally, Apple has slowed down the processors in its older devices with software updates.[207] Samsung imposed "performance limits" on approximately 10,000 apps, including Netflix and Google Keep.[208] And Google blocked YouTube from Amazon devices.[209] A Title II

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[204] Companies Market Cap, Comcast, https://companiesmarketcap.com/comcast/marketcap/; Verizon, https://companiesmarketcap.com/verizon/marketcap/; and AT&T, https://companiesmarketcap.com/att/marketcap/ (last visited Dec. 8, 2023).

[205] Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 Geo. L. Tech. Rev. 147 (2017), https://perma.cc/J3LD-DX2H; Editorial Bd., Opinion, *Social media algorithms determine what we see. But we can't see them*, Wash. Post (Aug. 9, 2021), https://www.washingtonpost.com/opinions/2021/08/09/social-media-algorithms-determine-what-we-see-we-cant-see-them/; Dorcas Adisa, *Everything you need to know about social media algorithm*s, Sproutsocial (Oct. 30, 2023), https://sproutsocial.com/insights/social-media-algorithms/.

[206] *E.g.*, Simon Hurtz, *X continues to throttle links to competitors*, Verge (Sept. 15, 2023), https://www.theverge.com/2023/9/15/23875251/x-twitter-links-throttling-facebook-instagram-threads.

[207] Samuel Martinez, *I wish we didn't have to worry about smartphone companies throttling our devices*, pocketnow (Mar. 31, 2022), https://pocketnow.com/i-wish-we-didnt-have-worry-about-smartphone-companies-throttling-our-devices/.

[208] Darryl Boxberger, *Samsung is throttling the performance of over 10,000 apps*, Apple Insider (Mar. 2, 2022), https://appleinsider.com/articles/22/03/02/samsung-is-throttling-the-performance-of-over-10000-apps.

[209] Jeffrey Dastin, *Google pulls YouTube from Amazon devices, escalating spat*, Reuters (Dec. 5, 2017), https://www.reuters.com/article/us-amazon-com-tech-alphabet/google-pulls-youtube-from-amazon-devices-escalating-spat-idUSKBN1DZ37O/.

reclassification would do nothing to address these issues, as it will not apply to Big Tech companies. The NPRM's proposal to re-adopt numerous aspects of the *2015 Order* makes no attempt to grapple with the very different marketplace dynamics that exist today.

Externalities. Supposed "externalities"[210] likewise cannot justify reclassification. Most internet services — indeed, innumerable goods and services in our economy generally — produce substantial externalities without triggering any need for regulation. Obvious examples include the network externalities associated with LinkedIn's social network, the Apple and Google/Android app stores, and Microsoft's desktop operating system and office productivity software.

There is no legitimate economic basis for suggesting that common carrier-type regulation is needed to protect or enhance these externalities.[211] For example, no one proposes requiring Microsoft to make its Office productivity software more interoperable with alternative word-processing and spreadsheet programs. And no U.S. policymaker seriously proposes a prescriptive scheme of regulation to determine how Apple and Google/Android should vet and arrange unaffiliated apps within their respective app stores, which together account for nearly 100% of app downloads in smartphones today.[212] There is no stronger "externalities" case to be made for regulating broadband ISPs, which is why the internet has succeeded in creating incalculable public benefits without such regulation.

State Laws. The NPRM suggests that it is because of the few state net neutrality laws — not competition and the incentives ISPs have to serve their customers — that there are no

[210] NPRM ¶ 123.

[211] *See* Israel et al. Decl. ¶ 58.

[212] David Curry, *App Store Data (2023)*, BusinessofApps (May 15, 2023), https://www.businessofapps.com/data/app-stores/ ("Outside of China, Apple and Google control more than 95 percent of the app store market share through iOS and Android, respectively.").

examples of actions that the Commission's proposed rules would prohibit.[213] But few states enacted net neutrality laws after the *2018 Order*,[214] and there is no record of such actions in the states that did not enact their own net neutrality laws. Most of the state laws that were enacted either have not been enforced or have not gone beyond the voluntary commitments that marketplace competition led ISPs to make to their consumers. All of this casts serious doubt on the NPRM's suggestion that state laws are the reason for the lack of blocking, throttling, and paid prioritization during the relevant period.

California's net neutrality law stands out, in that it includes a prohibition on many forms of "zero-rating."[215] As a result, consumers in California lost access to free data that was available to consumers in other states.[216] The prohibition harms consumers because it deprives them of free socially valuable services.

At bottom, blocking, throttling, and paid prioritization were not issues after the Commission's brief Title II classification was reversed. That was not because sporadic state net neutrality laws filled any gap in federal regulation, but rather because (as the *2018 Order* concluded)[217] it is in ISPs' interest not to engage in such conduct.

2. The General Conduct Standard Is Not Needed and Will Harm Innovation

The NPRM's proposal to re-adopt the *2015 Order*'s general conduct standard, which "would prohibit practices that unreasonably interfere with or disadvantage consumers or edge

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[213] *See* NPRM ¶ 129.

[214] *See* Nat'l Regul. Rsch. Inst., *Net Neutrality Tracker* (Oct. 1, 2018), https://www.naruc.org/nrri/nrri-activities/net-neutrality-tracker/.

[215] S.B. 822, 2017-2018 Reg. Sess. (Cal. 2018).

[216] Roslyn Layton, *The Economics of California's Net Neutrality Law*, Forbes (Feb. 25, 2021), https://www.forbes.com/sites/roslynlayton/2021/02/25/the-economics-of-californias-net-neutrality-law/?sh=5ae8a6d27886.

[217] *2018 Order* ¶¶ 263-265.

providers,"[218] is no more necessary than the bright-line rules. Broadband providers have no economic incentives to harm application or content providers.[219] And the adoption of the general conduct standard threatens severe and negative consequences. The vague standard will hinder innovation and new offerings by increasing regulatory uncertainty and impeding investment.[220]

To begin with, in stating what the general conduct standard would prohibit, the NPRM leaves "unreasonably interfere" and "disadvantage" — the key terms — undefined. That gives broadband providers "no principle for determining" what conduct this Commission (or a future Commission) might decide violates the rule.[221] That concern is particularly severe because these terms have "no settled usage or tradition of interpretation in law" in the broadband context.[222] And legacy telephone-era Section 201 and Section 202 precedents applying these terms will be of little value to determining whether broadband network management practices "unreasonably interfere with or unreasonably disadvantage" application or content providers in their dealings with customers or vice versa. Unsurprisingly, when first promulgating the general conduct standard in the *2015 Order*, then-Chairman Wheeler stated that he "d[idn't] really know" what conduct the rule prohibited.[223]

The "case-by-case approach [to enforcement] that would consider the totality of the circumstances when analyzing whether conduct satisfies the standard"[224] will leave ISPs with no

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[218] NPRM ¶ 164.

[219] *See* Ford Paper at 6-12.

[220] *See 2018 Order* ¶¶ 164-165; *see also* Israel et al. Decl. ¶¶ 74-80.

[221] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991).

[222] *Id.*

[223] FCC, February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), http://www.fcc.gov/events/open-commission-meeting-february-2015 (165:30-166:54).

[224] NPRM ¶ 166.

reasonable avenue to determine whether a new offering would satisfy the Commission. And the non-exhaustive list of seven factors the NPRM sets forth to aid the analysis does nothing to clarify what conduct would or would not satisfy the standard. If anything, those factors, which include considerations of "end-user control," "effect on innovation," and "free expression," compound the problem by introducing further confusion while providing no meaningful guidance. The non-exhaustive nature of the list adds to the uncertainty, as does the lack of guidance on how the Commission would weigh the known and unknown factors against one another.[225]

The D.C. Circuit's prior decision upholding the general conduct rule against a vagueness challenge was wrongly decided. That court failed to follow its own precedent when it concluded that the general conduct standard was sufficiently distinguishable from a vague SEC rule. The general conduct standard bears the same characteristics — and suffers from the same Due Process concerns — that the SEC rule the *Timpinaro* court was concerned about. In *Timpinaro*, the challenged rule defined "professional trading account" through seven open-ended factors that themselves contained vague terms, such as "*excessive* frequency of short-term trading."[226] In remanding, the court emphasized that the "uncertainty facing a [regulated party] . . . is all the greater when [open-ended factors] are considered in combination, according to some undisclosed system of relative weights."[227]

Just like the rule in *Timpinaro*, the general conduct standard contains several vague terms, such as "unreasonably" and "interfere," the meaning of which, like the meaning of the SEC

[225] *See Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993), *as amended on denial of reh'g* (Nov. 9, 1993).

[226] *Id.* at 460 (emphasis added).

[227] *Id.*

rule's "excessive," remains "a mystery."[228] And just like that rule, the NPRM does not explain the relative weight of the factors that the Commission will consider in deciding whether a practice violates the general conduct standard — worse, it does not even name all the factors that would be considered. The *USTelecom* court's claim that the general conduct standard was proper because it was "adopted to complement the bright-line rules [and] help[ed] delineate the contours of the proscribed conduct" is unpersuasive. The general conduct standard does not "complement" the bright-line rules, nor is it confined to the conduct those rules target — it expands them indefinitely, making it easy for the Commission to find a violation in nearly any practice while providing broadband providers with no certainty that any given practice would be deemed proper. Through that vague standard, the Commission may venture into regulation of nearly every aspect of broadband, from data usage limits to cybersecurity practices. And broadband providers will have no meaningful way of knowing how to predict the Commission's actions or evaluate its own initiatives.

Without certainty, broadband providers will be less likely to innovate and invest in innovation, sticking instead to old practices and old offerings that seem to have cleared the bar.[229]

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[228] *Id.*

[229] *See* Doug Brake, Info. Tech. & Innovation Found., *What Financial Data Shows About the Impact to Title II on ISP Investment* (June 2, 2017), https://itif.org/publications/2017/06/02/what-financial-datashows-about-impact-title-ii/ ("Not only did the Open Internet Order take potential business models off the table, and throw others into uncertainty under the Internet Conduct Standard, it represents the first step down the slippery slope to more onerous utility regulations, such as network unbundling requirements or price regulation."); Kevin A. Hassett & Robert J. Shapiro, Georgetown Ctr. for Bus. & Pub. Pol'y & NDN, *Regulation and Investment: A Note on Policy Evaluation under Uncertainty, With an Application to FCC Title II Regulation of the Internet* at 21 (July 14, 2015) ("Hassett & Shapiro"), https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=dc03ae80ddb93f0ef6c1c71c393dcc148e800ae3 ("[W]e found that the negative effects on investment may well be significantly understated by these factors because the new regulation's threshold effect will maximize the negative effects of uncertainty."); *see also* Ford Paper at 12 (stating that "[b]road 'catch all' provisions, such as the General Conduct Rule adopted in the *2015 Open Internet Order* and again proposed in the *2023 NPRM*, are certain to cause concern" with respect to investment).

