

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

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| In the Matter of |) | |
| |) | |
| Restoring Internet Freedom |) | WC Docket No. 17-108 |
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| |) | |
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**REPLY COMMENTS OF
USTELECOM ASSOCIATION**

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SUMMARY

Anyone who has been around long enough to remember the honk-and-screch of dial-up internet, or staring at the spinning symbol on your desktop while waiting endlessly for your browser to appear, likely has a special appreciation for the almost instantaneous access most Americans have to the internet using a vast array of services and devices. Although our methods of reaching the internet have changed dramatically in just two decades, the free and open nature of the internet, and the broadband sector's enduring commitment to it, have remained constant.

The fact is that yesterday's free and open internet is also today's free and open internet. And with a return to a forward-looking, modern, pro-consumer and pro-innovation policy framework, it can be tomorrow's free and open internet as well. Thus, a step back from Title II utility-style regulation will revert us to ... where we have always been. A step back from Title II regulation will ensure that providers keep investing to expand their networks and offerings, and that innovators keep finding ways to enhance our internet experiences. On the other hand, the "freeness" of the internet will not be guaranteed by unfairly and unwisely subjecting a subset of internet innovators to needlessly aggressive government controls in the form of outdated restrictions that ignore the nature of the internet, consumer needs, and the competitive marketplace in which they thrive. Nor will such restrictions guarantee access to the internet; to the contrary, they threaten the expansion of high-speed broadband to areas and consumers that may not already have it by eliminating investment incentives. Title II restrictions simply will not make the internet more available, nor has anyone demonstrated that they will preserve internet openness and freedom – at least not without significant and measurable costs.

American innovation and a commitment by US broadband companies to build the best networks in the world have helped make the internet what it is today. Congress, working in a non-partisan way with the executive branch, spurred this innovation and commitment by making the right call twenty-one years ago to promote the development of the internet and to preserve the existing competitive free market for the internet and other interactive services made possible by its use. Although commenters and others have described a parade of horrors that *could* inhibit internet freedom if broadband providers, free from Title II regulation, were to spurn their customers and customs and act badly or worse, it's all just unsubstantiated and unwarranted speculation. They conveniently ignore the fact that broadband access providers, guided by the needs of their customers and the demands of the market, have plenty of incentives to avoid violating the internet freedoms that were first embodied in principles adopted by the Commission in 2005; indeed, arguably even more so than so-called "edge" and other providers in the internet ecosystem.

Given the facts about the persistent and resilient state of internet freedom and openness we continue to enjoy today, it makes little sense to regulate based on speculation about what *could* happen if the Commission changes course to restore common sense, market-based protections to this thriving sector of our economy. In the highly competitive broadband internet access services (BIAS) marketplace, consumers can and do walk away when they are dissatisfied with their service. Thus, competition will ensure that broadband access providers behave in accordance with consumers' needs and society's requirements. Where competition fails, existing regulatory and antitrust requirements will provide enforceable protections for consumers without the stifling, regressive, and ultimately counter-productive restrictions of Title II.

Finally, Title II is ill-suited to regulate BIAS because the service provides, and consumers expect it to provide, information service capabilities. A recent survey of broadband internet users shows that consumers expect their providers to offer all the capabilities of information service, and that they use those capabilities from their providers.

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USTelecom is pleased to submit reply comments to the Federal Communications Commission’s (Commission or FCC) Restoring Internet Freedom proceeding.¹

I. INTRODUCTION.

Not surprisingly, commenters overwhelmingly support an open and free internet. So do we, and so do our members. Where we part company from those who advocate for the new Title II status quo is on what is the best approach for achieving effective, sustainable internet freedom and openness. Some of the comments filed rely more on rhetoric than facts,² or insist that

¹ Restoring Internet Freedom, *Notice of Proposed Rulemaking*, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017) (*Notice*). *See also* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) (*2015 Order*).

² *See* CTIA, NCTA– the Internet & Television Association, & USTelecom, *Opposition to Motion for Extension of Time*, WC Docket No. 17-108, at 3 (filed Aug. 10, 2017) (explaining that the vast majority of comments filed merely state ultimate policy preferences, without supporting facts or analysis). Moreover, many comments appear to have been fabricated, with one study stating that over seven million of the comments over a recent one-month period appear to be fraudulent. *See* Peter Flaherty, *Another 5.8 Million Fake Net Neutrality Comments Found*, Nat’l Legal and Policy Ctr. (Aug. 8, 2017), <http://nlpc.org/2017/08/08/another-5-8-million-fake-net-neutrality-comments-found-1-5-million-fakes-put-online-public-scrutiny/> (detailing 5.8 million fake comments filed between July 17, 2017 and August 4, 2017); Peter Flaherty, *Analysis: 1.3 Million More Pro-Net Neutrality FCC Public Comments Came From Russia, Other Foreign Countries*, Nat’l Legal and Policy Ctr. (Jul. 17, 2017) (detailing 1.3 million fake

anything short of a full endorsement of the current framework by the Commission will mean the end of the internet as we know it. They reject any notion or possibility that the public interest would best be served if the Commission restores reasonable, practical open internet protections without the additional baggage inherent with Title II, despite the fact that the internet was created and has flourished under light-touch regulation.

USTelecom and its members are not asking the Commission to take away the fundamental open internet protections that our nation's internet users have always enjoyed. However, those who support keeping the current rules in place³ seem content to have the Commission ignore the harms suffered by the innovative broadband companies investing to build the networks necessary to provide these valuable services. Any viable, pro-consumer solution for achieving a thriving, open internet cannot disregard the need for ongoing investment by our nation's broadband providers to continually upgrade broadband networks to reach all Americans. Nor can it disregard the real, demonstrated harms caused by utility-style regulations that have taken away incentives for providers to invest in and deploy broadband infrastructure, and to innovate to meet the growing needs of consumers and businesses that rely on broadband.

