

**RE: Notice of Proposed Rulemaking, In the Matter
of Safeguarding and Securing the Open Internet**

Federal Communications Commission, WC Docket No. 23-320

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I. Introduction

We thank the Federal Communications Commission (“FCC” or “the Commission”) for the opportunity to offer reply comments to this notice of proposed rulemaking (“NPRM”) as the Commission seeks, yet again, to reclassify broadband-internet-access services under Title II of the Communications Act of 1934.¹

As our previous comments, these reply comments, and the comments of others in this proceeding repeatedly point out, the idea of an “open internet” is not incompatible with business-model experimentation, which could include various experiments in pricing and network management. This is particularly apparent, given the lengthy history of broadband deployment reaching ever more consumers at ever lower cost per megabit, even in the absence of Title II regulation.

As repeatedly noted in this docket, U.S. broadband providers were able to support large increases in network load during the COVID-19 pandemic, and have been pressing forward to provide hard-to-reach potential customers with service tailored to their needs, whether through cable, fiber, satellite, fixed-wireless, or mobile connections, all without a Title II regime.

By contrast, applying Title II to broadband providers risks ossifying the existing set of technical and business-model parameters and undermining the internet’s fundamental dynamism. The ability to adapt to new applications and users has long driven the internet’s success. Declaring the current network architecture complete and frozen under Title II is at odds with this reality. In essence, openness requires embracing ongoing change, not freezing the status quo.

As noted extensively by multiple commentators in this proceeding, the rationale for applying Title II is rooted in the precautionary principle. This weak basis does not warrant preemptively imposing blanket prohibitions. A better approach would be to employ an error-cost framework that minimizes the total risk of either over- or under-inclusive rules, and to eschew proscriptive *ex ante* mandates.

Technology markets tend to be highly dynamic and to evolve rapidly. Which technology best fits particular deployment and usage needs, particular network designs, and the business relationships among different kinds of providers is determined by context, and by complex interactions between long-term investment and fast-changing exigencies that demand flexibility.

What this means here is that the Commission should not promulgate policies that would presumptively disallow so-called blocking, throttling, and paid prioritization. As detailed below, in most instances, there is no way to prohibit these practices *ex ante* without the risk of inducing a chilling effect on many pro-consumer business arrangements. Similarly, the General Conduct Standard threatens to foster an open-ended, difficult-to-predict regulatory environment that would chill innovation and harm consumers.

¹ Notice of Proposed Rulemaking, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (Sep. 28, 2023) [hereinafter “NPRM”] at ¶1.

Going forward, the Commission should avoid Title II reclassification and instead hew to the policy that has guided it since the 2018 Order. Where problems occur, *ex post* enforcement of existing competition and consumer-protection laws provides enforcers with the tools sufficient to guarantee a truly open internet.

II. The Commission Fails to Offer Sufficient Justifications for a Change in Policy

The Commission imposed Title II regulations on broadband internet with its 2015 Open Internet Order.² Title II regulation was repealed with the 2018 Restoring Internet Freedom Order.³ Thus, it would be reasonable to see this latest Title II proposal as a do-over of the 2015 Order. Indeed, the Commission describes its proposal as a “return to the basic framework the Commission adopted in 2015.”⁴ Attorneys at Davis Wright Tremaine say the proposed rules are “effectively identical” to the Open Internet Order.⁵ The American Enterprise Institute’s Daniel Lyons invokes the late Justice Antonin Scalia’s observation of bad policy as a “ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”⁶

In *ex parte* meetings with FCC commissioners in 2017, ICLE concluded that the 2015 Order was not supported by a “reasoned analysis.”

We stressed that we believe that Congress is the proper place for the enactment of fundamentally new telecommunications policy, and that the Commission should base its regulatory decisions interpreting Congressional directives on carefully considered empirical research and economic modeling. We noted that the 2015 OIO was, first, a change in policy improperly initiated by the Commission rather than by Congress. Moreover, even if some form of open Internet rules were properly adopted by the Commission, the process by which it enacted the 2015 OIO, in particular, demonstrated scant attention to empirical evidence, and even less attention to a large body of empirical and theoretical work by academics. The 2015 OIO, in short, was not supported by reasoned analysis.

In particular, the analysis offered in support of the 2015 OIO ignores or dismisses crucial economics literature, sometimes completely mischaracterizing entire fields of study as a result. It also cherry picks from among the comments in the docket, ignoring or

² Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28 (Mar. 15, 2015) [hereinafter “2015 Order”].

³ Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108 (Jan. 4, 2018) [hereinafter “2018 Order”].

⁴ NPRM at ¶114.

⁵ Maria Browne, David Gossett, K. C. Halm, Nancy Libin, Christopher Savage, & John Seiver, *Here We Go Again—FCC Proposes to Revive Net Neutrality Rules*, JD SUPRA (Oct. 2, 2023), <https://www.jdsupra.com/legalnews/here-we-go-again-fcc-proposes-to-revive-5527239>.

⁶ Daniel Lyons, *Why Resurrect Net Neutrality?*, AEIDEAS (Oct. 4, 2023), <https://www.aei.org/technology-and-innovation/why-resurrect-net-neutrality>.

dismissing without analysis fundamental issues raised by many commenters. Tim Brennan, chief economist of the FCC during the 2015 OIO's drafting, aptly noted that "[e]conomics was in the Open Internet Order, but a fair amount of the economics was wrong, unsupported, or irrelevant."⁷

With the current Title II NPRM, it appears the Commission is again ignoring or dismissing fundamental issues without conducting sufficient analysis. Moreover, the see-sawing between imposition, repeal, and possible re-imposition of Title II regulations invites scrutiny under the Administrative Procedures Act, especially in light of the 5th U.S. Circuit Court of Appeals' decision in *Wages & White Lion Invs. LLC v. FDA*.

The change-in-position doctrine requires careful comparison of the agency's statements at *T0* and *T1*. An agency cannot shift its understanding of the law between those two times, deny or downplay the shift, and escape vacatur under the APA. As the D.C. Circuit put it in the canonical case: "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."⁸

As the NCTA notes in its comments:

"[A]n agency regulation must be designed to address identified problems." Accordingly, "[r]ules are not adopted in search of regulatory problems to solve"; rather, "they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address." And because the reclassification of broadband would reverse previous agency decision-making, the Commission is obligated to show not only that it is addressing an actual problem, but that it reasonably believes the new rules "to be better" and has not "ignore[d] its prior factual findings" underpinning the existing rules or the "reliance interests" that have arisen from those rules. That is not possible here.⁹

The NPRM identifies two reasons for re-imposing Title II classification on broadband internet that mirror the reasons in the 2015 Order: (1) ensuring "internet openness" and (2) consumer protection. The NPRM also identifies several new justifications for reimposing Title II:

⁷ ICLE, Notice of Ex Parte Meetings, Restoring Internet Freedom, WC Docket No. 17-108 (Nov. 6, 2017), available at https://laweconcenter.org/images/articles/icle_fcc_rif_ex_parte.pdf. See also, ICLE, Policy Comments, WC Docket No. 17-108 (July 17, 2017), available at https://laweconcenter.org/wp-content/uploads/2017/09/icle-comments_policy_rif_nprm_final.pdf.

⁸ *Wages & White Lion Invs., L.L.C. v. Food & Drug Admin.*, No. 21-60766, 21-60800 (5th Cir. 2024) (*en banc*) (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted); accord *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("When an agency changes its existing position, it ... must at least display awareness that it is changing position and show that there are good reasons for the new policy." (quotation and citation omitted))).

⁹ Comments of NCTA, WC Docket No. 23-320 (Dec. 14, 2023) at 49.

1. Increased use and importance of broadband internet during and after the COVID-19 pandemic;¹⁰
2. Federal spending on provider investments and consumer subsidies;¹¹
3. Safeguarding national security¹² and preserving public safety;¹³ and
4. The need for a uniform national regulatory system.¹⁴

As we discuss below, these justifications do not stand up to scrutiny.

A. Increased Importance of Broadband Internet During the COVID-19 Pandemic

Beyond the obvious national-comparison data demonstrating that U.S. networks *already* outperform other countries, there are many problems with relying on internet-usage patterns during and subsequent to the COVID-19 pandemic as justification for imposing Title II regulations on broadband providers.

The NPRM concludes: “While Internet access has long been important to daily life, the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers’ participation in our society and economy.”¹⁵ It further notes: “In the time since the *RIF Order*, propelled by the COVID-19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life,”¹⁶ and that this importance “has persisted post-pandemic.”¹⁷ The Commission “believe[s] the COVID-19 pandemic dramatically changed the importance of the Internet today, and seek[s] comment on our belief.”¹⁸

¹⁰ NPRM at ¶1 (“[T]he COVID-19 pandemic ... demonstrated how essential broadband Internet connections are for consumers’ participation in our society and economy.”).