The NPRM's statement that it seeks comment on "whether elimination of the general conduct rule has resulted in new innovations which would not have been permissible under the general conduct rule"[230] is meaningless because, just like former Chairman Wheeler, broadband providers "don't really know" what conduct would be prohibited under the standard.

On the other hand, in the short life of the general conduct standard, the Commission invoked it to criticize consumer-benefiting innovative services and, in the process, chill innovation generally. Shortly after the *2015 Order*, Commission's Wireless Telecommunications Bureau issued a policy review condemning the use of zero-rating by mobile ISPs, a practice in which the mobile provider exempts certain content from data allowances in wireless plans that have them.[231] It did so even though this practice was indistinguishable from a bundled discount: it is simply a price concession that enables consumers to use more data at lower effective rates and thus intensifies both video and mobile competition. The agency thus invoked the general conduct standard as a tool to second guess practices that *lowered* prices to consumers. And, as discussed below, the NPRM strongly suggests that the Commission will rely on the general conduct standard as a basis for regulating certain data plans that allow ISPs to offer lower-priced data services than they otherwise could.[232] There can be no dispute that the potential for liability under such a vague standard will deter investment and innovation.[233]

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[230] NPRM ¶ 167.

[231] FCC, *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services* (Jan. 11, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf.

[232] NPRM ¶ 156.

[233] Israel et al. Decl. ¶¶ 77-79.

Finally, the NPRM's proposal to reinstate the advisory opinion process does not eliminate the problem that the general conduct standard creates.[234] Such a mother-may-I regime epitomizes the NPRM's bureaucratic overreach. Indeed, it is hard to imagine a regulatory process more conceptually hostile to the spirit of permissionless innovation at the heart of the modern internet economy.[235] The need to seek permission in advance would also harm competition by requiring a provider to give its rivals a public heads up before launching innovative services, thereby weakening its incentives to offer those services in the first place.[236]

Unsurprisingly, the *2015 Order*'s "mother-may-I" advisory process never worked. It was inadequate in key respects that the NPRM does not address. For example, Enforcement Bureau advisory opinions cannot be obtained for existing conduct, conduct subject to a pending inquiry, or conduct that is a "mere possibilit[y]."[237] The Bureau has discretion whether even to respond to a request for guidance (and has no deadline for doing so).[238] And any guidance is subject to revocation and is not binding.[239] Moreover, seeking guidance can trigger an enforcement proceeding.[240] Simply put, this advisory opinion process is unworkable as a means of eliminating the ambiguities in the general conduct standard and is harmful to the continued development of the internet.

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[234] *See* NPRM ¶¶ 191-192.

[235] *See* Michael Kende & Pierangela Samarati, *Let a Thousand Flowers Bloom.fm*, Internet Soc'y (May 5, 2014), https://www.internetsociety.org/blog/2014/05/let-a-thousand-flowers-bloom-fm/ ("'Permissionless innovation' is a key technical principle that has guided the Internet's development and evolution ever since its inception.").

[236] *See*, *e.g.*, Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, ¶ 33 (2007).

[237] *2015 Order* ¶¶ 231-232.

[238] *Id.* ¶¶ 231, 234.

[239] *Id.* ¶ 235.

[240] *Id.* ¶ 232.

3. Reclassification Would Open the Door to Harmful Rate Regulation

The NPRM correctly recognizes that rate regulation, whether *ex ante* or *ex post*, is undesirable and, therefore, proposes to "forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for" broadband.[241] The NPRM's stated intent to forbear from rate regulation is sensible. As the D.C. Circuit has recognized, "[r]ate regulation of a firm in a competitive market harms consumers: Prices set below the competitive level result in diminished quality, while prices set above the competitive level drive some consumers to a less preferred alternative."[242]

But subjecting ISPs to Title II opens the door to rate regulation, because the Commission believes that forbearance decisions are not "chiseled in marble" and a later Commission could undo them.[243] The Commission previously relied on that (purported) authority to modify a grant of forbearance.[244] And because forbearance is appropriate only where "regulation . . . is not necessary to ensure that the charges . . . for . . . [a] telecommunications service are just and reasonable," 47 U.S.C. § 160(a)(1), any future Commission that concluded that a broadband provider's rates are unjust and unreasonable could also easily conclude that it should undo the proposed forbearance from rate regulation. This Commission's forbearance would thus amount to only a minor inconvenience to rate regulation by a future Commission.

As the *2018 Order* correctly concluded, the threat of a reversal of course on the forbearance in the *2015 Order* undermined investment incentives.[245] The *2015 Order* also

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[241] NPRM ¶ 105.

[242] *Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18, 25 (D.C. Cir. 2017) (citing 1 Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 21, 66-67 (1970)).

[243] *See Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

[244] *See Business Data Services Report* ¶¶ 171-177.

[245] *See 2018 Order* ¶ 101.

showed that the Commission can use Title II effectively to regulate rates even while purporting to forbear from the rate-setting provisions of the Communications Act. As noted above, the Commission's staff was poised to recommend using the general conduct standard to ban most forms of sponsored (or zero-rated) data programs, which are the equivalent of toll-free calling,[246] effectively mandating that providers charge customers a non-zero rate for that data.[247] The NPRM also proposes to engage in effective rate regulation by inquiring about whether to permit providers to sell broadband plans that include data caps even where "the practice of slowing down an end user's connection to the Internet [is] based on a choice clearly made by the end user."[248] The NPRM makes clear it does "not intend to leave such data plans without oversight" and proposes to "allow the Commission to review" such data plans.[249] Such regulation would reduce consumer choice and force some consumers to pay more for broadband. The market has already responded to consumer demand for unlimited data, providing such options. But some consumers prefer cheaper plans that have limits on data usage. Eliminating such plans would disadvantage those consumers by forcing them to pay for data they do not want to buy.

4. Reclassification Would Undermine Investment Incentives and Undermine the Most Efficient Use of Congress's Appropriations To Close the Digital Divide

The NPRM states that the Commission does "not anticipate that the open Internet rules we propose today will have a harmful effect on investment."[250] That conclusion is contrary to

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[246] *See* FCC, *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services* at 12, 17 (Jan. 11, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf.

[247] *See* Ford Paper at 12 (explaining that rules such as no paid prioritization are rate regulation).

[248] NPRM ¶ 156.

[249] *Id.*

[250] *Id.* ¶ 150.

empirical evidence and economic theory.[251] In the *2018 Order*, the Commission assessed an extensive record and concluded that Title II regulation had "decreased investment and is likely to continue to decrease investment by ISPs," which in turn is "likely to result in less deployment" and fewer "upgrad[es]" to broadband systems.[252] The Commission further correctly concluded that reclassification of broadband as an information service was "likely to increase ISP investment and output," leading to "greater deployment" and research into and development of "new and more advanced services for consumers."[253] In contrast, if the Commission adopts the proposals in the NPRM, it will impede investment, slowing down broadband deployment, including in rural areas, and impede innovation.

The evidence supports that conclusion. ISPs invested significantly in broadband when it was regulated as an information service, making capital expenditures between $64 billion and $118 billion every year between 2000 and 2014.[254] And as many economists predicted, capital investment "declined sharply in 2016 relative to 2014, the last year before reclassification."[255] The *2018 Order* similarly documented that investment slowed down when broadband was classified as a telecommunications service, but picked up again after restoration of the information services classification.[256]

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[251] Ford Paper at 12-26.

[252] *See 2018 Order* ¶ 308.

[253] *Id.* ¶¶ 98-99.

[254] Patrick Brogan, *Broadband Investment Continued Trending Down in 2016*, at 2-3, USTelecom (Oct. 31, 2017), https://bit.ly/2WRzL3O. Investment began trending upwards again in 2017 and 2018. Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, at 1-2, USTelecom (July 31, 2019), https://bit.ly/3arM5fe.

[255] Hal Singer, *Bad Bet by FCC Sparks Capital Flight from Broadband*, Forbes (Mar. 2, 2017), https://www.forbes.com/sites/washingtonbytes/2017/03/02/capital-flight-from-broadband-inthe-title-ii-era/; *see also* Ford Paper at 14 (explaining that "several published and unpublished studies presented evidence of the deleterious investment effects of Net Neutrality and common carrier regulations").

[256] *2018 Order* ¶¶ 90-91.

As discussed above, the vague general conduct standard will impede investment in innovation by creating regulatory uncertainty and the potential for regulatory creep.[257] Any rational ISP will think twice before investing in innovative offerings that might someday be found to violate the Commission's (or a future Commission's) undisclosed policy preferences and thus give rise to a cease-and-desist order and potentially massive forfeiture penalties (or Section 208 damages). This concern is particularly acute because broadband innovation frequently requires sunk investments that cannot be recovered if the Commission ultimately prohibits the business practice. And the breadth of the standard would allow the Commission to assert broad regulatory authority that may even extend to rate regulation that it currently is disclaiming, further chilling investment and distorting an otherwise healthy market.

Indeed, the NPRM's proposed policy justifications for reclassifying broadband show regulatory creep in action. The NPRM envisions a host of future regulatory mandates that go even beyond the *2015 Order*, such as requirements for service and network reliability, cybersecurity measures, and exit restrictions. The network resiliency and reliability requirements in particular would force ISPs to redirect investment from extending broadband further throughout their footprints. The threat of these vague mandates will chill investment and growth, prompting ISPs to take a less risky wait-and-see strategy. The regulatory uncertainty and

[257] *See also* Ford Paper at 12 (stating that (stating that "[b]road 'catch all' provisions, such as the General Conduct Rule adopted in the *2015 Open Internet Order* and again proposed in the *2023 NPRM*, are certain to cause concern" with respect to investment); Doug Brake, Info. Tech. & Innovation Found., *What Financial Data Shows About the Impact to Title II on ISP Investment* (June 2, 2017), https://itif.org/publications/2017/06/02/what-financial-data-shows-about-impact-title-ii/ ("Not only did the Open Internet Order take potential business models off the table, and throw others into uncertainty under the Internet Conduct Standard, it represents the first step down the slippery slope to more onerous utility regulations, such as network unbundling requirements or price regulation."); Hassett & Shapiro at 21 ("[W]e found that the negative effects on investment may well be significantly understated by these factors because the new regulation's threshold effect will maximize the negative effects of uncertainty.").

likelihood of regulatory creep can only serve to reduce the incentive of ISPs to make investments on the margin.[258]

The NPRM underplays the harmful effect on investment that its proposals will have while conceding that they "might in some cases reduce providers' investment incentives."[259] The NPRM suggests that those harmful effects would be "far outweighed by positive effects on innovation and investment in other areas of the ecosystem."[260] The NPRM does not, however, specify what other areas of the ecosystem will be promoted or why investment in rural broadband coverage, network capacity, or innovation, among other things, should be deprioritized to benefit amorphous "other areas of the ecosystem." Nor does the NPRM address why "innovation and investment in other areas of the ecosystem" will not otherwise occur given the vast investment in broadband that is occurring in the absence of Title II regulation, encouraged by the competitive pressures on providers and consumer expectations that ensure that ISPs allow customers to access the content they desire.