Reclassification of broadband internet access service (BIAS) under Title II was a means to an end, but it was not the only option. We seek a more modern, durable, and effective solution that takes into account and equitably balances the costs and benefits inherent to rules that encompass outdated legacy service restrictions and requirements. Title II does not achieve such a balance. We therefore again urge the Commission to reverse the reclassification of BIAS

comments filed between July 3, 2017 and July 12, 2017 alone, from “addresses in France, Russia and Germany”).

³ See, e.g., Comments of the Ad Hoc Telecomm Users Committee, WC Docket No. 17-108 (filed Jul. 17, 2017); Comments of AARP, WC Docket No. 17-108 (filed Jul. 17, 2017).

in favor of a less burdensome approach to achieve the internet freedom and openness, and incentives to invest and innovate, that would serve the best interests of all stakeholders, while enhancing America’s global competitiveness and technological leadership.

II. CONSUMERS OVERWHELMINGLY RELY ON THEIR BROADBAND ACCESS SERVICE TO OFFER INFORMATION SERVICE CAPABILITIES.

A. The Capabilities Offered by BIAS Make it an Information Service.

As noted in USTelecom’s comments,⁴ the highest court in the land has already affirmed that the FCC may lawfully classify BIAS as an information service. That fact need not be re-litigated in this phase of the open internet debate. The statutory definition of “information service” is straightforward: it is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”⁵ It is indisputable that BIAS offers all of these capabilities, and therefore is properly classified as an information service.

Moreover, the Commission is not precluded from revisiting its 2015 decision. Although the court found that the agency’s reclassification decision was supported by “ample record evidence,” there also was ample evidence in the record for the Commission to conclude that BIAS is an information service, based on the capabilities offered. The 2015 Commission’s assertion that BIAS providers offer a “stand-alone transmission capacity”⁶ strains credulity when the service is stacked against the statutory definition of an information service. BIAS embodies the entire list of capabilities that define what is an information service.

⁴ Comments of USTelecom Association, WC Docket No. 17-108, at 14 (citing *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*)).

⁵ 47 U.S.C. § 153(24).

⁶ 2015 Order, ¶ 46.

For example, we noted that the 2015 record showed that Domain Name Server service (DNS) does not merely manage telecommunications, but also, “as the Commission previously concluded, ‘constitutes a general purpose information *processing* and *retrieval* capability that facilitates the use of the Internet in many ways.’”⁷ DNS is a capability that allows consumers to reach a website by typing in a simple website name or address rather than having to know the specific numerical Internet Protocol (IP) address. Because BIAS providers offer DNS as a standard feature in addition to other capabilities that consumers rely on and that fall squarely within the definition of information service, there is no question that BIAS is an information service.

B. Consumer Use and Expectations About Their Broadband Access Service Have Not Changed Significantly.

In the *2015 Order*, the Commission relied inappropriately on an alleged change in factual circumstances since internet access service was classified as an information service to justify reclassification. In our view, that rationale was merely a pretext for reaching the predetermined outcome that led to reclassification under Title II.⁸ As we noted, there was ample record evidence that, despite some changes in consumer use and preferences,⁹ consumers continue to

⁷ USTelecom Comments at 34 (citing *Cable Modem Order*, ¶ 37 (emphases added)).

⁸ See USTelecom Comments at 30-33 (disputing that purported changes in consumer broadband use and perceptions about their internet access service justified the Commission’s reclassification decision).

⁹ Advances in technology and availability of more and better services likely account for most of these changes in customer use and preferences, and their identification of broadband speed and reliability as key factors in their decision to purchase BIAS. For example, consumers rely on their broadband for bandwidth-intensive activities such as streaming music and videos far more today than a decade ago when such content, and the devices to access them, were not as readily available.

use and value certain features of their internet access service in ways similar to when such services were classified as information services.

For example, speed has always been important to consumers, and broadband providers have always advertised their services on the basis of transmission speed. Moreover, even in the days of dial-up and the familiar “You’ve Got Mail” notice to AOL users, consumers could download and use alternative web browsers, content from any website of their choice, and email service other than the one provided by their broadband service provider. We submit that on the vital question of consumers’ perspective of what they expect and want from internet access service, not much has changed at all, even though the content, applications, and services available on the internet have.

C. Our Consumer Survey Demonstrates That Consumers Overwhelmingly Expect Their BIAS Provider to Offer Information Service Capabilities.

The Commission further asserted in support of its contention that changed circumstances justified reclassification of BIAS that “times and usage patterns have changed and it is clear that broadband providers are offering [] straightforward transmission capabilities that the Communications Act defines as a ‘telecommunications service.’”¹⁰ That is, the BIAS available today is an “offering [of] stand-alone transmission capacity.”¹¹ The Commission also claimed that BIAS “is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing.”¹²

But the Commission offered no evidence – anecdotal, empirical, or otherwise – to back up those conclusions. It merely asserted its own unfounded assumption about what consumers

¹⁰ 2015 Order ¶ 43.

¹¹ 2015 Order ¶ 46.

¹² *Id.*

understand about BIAS, and then in circular fashion justified reclassification “[b]ased on this updated record.”¹³ If the Commission had actual, direct evidence, it failed to describe or articulate it in the *2015 Order*. Rather than ask consumers, the Commission instead decided that its own best guess about what customers understand BIAS to offer was sufficient. This alone should have dealt a fatal blow to any claim of deference due to the Commission.