¹¹ *Id.* (“Congress responded by investing tens of billions of dollars into building out broadband Internet networks and making access more affordable and equitable, culminating in the generational investment of \$65 billion in the Infrastructure Investment and Jobs Act.”).

¹² NPRM at ¶3 (“[R]eclassification will strengthen the Commission’s ability to secure communications networks and critical infrastructure against national security threats.”).

¹³ *Id.* (“[T]his authority will allow the Commission to protect consumers, including by issuing straightforward, clear rules to prevent Internet service providers from engaging in practices harmful to consumers, competition, and public safety, and by establishing a uniform, national regulatory approach rather than disparate requirements that vary state-by-state.”).

¹⁴ *Id.*

¹⁵ NPRM at ¶1.

¹⁶ NPRM at ¶16.

¹⁷ NPRM at ¶17.

¹⁸ *Id.*

In our initial comments on this matter, ICLE reported that, by most measures, U.S. broadband competition is already vibrant, and has improved dramatically since the COVID-19 pandemic.¹⁹ For example, since 2021, more households are connected to the internet; broadband speeds have increased while prices have declined; more households are served by more than a single provider; and new technologies—such as satellite and 5G—have served to expand internet access and intermodal competition among providers.²⁰

In these reply comments, we agree with the Commission’s assertion that internet access “has long been important to daily life.” We do, however, disagree in some key respects with the Commission’s conclusion that internet access “has become *even more* essential,” and we question whether the pandemic has actually “dramatically changed the importance of the Internet *today*.” At the risk of splitting hairs, the Commission is unclear in how it defines “post-pandemic.” On April 10, 2023, President Biden signed H.J. Res. 7, terminating the national emergency related to the COVID-19 pandemic effective May 11, 2023. Thus, by the administration’s reckoning, the United States is only about nine months into the “post-pandemic” era. It is mind-boggling how the Commission could draw any firm conclusions about post-pandemic internet usage, given the dearth of information regarding internet usage over such a short period.

The NPRM attempts to support the Commission’s conclusion by citing a 2021 Pew Research Center survey “showing that high speed Internet was essential or important to 90 percent of U.S. adults during the COVID-19 pandemic.”²¹ While we do not dispute Pew’s research, it seems the Commission has cherry picked from only this single report. Notably, an earlier Pew survey reported in 2017 that 90% of respondents also said high-speed internet access was essential or important.²² By this measure, it appears the importance of the internet has not changed since 2017, let alone changed *dramatically*. Moreover, a COVID-era Pew survey reported that 62% of respondents said “the federal government does *not* have” responsibility to ensure all Americans have a high-speed internet connection at home.²³

¹⁹ Comments of ICLE, WC Docket No. 23-320 (Dec. 14, 2023) at 4, 9-18.

²⁰ *Id.*

²¹ NPRM at ¶17 (citing Colleen McClain *et al.*, *The Internet and the Pandemic: 1. How the internet and technology shaped Americans’ personal experiences amid COVID-19*, Pew Research Center (Sep. 1, 2021), <https://www.pewresearch.org/internet/2021/09/01/how-the-internet-andtechnology-shaped-americans-personal-experiences-amid-covid-19>).

²² Monica Anderson & John B. Horrigan, *Americans Have Mixed Views on Policies Encouraging Broadband Adoption*, PEW RESEARCH CENTER (Apr. 10, 2017), <https://www.pewresearch.org/short-reads/2017/04/10/americans-have-mixed-views-on-policies-encouraging-broadband-adoption> (“[R]oughly nine-in-ten Americans describe high-speed internet service as either essential (49%) or important but not essential (41%)”).

²³ Emily A. Vogels, Andrew Perrin, Lee Rainie, & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RESEARCH CENTER (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak>.

To support its assertion that this heightened internet usage “has persisted post-pandemic,” the Commission cites research from OpenVault, reporting that the share of subscribers using 533 GB or more of bandwidth per-month increased from 10% to almost 50% between 2017 and 2022.²⁴ The report cited in the NPRM, however, concludes that one factor driving the acceleration of data usage is the trend among many usage-based billing operators to provide unlimited data to their gigabit subscribers.²⁵ It’s more than a little ironic that providers have rolled out a policy that encourages increased data usage, only to see the FCC invoke the increased usage as a justification for regulating the policies that increased that usage. Such reasoning suggests that the Commission’s overworked “virtuous cycle” concept is nothing more than a shibboleth to be invoked only to buttress the Commission’s proposals.²⁶

TABLE 1: Broadband Data Usage, 2018-2023 (Q3)

YEAR	BROADBAND USAGE (GB)	YOY % CHANGE
2018	228.0	n/a
2019	275.1	21%
2020	383.8	40%
2021	434.9	13%
2022	495.5	14%
2023	550.2	11%

SOURCE: OpenVault

There are other areas in which the Commission seems to misunderstand the available data and how it affects its conclusions. Table 1 provides average U.S. broadband data usage reported by OpenVault for the third quarter of the years 2018 through 2023.²⁷ While it is true that internet usage increased by 40% in the first year of the pandemic, the increase in subsequent years (11-14%) was smaller than the average pre-pandemic increase of 20%. The average annual increase over the six years in Table 1 is 19%. It is simply too soon to tell whether COVID-19 caused a permanent shift in the rate of increase of internet usage.

²⁴ NPRM at ¶17.

²⁵ OpenVault, *Broadband Insights Report (OVBI) 4Q22* (Feb. 8, 2023), https://openvault.com/wp-content/uploads/2023/02/OVBI_4Q22_Report.pdf.

²⁶ See, NPRM at ¶131 (describing the “virtuous cycle” as one in which “market signals on both sides of ISPs’ platforms encourage consumer demand, content creation, and innovation, with each respectively increasing the other, providing ISPs incentives to invest in their networks.”)

²⁷ OpenVault, *Broadband Industry Report (OVBI) 3Q 2019*, (Nov. 11, 2019), https://telecompetitor.com/clients/openvault/Q3/Openvault_Q319_Final.pdf; OpenVault, *Broadband Insights Report (OVBI) 3Q21*, (Nov. 15, 2021), https://openvault.com/wp-content/uploads/2021/11/OVBI_3Q21_Report.pdf; OpenVault, *Broadband Insights Report (OVBI) 3Q23*, (Nov. 3, 2023), https://openvault.com/wp-content/uploads/2023/11/OVBI_3Q23_Report_FINAL.pdf.

To further support its assertion, the Commission reports that usage per-subscriber smartphone monthly data rose by 12% between 2020 and 2021.²⁸ But these years were directly in the middle of the pandemic, rendering this information useless for assessing post-pandemic mobile data usage. Information from CTIA indicates that, from 2016, wireless data traffic increased an average of 28% annually, from 13.7 trillion MB to 37.1 trillion MB.²⁹ By contrast, from 2019 to 2022, traffic increased by an average of only 19% a year, to 73.7 trillion MB. It appears that, rather than COVID-19 being associated with mobile data use increasing at a faster rate, the pandemic was actually associated with usage increasing at a *slower* rate.

Thus, not only did the performance of U.S. broadband providers during the pandemic demonstrate that Title II regulations were unnecessary, but the data that the Commission cites in this proceeding on this point completely undermine its case.

B. Recent Federal Spending on Broadband Deployment Undermines the Case for Title II

The Commission invokes “tens of billions of dollars” of congressional appropriations on internet deployment and access as a reason to impose utility-style regulation on the industry.³⁰ The NPRM identifies the following bills that appropriated such funds:³¹

- Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (appropriating \$200 million to the Commission for telehealth support through the COVID-19 Telehealth Program);
- Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 903, 134 Stat. 1182, (2020) (appropriating an additional \$249.95 million in additional funding for the Commission’s COVID-19 Telehealth Program) and § 904, 134 Stat. 2129 (establishing an Emergency Broadband Connectivity Fund of \$3.2 billion for the Commission to establish the Emergency Broadband Benefit Program to support broadband services and devices in low-income households during the COVID-19 pandemic);
- American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 7402, 135 Stat. 4 (2021) (establishing a \$7.171 billion Emergency Connectivity Fund to help schools and libraries provide devices and connectivity to students, school staff, and library patrons during the COVID-19 pandemic);
- Infrastructure Act, § 60102 (establishing grants for broadband-deployment programs, as administered by NTIA); § 60401 (establishing grants for middle mile infrastructure); and § 60502 (providing \$14.2 billion to establish the Affordable Connectivity Program).

²⁸ NPRM at ¶17.

²⁹ CTIA, *2023 Annual Survey Highlights* (Nov. 2, 2023), available at <https://api.ctia.org/wp-content/uploads/2023/11/2023-Annual-Survey-Highlights.pdf>.

³⁰ NPRM at ¶1.