5. Reclassification Would Undermine Consumer Privacy

As the NPRM recognizes, reclassification would divest the FTC of authority over consumer privacy with respect to broadband.[261] As a result, the same piece of consumer information will no longer be treated consistently across the internet ecosystem and instead will be subject to different rules applicable in different contexts. The rules would vary, for example,

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[258] *See* Declaration of Mark A. Israel et al. at 43-61 (explaining that Title II regulation of broadband would create a risk of regulatory uncertainty and regulatory creep, and that, as a matter of basic economics, it will depress the investment incentives of broadband providers) (attached to Comments of AT&T Services Inc., WC Docket No. 17-108 (July 17, 2017)). The declaration is incorporated in these comments by reference. *See also* Israel et al. Decl. ¶¶ 74-80.

[259] NPRM ¶ 150.

[260] *Id.*

[261] *See id.* ¶ 134; *see also* 15 U.S.C. § 45(a)(2) (prohibiting FTC from regulating common-carriage services).

based on whether the information is provided to an ISP or an online entity (such as Google or TikTok), a retailer, or a data broker. Such fragmentation of federal privacy law, resulting from the NPRM's proposed divestiture of the FTC of its authority over consumer privacy, is highly undesirable.

The FTC is the expert federal privacy regulator and has been enforcing consumer protection requirements for nearly a century. The FTC is also the only agency that can apply consumer protection rules consistently across industries. And its technology-neutral, uniform approach to privacy regulation is required to ensure that the same protections and safeguards apply to consumer data, regardless of which entity collects that data.

It is confusing for consumers when privacy regimes differ based on who holds the information.[262] That confusion will be especially pronounced because social media platforms, streaming sites, data brokers, and ad exchanges have access to vast amounts of consumer data — far more than ISPs. It is inefficient — and makes no sense — to subject one part of the internet ecosystem to a different regime that was enacted for traditional telephone networks and divest the nation's leading privacy regulator from exercising jurisdiction over it. If anything, the patchwork regime the NPRM would create is a strong indication that Congress did not authorize the Commission to place broadband under Title II.

The NPRM also all but ignores Congress's decision to use the Congressional Review Act to vacate the Commission's 2016 broadband privacy rules.[263] Members of Congress voting to vacate those rules made clear that they did not want to undermine consumer privacy by distorting

[262] Cameron F. Kerry, *Broadband privacy belongs with the FTC, not the FCC*, Brookings (Dec. 16, 2021), https://www.brookings.edu/articles/broadband-privacy-belongs-with-the-ftc-not-the-fcc/.

[263] *See* S.J. Res. 34, 115th Cong. (2017). The NPRM acknowledges the disapproval of its prior privacy rules under the Congressional Review Act only in passing in a footnote. *See* NPRM ¶ 104 n.352.

the holistic, even-handed approach implemented by the FTC.[264] That vacatur bars the Commission from adopting a rule in "substantially the same form" as the one Congress rejected, severely limiting the Commission's ability to promulgate new privacy rules.[265] And given that the NPRM does not state that the Commission plans to initiate a new rulemaking to adopt privacy rules the Congressional Review Act would permit, a new regime will likely have to be created from scratch via private litigation and agency adjudication, based on statutory provisions that Congress enacted for legacy telephone service and not the modern internet. Such piecemeal development of an entirely new federal privacy regime, which would apply to ISPs only, would provide no benefit and confuse consumers and providers alike.

The Commission also lacks statutory authority to comprehensively regulate consumer privacy. The Communications Act includes a specific provision, Section 222, that governs carriers' obligations to keep certain data private. As it applies to consumers, however, Section 222 does not impose any obligations beyond the protections it affords for consumer proprietary network information ("CPNI") in Section 222(c). CPNI is a narrow subset of the personal information that the FTC's privacy regime currently oversees.

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[264] 163 Cong. Rec. H2479 (daily ed. Mar. 28, 2017) ("The Federal Communications Commission's privacy rules arbitrarily treat internet service providers differently from the rest of the internet, amounting to government intervention in the free market."); *id.* at H2494 ("Instead of a uniform, technology-neutral standard that balanced data protection with consumer choice, internet users were stuck with a two-sided approach that causes confusion and dampens competition. There is one set of rules for service providers, and one set for the rest of the internet ecosystem. But how often do consumers really recognize the difference between where their data is accessed and where it is stored?"); 163 Cong. Rec. S1954 (daily ed. Mar. 23, 2017) ("The FCC privacy rules are just another example of burdensome rules that hurt more than they help and serve as another example of the government's picking winners and losers. They unnecessarily target internet service providers and, ultimately, make our internet ecosystem less efficient by adding more red tape.").

[265] 5 U.S.C. § 801(b)(2).

While the Commission has in recent years suggested that Section 222(a) grants it authority to adopt consumer privacy regulations that go beyond CPNI,[266] that section is a mere introductory provision and not a freestanding source of obligations or authority. That Section 222(a) uses the phrase "proprietary information of . . . customers," rather than "customer proprietary network information," is of no moment. Section 222(a) identifies the three categories of information to which Section 222 applies: proprietary information relating to (1) carriers, (2) equipment manufacturers, and (3) customers. In the case of customer information, the operative subsection is Section 222(c), which, as explained above, is limited to CPNI.

The legislative history also confirms that, with respect to customer information, Congress intended that Section 222 apply only to CPNI as defined in Section 222(h)(1) and not to some broader category of customer "proprietary" information. In conference, Congress eliminated catch-all provisions in the House and Senate bills that would have given the Commission broader authority to regulate customer information more generally.[267] And the Conference Report described Section 222 as "striv[ing] to balance both competitive and consumer privacy interests with respect to CPNI."[268]

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[266] *See*, *e.g.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd 7818, ¶¶ 234-235 (2015).

[267] H.R. Rep. No. 104-204, pt. 1, at 22-23, 89-91 (1995) (the House version's definition of CPNI as including "such other information concerning the customer as is available to the local exchange carrier by virtue of the customer's use of the carrier's telephone exchange service or telephone toll services, and specified as within the definition of such term by such rules as the Commission shall prescribe consistent with the public interest" was not adopted); S. Rep. No. 104-23, at 23-24 (1995) (the Senate version's definition of customer information covering broadly "customer-specific proprietary information," with no limiting language, was not adopted).

[268] H.R. Rep. No. 104-458, at 205 (1996) (Conf. Rep.) (Joint Explanatory Statement of the Committee of Conference).

Nor does Section 201(b) provide the Commission with additional privacy authority. Congress necessarily assumed that the Commission lacked broad authority over the privacy of consumers' data when it adopted what the Commission correctly and contemporaneously recognized was a "comprehensive new framework" in Section 222.[269] It is therefore clear that the specific language in Section 222(c) controls over the general prohibition on unjust and unreasonable practices in Section 201(b).

6. The NPRM's Proposed Transparency Rules Will Impose High Costs on ISPs While Bringing No Meaningful Benefit to Consumers

The proposed return to the *2015 Order*'s enhanced disclosure requirements,[270] such as those relating to certain commercial terms and performance characteristics — including packet loss and geographically-specific disclosures — is unwarranted. As the *2018 Order* correctly concluded, those "additional reporting obligations unduly burden ISPs without providing a comparable benefit to consumers."[271] The cost of making such detailed, technical disclosures remains high, and the benefit to consumers, if any, is negligible. Significantly, the NPRM contemplates going even further by adopting disclosure requirements that the *2015 Order* rejected, such as requirements regarding "the source, location, timing, or duration of network congestion, packet corruption and jitter, and disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage."[272] Such detailed disclosures are costly for providers and meaningless to nearly all consumers.

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[269] *See* Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd 8061, ¶ 14 (1998).

[270] *See* NPRM ¶ 173.

[271] *2018 Order* ¶ 225.

[272] NPRM ¶ 176 (footnotes omitted).

Moreover, the Commission should maintain its existing requirements for disclosing speed and latency. Specifically, the Commission should continue to permit fixed ISPs that participate in the Measuring Broadband America ("MBA") program to disclose their speed and latency results as a sufficient barometer for performance customers can expect to experience.[273] For fixed ISPs that do not participate in the MBA program, the Commission should continue to permit use of the methodology from the MBA program or actual performance based on internal testing or other relevant reliable data for disclosure of speed and latency.[274] As the Commission has already found, geographically specific disclosures do not provide high value to consumers but are unduly burdensome for providers.[275] Such disclosures would take significant effort to develop as providers would not be able to leverage their MBA program results or its established methodology.

Additional disclosure requirements are also unnecessary because of the potential conflict and duplication between such requirements and the Commission's recent broadband label rules. The NPRM in fact recognizes that risk and seeks comment on ways to avoid duplication and inconsistency.[276] But inconsistency and duplication are inherent in needless multiplication of rules — all to address an issue that has not even arisen. Similarly unnecessary are additional advisory guidance mandates[277] regarding the positioning and additional locations of the

[273] *Id.* ¶ 175.

[274] *Id.*

[275] *2018 Order* ¶ 225.

[276] NPRM ¶ 171.

[277] *Id.* ¶ 180.

disclosures,[278] the "direct notification"[279] requirement, and the burdensome recordkeeping obligation[280] that the NPRM considers.

Broadband providers have consistently supported appropriate disclosure obligations that benefit consumers. But when the NPRM — without identifying any problem with current disclosure requirements or with ISPs' compliance — engages in a "how many can you name" game, it goes too far.

B. The NPRM's New Justifications for Title II Are Pretextual

The NPRM offers a number of new justifications for classifying broadband under Title II that the Commission did not rely on in the *2015 Order*. But none of these new justifications supports Title II reclassification. Either 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. The 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.