Moreover, by focusing its analysis on what customers understand BIAS to offer, the Commission made customer perspective a major factor in its decision to reclassify BIAS as a telecommunications service.¹⁴ At that time, the Commission presumably considered other evidence in the record that weighed against reclassification and decided to reclassify anyway.¹⁵ Thus, even the recent assertion by some self-described “Internet Engineers, Pioneers, and Technologists” that “the FCC would be making a major regulatory decision based on plainly incorrect assumptions about [how the internet works],”¹⁶ would not prevent the Commission in this proceeding from according substantial weight to customer perceptions, a regulatory approach that was sanctioned by the Supreme Court.¹⁷ The problem was not the weight given to customer perception as a factor, but rather the lack of evidence and misunderstanding of what that perception is.

¹³ *2015 Order* ¶ 47.

¹⁴ *2015 Order* ¶¶ 45-47.

¹⁵ Notwithstanding the Commission’s discretion to accord different weight to evidence in the record before it, we believe there was insufficient evidence to conclude that BIAS is “fundamentally understood by customers” to be a transmission platform.

¹⁶ Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC’s Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order, WC Docket No. 17-108, at 1 (filed Jul. 17, 2017).

¹⁷ See *Brand X*, 545 U.S. at 990 (“It is common usage to describe what a company “offers” to a consumer as *what the consumer perceives* to be the integrated finished product ...”) (emphasis added).

Rather than rely on the Commission’s undocumented assertions about how consumers view BIAS service for purposes of this proceeding, USTelecom and NCTA – The Internet & Television Association, commissioned a Consumer Survey, seeking to better understand consumer preferences and expectations regarding the internet access service offered by their broadband provider.¹⁸ Specifically, we wanted to confirm (or debunk), based on objective, data-driven analysis, the Commission’s assertion that consumers understand their BIAS to function only as a “transmission platform” that they can use to access third-party content, applications and services of their choosing. It turns out that consumers expect their BIAS to offer far more than just a pathway to the internet.

Internet users expect their broadband service to offer information service capabilities.

The Consumer Survey asked 1210 internet service users what they expected to be able to do with their broadband internet service.¹⁹ More than three quarters of respondents expect to be able to use these functionalities that define information services:²⁰ acquire information (86%); utilize information (79%); retrieve information (78%); process information (78%); and generate information (77%). More than half expect to be able to use the remaining functionalities

¹⁸ See Letter from Diane Holland, Vice President – Law & Policy, USTelecom, and Rick Chessen, Sr. Vice President, Law & Regulatory Policy, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, (Aug. 28, 2017) (Consumer Survey Letter).

¹⁹ See Consumer Survey Letter, Attachment B, Declaration of Praveen Chalise Regarding Methodology for USTelecom and NCTA Consumer Internet Research (describing the methodology and affirming the scientific soundness of the survey).

²⁰ “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §153(24).

provided by information services: store information (64%); make information available (64%); and transform information (56%).

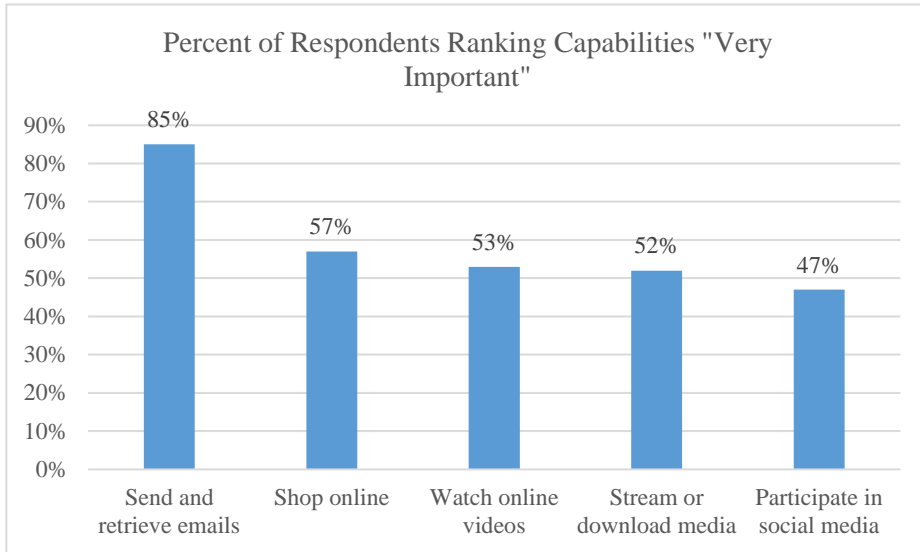
Thus, the FCC's contention that customers fundamentally understand their BIAS to be a transmission platform simply is not borne out by what consumers surveyed say they expect from their service. Clearly, consumers expect to be offered, and in fact are offered, information services from their BIAS providers.

Internet users value and utilize the information service capabilities offered by their BIAS providers. Not only do consumers expect information service functionality from their BIAS provider, they highly value those functionalities. For example, 89% of consumers stated that the ability to search for and find information, which correlate to acquiring and retrieving information, are "very important."²¹ The ability to send and retrieve emails, shop online, watch online videos, stream or download music, books, or other forms of media, and participate in social media are all made possible using information service capabilities, as they enable users to generate, transform, process, retrieve, utilize, and make available information. Only by having a broadband connection can consumers, for example, "retrieve" information from the internet. Nothing could be clearer that BIAS is an information service than the ability it provides for a consumer to transfer information – a photo, medical record, song or book – from a far off place to her computer's hard drive and then have that information available at any time, regardless of whether that computer is connected to the internet when she may want to access that content. Nearly half or more of respondents indicated that each of these capabilities is "very important."

²¹ We also asked about the more colloquial term "surf the internet," which 84% of respondents said was very important.