³¹ NPRM at n. 59.

As we note in our comments, the legislative process would have been a perfect time for Congress to legislate net neutrality or Title II regulation, as it debated four bills that proposed spending tens of billions of dollars to encourage internet adoption and broadband buildout for the next decade or so.³² But no such provisions were included in any of these bills, as noted in comments from the Advanced Communications Law & Policy Institute:

The Congressional record for each of these bills appears to be devoid of discussion about the inadequacy of the prevailing regulatory framework or a need to reclassify broadband. In addition, it does not appear that any bills or amendments were proposed that sought to impose common carrier regulation on broadband ISPs. An amendment that was included in the final IJA prohibited the NTIA from engaging in rate regulation as part of BEAD. Rate regulation is not permitted under the Title I regulatory framework but would be theoretically possible under Title II. This provides additional evidence that Congress was cognizant of the regulatory environment in which it was legislating.³³

The fact that Congress had numerous opportunities in recent years to mandate Title II regulations suggests the Commission's proposal is likely at odds with congressional intent and that the FCC should refrain from such excessive regulatory intervention. At the very least, the pattern of congressional spending in no way supports the presumption that Title II reimposition is important, given federal outlays.

C. There Have Been No New Developments in National Security or Safety to Support Reclassification

The Commission asserts that Title II reclassification “will strengthen the Commission’s ability to secure communications networks and critical infrastructure against national security threats.”³⁴ The NPRM concludes, “developments in recent years have highlighted national security and public safety concerns ... ranging from the security risks posed by malicious cyber actors targeting network equipment and infrastructure to the loss of communications capability in emergencies through service outages.”³⁵ The Commission “believe[s] that blocking, throttling, paid prioritization, and

³² ICLE Comments, *supra* n. 19, at 3.

³³ Comments of the Advanced Communications Law & Policy Institute, WC Docket No. 23-320 (Dec. 14, 2023) at 12. *See also*, Comments of CTIA, WC Docket No. 23-320 (Dec. 14, 2023) at 43 (“In the Notice, the Commission ignores that Congress has recently acted to address the ‘availability and affordability of BIAS’ via the IJA, which focused on BIAS in detail and, throughout that lengthy discussion, chose not to apply Title II.”). *See also*, Comments of NCTA, *supra* n. 9, at 83 (“The \$1 trillion Infrastructure Investment and Jobs Act (‘IJA’) that President Biden signed into law in November 2021, for example, allocates \$65 billion to support broadband deployment, adoption, and digital equity across the country, *without regard* to broadband’s regulatory classification.”) and *id.* 84 (“As with legislation relating to national security and other issues, the fact that Congress took comprehensive action on broadband affordability and adoption without requiring or authorizing regulation of broadband as a Title II service speaks volumes.”).

³⁴ NPRM at ¶3.

³⁵ NPRM at ¶25.

other potential conduct have the potential to impair public safety communications in a variety of circumstances and therefore harm the public.”³⁶

Comments from the Free State Foundation point out the obvious: The Commission has not identified any specific national-security threats and has not articulated any way in which Title II regulations would address these threats.

Unsurprisingly, the Notice fails to articulate any specific threats of harm to national security and public safety that Title II regulation would alleviate. And the Notice provides no basis for concluding that such regulation will improve broadband cybersecurity. If security and safety truly are vulnerable, why has the Commission kept that from public knowledge until the rollout of its regulatory proposal.³⁷

Comments from the CPAC Center for Regulatory Freedom suggest that the Commission’s assertions regarding national-security threats are likely based on the Annual Threat Assessment of the U.S. intelligence community.³⁸ The latest Threat Assessment identifies potential cyber threats from China, Russia, Iran, North Korea, and transnational criminal organization (TCOs).³⁹ The 2017 Threat Assessment, however, identified the same sources of potential threats, with TCOs divided into terrorists and criminals.⁴⁰ Broadly speaking, the United States faces cyber threats from the same sources today that it did when Title II was repealed with the *RIF Order*.

The “developments” identified by the Commission are not new. The 2017 Threat Assessment reported that: “Russian actors have conducted damaging and disruptive cyber attacks, including on critical infrastructure networks.”⁴¹ The assessment also reported an Iranian intrusion into the industrial control system of a U.S. dam and criminals’ deployment of ransomware targeting the medical sector.⁴² The Commission offers no evidence that these threats have changed sufficiently since the 2018 Order to justify a change in national-security posture with respect to regulating broadband internet under Title II.

The Free State Foundation criticizes the Commission’s national-security and public-safety justifications as mere speculation:

³⁶ NPRM at ¶119.

³⁷ Comments of the Free State Foundation, WC Docket No. 23-320 (Dec. 14, 2023) at 22.

³⁸ Comments of CPAC Center for Regulatory Freedom, WC Docket No. 23-320 (Dec. 14, 2023) at 9.

³⁹ Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community* (Feb. 6, 2023), available at <https://www.odni.gov/files/odni/documents/assessments/ata-2023-unclassified-report.pdf>.

⁴⁰ Daniel R. Coats, Statement for the Record, Worldwide Threat Assessment of the US Intelligence Community, Senate Armed Services Committee (May 23, 2017) at 1-2, available at <https://www.dni.gov/files/documents/newsroom/testimonies/sasc%202017%20ata%20sfr%20-%20final.pdf>.

⁴¹ *Id.*

⁴² *Id.*

But now the Notice suddenly makes national security and public safety into primary claimed justifications for reimposing public utility regulation on broadband Internet services. Over a dozen paragraphs in the draft notice address speculated future vulnerabilities in network management operations, functionalities, and equipment.⁴³

Not only are the Commission's asserted network vulnerabilities speculative, but so are the conclusions regarding Title II regulation's ability to address them. The NPRM "tentatively" concludes reclassification would "enhance" the FCC's ability and efforts to safeguard national security, protect national defense, protect public safety, and protect the nation's communications networks from entities that pose threats to national security and law enforcement.⁴⁴ Yet, it is mute on exactly how imposing Title II obligations on broadband providers would grant or enhance its powers to combat cyber-crime.

Indeed, as noted by CTIA, it is likely that many data services used in public safety would not be subject to Title II regulations:

Public Safety: The 2020 RIF Remand Order demonstrated that public safety entities often use enterprise-level quality-of-service dedicated public safety data services rather than BIAS. Title II regulation of BIAS therefore would not reach many of the data services relied on by public safety. In contrast, as the 2020 RIF Remand Order showed, the Title I framework for BIAS benefits virtually all services that advance public safety—including consumer access to information and to first responders over BIAS connectivity—as a result of the additional network investment that is better driven by Title I.⁴⁵

FirstNet is one such service that would not be subject to Title II regulation.

FirstNet is public safety's dedicated, nationwide communications platform. It is the only nationwide, high-speed broadband communications platform dedicated to and purpose-built for America's first responders and the extended emergency response community. Today, FirstNet covers all 50 states, the District of Columbia, and the five U.S. territories. As of September 30, 2023, 27,000 public safety agencies and direct-support organizations use FirstNet, representing more than 5.3 million connections on the network. FirstNet is designed for all first responders in the country—including law enforcement, EMS personnel, firefighters, 9-1-1 communicators, and emergency managers. It enables subscribers to maintain always-on priority access; FirstNet users never compete with commercial traffic for bandwidth, and the network does not throttle them anywhere in the country in any circumstances.

FirstNet is built and operated in a public-private partnership between AT&T and the First Responder Network Authority—an independent agency within the federal government. Following an open and competitive RFP process, the federal government selected AT&T to build, operate, and evolve FirstNet for 25 years. Custom FirstNet State

⁴³ Comments of the Free State Foundation, *supra* n. 37, at 22.

⁴⁴ NPRM at ¶¶21, 26, 27.

⁴⁵ Comments of CTIA, *supra* n. 33, at 36.

Plans were developed for the country's 56 jurisdictions, which ultimately all chose to opt in.⁴⁶

TechFreedom also notes that Title II does not apply to data services marketed to government users.⁴⁷ The group's comments dispel the myth that, if only the FCC had Title II authority, the legendary and nearly apocryphal Santa Clara fire-department saga could have been avoided.

For this rationale, FCC Chair Jessica Rosenworcel relies heavily on a single incident. In 2018, the Republican-led FCC returned broadband to Title I, the lighter regulatory approach. Months later, "when firefighters in Santa Clara, California, were responding to wildfires they discovered the wireless connectivity on one of their command vehicles was being throttled," Rosenworcel claims. "With Title II classification, the FCC would have the authority to intervene," she said separately.