1. Reclassification Will Not Aid in the Federal Government's Efforts To Address National Security Concerns

The Commission's asserted national security objectives will not be served by Title II regulation of broadband. The NPRM does not identify any evidence that continuing Title I regulation of mass-market broadband poses national security threats. Broadband network providers already engage with the U.S. government on critical matters of national security across numerous agencies, including, for example, through participation in government

[278] *Id.* ¶¶ 177, 179.

[279] *Id.* ¶ 181.

[280] *Id.* ¶ 185.

councils/committees such as the DHS Protected Critical Information Infrastructure Program's Communications Sector Coordinating Council, the Commission's Communications Security Reliability and Interoperability Council ("CSRIC") and the President's National Security Telecommunications Advisory Committee. These long-standing points of engagement/responsibility have taken place for many years absent Title II reclassification, obviating the Commission's justification that Title II is needed on national security grounds. These engagements also demonstrate that a number of agencies already have deep expertise, clear authority, and well-established mechanisms in place to address and mitigate any national security concerns.

Indeed, far from enhancing the ability of the federal government to address national security concerns, the Commission's proposal to interject itself into this space threatens to *undermine* national security. Congress has established a "whole-of-government" framework where national security agencies have clear lanes and established processes for coordination. The Commission's assertion of authority would introduce destabilizing uncertainty as to the new roles of those existing agencies, require those agencies to devote resources to coordinating with the Commission, and potentially increase risks by assigning the Commission a role where it lacks experience and expertise.

More specifically, in response to specific risks in connection with major commercial transactions, CFIUS can impose safeguards that limit foreign adversary influence in connection with internet traffic exchange and interconnection arrangements, and both CFIUS and the Commerce Department can block "covered transactions" that would introduce new security risks. The Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector ("Team Telecom") reviews applications for international

Section 214 authorizations for potential national security issues and considers the provision of broadband in its reviews even though broadband service itself is outside the scope of Section 214. The Commerce Department's Bureau of Industry and Security enforces Export Administration Regulations. And the Treasury Department levies economic sanctions on companies that present a security risk. The specific grants of power to these other agencies emphasize that Congress is keenly aware of national security threats and legislates to address them.

National security roles and responsibilities have been clearly defined in various executive branch agencies over the years, and the Commission must work within that structure. The authority the Commission has over national security is specific and limited. Congress has given the Commission the power and parameters to address specific risks as determined by expert agencies, through the Secure and Trusted Communications Networks Act of 2019, Secure Equipment Act of 2021, and the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"). These examples emphasize that, when Congress wants the Commission to address a national security issue, it will grant it authority to do so — the Commission cannot manufacture that authority itself. And it is not surprising that Congress did not bestow the broad national security authority on the Commission that the NPRM attempts to claim. Other agencies, and not the Commission, have the key expertise in matters of national security. And those agencies, with — where necessary — input from the Commission, are more than capable of addressing national security concerns.

Further, over the years, the federal government has adjusted to changes in national security risks and has been able to address emerging threats. There are no significant gaps in the federal government's authority that warrant the imposition of common-carrier regulation on

mass-market broadband services to solve them. Rather, the federal government has worked with industry to address the various threat vectors (e.g., China) for well over a decade, putting in place mechanisms for addressing evolving threats that are flexible and have stood the test of time. The NPRM does not find that those established mechanisms have somehow failed or that the threat landscape has taken a dramatic or unanticipated turn.

Moreover, the Commission's response to national security and law enforcement concerns during the period in which broadband has been classified as an information service demonstrates that Title II regulation is not necessary to achieve the NPRM's asserted objectives. For example, during that period, the Commission established the Covered List, pursuant to the Secure and Trusted Communications Networks Act.[281] The Secure Equipment Act later extended the Commission's authority to equipment authorization. The Commission took action pursuant to those Acts to prevent entities receiving Universal Service Fund ("USF") support from using that support to purchase equipment and services from entities on the Covered List, and to require USF support recipients to remove such equipment and services from their networks.[282] The Commission added entities to the Covered List based on specific determinations that national security agencies made in accordance with the Act, and adopted rules to cease issuing equipment authorizations to entities on the Covered List, consistent with the Secure Equipment Act of 2021. Additionally, the Commission revoked the international Section 214 authorizations of several Chinese carriers found to present significant national security and law enforcement concerns that

[281] Second Report and Order, *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 35 FCC Rcd 14284 (2020); 47 C.F.R. §§ 1.50002, 1.50003.

[282] Report and Order, Further Notice of Proposed Rulemaking, and Order, *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 34 FCC Rcd 11423 (2019); 47 CFR § 54.9.

various national security and law enforcement agencies, and Congress, espoused.[283] Finally, the Commission applied CALEA to facilities-based broadband providers and to providers of interconnected VoIP service nearly two decades ago, which enhanced law enforcement's independent interception and investigative authority under Title 18.[284] Again, Congress has squarely delineated the Commission's and law enforcement's authority in this area.

While the NPRM asserts that the same threats "equally exist" with respect to broadband,[285] it fails to acknowledge not only the authority of other expert agencies to address these threats, but also that those foreign entities do *not* provide mass market broadband that would be subject to Title II. These entities would be able to continue to participate in IP traffic-exchange and offer private carrier services in the enterprise marketplace. Notably, the Commission today has the ability to address concerns about these entities' ongoing operations by taking steps to prevent carriers over which it has authority from interconnecting with them.[286] And in reality, if there is a national security threat associated with a telecommunication-related company, it will be addressed by one of the agencies that has a broad national security mandate and expertise — the Commission is not the only knight who guards that wall.[287]

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[283] Order on Revocation and Termination, *China Telecom (Americas) Corp.*, 36 FCC Rcd 15966 (2021); Order on Revocation, *China Unicom (Americas) Operations Ltd.*, 37 FCC Rcd 1480 (2022).

[284] First Report and Order and Further Notice of Proposed Rulemaking, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005); *see also* 18 U.S.C. §§ 2510, 3121 *et seq*.

[285] NPRM ¶ 27.

[286] *Connecting America: Oversight of the FCC: Hearing Before the H. Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce* 3 (Mar. 31, 2022) (statement of FCC Commissioner Brendan Carr).

[287] For example, in 2023, the United States Commerce Department stopped granting export licenses for China's Huawei. *See* Karen Freifeld, Alexandra Alper, and Stephen Nellis, *U.S. stops granting export licenses for China's Huawei – sources*, Reuters (Jan. 21, 2023), https://www.reuters.com/technology/us-stops-provision-licences-export-chinas-huawei-ft-2023-01-30/. And the United States Treasury Department pursued ZTE for violations of federal regulations, which resulted in a $100 settlement in favor of the U.S. government. *See* U.S. Dep't of Treasury Press Release, *Treasury*

To the extent there are legitimate national security concerns, they frequently exist in spaces that the NPRM is rightly not proposing to subject to Title II, that no Commission has ever sought to regulate under Title II, and that, in all events, other expert federal agencies cover. Such potential concerns exist with respect to the non-mass-market broadband services that government agencies and critical infrastructure providers, such as hospitals and electric utilities, purchase. Subjecting retail mass-market broadband to regulation under Title II would give the Commission no authority over these services, and a national security rationale that ignores services sold to actual national security agencies has glaring holes. Similarly, Title II classification of mass-market broadband would not authorize the Commission to address security concerns with respect to tech platforms or IP transit and peering providers. The Commission's underinclusive authority would cast doubt on the roles of those federal agencies that do have undoubted authority in these areas, and that uncertainty risks creating regulatory gaps that could be exploited by bad actors.

Reclassification could frustrate national security and law enforcement goals in another way as well. Imposing common carriage on broadband services — a legal framework premised on indiscriminate carriage of internet traffic — could make it more difficult to screen, filter, intercept, or otherwise treat suspicious traffic (e.g., from foreign adversaries) non-neutrally. The NPRM makes no attempt to reconcile its proposed "neutrality" mandates with its ostensible national security focus.

Finally, the Commission's parallel proposals to revamp its international Section 214 review process are problematic, as USTelecom and other commenters have explained in that

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Department Reaches $100 Million Settlement with Zhongxing Telecommunications Equipment Corporation (Mar. 7, 2017), https://home.treasury.gov/news/press-releases/sm0023.

docket.[288] At the very minimum, the Commission should tailor any imposition of Section 214 to apply only to foreign entities. If adopted, applying such changes to broadband more broadly would only exacerbate problems by subjecting a broader array of services to those burdensome, non-risk-driven, unnecessary requirements.

2. Reclassification Will Harm Cybersecurity

The Commission's role in cybersecurity is limited, and the NPRM's effort to address cybersecurity does not depend on classifying broadband as a Title II service. Congress has recognized that other agencies — such as the Department of Homeland Security — have the relevant expertise and resources to provide oversight related to cybersecurity. In 2006, the Department of Homeland Security established the Critical Infrastructure Partnership Advisory Council to facilitate interaction between governmental entities and representatives from the community of critical infrastructure owners and operators. And in 2018, Congress established the Cybersecurity and Infrastructure Security Agency ("CISA"), which reorganized and elevated the mission of the Department of Homeland Security's former National Protection and Programs Directorate, establishing CISA as the Federal leader for cyber and physical infrastructure security.

The NPRM ignores the robust public-private partnership — which is risk-management-based rather than a more rigid security-by-compliance approach — that is already in place to protect and enhance cybersecurity. Communications industry participants work closely with CISA and other federal agencies through organizations that provide the policy, planning, and operations framework necessary to safeguard the security of communications networks and

[288] *See*, *e.g.*, Comments of USTelecom, IB Docket No. 23-119 (Aug. 31, 2023); Comments of Verizon, IB Docket No. 23-119, MD Docket No. 23-134 (Aug. 31, 2023).

services.[289] Those organizations are: the National Security Telecommunications Advisory Committee ("NSTAC"), which provides policy recommendations intended to assure the continuity of vital telecommunications links through any event or crisis; the Communications Sector Coordinating Council ("C-SCC"), which helps coordinate initiatives to improve the physical and cybersecurity of sector assets, ease the flow of information within the sector and across sectors, and address issues related to response and recovery following an incident or event; as well as the National Coordinating Center for Telecommunications Communications Information Sharing and Analysis Center ("C-ISAC"), which facilitates the exchange of information among government and industry participants regarding vulnerabilities, threats, intrusions, and anomalies affecting telecommunications infrastructure.