Figure 1

Internet Users Value Information Service Capabilities



Source: Market Strategies, Inc. - USTelecom and NCTA Consumer Survey July 2017

We note that consumers also ranked speed and reliability as very important attributes, which makes sense because they enhance the ability to use the information service capabilities offered by their BIAS providers. Broadband providers know, in particular, that their customers value speed, and thus have always advertised their internet access services based on speed.²² This in no way negates the significance of these findings that consumers highly value other aspects of their BIAS as well.

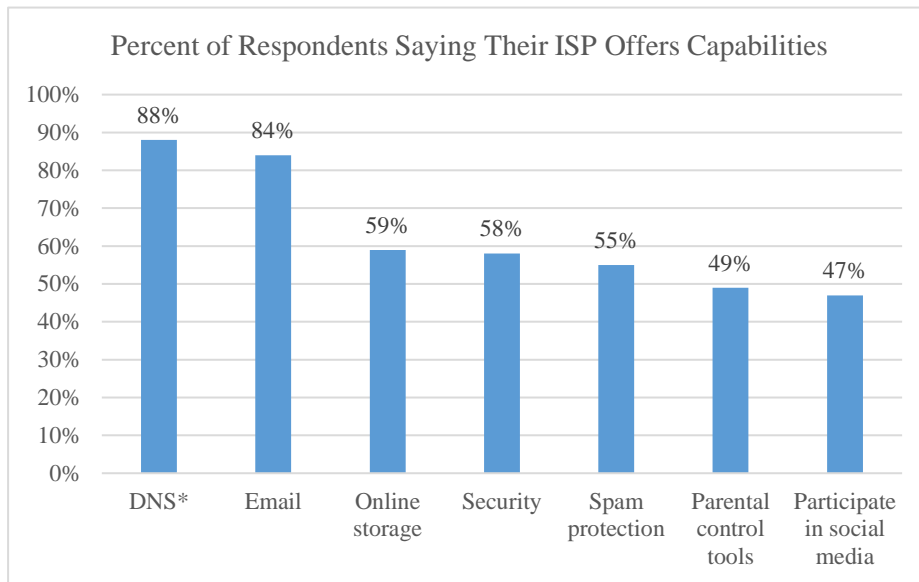
Not only do consumers highly value these capabilities, they expect and rely on their Internet Service Providers (ISPs) to offer them. When asked whether their ISPs provided functionality and capabilities that meet the definition of information service, consumers overwhelmingly said they do. For example, consumers said their ISPs offer many capabilities

²² See USTelecom Comments at 32 (explaining that there was significant evidence in the record “that broadband providers advertised their service based on speed before the turn of the millennium”).

that encompass and go beyond basic web browsing and email including DNS; online storage; security protection against viruses, malware, spyware, ransomware, and other online threats; parental control tools; and the ability to participate in social media.

Figure 2²³

Internet Users Aware of Information Service Capabilities



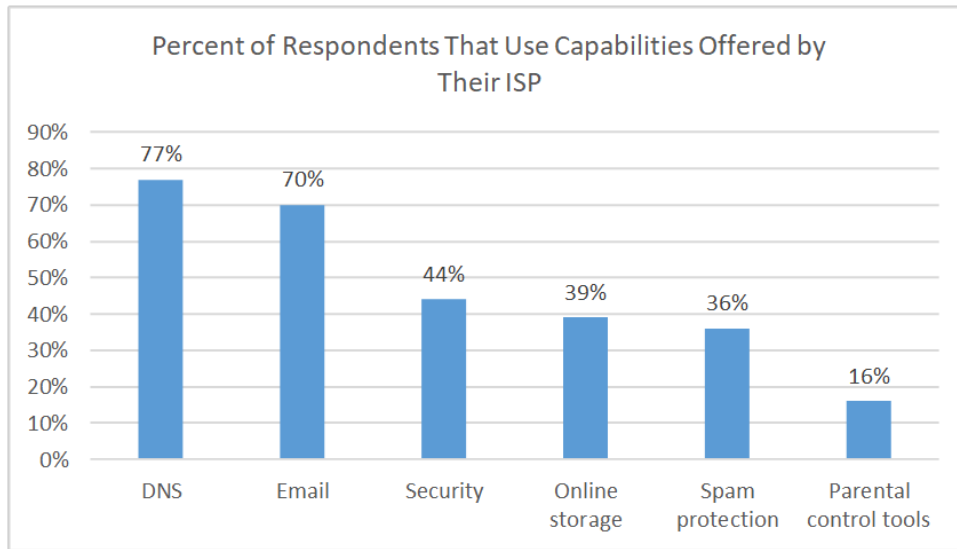
Source: Market Strategies, Inc. - USTelecom and NCTA Consumer Survey July 2017

Importantly, most consumers use these highly valued capabilities provided by their ISP, as opposed to (or in addition to) third-party offerings. This is important because of the Commission’s assertion that customers fundamentally understand their BIAS to be a means to access third-party content, applications, and services. The Consumer Survey results show otherwise.

²³ The response for DNS in Figure 2 is somewhat anomalous; given that all ISPs offer some level of DNS, we would have expected a number closer to 100%. This data point is nevertheless useful, however, because it shows a high number of consumers believe their ISP offers this essential information service capability.

Figure 3

Internet Users Using Information Service Capabilities



Source: Market Strategies, Inc. - USTelecom and NCTA Consumer Survey July 2017

These responses make clear that consumers rely on the BIAS offered by their ISP not only for access to the internet, but also for capabilities that allow them to fully utilize all that the internet offers. The ability to shop online and *process* payment by credit card while sitting on your couch; to *retrieve* NASA’s live cast of a solar eclipse and watch it from your smartphone; to upload and *make available* to Grandma an instant video of your child taking his first steps – these capabilities are all enabled by the BIAS offered by ISPs. BIAS offers these information service capabilities *in combination with* transmission service (*i.e.*, “information via telecommunications”), which is precisely how Congress defined information service. This Commission has authority to so find – again – and right the wrong of Title II reclassification.

