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COMMENTS OF ITIF

Before the

Federal Communications Commission

Washington, D.C.

In the Matter of:	)	
Safeguarding and Securing the Open Internet	)	WC Docket No. 23-320

December 14, 2023

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INTRODUCTION AND SUMMARY

As the Federal Communications Commission (FCC) delves into its consideration of broadband regulation, it is more important than ever that it choose the classification best matched to promoting the expansion of the benefits of broadband to all. ITIF appreciates the opportunity to comment on the right FCC approach to a service as essential as broadband.[1] Precisely because it is essential, the Commission should not impose Title II regulation on broadband.

While Congress should codify consensus net neutrality principles in statute, until it does, the current Title I framework, combined with targeted initiatives to address specific areas of concern, provides a more prudent path forward. Title II would have harmful effects on consumers and would be unlawful. The Commission should reject the proposed reclassification because it is a solution in search of a problem.

A TITLE II RECLASSIFICATION IS UNNECESSARY AND POTENTIALLY HARMFUL TO THE GOALS OF THE DIGITAL AGE

A basic prerequisite for extensive regulation, such as that contemplated by the NPRM, is identification of a specific problem that the proposed regulation would solve. Though there are areas for improvement, U.S. broadband networks are not in need of a regulatory overhaul. By and large, they are on the path to success. The pressure test of the pandemic exemplified this fact. As millions of Americans shifted to remote work and online learning, we might have expected the Internet to falter under the sudden avalanche of new traffic. But American broadband networks held up remarkably well.[2] Despite an unprecedented surge in data consumption, providers adapted, investing billions of dollars to upgrade their infrastructure and increase capacity.[3] This flexibility is a hallmark of a competitive industry, where providers strive to meet the needs of consumers efficiently and quickly.

Despite this background, the FCC undergirds its proposal with claims that imposing Title II regulations on providers now is necessary to ensure equitable, widespread deployment and socially beneficial behavior by ISPs. But where there are areas for improvement in the U.S. broadband marketplace, Title II regulations would likely hinder, not hasten them.

The Commission cites the necessity of broadband access as a reason for Title II classification and seeks comment on that view. The critical importance of broadband is not in itself an argument for blanket heavy

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[1] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, https://itif.org/about.

[2] "2020 Pandemic Network Performance: A BROADBAND INTERNET TECHNICAL ADVISORY GROUP TECHNICAL WORKING GROUP REPORT" (BITAG working group report, April 2021), https://www.bitag.org/documents/bitag_report.pdf.

[3] "2022 Broadband Capex Report" USTelecom: The Broadband Association, September 2023, https://ustelecom.org/research/2022-broadband-capex/.

regulations. Indeed, the growth and development of broadband uses, including public health and safety applications, has flourished under a Title I regime. In short, U.S. broadband networks are already delivering the benefits the Commission suggests are only possible under Title II.

Broadband is also widely available throughout the country with deployment and competition increasing all the time. 90 percent of the population is covered by wired or licensed fixed wireless networks reaching speeds of 100 Mbps down and 20 Mbps up.[4] Coverage shrinks if you exclude older technologies like DSL and expands to near ubiquity once nascent satellite service is thrown into the mix. As technology shifts from old to new, consumers' options are expanding. Intermodal competition is stronger than it was at the time of the 2015 Open Internet Order with the emergence of faster 5G home and low-earth-orbit satellites. U.S. broadband speeds are regularly in the global top tiers.[5] U.S. infrastructure has been and remains strong when compared to many of its global peers, reflecting the abundance of private dollars invested by ISPs over the years.[6] It is these developments, enabled by a light-touch regulatory framework, that enable the benefits that broadband delivers. There is no rational basis for viewing these successes as a reason to abandon the regulatory regime that made them possible.

International comparisons further emphasize the detrimental impacts we should expect from Title II-style regulation. Much of Europe, which has regulations akin to those envisioned by the NPRM, lags behind the U.S. in many deployment metrics.[7] Its decision to pursue net neutrality created imbalances that led in part to the misguided idea of imposing Sending Party Pays mandates on providers.[8] European networks subject to utility-style regulations also performed worse across the board than did U.S. companies under the enormous strain of COVID-19 generated traffic, largely because of the latter's historically superior levels of investment.[9]

Title II directly threatens that investment and, therefore, the consumers who would benefit from robust broadband networks. Determining the effect of Title II on broadband investment is complicated but not impossible. While advocates on both sides of this policy debate sometimes incorrectly compare absolute numbers to draw conclusions about investment, econometric tools allow for proper counterfactual analysis.[10] That is, they determine what investment would have been but for the regulatory overhang of Title II. The analysis that used the most reliable data and statistical methods determined that the threat of Title II

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[4] Federal Communications Commission (FCC), "FCC National Broadband Map," latest data as of June 2023, https://broadbandmap.fcc.gov/area-summary/fixed.