Reclassifying broadband as a Title II service would not improve this well-established and carefully coordinated process. If anything, it would prove detrimental because cybersecurity requires a whole-of-government approach, not sector-specific governance. As such, the imposition of new cybersecurity requirements via reclassification risks undermining the current harmonization effort within the U.S. government. As the Department of Homeland Security stated in its September 19, 2023 report: "Among the most significant challenges to harmonization are varying definitions, timelines and triggers for reporting, report content requirements, and reporting mechanisms" of the federal agencies that currently have cybersecurity responsibilities.[290] The NPRM's proposed reclassification and assertion of authority under Title II to add yet another cybersecurity regulator — and one with far less

[289] AT&T Comments Part I.C (Dec. 14, 2023); Verizon Comments Part II.C (Dec. 14, 2023).

[290] U.S. Dep't of Homeland Sec., *Harmonization of Cyber Incident Reporting to the Federal Government* 15 (Sept. 19, 2023), https://www.dhs.gov/sites/default/files/2023-09/DHS%20Congressional%20Report%20-%20Harmonization%20of%20Cyber%20Incident%20Reporting%20to%20the%20Federal%20Government.pdf.

expertise than the federal agencies noted above — would serve only to exacerbate these problems. The harmonization effort also recognizes that there is an entire ecosystem of access networks, data centers, devices, and users, and that any part of the ecosystem may become vulnerable to cybersecurity incidents or breaches. That includes users, who sometimes fail to protect their information.[291] Title II reclassification will do nothing to address such security threats.

Importantly, expanding cybersecurity regulation would threaten a host of unintended consequences, including: (a) slowing adaptation to evolving threats and technologies; (b) undermining resource allocation by diverting funds from other security investments; (c) imposing a one-size-fits-all approach that does not permit case-by-case exceptions; and (d) encouraging secrecy by discouraging companies from sharing information once their relationship with government shifts from partnership to adversarial. And tying cybersecurity policy to broadband reclassification will invite instability and inconsistency in the policy by causing it to change with each new Administration, and disrupt the collaborative approach that has successfully worked to build cybersecurity policy for decades.

Moreover, reclassification would result in a highly underinclusive regime that would not be fit for its purpose. For example, key goals the NPRM sets cannot even be achieved through reclassification, such as promotion of security and integrity of Border Gateway Protocol ("BGP"). BGP governs the exchange of packets between the networks that comprise the internet and is a complex area in which the Commission lacks the necessary technical expertise. In the internet routing security context, the key entities that would play a role in increasing BGP

[291] Verizon, *2023 Data Breach Investigations Report* at 14-18, https://www.verizon.com/business/resources/Td9d/reports/2023-data-breach-investigations-report-dbir.pdf.

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. If the Commission plans to tell only ISPs how to implement BGP — thus leaving most network providers' BGP implementation unregulated — any regulation will be ineffective.[292] Importantly, without the Commission's regulation, the industry has already implemented defenses to detect nefarious changes to the BGP tables, and the Commission will not be able to offer anything that could more effectively manage the issue.[293] Regarding malicious websites, the NPRM's idea to require ISPs to block traffic to IP addresses associated with those sites would solve nothing, including because of collateral damage and overbroad blocking that would occur where a hosting company has multiple sites associated with a single IP address.

The NPRM, as drafted, will not be able to address a cohort of other cybersecurity concerns. Malevolent actors regularly target national security agencies, the military, law enforcement, critical infrastructure like power companies, airports, hospitals, and businesses, whether as part of a ransomware attack, terrorism, or to steal trade secrets and other sensitive information. For example, the recent MOVEit hacks have hit agencies in at least four states — including most recently in Maine — as well as several federal agencies and a federal government contractor.[294] But the NPRM will not give the Commission any additional national security or cybersecurity authority to respond to serious threats such as these, because, like the *2015 Order*,

[292] As explained below, reclassifying retail, mass-market broadband service sold to end-user customers as a Title II service does not give the Commission authority over those ISPs' exchange of internet traffic with other networks and that exchange of traffic — including the protocols that make it possible — is an information service. *See infra* Part IV.

[293] Rysavy Decl. ¶ 16.

[294] Zack Whittaker, *Maine government says data breach affects 1.3 million people*, TechCrunch (Nov. 9, 2023), https://techcrunch.com/2023/11/09/maine-government-data-breach-clop-ransomware/.

it leaves the enterprise services those customers purchase subject to Title I. Unless the Commission intends to invoke its ancillary authority to expand dramatically the scope of its authority over the internet — in ways unprecedented and that the NPRM does not even suggest — the only conclusion is that these novel rationales for imposing Title II on providers of retail, mass-market internet access service are makeweights.

Finally, it is not clear, and the NPRM does not state, what specific provisions of Title II the Commission intends to use to accomplish its stated goals. Instead, the NPRM simply lists a few of the actions the Commission is interested in taking with respect to cybersecurity and seeks comment on whether reclassification would permit the Commission to take those actions. But it fails to cite a single statutory provision that would permit such exercise of authority. For example, the NPRM seeks comment on whether reclassification would "allow the Commission to mandate the adoption of Communications Security, Reliability, and Interoperability Council (CSRIC) best practices directed to ISPs."[295] But no provision in Title II would allow the Commission to require ISPs to adhere to CSRIC best practices. CSRIC itself is an advisory committee that merely offers recommendations to the Commission, and its recommendations generally are not meant to be converted into mandates. Moreover, mandating these efforts as regulation would discourage collaboration, which will undermine the quality of CSRIC's recommended best practices. The government's approach to cybersecurity has rightly been risk-management-based, not security by compliance, which would have been too rigid in the face of a constantly evolving threat landscape.

It is therefore clear that, at best, the NPRM will have no positive effect on cybersecurity. But more likely, it will hurt existing cybersecurity stakeholders by interfering with the

[295] NPRM ¶ 32.

harmonization effort, undermining the cooperation between the government and the private sector, and unnecessarily distorting the workable framework by subjecting cybersecurity to transformation with every change of Administration through broadband reclassification, thereby exposing the system to executive overreach.

3. Reclassification Is Not Necessary To Ensure Network Resiliency and Reliability

The NPRM also suggests that Title II reclassification is necessary to ensure network reliability and resiliency.[296] The performance of America's broadband networks during the pandemic fatally undermines this justification. Unlike in the EU and countries with public utility regimes for broadband, Americans were able to use their internet connections for school, work, healthcare, and entertainment at full speed, without slowdowns or reductions in video quality.[297] It is hard to imagine a more significant stress test, yet Title I broadband networks continued to provide robust internet service with unprecedented levels of demand.

The NPRM not only suggests that reclassification is necessary to further network reliability and resiliency, but it previews a host of burdensome new rules. The NPRM indicates that the Commission will use Title II to mandate new reporting obligations as well as "requirements for network upgrades and changes, rules relating to recovery from network outages, and improving [the Commission's] incident investigation and enforcement authority."[298]

Tellingly, the NPRM cites no evidence indicating that broadband providers lack incentives to deploy robust and resilient networks. But broadband providers have made massive investment in broadband networks to ensure, as confirmed by the pandemic, that there is

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[296] *Id.* ¶ 39.

[297] *See supra* pp. 44-45.

[298] NPRM ¶ 39.

adequate capacity even for unprecedented levels of demand.[299] Broadband providers also invest heavily to harden broadband networks and restore operations quickly when they are impacted by catastrophic events.[300] For example, AT&T has invested over a billion dollars in its Network Disaster Recovery program to rapidly restore connectivity to areas affected by disasters.[301] And Verizon and other providers have invested massively in their fiber networks — which in themselves provide substantial reliability benefits to broadband customers.[302] Moreover, because no two disasters are the same and different technologies demand different approaches to disaster preparedness and response, the Commission should be building upon existing voluntary frameworks and best practices to foster a flexible — rather than prescriptive — approach to network resiliency.[303]

The regulatory mandates the NPRM presages not only are unnecessary, but also would likely undermine broadband deployment. Resiliency and reliability mandates could potentially impose tens of billions of dollars in costs on broadband providers.[304] By definition, such obligations will siphon off capital that could be used to upgrade and expand broadband networks,

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[299] *See supra* pp. 37-39, 44-45.

[300] AT&T Comments Part I.C (Dec. 14, 2023); Verizon Comments Part I.B (Dec. 14, 2023).

[301] AT&T, *Network Disaster Recovery*, https://about.att.com/pages/disaster-recovery/network-recovery.

[302] *See*, *e.g.*, Verizon, *Fiber vs. Cable: Which is better?*, https://www.verizon.com/business/resources/articles/fiber-vs-cable/ (discussing reliability advantages of fiber).

[303] *See*, *e.g.*, Comments of USTelecom at 1-5, PS Docket Nos. 21-346 *et al.* (Dec. 16, 2021) (discussing participation by broadband providers and electric companies in the Cross-Sector Resiliency Forum to improve communication and coordination in preparing for and responding to natural disasters and cooperation and collaboration by the wireless and wireline sectors on sharing fuel resources, information sharing, debris removal, and restoring backhaul as part of disaster recovery efforts).

[304] For example, AT&T recently estimated that a potential requirement to impose 72 hours of onsite backup power in California would cost AT&T alone nearly $5 billion and take more than 10 years to implement, even assuming it could be done. *See* Decl. of Jeff Luong in Supp. of AT&T's Opening Comments ¶ 34, *Order Instituting Rulemaking Regarding Emergency Disaster Relief Program*, R.18-03-011 (Cal. Pub. Utils. Comm'n filed Apr. 3, 2020).

particularly to high-cost areas in rural America where the economics of deployment are already challenging.[305]

4. Reclassification Is Not Necessary To Ensure Public Safety

As the NPRM recognizes, broadband plays an important role in promoting public safety.[306] Broadband makes our communities safer in countless ways, from dissemination of health announcements to coordinating emergency responses. Today, broadband networks across the country remain robust, resilient, and reliable. U.S. broadband networks were able to withstand the unprecedented challenges of the COVID-19 pandemic, allowing customers to continue to receive important public safety updates, including from public safety entities, access government resources, and stay informed. That success was achieved due to the significant investment that would not have been possible in a heavily regulated environment. Subjecting broadband to Title II regulation would result in diminished broadband investment, to the detriment of public safety.

Reclassifying broadband as a common carrier service will do nothing to ensure that first responders and other public safety entities can communicate during a crisis. Unlike residential consumers, public safety entities can — and normally do — purchase non-"mass-market retail service[s]" that the NPRM does not propose to subject to Title II.[307] Instead, they generally purchase wireless and/or wired enterprise services that provide public safety customers with pre-determined amounts of capacity that can be tailored to their specific needs. Like other services sold to enterprise customers, these information services are regularly sold to government customers through negotiated contracts, which allow those customers to adjust the services to

[305] *See* AT&T Comments Part I.B (Dec. 14, 2023).