III. BROADBAND COMPETITION CONTINUES TO GROW.

Policy debates are often rife with inaccuracies, misrepresentations, and misperceptions about broadband competition. Proponents of aggressive government intervention in the broadband marketplace frequently justify their preferred policies by citing selective data that inaccurately understate the extent of competition. Snapshots based on selective speed thresholds and technologies at a single point in time will understate the availability and competitiveness of broadband. A more accurate view takes into account all speeds and all technologies, as well as the dynamics of deployment and technological advancement over time. Basic competitive infrastructure from multiple providers is available in the vast majority of the country. At the same time, broadband technologies are constantly evolving and becoming increasingly powerful. With foundational competitive infrastructure deployed to offer broadband, increasing speed and quality is a matter of upgrading networks.

As of mid-2016, 96 percent of Americans had at least one wired broadband service available to them – 98 percent, if fixed wireless is included in the analysis. Moreover, there are competing wired broadband infrastructures in 84 percent of the country – 89 percent, if fixed wireless is included in the analysis.²⁴ Nearly all Americans could get broadband service via mobile wireless and satellite.²⁵

Moreover, at higher speeds, competitive availability is growing rapidly, demonstrating the dynamic nature of broadband competition. As of mid-2016, wired broadband service at 10 megabits per second download and 1 megabit per second upload was available to 93 percent of

²⁴ Patrick S. Brogan, USTelecom, U.S. Broadband Availability Mid-2016, at 1-4 (Aug. 25, 2017) (available at <https://www.ustelecom.org/sites/default/files/US%20Broadband%20Availability%20Mid-2016%20formatted.pdf>) (visited Aug. 30, 2017).

²⁵ *Id.* at 4, 15.

Americans; availability of wired broadband from two or more providers at 10 megabits per second download and 1 megabit per second upload was 65 percent, up from an estimated 55 percent four years earlier. As of mid-2016, wired broadband at 25 megabits per second download and 3 megabits per second upload was available to 89 percent of Americans; and availability of wired broadband from two or more providers at 25 megabits per second download and 3 megabits per second upload was 49 percent, up from 23 percent four years earlier.²⁶ As of mid-2016, fixed wireless service at any speed was available to 37 percent of Americans. When taking into account fixed wireless broadband service, as of mid-2016, the reported portion of Americans with three or more fixed broadband providers available to them at any speed was 41 percent, according to FCC data.²⁷

Historical data reveal that competition is generally driving up available broadband speeds. Data describing wired broadband availability by download speed are available as far back as 2010. The 2010 data did not include a fixed broadband category that aggregated fixed wireless and wired technologies, but they did include an aggregate wired broadband category. Wired broadband availability across all speed categories grew from 2010 to 2016. Availability of broadband at 25 mbps download grew from 49 percent in 2010 to 90 percent in 2016 while broadband at 50 mbps download showed similar growth. Availability of broadband at 100 mbps download grew from 10 percent in 2010 to 76 percent in 2016. Gigabit broadband, which did not exist in 2010 as a practical matter, was available to 9 percent of households in mid-2016, and it is growing.²⁸

²⁶ *Id.* at 2, 6.

²⁷ *Id.* at 4.

²⁸ *Id.* at 8.

Mobile broadband from multiple providers is also widely available throughout the U.S. The most current mobile broadband data available from the FCC are for year-end 2015. Mobile broadband using fourth generation (4G) Long Term Evolution (LTE) wireless technology, which was available to less than one percent of Americans as of mid-2010, was available to 99.5 percent of Americans as of year-end 2015.²⁹ At that time, 98 percent of Americans had a choice of two or more 4G LTE providers. Four or more 4G LTE mobile broadband options were available to 88 percent of Americans, 7 percent could choose among three 4G LTE providers, and 3 percent had a choice of two.³⁰ Some consumers are choosing mobile broadband only. Pew Internet (Pew) reported that 12 percent of adults surveyed in 2016 had smartphones but no fixed home broadband.³¹ According to Pew, some portion of those who have chosen only smart phones report having adequate fixed broadband alternatives.³²

The current and historical data demonstrate that consumers are reaping the benefits of this dynamic process of competition. There was no paucity of competition, or systemic market failure, that justified reclassifying broadband providers as utilities in 2015; and there is no such justification for retaining that classification today.

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ *Id.* at 5 (citing Pew Research Center, Internet & Technology, *Mobile Fact Sheet* (Jan. 12, 2017) (available at <http://www.pewinternet.org/fact-sheet/mobile/>) (visited Aug. 30, 2017)).

³² *Id.* (citing Aaron Smith, Pew Research Center, Internet & Technology, *US Smart Phone Use in 2015* (Apr. 1, 2015) (available at <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>) (visited Aug. 30, 2017)).

IV. THE INTERNET ASSOCIATION’S CRITICISMS OF USTELECOM ANALYSIS OF HARMS CAUSED BY TITLE II REGULATION ARE UNSUBSTANTIATED.

The Internet Association (IA) offers a series of empirical analyses in support of maintaining enforceable net neutrality rules.³³ The IA attempts to test certain claims of so-called “critics” of net neutrality rules, alleging that its analyses demonstrate there have been no harms as a result of various net neutrality rules to: (1) broadband capital investment; (2) network capacity (*i.e.*, congestion); (3) industry harms (profitability and valuation); and (4) innovation (capacity, speed, and patents). IA also attempts to document the benefits of net neutrality rules. As explained below, the Commission should reject these analyses as baseless and unsubstantiated.