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

[6] Jessica Dine and Joe Kane, "The State of US Broadband in 2022: Reassessing the Whole Picture (ITIF, December 2022), https://itif.org/publications/2022/12/05/state-of-us-broadband-in-2022-reassessing-the-whole-picture/.

[7] *2022 Communications Marketplace Report, Attachment G: International Broadband Data Report* (FCC, Washington, D.C.: December 2022), Docket No. 22-203, https://docs.fcc.gov/public/attachments/FCC-22-103A5.pdf.

[8] Joe Kane and Jessica Dine, "Consumers Are the Ones Who End Up Paying for Sending-Party-Pays Mandates" (ITIF, November 2022), https://itif.org/publications/2022/11/07/consumers-are-the-ones-who-end-up-paying-for-sending-party-pays-mandates/.

[9] Doug Brake, "Lessons From the Pandemic: Broadband Policy After COVID-19 "(ITIF, July 2020), https://itif.org/publications/2020/07/13/lessons-pandemic-broadband-policy-after-covid-19/.

[10] Joe Kane, "Net neutrality's effect on investment: It's complicated" (R Street, December 2017), https://www.rstreet.org/commentary/net-neutralitys-effect-on-investment-its-complicated/.

regulations had a significant negative effect on private broadband investment.[11] Private infrastructure investment has been the main reason the United States deployed broadband so well, and these investments in capacity reduce the likelihood of congestion that would necessitate the very prioritization decisions that the Commission fears. It is, therefore, illogical to sacrifice that investment to regulate problems the regulation would, in part, cause.

Of course, U.S. broadband is not perfect, and federal policy continues to play an important role in closing the remaining digital divide. But when Title II was used to ensure universal telephone service, it was governing a government-created monopoly through regulations that fit less clearly today over the more competitive broadband marketplace. While maintaining appropriate oversight of networks should go hand in hand with expanding their reach, the Commission should be wary of oversight that is a mismatch for the network and market being regulated. Such regulations will fail to capitalize on the benefits of the existing regime and stymy efforts to solve remaining problems with them. For example, where gaps in broadband deployment remain, they are set to be closed with billions more in forthcoming federal funds.[12] The success of these funds, however, depends largely on the voluntary participation of private ISPs with the institutional resources and expertise to deploy networks. A new and more onerous regulatory regime would reduce the incentive for ISPs to participate and reduce the scope of participation for those who are not dissuaded. Thus, a Title II classification would work counter to federal broadband deployment policy elsewhere.

Furthermore, the most significant remaining barrier for broadband policy is not deployment but adoption. U.S. broadband adoption rates lag, with nonadopters citing general unwillingness or inability to subscribe stemming from multiple barriers.[13] Importantly, the vast majority of the offline population does not remain so because of a lack of infrastructure to their home.[14] Though building out networks to every corner of the country is a clear prerequisite to universal adoption, it is less clear how Title II will help in that regard. At best, it is a distraction from solving this issue that should be front and center in the Commission's mind.

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[11] George S. Ford, "Net Neutrality, Reclassification and Investment: A Counterfactual Analysis," PERSPECTIVES: PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES (2017): 17-02, https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf; Another analysis comes to a different conclusion but has methodological and data-quality flaws. *Compare* Christopher Alex Hooton "Testing the Economics of the Net Neutrality Debate," Telecommunications Policy (2019) https://s3.documentcloud.org/documents/6430695/Net-Neutrality.pdf *with* George S. Ford "Statistical Negligence in Title II Impact Analysis," PERSPECTIVES: PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES (2019): 19-0, https://phoenix-center.org/perspectives/Perspective19-05Final.pdf.

[12] BroadbandUSA: National Telecommunications and Information Administration, "Grants Overview," accessed December 2023, https://broadbandusa.ntia.doc.gov/resources/grant-programs.