She is mistaken. Title II doesn't apply to data plans marketed to government users; both the 2015 Order and the NPRM define BIAS as a "mass-market retail service" offered "directly to the public." Even if Title II had applied, the FCC's rules wouldn't have addressed the unique confusion that occurred in Santa Clara, which involved the fire department buying a plan that was obviously inadequate for its needs, Verizon recommending a better plan, and the department refusing. But that isn't really the point. The point is that the FCC needed to shift its speculation about the possible impacts of blocking, throttling, or discrimination to something that seemed more tangible than abstractions like "openness." Invoking the Santa Clara kerfuffle may make the stakes *seem* higher, but it won't change how courts apply the major question doctrine.⁴⁸

It beggars belief that the Commission would impose regulations with vast economic and political significance based on speculative threats and only tentative inklings about whether and how Title II could "enhance" the FCC's ability and efforts to address those threats. In short, before asserting public safety as a basis for imposing Title II, the Commission needs to produce evidence demonstrating both the existence of such a problem (beyond the weak anecdote of the Santa Clara incident), as well as evidence demonstrating that the vast majority of services necessary for public safety would even be subject to Title II.

⁴⁶ Comments of AT&T, WC Docket No. 23-320 (Dec. 14, 2023) at 20-21.

⁴⁷ Comments of TechFreedom, WC Docket No. 23-320 (Dec. 14, 2023) at 46 ("The Communications Act specifies that 'public safety services' are those which are 'not made commercially available to the public by the provider.' Accordingly, the 2015 Order explicitly 'excluded [such services] from the definition of mobile [BIAS].' Likewise, the Act defines a 'telecommunications service' (the thing Title II covers) as 'the offering of telecommunications for a fee directly to the public.' Accordingly, the 2015 Order applied Title II only to 'broadband Internet access service' (BIAS), defined as a 'mass-market retail service' offered 'directly to the public.'")

⁴⁸ *Id.* at 44-45. *See also*, Comments of Technology Policy Institute, WC Docket No. 23-320 (Dec. 14, 2023) at 39 ("But this example highlights the need for public safety to have prioritized access to networks, which demonstrates potential benefits of prioritization."). *See also*, Comments of AT&T at 20-21 ("FirstNet users never compete with commercial traffic for bandwidth, and the network does not throttle them anywhere in the country in any circumstances.")

D. The Commission Must Work to Establish a National Standard for Broadband Regulation

The NPRM reports that, following the 2018 Order, “[a] number of states quickly stepped in to fill that void, adopting their own unique regulatory approaches” toward broadband internet.⁴⁹ The Commission claims “establishing a uniform, national regulatory approach” is “critical” to “ensure that the Internet is open and fair.”⁵⁰ Toward that end, the FCC now indicates it intends to pre-empt these state laws with Title II regulation and “seek[s] comment on how best to exercise [its] preemption authority.”⁵¹ Crucially, the NPRM asks whether the proposed Title II regulations should be treated as a “floor” or a “ceiling” with respect to state or local regulations.⁵²

While we believe that Title II regulation is unnecessary, unwarranted, and likely harmful to both providers and consumers, we agree with NCTA’s conclusion that, if the Commission imposes Title II regulations, those rules should be imposed and enforced uniformly nationwide as both a “floor” and a “ceiling”:

At the same time, the NPRM appropriately recognizes that broadband is an inherently interstate service, and it is critical that the states be preempted from adopting separate requirements addressing ISPs’ provision of broadband. The Commission has long recognized, on a bipartisan basis, that broadband is a jurisdictionally interstate service regardless of its regulatory classification—and the Commission can and should confirm that determination. Consistent with the initial draft of the NPRM, and contrary to any suggestion in the released version, the federal framework should not serve as a “floor” on top of which states may layer additional requirements or prohibitions. Rather, it should serve as both a floor and a ceiling. A uniform national approach is particularly vital today, as states have shown a growing desire to adopt measures that conflict with federal broadband regulation precisely because they disagree with and wish to undermine federal policy choices.⁵³

If the Commission imposes Title II regulation as only a “floor,” rather than both a “floor” and a “ceiling,” then the rules will do little to eliminate the “patchwork” of state regulations about which the Commission has “expressed concern.”⁵⁴ Indeed, it is likely that the “patchwork” would become even more “patchy.” It is also likely a two-tier system of regulation would arise, much as with motor-vehicle emissions, where Environmental Protection Agency rules govern emissions for some states, but 18 other states follow California’s more stringent standards.⁵⁵ The result is a patchwork of state

⁴⁹ NPRM at ¶21.

⁵⁰ NPRM at ¶21.

⁵¹ NPRM at ¶21.

⁵² NPRM at ¶96.

⁵³ Comments of NCTA, *supra* n. 9, at 10.

⁵⁴ NPRM at ¶24.

⁵⁵ Section 177 of the Clean Air Act (42 U.S.C. §7507) is a provision that allows states to adopt and enforce California’s

laws with a mishmash of emissions standards. This would be unacceptable, as the Second Circuit ruled in *American Booksellers Foundation*:

[A]t the same time that the internet's geographic reach increases Vermont's interest in regulating out-of-state conduct, it makes state regulation impracticable. 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.”⁵⁶

We continue to oppose the imposition of Title II on broadband providers. With that said, whatever regulatory course the Commission charts, it is crucial that it fully preempt state law so as to avoid creating a thicket of contradictory, economically inefficient requirements that will generate unnecessary red tape on broadband providers and ultimately lead to slower deployment.

III. Title II Will Commoditize Broadband Services and Stifle Innovation

Before discussing the NPRM's particulars, it is important to note that regulatory humility is crucial when dealing with industries and firms that develop and deploy highly innovative technologies.⁵⁷ It remains a daunting challenge to forecast the economics of technological innovation on the economy and society. The potential for unforeseen and unintended consequences—particularly in hindering the development of new ways to serve underserved consumers—is considerable. Such regulatory actions could have profound and far-reaching effects. In particular, it can serve to eliminate many of the dimensions across which providers compete. The result would be to remove much of the product differentiation among competitors and turn broadband service into something more like a commodity service.

The Commission's proposed Title II regulation of broadband internet seeks to prohibit blocking, throttling, or engaging in paid or affiliated prioritization arrangements, and would impose a “general conduct standard” that it claims would prohibit “interference or unreasonable disadvantage to consumers or edge providers.”⁵⁸ But the Commission has not identified any actual harms from these practices or any actual benefits that would flow from banning or limiting them, or from placing

motor vehicle emission standards, which are often more stringent than federal standards. This section was implemented due to California's unique authority to set emission standards, as it had vehicle regulations that preceded the federal Clean Air Act. See also, California Air Resources Board, *Section 177 States Regulation Dashboard* (2024), <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations>.

⁵⁶ *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2003), citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852).

⁵⁷ See, e.g., Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

⁵⁸ *FACT SHEET: FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules*, Fed. Comm'n Comm'n. (Sep. 26, 2023), available at <https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf>.

deployment under a broad discretionary standard. Indeed, the NPRM identifies only four concrete examples of alleged blocking or throttling.⁵⁹

1. A 2005 consent decree by DSL-service provider Madison River requiring it to discontinue its practice of blocking Voice over Internet Protocol (VoIP) telephone calls.⁶⁰ At the time, Madison River had fewer than 40,000 DSL subscribers.⁶¹
2. A 2008 order against Comcast for interfering with peer-to-peer file sharing.⁶² Comcast claimed intensive file-sharing traffic was causing such severe latency and jitter that it made VoIP telephony unusable.⁶³
3. A study published in 2019, using data mostly from 2018, that “suggested that ISPs regularly throttle video content.”⁶⁴ Several commenters note that this study has been “debunked.”⁶⁵ We note in our comments that the study found that, whatever throttling ISPs engaged in, the authors concluded it was “not to the extent in which consumers would likely notice.”⁶⁶
4. In 2021, a small ISP in northern Idaho planned to block customer access to Twitter and Facebook; responding to public pressure, the provider backtracked on the policy.⁶⁷

The first two examples are now more than 15 years old and provide no useful information regarding current or future conduct by broadband-internet-service providers. The third example is of questionable reliability. The fourth example is of a policy that was never fully implemented and was, indeed, rectified because of the pressures of market demand.

The Commission seems to be missing, ignoring, or dismissing a key fact: The powers it seeks under Title II are unnecessary and unwarranted, and—in many cases—it already has the power to deter

⁵⁹ In public comments, Commissioners have invoked a fifth example regarding 2018 allegations of Verizon throttling the Santa Clara Fire Department’s wireless broadband service during a wildfire emergency. However, it’s unlikely the service would have been subject to Title II regulation and, even if it was, whether such regulation would have addressed the allegations in this particular example. *See, for example*, Comments of TechFreedom, *supra* n. 47, at 44-45. It is perhaps for these reasons that this example was not included in the NPRM, except obliquely in a footnote. *See* NPRM at n. 56.

⁶⁰ NPRM at n. 7.