A. IA’s Analysis of Harms Caused by Net Neutrality Rules is Fundamentally Flawed.

There are several fundamental flaws with the IA analysis. First, the IA analysis starts with the false premise that the broadband industry supports, and the FCC is considering, wholesale elimination of net neutrality regulation. As evidenced in the comments, that is simply not true. Industry has consistently noted the importance of maintaining an open and free internet and any necessary rules to protect it, but opposes the 2015 classification of broadband providers under Title II of the Communications Act as an overbroad means of achieving net neutrality. USTelecom supports FCC Chairman Pai’s proposal to return to the light-touch regulatory framework that served our nation so well during the Clinton Administration, the Bush Administration, and the first six years of the Obama Administration.

³³ See Christopher Hooton, Ph.D., Internet Association, *An Empirical Investigation of the Impacts of Net Neutrality* (Jul. 17, 2017) (available at <https://internetassociation.org/reports/an-empirical-investigation-of-the-impacts-of-net-neutrality/>) (visited Aug. 30, 2017) (IA Report).

Relatedly, the IA paper purports to provide evidence that there have been no harms after seven years of de jure or de facto net neutrality rules.³⁴ The implicit assumption that net neutrality protections first materialized seven years ago, with the FCC’s 2010 rules, is a false premise and provides an inaccurate baseline for analysis. Ever since the U.S. government commercialized the Internet in 1994, a combination of market forces, industry commitments, antitrust enforcement mechanisms, and light-touch regulatory requirements resulted in an open internet where consumers could access the lawful content of their choice when and how they wished. Unlike the “walled gardens” created by early online services, the broadband internet evolved from the start as an open platform. Even as the FCC was moving toward a uniform Title I framework, after its 2002 classification of cable broadband as an “information service,” its Chairman articulated expected Internet freedoms in early 2004.³⁵

In 2005, after the Supreme Court upheld the cable information services classification and wireline broadband was classified as an “information service,” the Commission adopted open internet principles.³⁶ Not until 2010 did an appeals court decide that the principles were unenforceable. In other words, the practice of net neutrality under light touch regulation evolved incrementally over decades. Therefore, variation around most discrete points in time would not necessarily be significant enough to show up in a time series analysis, even with external

³⁴ IA Report at 3.

³⁵ Remarks of Michael K. Powell Chairman, Federal Communications Commission at Silicon Flatirons: “Preserving Internet Freedom: Guiding Principles For The Industry” (Feb. 8, 2004) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

³⁶ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, et al, Policy Statement*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, 20 FCC Rcd 14986 (2005). See also *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al, Report and Order and Notice of Proposed Rulemaking, et al*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, 20 FCC Rcd 14853 (2005).

controls. With respect to the 2015 rules, Title II regulation is a sufficiently different approach that it might provide such an inflection. However, the available time series data, which amount to barely a year after Title II regulations were adopted, are unlikely to reveal the full negative impact. Moreover, some of the data that IA used for its analyses, *e.g.*, the OECD data consist of projections after 2013 and therefore do not reliably or accurately reflect actual market conditions for the projected periods.

B. The FCC’s Failure to Find a Market Failure Further Undercuts IA’s Assertions.

The other great conceptual flaw in the IA analysis involves burden of proof. IA starts from the baseline assumption that the FCC may not remove any net neutrality rules unless empirical proof of critics’ claims emerges. This gets the burden of proof backwards. The rules must be justified in the first instance based on a finding of a market failure; and should economic evidence emerge that there was no such market failure, or that no such market failure exists today, the rules are no longer justified. We agree with economists filing in this proceeding: the allegations of terminating monopoly and market externalities that the Commission put forth to justify its 2015 intervention do not stand up to economic scrutiny.³⁷ Section II above provides additional corroborating evidence from the most current FCC data about competition for broadband Internet access services. Therefore, USTelecom believes the market did not warrant reclassification in 2015 and does not warrant continued classification under Title II. As Chairman Pai has stated, “For decades before 2015, we had a free and open Internet. Indeed, the free and open Internet developed and flourished under light -touch regulation. We were not

³⁷ Declaration of Mark A. Israel, Allan L. Shampine & Thomas A. Stemwedel, WC Docket No. 17-108, at ¶¶ 16-19, 25-76 (filed Jul. 17, 2017).

living in some digital dystopia.”³⁸ USTelecom also believes that the case for Title II is even weaker today as market competition is increasing.³⁹

C. IA’s Impact Analysis Fails to Account For Relevant Factors.

USTelecom agrees with IA that the appropriate approach to ascertaining the impact of a particular policy is to analyze relevant data against a counterfactual, controlling for other relevant factors. At its best, IA, using its controls, finds no discernible impact of net neutrality rules on broadband providers’ capital investment. However, there are several technical flaws with the IA analysis. For the reasons discussed above, USTelecom believes IA falls short of making the empirical case, even on investment where it factored in external controls. IA itself acknowledges the limitations of its investment analysis and attempts to supplement it with a mosaic of additional metrics purporting to show that net neutrality rules have not negatively affected factors such as network capacity, company earnings and valuation, and innovation. The problem is that for all of the metrics other than investment, IA does not use controls or counterfactuals. Therefore, it does not account for potential alternative factors explaining the various metrics it cites, nor does it answer the question of how these metrics might have been different under alternative regulatory regimes, even on the assumption that sufficient time passed since the imposition of Title II to conclusively identify market effects.

D. Title II Restrictions Diminish the Benefits of the Open Internet Rules.

There are several issues surrounding the alleged benefits of open internet rules promulgated under Title II. First, IA points to the growth of “edge” services and investments. In

³⁸ See Remarks of Ajit Pai, FCC Chairman, “The Future of Internet Freedom” (Apr. 16, 2017), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0427/DOC-344590A1.pdf (Chairman Pai Newseum Speech).