[13] Jessica Dine, "The Digital Inclusion Outlook: What It Looks Like and Where It's Lacking" (ITIF, May 2023), https://itif.org/publications/2023/05/01/the-digital-inclusion-outlook-what-it-looks-like-and-where-its-lacking/.

[14] Ibid.

Title II Is Not Necessary to Close the Digital Divide

While the FCC is correct to say that reclassification would put its Universal Service Fund (USF) support on stronger footing, such USF funds no longer play a pivotal role in closing the remainder of the digital divide.[15] Though these programs have served a critical purpose in connecting rural America, with the onset of cheaper technologies—and as remaining uncovered households become increasingly expensive to connect—USF is seeing skyrocketing contribution factors and dwindling returns.[16] BEAD and its associated programs should provide enough funds to bring good service to every location that lacks it, and will ideally render many other deployment programs obsolete once and for all. ACP is available to every consumer eligible for Lifeline and offers a larger dollar amount. Currently, ISPs offer plans that are fully covered by the benefit, and we should expect that to continue if ACP funding is replenished. Therefore, expanding USF support for broadband is not a compelling reason to reclassify BIAS under Title II.

In fact, given that the majority of nonadopters today are so despite the availability of service—frequently explicitly and often implicitly at least partially because of the price of that service—perhaps the single most important current federal broadband policy is ACP. ACP is already facing congressional inaction and partisan opposition, and adding another partisan policy debate to the mix with a Title II reclassification would only strengthen the impasse and reduce the likelihood of consensus.

Separately, though the Commission is correct that friction over obtaining access to pole attachments may delay efforts to complete infrastructure buildout, it is not necessarily true that reclassification—and therefore the application of section 224 to broadband-only providers—is the only way to ensure access to these poles, nor that the benefits of such streamlined access compensate for the harms of the overall classification.[17] Section 224 provides the Commission the authority to regulate and streamline telecommunications and cable providers' access to utility-owned poles, but that authority is already limited where poles are owned by other entities or states have enacted their own regulations.[18] Further, since the majority of ISPs already provide concurrent telecommunications or cable service, they are already governed by regulations protecting their access to pole attachments—regulations that continue to apply when those providers use those same poles for broadband rather than telecommunications or cable service.[19] It is true that streamlining administrative processes like pole attachment rights will be important to using federal funding quickly and effectively. If the FCC wants to address remaining friction in the pole attachment process and similar potential roadblocks, it

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[15] FCC, "In the Matter of Safeguarding and Securing the Open Internet," Notice of Proposed Rulemaking, WC Docket No. 23-320, issued on October 20, 2023, para. 49, https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf (NPRM).

[16] Joe Kane, "Rural Broadband Infrastructure Should Fund People Wherever They Are," *Broadband Breakfast*, August 26, 2022, https://broadbandbreakfast.com/2022/08/joe-kane-rural-broadband-infrastructure-should-fund-people-wherever-they-are/.

[17] NPRM at para. 47.

[18] FCC, "In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, and Lifeline and Link Up Reform and Modernization," Order on Remand, Docket Nos: 17-108, 17-287, 11-42, issued on October 29, 2020, paras. 69-70, https://docs.fcc.gov/public/attachments/FCC-20-151A1.pdf.

[19] *Ibid.* paras. 71-73.

can and should enforce this through other measures, such as by requesting that NTIA mandate states streamline pole attachment processes as a condition of receiving the BEAD funds.

Congress, Not Title II Can Provide Regulatory Certainty

Today's FCC is uniquely situated to steward the final closing of the digital divide that has plagued us for decades and threatens to perpetuate inequities into the future if left unaddressed. Very broadly, it must do this through two approaches: By enabling the build out of infrastructure to every corner of the country and by targeting efforts to increase adoption in areas where access rates lag. As the former is accomplished, the latter becomes more complex and requires ever more targeted approaches. Closing the divide also requires a whole-of-market approach—with everybody, from community anchor institutions to local governments to ISPs, working collaboratively. Neither of these efforts will be aided by reclassifying broadband under Title II. None of this is to say that broadband networks do not require any oversight. But the mechanism through which that oversight is wielded matters. There is little evidence to suggest that the twin goals of ensuring digital access and equity can be best ensured by imposing the antiquated legal framework of a previous era onto modern-day technology.