⁶¹ Declan McCullagh, *Telco Agrees to Stop Blocking VoIP Calls*, CNET (Mar. 5, 2005), <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls>.

⁶² NPRM at n. 7.

⁶³ Comments of TechFreedom, *supra* n. 47, at 27.

⁶⁴ NPRM at ¶128.

⁶⁵ *See*, Comments of CTIA, *supra* n. 33, at 11 (“[T]he Commission makes no findings and the *Notice* does not recognize the thorough rebuttal debunking the claims in the paper.”). *See also*, Comments of the U.S. Chamber of Commerce, WC Docket No. 23-320 (Dec. 14, 2023) at 5 (“[T]he Commission cites a single 2019 study regarding alleged throttling practices by wireless ISPs in the U.S. and elsewhere—the methodology, veracity, and import of which has been contested by providers and others.”)

⁶⁶ Comments of ICLE, *supra* n. 19, at 29.

⁶⁷ NPRM at n. 484. *See also*, Comments of CTIA at 10-11.

harmful conduct. For example, Scalia Law Clinic finds “no credible evidence of internet service providers engaging in blocking, throttling, or anticompetitive paid prioritization.”⁶⁸

TechFreedom notes:

The FCC could still police *surreptitious* blocking, throttling, or discrimination among content, services, and apps—but then, the Federal Trade Commission can already do that; it just hasn’t needed to.⁶⁹

ITIF’s comments explain how the 2018 Order’s transparency requirements have stifled incentives to engage in undisclosed blocking, throttling, or paid prioritization, to the point that the largest providers have publicly indicated they don’t—and won’t—engage in such practices:

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. The RIF’s transparency requirements ensure that these practices cannot happen in secret. 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.⁷⁰

⁶⁸ Comments of the Scalia Law Clinic, WC Docket No. 23-320 (Dec. 14, 2023) at 6.

Critics of the net neutrality repeal advanced a parade of horrors, speculating that internet providers would engage in various undesirable practices, including throttling, anticompetitive paid-prioritization, and blocking. Yet none of this has come to pass. To date, there is no credible evidence of internet service providers engaging in blocking, throttling, or anticompetitive paid prioritization. That is unsurprising given the competitive environment. *See* RIF, 83 Fed. Reg. 7900 (“[N]o Internet paid prioritization agreements have yet been launched in the United States, rendering any concerns about such practices purely theoretical.”), *id.* at 7901 (“[T]here is scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing.”); USTelecom Reply Comments, *supra*, at 7-8 (“[The 2018 Order’s critics] raise alarm regarding the potential for harmful blocking, throttling, or paid prioritization, but the record lacks any evidence that ISPs have employed these practices since the RIF Order took effect.”); Charter Communications, Inc., Comments on Restoring Internet Freedom, at 3 (Apr. 20, 2020) (“For the nineteen years before the Commission’s Title II Order, there were only isolated incidents of purported ISP blocking or discrimination, and there is no evidence that ISPs have engaged in such practices since the adoption of the RIF Order in 2017.”).

⁶⁹ Comments of TechFreedom, *supra* n. 47, at 28.

⁷⁰ Comments of the Information Technology & Innovation Foundation (ITIF), WC Docket No. 23-320 (Dec. 14, 2023) at 7. *See also*, Comments of CTIA, *supra* n. 33, at 19 (“The Notice does not identify a single BIAS provider that has disclosed it engages in blocking or throttling or paid prioritization, or a single instance where a BIAS provider has failed to make such a disclosure in violation of existing law. This more than demonstrates that market forces and transparency are sufficient to prevent harm to openness, and there is no basis to re-impose the Internet conduct rules.”). *See also*, Comments of NCTA, *supra* n. 9, at 53 (“[A]s the Commission is well aware, providers’ commitments are enshrined in their disclosures under the Commission’s Transparency Rule, which the Commission can independently enforce—holding providers to their obligations to clearly and publicly disclose on their websites the terms and conditions of their broadband offerings, including any practices regarding blocking, throttling, and paid prioritization.”)

As much as the Commission would like to expand its reach across other agencies, CTIA notes that the Federal Trade Commission (FTC) has been “active” in monitoring providers’ practices:

In any event, BIAS providers have made meaningful commitments to their customers, in keeping with the transparency rule, not to block or throttle or engage in paid prioritization, which the Federal Trade Commission (“FTC”) can enforce under many circumstances. And the FTC has been active in scrutinizing broadband provider practices following adoption of the *2018 RIF Order*.⁷¹

As we note in our comments, the U.S. broadband industry is both competitive and dynamic. This vigorous competition forces providers to align their interests with those of their customers, both consumers and edge providers, as noted by CTIA:

Despite the Notice’s suggestion, regulation in a handful of states has not affected what these thousands of BIAS providers do, because it remains in their interest to offer customers service that does not block, throttle, or engage in paid prioritization. In addition, the Notice does not identify a list of harms arising since the 2018 RIF Order, and even Internet openness allegations against BIAS providers are, for all practical purposes, non-existent.⁷²

More broadly, a survey of the research summarized by Roslyn Layton and Mark Jamison concludes that, with the exception of some bans on blocking, “net neutrality” regulations would do more harm than good to both consumers and providers:

But in general, the literature finds that regulations would hinder investment and harm consumers, but not under all conditions. The exception is for traffic blocking, where there is broad agreement that consumers are worse off with blocking. The literature supported the conclusion that paid prioritisation would lead to lower retail prices for broadband access and provide financial resources for network expansion. Jamison concludes that because the scenarios that give different answers are each feasible and may exist at different times, it seems that policy should favour applying competition and consumer protection laws, which can be adapted to individual cases, rather than ex ante regulations, which necessarily apply broadly.⁷³

And as CTIA notes:

The practical benefit of rules banning blocking, throttling, and paid prioritization would be negligible, as no such behavior exists, but the costs of reclassification to Title II would be substantial, as the switch to Title II regulation raises the specter of further regulation

⁷¹ Comments of CTIA, *supra* n. 33, at 18-19.

⁷² *Id.* at 12.

⁷³ Roslyn Layton & Mark Jamison, *Net Neutrality in the USA During COVID-19*, in *BEYOND THE PANDEMIC? EXPLORING THE IMPACT OF COVID-19 ON TELECOMMUNICATIONS AND THE INTERNET* (Jason Whalley, Volker Stocker & William Lehr eds., 2023).

at the Commission's whim, generating regulatory uncertainty that harms the Commission's stated goals.⁷⁴

In summary, the Commission has only speculated about whether blocking, throttling, or paid or affiliated prioritization currently exists, or would exist in the future without Title II regulation. It further speculates with respect to potential harms, and ignores or dismisses the benefits from these practices. In reality, there is no evidence to suggest that there is systematic abuse along these lines.

A. Economic Logic and the Economic Literature Support Non-Neutral Networks⁷⁵

Tim Wu, widely credited with coining the term “net neutrality,” has argued that even a “zero-pricing rule” should permit prioritization:

As a result, we do not feel as though a zero-pricing rule should prohibit this particular implementation, as here content providers are not forced to pay a termination fee to access users.⁷⁶

Moreover, it is important to note that not all innovation comes from small, startup edge providers. As economists Peter Klein and Nicolai Foss have pointed out:

The problem with an exclusive emphasis on start-ups is that a great deal of creation, discovery, and judgment takes place in mature, large, and stable companies. Entrepreneurship is manifest in many forms and had many important antecedents and consequences, and we miss many of those if we look only at start-up companies.⁷⁷

Adopting a regulatory schema that prioritizes startup innovation (although, as noted, it likely doesn't even do that) at the expense of network innovation—in part, because network operators aren't small startups—may materially detract from consumer welfare and the overall rate of innovation.

In effect, net neutrality claims that the only proper price to charge content providers for access to ISPs and their subscribers is zero. As an economic matter, that is possible. But it most certainly needn't be so.

At the most basic level, it is simply not demonstrably the case that content markets *themselves* are best served by being directly favored, to the exclusion of infrastructure. The two markets are symbiotic, in that gains for one inevitably produce gains for the other (*i.e.*, increasing quality/availability of applications/content drives up demand for broadband, which provides more

⁷⁴ Comments of CTIA at 97.

⁷⁵ Many of our findings and conclusion submitted during the 2018 Order's rulemaking process remain true today and much of this section builds on those comments. ICLE, Policy Comments, *supra* n. 7.

⁷⁶ *Id.* at 73-74.