[306] *See*, *e.g.*, NPRM ¶ 34.

[307] *Id.* ¶ 59.

their specific needs, such as speed or latency requirements or quality of service guarantees that go beyond ISPs' core commitments not to block or throttle traffic.[308]

In addition, since 2018, public safety agencies have access to tailored offerings that address the unique needs of public safety, such as FirstNet and Frontline. Together, these offerings have millions of connections and tens of thousands of public safety agencies and organizations as subscribers.[309] The Commission has never regulated these services under Title II and, correctly, does not propose to do so now, even though they are critical to public safety and are treated by providers as such.

Finally, the NPRM — citing the *2020 Remand Order*[310] — asserts that, "[i]ncreasingly, public safety entities rely on retail BIAS."[311] That assertion, unsupported by any evidence, is inconsistent with USTelecom's members' experience, particularly following the introduction of FirstNet and Frontline. In all events, public safety entities have choices when it comes to their service, and there is fierce competition for these customers. Public agencies could, and would, obtain their services from another provider should any one ISP implement policies that harm public safety.

Mass-market retail customers use their broadband service to access public safety information or to send information to public safety entities. But the NPRM does not suggest that any ISP has ever interfered with any customer's ability to use their broadband service to access

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[308] *2018 Order* ¶¶ 141-142.

[309] FirstNet, *By the Numbers* (July 26, 2023), https://www.firstnet.com/content/dam/firstnet/white-papers/firstnet-by-the-numbers.pdf; Verizon, *Our commitment to public safety*, https://www.verizon.com/business/solutions/public-sector/public-safety/our-commitment/.

[310] Order on Remand, *Restoring Internet Freedom*, 35 FCC Rcd 12328 (2020) ("*2020 Remand Order*").

[311] NPRM ¶ 34 (citing *2020 Remand Order* ¶ 27).

or send such information — nor has the Commission ever posited any theory on which any ISP would have an incentive to do so. The Commission's rules require providers to disclose their practices regarding blocking, throttling, paid prioritization, and other practices for consumer broadband, which would include disclosure of any such practices affecting access to public safety websites.

The NPRM notes that public safety agencies often use social media to send out public safety information.[312] But the Big Tech companies operating those social media sites, through their algorithms, have far more control over the reach of that information and the ability of the public to receive it than any ISP does. Reclassifying broadband as a Title II service would have no effect on the ability of public safety entities to get their message out through these platforms — unless the Commission is planning to use its ancillary authority to regulate those social media companies.

Finally, broadband providers already have obligations under the CALEA, which is intended "to preserve the ability of law enforcement agencies to conduct electronic surveillance while protecting the privacy of information outside the scope of the investigation."[313] Reclassification will have no effect on their obligations under that public safety law.

5. The NPRM's Remaining New Justifications for Title II All Lack Merit

a. Reclassification Is Not Needed To Prevent Robocalls or Robotexts

The NPRM seeks comment on whether Title II reclassification can enhance the agency's authority to combat illegal robocalls.[314] But the NPRM fails to recognize that broadband

[312] *See id.*

[313] FCC, *Communications Assistance for Law Enforcement Act*, https://www.fcc.gov/calea (last visited Dec. 11, 2023).

[314] NPRM ¶ 45.

services it proposes to subject to Title II regulation are *not* the source of robocalls. Rather, as the NPRM acknowledges, many illegal robocalls are transmitted via VoIP providers.[315] Through the TRACED Act and the agency's ancillary authority over VoIP, the Commission has already imposed anti-robocall measures on voice service providers, including VoIP providers, that are proving impactful. Indeed, the NPRM itself notes the myriad prior and ongoing proceedings to adopt new measures to address illegal robocalls (and robotexts) under current authorities.[316] Just last month, Chairwoman Rosenworcel explained that these Commission efforts are "beginning to bear fruit," noting that, "[a]fter we identified the companies behind the auto warranty robocall scam, we told the rest of the industry to cut them off and auto warranty calls fell by 90 percent. We used the same method to reduce student loan scam calls by 88 percent."[317] The Commission's successful ongoing efforts to protect consumers from the scourge of illegal robocalls do not require nor have any relation to Title II reclassification.

Furthermore, insofar as scammers are using over-the-top ("OTT") messaging services, such iMessage, WhatsApp, and Signal, to send robotexts,[318] classifying broadband as a Title II service would not address that problem. Broadband providers do not block, throttle, or otherwise interfere with the transmission of OTT messages. They do not intercept them (which federal law also prohibits[319]) — let alone read them. And those messages are often end-to-end encrypted, preventing broadband providers from intercepting and reading them even if they tried (which

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[315] *Id.*

[316] *Id.* ¶ 45 n.161.

[317] *Hearing Before the H. Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce* 3-4 (Nov. 30, 2023), https://docs.fcc.gov/public/attachments/DOC-398881A1.pdf (statement of FCC Chairwoman Jessica Rosenworcel).

[318] *See* NPRM ¶ 45.

[319] *See* 18 U.S.C. § 2511.

they do not).[320] The responsibility for addressing robotexts in OTT messages should lie with the providers of those services. And as the SMS context shows, Title II is not necessary to empower providers of messaging services to work to keep their offerings free of such spam.[321] The NPRM, instead, turns to the heavy-handed suggestion of requiring ISPs to block traffic to certain IP addresses associated with websites,[322] without explaining how it would create such a list or ensure that legitimate businesses did not end up on it, harming end users.

The suggestion that the Commission might use reclassification to regulate how users interact with messages and calls delivered OTT via broadband is just one more way in which reclassification could only solve a purported problem if the Commission were planning to use ancillary authority to extend itself into all aspects of the internet. And while the NPRM does not state that intent directly, it does ask if Title II would "grant the Commission oversight to reach *a larger class of entities*"[323]

b. Reclassification Is Not Needed To Protect Access to Pole Attachments

The Commission's regulation of attachments to utility poles both protects consumers from the safety risks of overloaded poles and promotes broadband deployment by preventing utilities from charging excessively high rates to attachers. Title II regulation of broadband is unnecessary to achieve those goals. Although broadband has been classified as an information service for nearly the entirety of its existence, the NPRM provides no evidence that Title I

[320] *See* Kende Report at 9-11, 25-27.

[321] The NPRM also ignores that the Commission *denied* a petition seeking to bring SMS messaging within Title II, in part because such a classification would "stop wireless providers from helping consumers by incorporating robotext-blocking, anti-spoofing measures, and other anti-spam features into their offerings." Declaratory Ruling, *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd 12075, ¶ 2 (2018); *see* NPRM ¶¶ 44-45.

[322] NPRM ¶ 45.

[323] *Id.* (emphasis added).

classification has enabled the utilities that Section 224 regulates to materially impede broadband deployment.

That is because the Commission has authority to regulate "any attachment by a cable television system or provider of telecommunications service to a pole."[324] As the NPRM recognizes, companies that offer both broadband and either telephone or cable service benefit from the rights that Section 224 affords even while broadband is classified as an information service.[325] The NPRM cites no evidence that there are broadband-only providers that could not receive those benefits today or that the availability of the Broadband Equity, Access, and Deployment funding is leading to the creation of such providers.[326] Even if there are such providers, there is no record evidence that Title I classification is preventing them from obtaining just and reasonable pole attachment rates.

The Commission's concerns about broadband-only providers are thus speculative. What is certain is that subjecting broadband to Title II regulation would deter investment throughout the rest of the market and "undermine[] the . . . buildout of broadband networks the Commission seeks to encourage."[327] If the Commission were to identify a problem with the pole attachment rates offered to any broadband-only providers that materialize in the future, Congress can address that harm through targeted statutory relief.

[324] 47 U.S.C. § 224(a)(4). This jurisdiction is revoked in states that choose to regulate poles, which makes the impact of reclassification even more limited.

[325] *See* NPRM ¶ 47; *see also 2020 Remand Order* ¶ 68 (same).

[326] *See* NPRM ¶ 47.

[327] *2018 Order* ¶ 185.

c. Reclassification Is Not Needed To Support Broadband Through the Universal Service Fund

Regardless of how broadband is classified, the Commission has ample authority to address the digital divide through the Universal Service Fund. Indeed, before the *2018 Order*, the Commission had already supported broadband services under all universal service programs, including High Cost and Lifeline.[328] Contrary to the NPRM's assertion, the *2020 Remand Order* did not merely "assert[ ] a theory" allowing the inclusion of broadband in Lifeline and the High Cost program.[329] The question whether the Commission could provide universal service support for broadband regardless of regulatory classification was litigated before the Tenth Circuit, which affirmed the agency's authority.[330] And while the NPRM contends that reclassification would "enhance" its "ability to connect low-income households in rural areas," the NPRM ignores that its proposed reclassification will impede investment, slowing broadband deployment in rural areas, and thereby undermining the Commission's connectivity goals. In areas where reclassification prevents broadband deployment, the Commission's asserted "enhanced" ability to help will be useless.

As with other issues, the NPRM does not cite any problems in the distribution of universal service funding to support broadband either through Lifeline or the High Cost program over the past six years that justify Title II regulation of broadband. And while there remain issues to be solved in the universal service program — including the ever-increasing contribution

[328] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶¶ 60-72 (2011).

[329] NPRM ¶ 49.

[330] *See 2020 Remand Order* ¶ 83 (citing *In re FCC 11-161*, 753 F.3d 1015, 1044-48 (10th Cir. 2014)).

factor and the ever-declining contribution base — the NPRM does not propose solutions to any of them.

d. Reclassification Is Unnecessary To Ensure Free Expression on the Internet

The NPRM would do nothing to promote free speech on the internet. As the NPRM notes, "[s]ocial media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism."[331] ISPs have expressly committed not to block or throttle access to these websites and, as noted above, the NPRM provides no evidence questioning those commitments. Even without such a commitment, market forces compel ISPs to ensure that their customers can reach whatever website they wish to visit.

Of course, as explained above, those websites and platforms — the most prominent of which Big Tech companies operate — have control over the reach of information through the algorithms they employ. But broadband providers lack that control, and the acts of content providers cannot be a justification for imposing common carriage on broadband providers.

e. Reclassification Is Not Necessary To Advance Digital Equity

The NPRM seeks comment "on any equity-related considerations and benefits (if any) that may be associated with" its Title II proposal.[332] Reclassification is not needed to advance digital equity goals, and it can in fact undermine such goals by inhibiting private sector investment in broadband. Importantly, through the Infrastructure Investment and Jobs Act of 2021 ("IIJA"), Congress established numerous programs to promote digital equity, including the $42.45 billion Broadband Equity, Access, and Deployment program for deployment to unserved and underserved areas; the Affordable Connectivity Program, which provides a discount for

[331] NPRM ¶ 53.