The FCC is correct that there is nothing to be gained from a uniform patchwork of laws across state lines: as the 2017 Restoring Internet Freedom (RIF) Order argued and the current FCC broadly concurs, "broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[20] In fact, a lack of consistent federal standards can impose huge regulatory costs and uncertainty onto providers looking to build out their networks, particularly small ones, and particularly those venturing into more innovative and therefore potentially regulatorily fraught areas. Similarly, there are enormous drawbacks to a long-term game of regulatory ping-pong that sees broadband's classification change every time the administration changes hands. Lack of consistency, uniformity, and certainty render consumers uncertain, deter innovation, and will depress investment down the road. All of this, however, is an argument for legislative action, not unilateral continuation of regulatory ping pong at the FCC.

Such legislation could be purpose-built to enshrine a broadband-specific title of the Communications Act. Rather than being classified under Title II or Title I, Congress should create a new broadband Title to the Communications Act insertion of a separate statute into the 1996 Act, which should be specifically designed to facilitate rather than hamper the growth of the technologically dynamic broadband marketplace while holding ISPs to basic net neutrality standards on which there is broad agreement. There has been ample work on the contours of such legislation, most notably the framework conceived of by a cross-partisan working group convened by the Internet Society.[21] The freedom to innovate can coexist with effective FCC oversight as long as the latter takes a targeted approach to specified harms as they arise, rather than presuming innovations harmful at the outset.

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[20] FCC, "In the Matter of Restoring Internet Freedom," Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, issued on January 4, 2018, para. 194, https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf (RIF).

[21] "Net Neutrality Legislation: A Framework for Consensus" Internet Society, May 29, 2019, https://www.internetsociety.org/resources/doc/2019/net-neutrality-legislation-a-framework-for-consensus/.

THE PROPOSED "BRIGHT-LINE RULES" ARE TOO BROAD AND WOULD HARM CONSUMERS

Even if the Commission's proposed rules could survive a legal challenge, it should decline to adopt them because they are not in the public interest. Consumers would be harmed by bright-line rules that broadly presume network management practices to be unlawful absent evidence of harm.

Harmful violations of basic net neutrality principles are exceedingly rare, and there is no evidence of them since the 2018 reapplication of the Title I regime the FCC now looks to unwind. Much of the heavy lifting of the bright line requirements is already functionally in practice. Many major ISPs have publicly foresworn blocking, throttling, or paid prioritization.[22] The RIF's transparency requirements ensure that these practices cannot happen in secret.[23] Therefore, to the extent a flat ban might deter the few harmful attempts that might get through, its benefits would likely be counterbalanced by the broader chilling effects of Title II.

In the case of paid prioritization there would be significant harm to presuming conduct unlawful. The 2017 RIF order found that banning all paid prioritization chilled general innovation and network experimentation.[24] These harms disproportionately fall on potential new entrants who are most likely to want to differentiate their service, perhaps by "zero-rating" popular services, but who are also least able to afford the cost of lawyers and consultations.[25] It might also preclude practices that could have increased equity. For example, an agreement between an ISP and a content provider to guarantee a certain service quality for an application across varying network speeds would likely benefit subscribers to lower speeds most of all. ISPs have an incentive to provide the type of service consumers value, but insofar as limited competition in some areas of the country might prevent consumers from switching providers if they are unhappy with their ISP's practices, the Commission should have expected those risks to have been greatest when competition was lowest. Since competition is increasing over time as more technologies emerge, the fact that ISPs have so far not required bright-line prohibitions to keep them from engaging in specifically harmful behaviors suggests that they are no more likely to in the future. Therefore, in the event that the Commission proceeds with its reclassification proposal, it should adopt a rule that presumptively allows prioritization when it does not involve a BIAS provider prioritizing content it owns at the expense of competitors' content. The Commission could still address versions of non-self-preferencing paid prioritization as they arise, but they should not kill all prioritization in the cradle just to prevent speculative harms.