⁷⁷ Ángel Martín Oro, *Interview: Nicolai J. Foss and Peter G. Klein on “Organizing Entrepreneurial Judgment,”* SINTETIA (Jul. 7, 2014), <http://www.sintetia.com/interview-nicolai-j-foss-and-peter-g-klein-on-organizing-entrepreneurial-judgment>. See also NICOLAI J. FOSS & PETER G. KLEIN, ORGANIZING ENTREPRENEURIAL JUDGMENT: A NEW APPROACH TO THE FIRM (2014).

funding for networking infrastructure, and increased bandwidth enabled by superior networking infrastructure allows for even more diverse and innovative applications/content offerings to utilize that infrastructure). Absent an assessment of actual and/or likely competitive effects, it is impossible to say *ex ante* that consumer welfare in general—and with regard to content, in particular—is best served by policies intended to encourage innovation and investment in one over the other.

To the extent that new entrants might threaten ISPs' affiliated content or services, the Commission's proposal is on somewhat more solid economic ground. But such a risk justifies, at most, *only* a limited rule that creates a rebuttable presumption of commercial unreasonableness. Even then, the logic behind such a rule tracks precisely the well-established antitrust law and economics of vertical foreclosure, which neither justifies a presumption (even a rebuttable one), nor the imposition of a targeted regulation beyond the antitrust laws themselves.⁷⁸

I. Economic literature

The use of paid prioritization as a means for ISPs to recover infrastructure costs raises the fundamental empirical question that has largely remained unaddressed: whether the benefits of mandated “openness” outweigh the forsaken benefits to consumers, infrastructure investment, and competition from prohibiting discrimination.

A related question was considered by Tim Wu, who acknowledged that there were inherent tradeoffs in mandating neutrality. Among other things, prohibiting content prioritization (thus precluding user subsidies) raises consumer prices:

Of course, for a given price level, subsidizing content comes at the expense of not subsidizing users, and subsidizing users could also lead to greater consumer adoption of broadband. It is an open question whether, in subsidizing content, the welfare gains from the invention of the next killer app or the addition of new content offset the price reductions consumers might otherwise enjoy or the benefit of expanding service to new users.⁷⁹

Policy advocates that support net neutrality routinely misunderstand this dynamic, and instead seem to presume that discrimination by ISPs can only harm networks. As Public Knowledge has claimed, for instance:

If Verizon – or any ISP – can go to a website and demand extra money just to reach Verizon subscribers, the fundamental fairness of competing on the internet would be disrupted. It would immediately make Verizon the gatekeeper to what would and would not succeed online. ISPs, not users, not the market, would decide which websites and services succeed.

⁷⁸ See Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012).

⁷⁹ See, e.g., Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23 J. ECON. PERSPECTIVES 61, 67 (2009).

* * *

Remember that a “two-sided market” is one in which, in addition to charging subscribers to access the internet, ISPs get to charge edge providers on the internet to access subscribers as well.⁸⁰

And elsewhere:

Comcast’s market power affords it advantages vis-à-vis recipients of Internet video content as well as creators of Internet video content. For example, Comcast will be able to distribute NBC content through its Xfinity online offering without having to pay itself license fees.

This two-sided market advantage results from Comcast’s position as a gatekeeper: it provides access to customers for content creators and it provides access to content for customers. Control over both directions of this transaction allows Comcast the opportunity for anticompetitive behavior against either content creators or consumers, or both simultaneously.⁸¹

These comments fundamentally misunderstand the economics of two-sided markets: Rather than facilitating anticompetitive conduct or enabling greater exploitation of both sides of the market, two-sided markets facilitate efficient but otherwise-difficult economic exchange, and nearly all such markets incorporate subsidies from one side of the market to the other—not excessive profiteering by the platform.⁸² The “two-sidedness” of markets does not inherently confer increased ability to earn monopoly profits. In fact, the literature suggests that the availability of subsidization *reduces* monopoly power and increases welfare. In the broadband context, as one study notes:

Imposing rules that prevent voluntarily negotiated multisided prices will never achieve optimal market results, and...can only lead to a reduction in consumer welfare.⁸³

Business models frequently coexist where different parties pay for the same or similar services. Some periodicals are paid for by readers and offer little or no advertising; others charge a subscription and offer paid ads; and still others are offered for free, funded entirely by ads. All of these models work. None is necessarily “better” than another. Indeed, each model may be better than the others *under*

⁸⁰ Michael Weinberg, *But For These Rules....*, PUBLIC KNOWLEDGE (Sep. 10, 2013), <https://www.publicknowledge.org/news-blog/blogs/these-rules>.

⁸¹ Public Knowledge, Petition to Deny, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, available at <https://www.publicknowledge.org/files/docs/PK-nbc-comcast-20100621.pdf>.

⁸² See generally Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASSOC. 990 (2003).

⁸³ Larry F. Darby & Joseph P. Fuhr, Jr., *Consumer Welfare, Capital Formation and Net Neutrality: Paying for Next Generation Broadband Networks*, 16 MEDIA L. & POL’Y 122, 123 (2007).

each model's idiosyncratic product and market conditions. There is no reason the same wouldn't be true for broadband and content.

What's more, the literature directly contradicts the assumption that net neutrality improves consumer welfare or encourages infrastructure investment. In fact, the opposite appears to be true, and non-neutrality actually generally benefits both consumers and content providers:

Our main result is that a switch from the net neutrality regime to the discriminatory regime would be beneficial in terms of investments, innovation and total welfare. First, when ISPs offer differentiated traffic lanes, investment in broadband capacity increases. This is because the discriminatory regime allows ISPs to extract additional revenues from CPs [Content Providers] through the priority fees. Second, innovation in services also increases: some highly congestion-sensitive CPs that were left out of the market under net neutrality enter when a priority lane is proposed. Overall, discrimination always increases total welfare....⁸⁴

Another paper finds the same result, except in a small subset of cases:

Our results suggest that investment incentives of ISPs, which are important drivers for innovation and deployment of new technologies, play a key role in the net neutrality debate. In the non-neutral regime, because it is easier to extract surplus through appropriate CP pricing, our model predicts that ISPs' investment levels are higher; this coincides with the predictions made by the defendants of the non-neutral regime. On the other hand, because of platforms' monopoly power over access, CP participation can be reduced in the non-neutral regime; this coincides with the predictions made by the defendants of the neutral regime. We find that in the walled-garden model, the first effect is dominant and social welfare is always larger in the non-neutral model. While this still holds for many instances of the priority-lane model, the neutral regime is welfare superior relative to the non-neutral regime when CP heterogeneity is large.⁸⁵

The economic literature does, however, provide some support for imposing a minimum-quality standard:

We extend our baseline model to account for the possibility that ISPs engage in quality degradation or "sabotage" of CP's traffic. We find that sabotage never arises endogenously under net neutrality. In contrast, under the discriminatory regime, ISPs may have an incentive to sabotage the non-priority lane to make the priority lane more valuable, and hence, to extract higher revenues from the CPs that opt for priority. Any

⁸⁴ Marc Bourreau, Frago Kourandi & Tommaso Valletti, *Net Neutrality with Competing Internet Platforms*, 63 J. INDUS. ECON. 1 (2015).

⁸⁵ Paul Njoroge *et al.*, *Investment in Two-Sided Markets and the Net Neutrality Debate*, 12 REV. NETWORK ECON. 355, 361 (2013). Some previous papers have found the opposite result in some instances. All of these models exclude important aspects of the more updated literature, however. See *Id.* 362-65, for a literature review. One, in particular, finds a welfare increase from neutrality, although *not* with monopoly platforms, interestingly. But this paper *does not incorporate infrastructure investment incentives in its models*. See Nicholas Economides & Joacim Tåg, *Network Neutrality on the Internet: A Two-sided Market Analysis*, 24 INFO. ECON. & POL'Y 91 (2012).

level of sabotage is detrimental for total welfare, and therefore, a switch to the discriminatory regime would still require some regulation of traffic quality.⁸⁶

Even here, however, the analysis does not consider disclosure-based (transparency) restraints on quality to be degradation, and it is entirely possible that a transparency rule (or simply the risk of public disclosure, even without such a rule) would be sufficient to deter quality degradation.

In the end, the literature to date supports, at most, a minimum-quality requirement and perhaps only a transparency requirement; it does not support mandated nondiscrimination rules.

B. Paid Prioritization

The Commission “does not dispute” that there may be benefits associated with paid prioritization.⁸⁷ Yet it “tentatively” concludes that the “potential” harms “outweigh any speculative benefits.”⁸⁸ To be blunt, the Commission is just guessing, as summarized by TPI:

The argument that paid prioritization was necessarily a net harm to society was always an unproven hypothesis. The test still has not been conducted, making it impossible to draw the conclusion that it would necessarily be bad.⁸⁹

Indeed, both the economics of nonlinear pricing, and the evidence already added to the record, demonstrate that the Commission should not ban paid prioritization.