³⁹ See *supra* section II.

the short-term, such edge growth is entirely consistent with USTelecom’s and others’ critiques of the “virtuous cycle” argument put forth in the FCC’s 2015 Title II order. The FCC’s theory was that stimulating demand from edge providers leads to a rising cycle for all, and increased demand from the edge yields profits for broadband providers. However, in reality Title II sets up a cycle that skews the incentives toward one side. In the short term, low prices or, in some cases, a zero price for edge providers’ access and interconnection would inflate incentives to invest in traffic-generating content. At the same time, Title II carries risks and uncertainties for broadband access providers – including the potential for “just and reasonable” pricing enforcement and the FCC’s open-ended general Internet conduct standard – that exert negative pressures on broadband providers’ incentives to expand investment in capacity. In other words, over time, Title II could slow edge investment and innovation as ISP capacity growth slowed – relative to what it would have been under different regulatory circumstances.

Finally, IA attributes all consumer and other benefits arising from net neutrality to particular rules. As discussed in detail above, net neutrality in practice arose incrementally over decades as a result of many factors, so one cannot attribute those benefits to discrete “rules,” whether the rules adopted in 2010 or, even less so, the Title II rules of 2015.⁴⁰

V. THE COMMISSION SHOULD MAKE CLEAR THAT BROADBAND INTERNET ACCESS SERVICE IS AN INTERSTATE SERVICE.

If the Commission classifies broadband Internet access service as an information service, as it should, it should also make clear that, contrary to some suggestions,⁴¹ states and localities cannot impose common-carrier-like regulations, including economic and other regulations, on

⁴⁰ See Chairman Pai Newseum Speech.

⁴¹ See, e.g., Letter from James Bradford Ramsay, General Counsel, Nat’l Ass’n of Regulatory Util. Comm’rs, to Marlene H. Dortch, Secretary, FCC, at 2 (Feb. 19, 2015).

broadband providers. As the Commission has repeatedly held, broadband is jurisdictionally interstate. Accordingly, the Commission’s chosen regulatory framework preempts state regulations that would conflict with federal regulatory objectives. Moreover, as the Commission itself has also noted, state regulations that burden internet services likely run afoul of the Commerce Clause.

A. BIAS is Jurisdictionally Interstate.

The Commission has “traditionally used” an “end-to-end analysis” that determines whether a communication is interstate (and within its exclusive jurisdiction for purposes of § 2 of the Communications Act) or intrastate (and within the jurisdiction reserved to the states) based on the terminal points of the communication.⁴² Courts and the Commission have acknowledged that some services allow for both interstate and intrastate communications and are thus “jurisdictionally-mixed.”⁴³ As the Commission has long held, internet access services are among these jurisdictionally mixed services:

An Internet user typically communicates with more than one destination point . . . and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet.⁴⁴

⁴² *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (“Every court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used.”).

⁴³ *AT&T Corp. v. Core Commc’ns, Inc.*, 806 F.3d 715, 727 (3d Cir. 2015).

⁴⁴ Declaratory Ruling and Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Comp. for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 18 (1999) (discussing dial-up Internet access).

The Commission expressly determined in 2002 that broadband internet access is a *jurisdictionally-mixed* service, and accordingly treated it as a *jurisdictionally interstate* information service.⁴⁵ The Commission has reiterated that conclusion multiple times since then.⁴⁶ Indeed, even in the *2015 Open Internet Order*, the Commission reaffirmed that the allegedly separate telecommunications component of broadband service was itself jurisdictionally interstate because its interstate and intrastate components are mixed and practically inseparable.⁴⁷

Returning broadband to its previously long-established (and correct) classification as a single, integrated information service does not change the jurisdictional analysis in any way. On the contrary, as noted above, the Commission properly determined long ago that broadband was both an integrated information service and jurisdictionally interstate. Treating the telecommunications component of broadband access as an inseparable part of a single “offering” that is an information service does not change the fact that broadband may still be used for both intrastate and interstate communications, and it is impractical or impossible to separate those two

⁴⁵ See Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, ¶ 59 (2002) (“[A]lthough such traffic is both interstate and intrastate in nature, it is properly classified as interstate and it falls under the Commission’s . . . jurisdiction.”) (internal quotation marks omitted). The Supreme Court agreed that “the Commission has jurisdiction to impose additional regulatory obligations [on information services] under its Title I ancillary jurisdiction to regulate interstate and foreign communications.” *Brand X*, 545 U.S. at 976.

⁴⁶ See e.g., Report and Order, *Preserving the Open Internet Broadband Indus. Practices*, 25 FCC Rcd 17905, ¶¶ 9, 115 (2010); Memorandum Opinion and Order, *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, ¶ 15 (2008).

⁴⁷ See Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 431 (2015) (“*2015 Open Internet Order*”).

portions of the service.⁴⁸ Thus, the Commission should make clear that reclassification does not change its previous determination and that broadband internet access services are jurisdictionally interstate.

B. Conflicting or Inconsistent State Regulations Are Subject to Preemption.

Under established principles, state requirements are preempted where: “(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.”⁴⁹ Those conditions are readily satisfied here.

First, as discussed, the architecture of the internet makes it impossible to separate the interstate and intrastate aspects of broadband internet access. Thus, one could not plausibly offer a separate intrastate broadband internet access service.

Second, it is equally clear that state attempts to impose common-carrier-like economic and other regulation would undermine federal policy. In particular, preemption applies when the Commission has affirmatively enacted a light-touch regulatory scheme that furthers a federal policy of regulation by market forces, and state regulation would be contrary to that goal.⁵⁰ Courts have held that the Commission’s removing or declining to impose regulations preempts

⁴⁸ Indeed, the Commission can determine its jurisdiction (and the preemptive force of its regulations) without determining whether a given service should be classified as an information service or a telecommunications service. See *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 577-78 (8th Cir. 2007) (approving the FCC’s decision to decline classifying voice over Internet protocol (“VoIP”) because the FCC has jurisdiction and can preempt state regulations regardless).