[332] *Id.* ¶ 54 (footnote omitted).

broadband service to eligible households; the Digital Equity Act programs that provide $2.75 billion to establish three grants with the goal of ensuring that all people have the skills, technology, and capacity needed to participate in the digital economy. In the IIJA, Congress also enacted provisions aimed at facilitating equal access to broadband, including by preventing and eliminating digital discrimination. And Congress's decision to address equal access directly — in the way that it chose — demonstrates that it did not intend for the Commission to attempt to address the issue through Title II reclassification of broadband.

f. Reclassification Will Not Provide Additional Accessibility Benefits

The Commission has ample authority under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") to ensure the accessibility of Internet-based communications services.[333] In particular, sections 716 and 718 do not turn on whether a service is classified as a telecommunications service or an information service. And because of the CVAA and the Commission's implementing regulations, any effect of applying Section 255 to broadband on accessibility would be quite limited. Indeed, the NPRM does not even attempt to identify any specific benefits.

Congress is also considering updates to the CVAA, and its potential solutions notably do *not* include reclassifying broadband as a common-carrier service.[334] The Commission should not attempt to substitute its judgment for that of Congress.

[333] *See 2018 Order* ¶ 205.

[334] Bill to Update the 21st Century Communications and Video Accessibility Act of 2010, S.L.C., 117th Cong., 2d Sess. (introduced by Sen. Edward J. Markey).

g. Reclassification Will Not Substantially Affect Competitive Deployment to Multiple Tenant Environments

The Commission already has ample authority to address the issues associated with Multiple Tenant Environments ("MTEs"). As the NPRM notes, citing a host of orders, the "Commission has long prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE."[335] The NPRM does not identify any need for additional rules that the Commission could not already adopt with regard to carriers or cable operators with commingled broadband facilities. Reclassification of broadband is therefore unnecessary for the Commission to be able to continue to address those issues. While reclassification would allow the Commission to expand its rules to encompass broadband-only providers, the NPRM does not identify any evidence that this set of providers exists, much less is entering into exclusive contracts that are hindering competitive deployment to MTEs.

IV. The Commission Cannot and Should Not Impose Common-Carrier Regulation on One Subset of the Participants in the Internet Traffic Exchange Marketplace

A. The Commission's Proposal Would Significantly Disturb and Harmfully Distort the Well-Functioning Internet Traffic Exchange Marketplace

The internet is composed of many constituent networks, and each network must connect either directly or indirectly with every other to ensure connectivity among their respective customers. To accomplish this end, networks accept and deliver traffic from any number of other networks through a variety of peering, transit, and other interconnection arrangements.[336] In recent years, many content providers have supplemented their existing indirect interconnection arrangements by also negotiating direct connections with ISPs or purchasing CDN services from

[335] NPRM ¶ 52.

[336] *See* Kende Report at 5-9 (explaining these various arrangements).

ISPs.[337] And many content providers purchase specialized content delivery services from third-party CDNs such Akamai and Limelight, which in turn arrange for either direct or indirect interconnection with ISP networks.

All these commercial relationships have always been unregulated, and the interconnection marketplace has always functioned efficiently, in part because there are many routes into and out of any broadband ISP's network.[338] Given the wide variety of interconnection possibilities, application and content providers need not even deal with an ISP directly to reach the ISP's end users; they can instead choose transit services offered by one or more of the ISP's peers (and, for many ISPs, the ISP's own transit providers).[339] ISPs, in turn, cannot selectively degrade particular peering arrangements to harm particular providers because those providers and their transit intermediaries — not the ISP — choose the interconnection facilities they will use for sending content to the ISP's customers.[340] This prevalence of individual negotiation and choice ensures that ISPs cannot exercise leverage over application and content providers and other consumers in the market for interconnection services.

Notably, while the *2015 Order* discussed "competing narratives" about then-current internet exchange traffic disputes,[341] the Commission did not resolve those narratives and concluded that it "would be premature to adopt prescriptive rules."[342] By the *2018 Order*, the

[337] *See id.* at 8-9 (explaining the role of content delivery networks).

[338] *See id.* at 28 ("While these arrangements have evolved to address changes in applications and business models, they have done so free of regulation.").

[339] *See* Israel et al. Decl. ¶¶ 54-55.

[340] *See* Kende Report at 28 (finding "no evidence that any provider has acted as a gatekeeper, to force any interconnection conditions that require regulation to avoid or undo").

[341] *2015 Order* ¶ 200; *see id.* ¶¶ 199-201.

[342] *Id.* ¶ 202.

"record [was] devoid of evidence of consumer harm" involving interconnection arrangements.[343] The case-by-case process the Commission established in the *2015 Order* to hear any disputes with ISPs about their terms and conditions for internet traffic exchange had "gone unused."[344] The NPRM does not identify any issues that have arisen in the internet traffic exchange marketplace since the *2018 Order*. Internet traffic exchange is, instead, a well-functioning marketplace.

While not addressing any legitimate concern, the Commission's proposal has the potential to distort that marketplace by imposing regulatory obligations on one set of players, but not their counterparties. The NPRM would allow application and content providers (which the NPRM correctly notes include companies as large as, if not larger than, the ISPs)[345] 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.

B. Internet Traffic Exchange Is an Information Service, Not a Common-Carrier Telecommunications Service

The Commission has never classified internet traffic exchange as a telecommunications service, including when offered by ISPs that also sell retail, mass-market broadband service. The NPRM does not propose to change that. Instead, it proposes to repeat the *2015 Order*'s conclusion that the Commission can regulate the terms and conditions those ISPs offer for internet traffic exchange as an adjunct to the Commission's regulation of broadband as a Title II

[343] *2018 Order* ¶ 168.

[344] *Id.*

[345] *See* NPRM ¶ 187.

service.[346] While the D.C. Circuit upheld that aspect of the *2015 Order*,[347] its decision was erroneous for at least three reasons.

First, the D.C. Circuit's conclusion is inconsistent with the Communications Act's express provisions governing interconnection. In the context of legacy voice telephone service, the fact that telephone companies offer Title II telecommunications services that include the ability of customers to call all other phone numbers does not give the Commission inherent authority to impose common carrier regulation on those companies' interconnection arrangements. Instead, Congress enacted three express statutory provisions governing interconnection. The first merely imposes a duty on all telecommunications carriers to interconnect (directly or indirectly) with other telecommunications carriers; it does not give the Commission authority to regulate the terms and conditions of those interconnection arrangements.[348] The other two provisions do give the Commission authority over those terms and conditions, but only in limited circumstances. The Commission can adopt rules governing the terms and conditions on which incumbent local telephone companies offer interconnection to new entrants offering local telephone service.[349] Or the Commission can impose specific interconnection obligations through adjudication on a carrier-specific basis, but only after "an opportunity for [a] hearing" on the merits of particular interconnection disputes.[350]

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[346] *See* NPRM ¶ 66. Because the NPRM's asserted authority over ISPs' internet traffic exchange arrangements is explicitly contingent on its classification of broadband as a Title II service, rejection of that reclassification is sufficient to deprive the Commission of the contingent authority the NPRM asserts over internet traffic exchange arrangements.

[347] *See USTelecom I*, 825 F.3d at 713.

[348] *See* 47 U.S.C. § 251(a).

[349] *See id.* § 251(c)(2).

[350] *Id.* § 201(a).

The existence of these express provisions refutes any notion that classification of a retail service as a Title II common-carrier service carries with it authority for the Commission to regulate on a common-carrier basis the terms and conditions on which those retail providers interconnect. Indeed, the specific limitations on the Commission's authority in Sections 251(c)(2) and 201(a) would be rendered obsolete if the provision of a retail telecommunications service were sufficient to authorize common-carrier regulation of interconnection, as the NPRM claims. Nor can the Commission rely on any of the three explicit interconnection provisions to regulate internet traffic exchange arrangements. Each of them applies only to interconnection between two telecommunications carriers. Yet ISPs' internet traffic exchange counterparts are entities that the Commission is proposing to leave subject to Title I.

Second, absent such implicit authority, the Commission could engage in common-carrier regulation of internet traffic exchange arrangements only if the Commission classified such arrangements as a telecommunications service. But such arrangements by definition involve information service providers on both sides. Both parties to the arrangements "offer" each of the "capabilit[ies]" in Section 153(24): "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available, information via telecommunications." And information processing is tightly integrated into those arrangements, as the NPRM recognizes in its discussion of the use of BGP.[351] For these reasons, the Commission has never classified internet traffic exchange as a telecommunications service; the NPRM rightly proposes not to depart from that decades-long treatment of such arrangements.

Third, even aside from the fact that internet traffic exchange arrangements are an information service, they independently do not satisfy the *NARUC* test for classifying a service

[351] *See* NPRM ¶ 31.

as common carriage rather than private carriage. ISPs do not voluntarily offer to enter internet traffic exchange arrangements on a common-carrier basis. Nor do the explicit or implicit terms of ISPs' contracts with their customers commit them to offer to enter internet traffic exchange arrangements with third-party networks on such a basis.[352] The NPRM also does not make any findings about market power, which would be necessary for the Commission to compel ISPs to offer such arrangements on a common-carrier basis. As discussed above, the NPRM's endorsement of the *2015 Order*'s "gatekeeper" theory of a terminating access monopoly lacks merit. Intense competition in the broadband market also constrains ISPs' ability to dictate prices and terms for their services.

For all these reasons, common-carrier regulation of Internet traffic exchange arrangements would exceed the Commission's authority under Title II of the Act, even granting the (erroneous) premise that the Communications Act authorizes the Commission to regulate mass-market retail broadband services under Title II in the first place.

V. Broadband Internet Access Service Providers Should Be Subject to a Single Set of Uniform, National Rules

Regardless of the action the Commission takes in this proceeding, it should state unambiguously that its rules are the only set of rules that govern broadband internet access service, as the Commission has defined that term since 2010. The Commission correctly acknowledges the importance of "establishing a national regulatory approach rather than disparate requirements that vary state-by-state."[353] Complying with "differing state open Internet

[352] Indeed, some providers' Terms of Services expressly disclaim offering internet traffic exchange services on a common-carrier basis. *See*, *e.g.*, AT&T Network Practices, https://about.att.com/sites/broadband/network.