1. Paid prioritization is a necessary feature of providing internet service

First, as we have previously noted before the Commission, simply banning paid prioritization does not remove the need to ration broadband in a resource-constrained environment:

Scarcity on the Internet (as everywhere else) is a fact of life — whether it arises from network architecture, search costs, switching costs, or the fundamental limits of physics, time and attention. The need for some sort of rationing (which implies prioritization) is thus also a fact of life. If rationing isn’t performed by the price mechanism, it will be performed by something else. For startups, innovators, and new entrants, while they may balk at paying for priority, the relevant question, as always, is “compared to what?” There is good reason to think that a neutral Internet will substantially favor incumbents and larger competitors, imposing greater costs than would paying for prioritization. Far from detracting from the Internet’s value, *including its value to the small, innovative edge providers so many net neutrality proponents are concerned about*, prioritization almost certainly increases it.⁹⁰

⁸⁶ Marc Borreau, *et al.*, *supra* n. 84 at 33-34.

⁸⁷ NPRM at ¶160.

⁸⁸ *Id.*

⁸⁹ Comments of the Technology Policy Institute, *supra* n. 48, at 15.

⁹⁰ ICLE Policy Comments, *supra* n. 7, at 50.

Essentially, banning “paid prioritization” does nothing to actually remove the need for prioritization. Instead, it merely moves the locus of decision-making out of the scope of a market made of arm’s-length transactions, and puts it into the hands of a few individuals at the Commission.

Broadband-internet access is a valuable service that requires ongoing investments and maintenance. Determining who pays for broadband access is a complex economic issue. In multi-sided markets like broadband, rigid one-size-fits-all pricing models are often inadequate. Instead, experimentation and flexibility are needed to find optimal and sustainable cost allocations between consumers and industry. Multiple business models can reasonably coexist, with costs shared in various ways.⁹¹ Overall, broadband pricing should balance economic sustainability, consumer affordability, and the public interest.

Pricing models across industries demonstrate that there is no single best approach. For example, as with periodicals (discussed above), some websites rely entirely on subscription fees, others use a mix of subscriptions and advertising, and some are given away for free and supported solely by ads. All of these models can work, and all may appeal to different consumer segments. Similarly, for emerging data and content services that intend to attract new users, pricing flexibility and experimentation are needed. There is no one-size-fits-all model inherently superior in reaching consumers or promoting consumer welfare. The optimal strategy depends on market dynamics and consumer demand, which are uncertain and evolving in new markets. Rigid pricing mandates risk stifling innovation and growth.

Moreover, the assumption that paid prioritization inherently favors incumbents over new entrants is flawed. In many cases, new entrants are at a disadvantage with respect to incumbents. Incumbents may have any number of many advantages, including brand loyalty, mature business processes, economies of scale, etc. But prioritization can reduce the scope and scale of some of these advantages:

[P]remium service stimulates innovation on the edges of the network because lower-value content sites are better able to compete with higher-value sites with the availability of the premium service. The greater diversity of content and the greater value created by sites that purchase the premium service benefit advertisers because consumers visit content sites more frequently. Consumers also benefit from lower network access prices.⁹²

Thus, there must be some evidence presented that paid prioritization benefits incumbents at the expense of new entrants before this claim can be taken seriously. There may be some cases where this is so, but it’s absolutely not a warranted presumption, and should be demonstrated as a realistic harm before it is categorically forbidden.

As noted, non-neutrality offers the prospect that a startup might be able to buy priority access to overcome the inherent disadvantage of newness, and to better compete with an established company.

⁹¹ See, e.g., Daniel A. Lyons, *Innovations in Mobile Broadband Pricing*, 92 DENV. U. L. REV. 453 (2015).

⁹² Mark A. Jamison & Janice Hauge, *Dumbing Down the Net: A Further Look at the Net Neutrality Debate*, INTERNET POLICY AND ECONOMICS: CHALLENGES AND PERSPECTIVES 57-71 (William H. Lehr & Lorenzo Maria Pupillo, eds., 2009).

Neutrality, on the other hand, renders that competitive advantage unavailable; the baseline relative advantages and disadvantages remain—all of which helps incumbents, not startups. With a neutral internet, the incumbent competitor's in-built advantages can't be dissipated by a startup buying a favorable leg-up in speed. The Netflixes of the world will continue to dominate.

Of course, the claim is that incumbents will use their huge resources to gain *even more* advantage with prioritized access. Implicit in this claim must be the assumption that the advantage a startup could gain from buying priority offers less potential return than the costs imposed by the inherent disadvantages of reputation, brand awareness, customer base, *etc.* But that's not plausible for all startups. Investors devote capital there is a likelihood of a good return. If paying for priority *would* help overcome inherent disadvantages, there would be financial support for that strategy.

Also implicit is the claim that the benefits to incumbents (over and above their natural advantages) from paying for priority—in terms of hamstringing new entrants—will outweigh the cost. This, too, is unlikely to be true, in general. Incumbents already *have* advantages. While they might sometimes want to pay for more, it is *precisely* in those cases where it would be worthwhile that a new entrant would benefit most from the strategy—ensuring, again, that investment funds will be available.

Finally, implicit in these arguments is the presumption that content deserves to be subsidized, while networks need neither subsidy nor the flexibility to adopt business models that increase returns or help to operate their networks optimally. But broadband providers, equipment makers, and the like have spent trillions of dollars to build internet infrastructure. The “neutrality for startups” argument holds that content providers shouldn't be the ones to pay for it, but it maintains this without evidence that mandating subsidies to content providers (in the form of zero-price internet access) will actually lead to optimal results.⁹³

While paid prioritization does carry risks, the impacts on competition are nuanced. Claims that it necessarily harms new entrants and benefits only incumbents oversimplify a complex issue. The real impacts likely depend on the specifics of how prioritization is implemented in a given market.

The notion that businesses' internet-access costs should be zero reflects flawed thinking. Access is never truly zero-cost—all businesses have costs. Early-stage startups, in particular, need capital to cover expenses as they grow. Singling out broadband access as uniquely important for price parity is questionable. One could make equivalent arguments for controlling other business costs like rent, advertising, personnel, *etc.* Businesses rationally factor the costs of key resources into their planning and investments. Some enjoy cost advantages in certain areas, and disadvantages in others. Whether “equal” pricing is mandated across businesses is often irrelevant to long-term investment decisions. While fair-access policies have merits, the costs of resources like internet access are just one factor among many that businesses must weigh.

⁹³ See, e.g., Lee & Wu, *supra* n. 79, at 67.

This is not an argument unique to broadband service pricing. “Paid prioritization” is a pricing technique that occurs in many other areas, and frequently is useful for solving rationing problems. And where it is banned, this yields downstream effects that we would similarly expect to occur in the broadband market. As the Nobel Laureate economist Ronald Coase pointed out, banning paid prioritization for radio airplay (*i.e.*, payola) actually benefits large record labels at the expense of smaller artists.⁹⁴ Simply banning payola, however, did nothing to rectify the underlying problem: airtime on radio was scarce and radio stations had to resort to other ways to ration it. As with insider trading,⁹⁵ the *de facto* practice necessarily is reconstituted elsewhere. The dollars previously spent on payola simply end up somewhere else, such as in advertising.⁹⁶ On the radio, this meant more ads taking up airtime, creating more scarcity and less music of any kind. While the specific mix of actual songs played may be different, there is no reason to believe it is in any way “better” or even more diverse without payola, and every reason to believe that there will simply be less of it.

Retail-store slotting contracts provide another helpful analogy:

Retailer supply of shelf space can therefore be thought of as creating incremental or “promotional” sales that would not occur without the promotion. The promotional shelf space provided by retailers induces these incremental sales by increasing the willingness of “marginal consumers” to pay for a product that they would not purchase absent the promotion. The generation of these promotional sales may occur by more prominently displaying a known brand, for example, in eye-level shelf space or a special display, or by providing shelf space for an unknown or new product.⁹⁷

As with prioritization on the internet, an intuitive fear about such arrangements is that they will be used by established content providers to hamstring their rivals:

The primary competitive concern with slotting arrangements is the claim that they may be used by manufacturers to foreclose or otherwise disadvantage rivals, raising the costs of entry and consequently increasing prices. It is now well established in both economics and antitrust law that the possibility of this type of anticompetitive effect depends on whether a dominant manufacturer can control a sufficient amount of distribution so that rivals are effectively prevented from reaching minimum efficient scale.⁹⁸

The problem with this argument is that:

⁹⁴ See Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979), available at <http://old.ccer.edu.cn/download/7874-3.pdf>.

⁹⁵ See Stephen M. Bainbridge, *Manne on Insider Trading* (UCLA School of Law, Law-Econ Research Paper No. 08-04), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096259.

⁹⁶ See GABRIEL ROSSMAN, *CLIMBING THE CHARTS: WHAT RADIO AIRPLAY TELLS US ABOUT THE DIFFUSION OF INNOVATION* (2012).

⁹⁷ Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, 74 ANTITRUST L. J. 439, 448 (2007). See also Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J. L. & ECON. 421 (2007).