THE VAGUE "GENERAL CONDUCT RULE" WOULD CHILL INNOVATION

Even worse than the bright-line rules, the Commission's proposed General Conduct Rule would operate as a catchall authority to find BIAS providers liable for conduct that they could not have known was unlawful. Faced with such risk, providers seeking to follow the rules will only timidly approach innovative business

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[22] RIF at para. 244. See, e.g., "Net Neutrality; a path forward," *Verizon*, (March 21, 2016) https://www.verizon.com/about/news/net-neutrality-path-forward "Net Neutrality," *Comcast,* https://corporate.comcast.com/openinternet/open-net-neutrality; Randall Stephenson, "Consumers Need an Internet Bill of Rights," *AT&T* (January 23, 2018), https://about.att.com/story/consumers_need_an_internet_bill_of_rights.html

[23] RIF at para. 240.

[24] *Ibid.* para. 254.

[25] *Ibid.* para. 257.

models or network management practices, even if they would unambiguously benefit consumers, because the risk that the Commission will disallow them, or only allow them after a long and expensive procedural delay, erodes their benefits. Rather than aligning incentives so that ISPs can benefit from giving consumers what they want, the general conduct rule would have the FCC play the middleman applying free-floating, and potentially ideologically driven, rules, with providers left to guess whether the risks of liability and costs of defending their practices are worth it. Even if the Commission eventually allows practices, the time and expense dedicated to FCC review will be enough to forestall innovations that are already an economic risk to the party seeking to implement them. Such a system is a recipe for stagnation, not the innovation that will enable new generations of broadband-dependent applications.

THE PURPORTED NATIONAL SECURITY JUSTIFICATIONS FOR RECLASSIFICATION ARE NOT CREDIBLE

The NPRM's invocation of national security concerns to support reclassification is little more than a grasp at a policy trump card. The Commission avers that "authority under applicable Title II provisions, reinforced by the Commission's existing authority, would enhance the Commission's efforts to protect the national defense."[26] Yet it does not provide a coherent principle for why it needs the authority of Title II as opposed to its existing authority to safeguard national security. The justification cannot be that more authority is, per se, necessary for national security because that would be true of any power the Commission sought to grab. Rather, the Commission must evaluate the benefits of national security that would actually result from reclassification, not just the hypothetical situations in which greater authority would come in handy. It must then compare these benefits to the costs of carrying out the new national security role and the aforementioned detrimental consequences of a Title II overhang on U.S. broadband networks. The net marginal benefit of this entire analysis must be positive for the Commission to rationally use it as a basis for a new regulatory classification. The importance of national security in the abstract, like the importance of broadband itself, does not make the case for any particular regulatory regime.

A TITLE II RECLASSIFICATION WOULD BE UNLAWFUL

As discussed above Title II is not necessary for a thriving broadband market that develops to the benefit of consumers. This fact not only makes the NPRM's proposal bad policy, it also puts it on shaky legal footing under 5 U.S.C. § 706 and under the Major Questions Doctrine.

The Proposed Rules Would Be Arbitrary and Capricious

Under *FCC v. Fox Television Stations, Inc.* (*Fox I*), when an agency seeks to change policy based on factual findings that contradict those that underly the current policy, it is arbitrary and capricious not to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[27] As the Court explained, this "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[28] Here, the Commission proposes to change policy from the Title I classification under the RIF Order to a Title II classification based on unfounded factual claims about the

[26] NPRM at para. 26.

[27] *FCC v. Fox Television Stations, Inc.* 129 S.Ct. 1800 (2009).

[28] *Ibid.* at 1811.

state of the broadband marketplace and the relationship of its proposal to the outcomes it seeks. For example, the RIF Order found that competition was sufficient to protect free expression, and competition has only become more intense since then. Therefore, the Commission will be unable to make the required "more detailed justification" for the change, and an Order classifying BIAS under Title II would be arbitrary and capricious.

The Proposed Reclassification Would Violate the Major-Questions Doctrine

Even if a reclassification survives under the *Fox I* standard, it would still be subject to, and would likely fail, a challenge under the major-questions doctrine. The first prong of that doctrine considers whether the agency action is one of "economic and political significance."[29] There can be little doubt that a Title II classification of BIAS is an issue of economic and political significance. The Commission itself spells out the essential nature of the Internet and how its attempt to more heavily regulate it stems precisely from its judgment that it is the most important communications network in history.[30] Moreover, the NPRM's foray into national security justifications only strengthens the case for application of the major-questions doctrine: if our national security really does depend on the statutory classification of BIAS as a Title II service, that question becomes even more significant than merely tweaking market dynamics.