⁴⁹ *Id.* at 578.

⁵⁰ See *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982) (“Federal regulation need not be heavy-handed in order to preempt state regulation.”) (quoting *New York Comm’n on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982)).

state imposition of those or similar regulations.⁵¹ As the Eighth Circuit put it when it affirmed the Commission’s preemption of intrusive state regulation of VoIP services in contravention of federal policy:

With respect to the conflicts which would develop if [VoIP] were classified as an information service, the FCC referred to its long-standing national policy of nonregulation of information services. The FCC has promoted a market-oriented policy allowing providers of information services to burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements. Thus, any state regulation of an information service conflicts with the federal policy of nonregulation.⁵²

The same analysis applies here. By classifying broadband access as an information service, the Commission would be continuing its long-standing policy of minimal regulation of broadband providers. State regulation would impede the Commission’s chosen approach to “promoting competition in the telecommunications market”⁵³ through light-touch regulation and thus should be preempted.

To avoid confusion and wasteful litigation and to ensure that its regulation has preemptive effect, the Commission should clearly indicate its intent to preempt, especially in this

⁵¹ See, e.g., *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm’n*, 669 F.3d 704, 707-08 (6th Cir. 2012) (FCC’s decision not to require incumbent local exchange carriers (“ILECs”) to lease out certain network elements at regulated rates, preempted state commission from requiring them to do so); *Verizon New England, Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 12 (1st Cir. 2007) (same); see also *BellSouth Telecommunications*, 669 F.3d at 708-12 (FCC’s decision not to require unbundling of high-frequency and low-frequency portions of loop preempted the state commission requirement to unbundle); *Pac. Bell Tel. Co. v. Pub. Utils. Comm’n of California*, No. C 03-01850 SI, 2005 WL 818375, at *3-5 (N.D. Cal. Apr. 5, 2005) (same).

⁵² *Minnesota Public Utilities*, 483 F.3d at 580 (internal quotation marks omitted); see also *id.* (“Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.”).

⁵³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(b), 110 Stat. 56 (codified as amended at 47 U.S.C. § 1302(b)).

context.⁵⁴ Just as it did in the *2015 Open Internet Order*, the Commission should expressly state that it intends to “exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent” with its regulatory scheme and with the federal policy of nonregulation of information services.⁵⁵

C. States May Not Impose Unreasonable Burdens on Interstate Commerce.

Commerce Clause Implications. Any such state regulation would also be contrary to bedrock constitutional principles. Under the “negative” or “dormant” principles of the Commerce Clause, states cannot regulate entirely out-of-state commerce and cannot discriminate against interstate commerce or “unduly burden” interstate commerce with facially neutral regulations.⁵⁶ With respect to this last requirement, a state regulation is invalid if “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁵⁷

Because internet traffic is overwhelmingly interstate, any substantial regulation by states (such as imposing common-carrier-like economic requirements or state-specific privacy obligations) is likely to cause an undue burden on interstate commerce, relative to the minor

⁵⁴ *Glob. Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006) (“The requirement of a clear indication of the agency’s intent to preempt is especially important in the context of the [Telecommunications Act of 1996].”).

⁵⁵ *Open Internet Order* ¶ 433.

⁵⁶ See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287-88 (1997); *Healy v. Beer Inst.*, 491 U.S. 324, 330, 336-37 (1989).

⁵⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

effect on local commerce.⁵⁸ Depending on the precise regulation, it might also regulate purely extraterritorial commerce, and be separately invalid for that reason.⁵⁹

Further, there are some “phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”⁶⁰ Any state regulation in these areas is, barring the express authorization of Congress, prohibited by the Commerce Clause. As the Commission itself has recognized, the Internet “is likely the type of commerce that is of such a unique nature that it demand[s] cohesive national treatment under the Commerce Clause.”⁶¹ The need for national uniformity means that state common-carrier-like economic regulation of broadband access would likely be invalid for this reason as well, and provides further reason for the Commission to expressly state its intention to preempt state regulation that conflicts with a free and open market for broadband access.

⁵⁸ See, e.g., *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (“Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without ‘project[ing] its legislation into other States.’”) (quoting *Healy*, 491 U.S. at 334).

⁵⁹ The Commission suggested that this was likely the case for attempted state regulation of VoIP as an intrastate telephone service, given the difficulties in complying with the state regulations for only a subset of users. See Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Utils. Comm’n*, 19 FCC Rcd 22404, ¶ 39 (2004). Cf. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239 (4th Cir. 2004) (striking down state regulation of Internet materials under the dormant Commerce Clause, as the statute likely regulated purely extraterritorial commerce given that there is “no effective way to limit access to online materials by geographic location”).

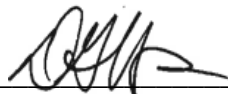
⁶⁰ *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

⁶¹ *Vonage Holdings* ¶ 41 (internal quotation marks omitted); see also *American Booksellers Foundation*, 342 F.3d at 104 (“We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand[] a single uniform rule.”) (internal quotation marks omitted); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (“[C]ertain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium.”) (citation omitted).

VI. CONCLUSION.

In the long-term, the most durable approach for restoring stability to the internet ecosystem and maintaining internet freedom is legislation that would be immune from periodic changes in the political landscape. Short of that, the Supreme Court in *Brand X* confirmed more than a decade ago that the FCC has authority to classify BIAS as an information service, stating that it is “at least reasonable” to think of DNS and other BIAS capabilities as part of an information service offered by BIAS providers.⁶²

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⁶² *Brand X*, 545 U.S. at 999.