[353] NPRM ¶ 3; *see also*, *e.g.*, *id*. ¶ 16 (acknowledging the importance of "a national regulatory approach" to broadband); *id*. ¶¶ 21, 24 (similar).

requirements" is likely to be "burdensome for ISPs, particularly small ISPs, thus hindering the broadband market," and ultimately consumer access to broadband.[354] To avoid that outcome, any rules the Commission adopts must apply uniformly nationwide, and be both a "floor" and "ceiling" on the requirements that can be imposed on ISPs. That is, the Commission should revert to and adopt the proposal in the draft NPRM and establish a "*uniform*, national" set of rules."[355]

If the Commission were instead to adopt rules that, in its view, functioned only as a "nationwide floor," and purported to give each state the option of building atop that floor with its own, unique set of requirements, the result would be a patchwork that would be burdensome for ISPs and a hindrance to the broadband marketplace. To the extent that ISPs are able to adjust their practices on a state-by-state basis, allowing each state to adopt its own, unique set of requirements would result in consumer confusion. The rules of the road for broadband would change when consumers move their residence. A customer relocating from one state to another might find that, even if she continues to rely on the same ISP for internet access, features, functionalities, and services she enjoyed for years are no longer available to her.

However, technical and practical limitations are likely to prevent ISPs from varying many practices by state. Therefore, individual state laws will likely require ISPs to adjust their practices nationally. Every time a state enacts a new prohibition or mandate, ISPs will likely need to adjust their practices nationwide to comply with the new rule in the relevant state. In this way, each individual state could have the power to impose burdens on ISPs nationwide, and ISPs

[354] *Id*. ¶ 24.

[355] *See*, *e.g.*, Draft Notice of Proposed Rulemaking, *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, FCC-CIRC2310-01, ¶¶ 3, 16, 21, 24, 93, 95, 96 (Sept. 28, 2023) (emphasis added).

could find themselves adjusting their national practices again and again as additional states adopt their own, unique sets of rules.

In the event the Commission were to adopt the onerous set of requirements for ISPs that the NPRM contemplates, any requirements states decide to impose on ISPs over and above those rules are unlikely to yield benefits sufficient to justify the cost of compliance on ISPs and the confusion to consumers. In that scenario, the potential costs to ISPs — ultimately borne by their customers — of potentially complying with more than 56 unique regimes (those of the 50 States, the District of Columbia, Puerto Rico and other inhabited territories, and the Commission's rules), easily outweighs any benefit that a state might claim that its own unique set of individual requirements would yield.

VI. The Commission Should Forbear from Section 214 Obligations in Addition to the Other Title II Obligations and Rules From Which It Proposes To Forbear

A. The NPRM Correctly Proposes To Forbear From Numerous Provisions of Title II, Including Rate Regulation Provisions

The *2015 Order* recognized that broadband should not be subjected to the entirety of Title II, and the NPRM correctly proposes to continue that. One important change from the draft NPRM was the expansion of the Commission's proposed forbearance from the core rate regulation provisions of Title II. While the draft NPRM's proposed forbearance would still have permitted the Commission to "rely on sections 201 and 202 to address [rates] on an *ex post* basis,"[356] the NPRM proposes to "forbear from all provisions of Title II that would permit Commission regulation of [broadband] rates," whether *ex ante* or *ex post*.[357] While that forbearance does not go far enough to protect broadband from rate regulation — both because

[356] Draft NPRM ¶ 104.

[357] NPRM ¶ 105.

the general conduct standard is readily misapplied to impose de facto rate regulation and because future Commissions can undo forbearance — that was a necessary change to the draft NPRM.

Any threat of future rate regulation, direct or indirect, chills investment. As the NPRM notes, broadband infrastructure deployment requires "long-term, irreversible investments."[358] Providers will be reluctant to make those investments if faced with the threat of future rate regulation that could change the economics of those investments. Indeed, New York's recent attempt at rate regulation demonstrated just that. As multiple ISPs explained in sworn declarations, a New York law capping prices for low-income broadband customers at $15/month — if that law had taken effect — would have caused them to stop planned (but not yet implemented) network expansions.[359]

Rate regulation is also "not necessary for the protection of consumers,"[360] given the increasing competition to serve broadband customers. As described above, more Americans have more broadband options than ever before, particularly with the increasing roll out and adoption of 5G fixed wireless offerings. These competitive market dynamics encourage investment and promote innovation, improving product offerings while keeping broadband prices low.

To the extent any government action were needed to ensure that broadband remains affordable, the appropriate form of intervention is direct subsidization, as Congress has already done through the Emergency Broadband Benefit program and Affordable Connectivity Program. Such direct subsidization minimizes interference with the salutary marketplace dynamics

[358] *Id.* ¶ 57.

[359] *See N.Y. State Telecomms. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 277 (E.D.N.Y. 2021).

[360] 47 U.S.C. § 160(a)(2).

referenced above, and ensures that broadband providers are not forced to bear the costs of subsidies that are appropriately funded by taxpayers generally.

B. The Commission Should Also Forbear Broadly From Section 214(a)-(d)

Section 214 of the Communications Act requires service providers to obtain the Commission's approval for the construction, acquisition, operation, and transmission of common carrier services, as well as before discontinuing, reducing, or impairing such services.[361] It also requires prior approval from the Commission for any substantial transfer of control of a carrier's lines or authority. In part due to the breadth of these requirements, the Commission has always exempted broadband from Section 214. In 2005, the Commission granted "blanket certification to discontinue" any DSL transmission inputs to retail broadband service that had been offered on a common-carrier basis to third-party ISPs.[362] In 2015, the Commission forbore from the entirety of Section 214(a)-(d).[363] No party challenged that forbearance.

As the Commission recognized in 2015, against this status quo, the burden is on those proposing to impose Section 214 requirements for the first time to "persuade[]" the Commission that doing so "is necessary within the meaning of sections 10(a)(1) and (a)(2) or that forbearance would not be in the public interest under section 10(a)(3)."[364] The NPRM does not even attempt to carry that burden. While the NPRM discusses at some length potential justifications for using *international* Section 214 requirements to give the Commission the power to eject from the marketplace a hypothetical Chinese broadband provider,[365] the NPRM offers no reasons for

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[361] 47 U.S.C. § 214.

[362] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶¶ 100-101 (2005).

[363] *2015 Order* ¶¶ 509-512.

[364] *Id.* ¶ 510.

[365] *See* NPRM ¶¶ 27, 108.

deviating from past practice and imposing any other Section 214(a)-(d) obligations on broadband. Instead, the Commission merely "seek[s] comment on any implementation issues concerning our domestic section 214 requirements."[366]

Regardless of whether the Commission can justify retaining Section 214 authority to rescind international Section 214 licenses from broadband providers, it should otherwise forbear from applying Section 214(a)-(d).[367] Broadband providers have always been free to roll out new and innovative offerings — and to remove older, less popular offerings — without first obtaining Commission approval. Similarly, broadband providers have been free to invest in providing broadband in new territories, knowing that if the investment does not pan out, the Commission cannot force them to continue providing unprofitable services by denying authorization under Section 214. This freedom has allowed broadband providers to make investments without fear of being "locked in" to those investments irrespective of future developments that might make the investments unprofitable.[368]

Such investments have increased innovation and resulted in faster (and for wireless, lower latency) broadband offerings. This freedom is particularly important as newer, better broadband technologies have overtaken older, costlier ones, such as DSL.[369] The Commission

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[366] *Id.* ¶ 108.

[367] The Commission should also make clear that, insofar as it does not forbear from the requirement in Section 214(a) that carriers obtain Commission permission before "engag[ing] in transmission," all current and future broadband providers have blanket interstate and international Section 214 licenses.

[368] *See*, *e.g.*, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628 (1974) ("Ease of entry into a market presumes ease of exit[.]"); First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities*, 85 FCC 2d 1, ¶ 147 (1980) ("If regulatory exit barriers are not lowered, carriers may be discouraged from entering high risk markets for fear that they may not be able to discontinue service in a reasonably short period of time if it proves unprofitable. Ease of exit is also a fundamental characteristic of a competitive market.").

[369] *See*, *e.g.*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32

should not impose for the first time new barriers on providers that wish to discontinue these older services so that they can focus their resources on transitioning to newer technologies that consumers are demanding.

Requiring ISPs to seek the Commission's permission every time they want to discontinue or change an existing service offering would undermine investment incentives. The prospect of being locked into providing an unprofitable service may cause providers to simply decline to make investments in the first instance. Such requirements would also impose substantial additional obligations on the Commission, even if the Commission adopted a streamlined process with automatic grants.

As there is no record of harm to any customers from the decades-long absence of Section 214 requirements for broadband providers, the Commission could not justify such a major change to their investment-backed expectations.[370] The Commission should accordingly forbear from all domestic Section 214 requirements.

VII. Conclusion

Contrary to the NPRM's claims, the *2018 Order* has been an unmitigated success and all its predictive judgments have been borne out. More Americans have access to broadband, have more broadband choices, and have faster and cheaper broadband options than they did in 2017. None of the problems the *2015 Order*'s rules were intended to prevent have arisen. Certainly,

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FCC Rcd 11128, ¶ 83 (2018) ("The record also makes clear that the Commission's current section 214(a) discontinuance rules impose needless costs and delay on carriers that wish to transition from legacy services to next-generation, IP-based infrastructure and services. Even relatively short delays or periods of unpredictability can, in the aggregate, create significant hurdles for providers who seek to upgrade hundreds or thousands of lines across their service territory. As Verizon explains, excessive restrictions on the discontinuance of legacy services harm both consumers and competition alike 'as they delay the ability of providers to shift resources from legacy voice services to the more modern offerings that consumers demand.' ") (footnotes omitted).

[370] *See*, *e.g.*, *Advanced Commc'ns Corp. v. FCC*, 376 F.3d 1153, 1158 (D.C. Cir. 2004); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996).

the prophesized end of the internet did not occur. The Commission should reject the NPRM's proposal to nonetheless revert to the *2015 Order* and then to add to the regulatory burdens that earlier order imposed with numerous new obligations. Such a power grab is both unwarranted and unlawful. It will not survive judicial review, but will cause turmoil in an industry that is critical to every aspect of modern life. Rather than searching for solutions to non-existent problems, the Commission should focus on ensuring that it exercises its actual statutory authority in ways that best help close the digital divide and bring the promise of the internet to all Americans.

Respectfully submitted,

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