Second, the court will consider whether Congress has unambiguously delegated to the agency authority over a decision of such significance. The NPRM suggests that the D.C. Circuit's opinion in *United States Telecom Ass'n v. FCC* (*USTA*) means that the Commission's potential Title II classification is unambiguously within its discretion such that the major-questions doctrine does not even apply.[31] But even if that were true at the time (which the Supreme Court declined to decide), the doctrine has become more stringent since then. Under *West Virginia v. EPA*, the Court will not unhesitatingly defer even to plausible readings of a statute when the agency asserts authority over issues of economic and political significance.[32] Instead, the Court will look for "clear congressional authorization" for the agency to answer such major questions, and, in the absence of such authorization, presume that Congress did not leave the decision to the agency.[33]

This presumption is the opposite of that exercised by the D.C. Circuit in *USTA*. There, the court relied on the fact that Congress had not "clearly precluded" a Title II reclassification and resolved the "statutory ambiguity" in favor of the Commission.[34] Under *West Virginia v. EPA*, those same facts will produce the opposite result: The Court now looks for clear authorization to answer major questions, not just an absence of clear preclusion, and it will not treat statutory ambiguity as the required authorization.

Therefore, any Commission reliance on *USTA* to rubber stamp rules similar to the 2015 OIO is misplaced; the Commission lacks the authority to make such rules today.

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[29] *West Virginia v. EPA* 597 slip op. at 17, 597 U.S. ___ (2022).

[30] NPRM at paras. 1-3.

[31] NPRM at para. 81.

[32] *West Virginia v. EPA* slip op. at 17.

[33] *Ibid*. slip op. at 19.

[34] *United States Telecom Ass'n v. FCC* 825 F. 3d 674, 704-05 (D.C. Cir. 2016).

The Definition of BIAS Makes the Rules Impractical

The NPRM readily admits that it may not apply its rules to broadband services that do not meet the definition of BIAS.[35] But since that definition entails providing equal access to all or substantially all Internet endpoints, the rules become essentially voluntary as long as the entity discloses its network management practices. They only apply to BIAS providers, but anyone who breaks the rules is not a BIAS provider.

Indeed, the FCC admitted this fact of its 2015 Open Internet Order and the D.C. Circuit rejected First Amendment challenges to the rules only because it was so easy for ISPs to avoid them:

> That definition [of BIAS], by its terms, includes only those broadband providers that hold themselves out as neutral, indiscriminate conduits. Providers that may opt to exercise editorial discretion — for instance, by offering access only to a limited segment of websites specifically catered to certain content — would not offer a standardized service that can reach "substantially all" endpoints. The rules therefore would not apply to such providers, as the FCC has affirmed.[36]

Since the NPRM consciously mirrors the 2015 rules, the same assessment would apply to the new proposed rules. The Commission asks whether it could simply apply its rules to non-BIAS services, but doing would run afoul of the first amendment issues that it managed to dodge in USTA. That the rules can only survive judicial review by undermining themselves further emphasizes the mismatch between Title II and the Internet ecosystem. By focusing on transparency and disclosure, the RIF Order better matches FCC authority to the goal of Internet openness, and the FCC should decline to upend that focus.

CONCLUSION

The Commission is right to characterize broadband access as essential. And it is right to "place high importance on innovation, investment, and free expression."[37] It is mistaken, however, in its tentative conclusions that Title II regulations will advance those goals. Sweeping bans that encompass pro-consumer conduct will stifle innovation, not promote it. Heavy-handed rules and mere discretionary forbearance will hinder investment, not incentivize it. And regulations of how traffic must flow over the Internet will burden free expression, not protect it.

Congress should indeed create a statutory scheme that enshrines agreed-upon principles into law. But until that happens, the current Title I framework is a better way of doing no harm to a network as important as the Internet.

Again, this does not mean there is no role for the Commission to play. Only that, rather than throwing out the regulatory regime that governed the Internet from its early growth and facilitated its success through a global pandemic, the Commission should shift its efforts to areas in which public policy can do the most

[35] NPRM at para. 216.

[36] *US Telecom Ass'n, et al. v. FCC* 825 F.3d 674, 743 (D.C. Cir. 2016) (*USTA*).

[37] NPRM at para. 118.

good: unraveling the multifaceted challenges to adoption, lowering regulatory barriers to deployment, and enabling intermodal competition by accelerating terrestrial and satellite wireless broadband.

Thank you for your consideration.

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