⁹⁸ Klein & Wright, *supra* note 97 at 422.

[S]lotting fees are a payment that must be borne by all manufacturers. Competition for shelf space that leads to slotting may raise the cost of obtaining retail distribution, but it does so for everyone.... However, competition between incumbents and entrants for retail distribution generally occurs on a level playing field in the sense that all manufacturers can openly compete for shelf space and it is the manufacturer willing to pay the most for a particular space that obtains it.⁹⁹

While not a violation of antitrust law, the NPRM's approach would ban this practice without evidence of harm. So long as there are minimum-service guarantees in place, however, there is no reason to believe that the practice would actually harm startups or consumers. Moreover, these sorts of arrangements are usually tailored to the firms in question, with larger firms that demand more service also drawing higher prices for that service. Thus, in practice, the opportunity to pay for prioritization is relatively less attractive to large firms.

A blanket ban on paid prioritization risks locking in inefficient and suboptimal pricing models. It would restrict the very experimentation and innovation in business models that could help expand internet access. Rather than a one-size-fits-all ban, tailored oversight and monitoring of prioritization practices through the existing transparency rules would better balance the complex tradeoffs involved.

In the NPRM, the Commission notes that “In adopting a ban on paid prioritization in 2015, the Commission sought to prevent the bifurcation of the Internet into a ‘fast’ lane for those with the means and will to pay and a “slow” lane for everyone else.”¹⁰⁰ It then tentatively concludes that this concern remains valid today. But this framing makes as little sense now as it did in 2015.

The concept of “fast lanes” is a gross oversimplification, even apart from paid-prioritization schemes. In most cases, prioritization involves applying network-management strategies to guarantee certain content meets minimum-performance levels appropriate for its data type. For example, this could include prioritizing video-conferencing data for lower latency, or streaming video for better throughput. Technically, this creates a “fast lane,” but it is highly misleading to refer to it as such.

The costs and benefits of prioritization are nuanced and context-dependent. Whether prioritization is beneficial or harmful depends heavily on the presence of congestion. Prioritization matters most when congestion exists, since it inherently involves improving service for some content at the expense of other content.¹⁰¹ While prioritization schemes risk worsening service for non-prioritized content, they also can improve quality for higher-value applications. Congestion levels, minimum

⁹⁹ *Id.* at 423-24.

¹⁰⁰ NPRM at ¶158.

¹⁰¹ See, e.g., Jan Krämer & Lukas Wiewiorra, *Network Neutrality and Congestion Sensitive Content Providers: Implications for Service Innovation, Broadband Investment and Regulation*, (MPRA Paper No. 27003, Oct. 2010), available at http://mpra.ub.uni-muenchen.de/27003/1/MPRA_paper_27003.pdf. See also Drew Fitzgerald, *How the Web's Fast Lanes Would Work Without Net Neutrality*, WALL ST. J. (May 16, 2014), <http://online.wsj.com/news/articles/SB10001424052702304908304579565880257774274>.

standards, and other factors combined to determine the impact. Overly simplistic "fast lane" rhetoric should be avoided in favor of careful analysis of the tradeoffs, given technical and market conditions. What works as a better default is to provide minimum-performance guarantees for internet service.

A minimum-performance guarantee means that prioritized services cannot degrade non-prioritized content below a certain level. It also limits the extent to which prioritized content can receive better service, given the bandwidth needed to satisfy the minimum guarantees. As a result, ISPs that offer prioritization may actually increase total network capacity to deliver meaningful priority benefits without violating minimums.¹⁰²

Even without expanded capacity, prioritization with minimum guarantees does not necessarily create starkly differentiated service levels. During congestion, "slower" service becomes a reality for non-prioritized content. But simultaneously, the meaningfulness of "faster" service decreases in proportion to congestion levels. The practical difference between prioritized and non-prioritized traffic is less than is often assumed, and varies based on fluctuating traffic volumes. With appropriate safeguards, the fears of dramatic disparities created by "fast lanes" are overblown. For latency-insensitive content, even degraded "slow lanes" would have minimal effect. Thus, even if prioritization were to become widespread, its value and price would likely decrease. More content providers could thereby afford priority, further lessening any differentiation. With marginal speed differences and cheap priority access, dramatic impacts are unlikely.

We see the same dynamic even within edge providers' operations with respect to what are glibly deemed "slow" and "fast" lanes on the open internet. For example, it was discovered in 2015 that Netflix had been throttling its own transmission rate in certain situations, likely in order to optimize customers' viewing experience.¹⁰³ But under the framing presented in this NPRM, the incentive for this sort of self-disciplining behavior—which optimally rations scarce network resources—would disappear.

2. *The record reflects that the Commission should not ban paid prioritization*

As we discuss below, the Commission asserts that "minimal" compliance costs are associated with a ban on blocking and a "minimal" compliance "burden" is associated with a ban on throttling. The Commission has no principled means to make this determination.

CEI's comments point out the obvious: Paid prioritization is ubiquitous, even in the federal government, with TSA PreCheck and USPS Priority Mail,¹⁰⁴ as well as paid priority (*i.e.*, "expedited

¹⁰² See Mark A. Jamison & Janice A. Hauge, *Getting What You Pay For: Analyzing The Net Neutrality Debate* (TPRC 2007) at 14-15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081690. ("When the non-degradation condition holds, a network provider will increase network capacity when providing premium transmission service.")

¹⁰³ Steven Musil, *Netflix: We're the Ones Throttling Videos Speeds on AT&T and Verizon*, CNET (Mar. 24, 2016), <https://www.cnet.com/news/netflix-admits-throttling-video-speeds-on-at-t-verizon>.

¹⁰⁴ Comments of the Competitive Enterprise Institute, WC Docket No. 23-320 (Dec. 14, 2023) at 15.

service”) for passports.¹⁰⁵ The Federal Highway Administration not only condones paid prioritization of roadways (e.g., high-occupancy toll lanes, or “HOT lanes”), it encourages them, concluding that:

HOT lanes provide a reliable, uncongested, time saving alternative for travelers wanting to bypass congested lanes and they can improve the use of capacity on previously underutilized HOV lanes. A HOT lane may also draw enough traffic off the congested lanes to reduce congestion on the regular lanes.¹⁰⁶

In our comments on this matter, we note that the Commission fails to distinguish between instances where so-called “paid prioritization” has pro-consumer benefits and where it may constitute an anticompetitive harm.¹⁰⁷ For example, Netflix’s collocation of data centers within different networks to expedite service and reduce overall network load are unequivocally pro-consumer.¹⁰⁸ In addition, AT&T’s Sponsored Data program and T-Mobile’s Binge On offerings provide more choices, potentially lower prices, and introduce competitive threats to other providers in the market.¹⁰⁹

Under the Commission’s proposed Title II regulations, these innovations would be illegal. As a result, as ITIF points out, firms and potential entrants would have reduced incentives to experiment with and roll out new and innovative services to a wide range of consumers, especially lower-income consumers:

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. 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. 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

¹⁰⁵ U.S. Department of State, *Passport Fees* (Aug. 1, 2023), <https://travel.state.gov/content/travel/en/passports/how-apply/fees.html>.

¹⁰⁶ Federal Highway Administration, *High-Occupancy Toll Lanes (Partial Facility Pricing)* (Feb. 11, 2022), https://ops.fhwa.dot.gov/congestionpricing/strategies/involving_tolls/hot_lanes.htm.

¹⁰⁷ Comments of ICLE, *supra* n. 19, at 7.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 23.

from engaging in specifically harmful behaviors suggests that they are no more likely to in the future.¹¹⁰

We agree with several commenters who conclude that the proposed ban on paid prioritization may be at odds with the Commission's desire to "preserve" and "advance" public safety. For example, the Free State Foundation says:

[T]he Notice does not even appear to directly permit any form of traffic prioritization for serving public safety purposes. And to the extent that such an omission is inadvertent, it might suggest the Commission has not adequately carried out its duty to consider the negative effects that a ban on paid prioritization can have on "promoting safety of life and property through the use of wire and radio communications."¹¹¹

NCTA points out that public safety during emergencies is one of the key instances in which prioritization is clearly beneficial:

If anything, retaining a light-touch regulatory regime for broadband would benefit public safety users by allowing ISPs to prioritize such critical traffic in times of emergency without fear of becoming subject to enforcement action for being "non-neutral."¹¹²

A recurring theme throughout this rulemaking process is that the U.S. broadband industry is both competitive and dynamic. This vigorous competition forces providers to align their interests with those of their customers, as noted by CEI:

A bright line prohibition is also unneeded because the market will impose rationality on prioritization practices. If an ISP engaging in paid prioritization provides an inferior consumer experience, its customers are empowered to take their business elsewhere because most consumers have multiple options in ISPs. This is exactly how the market functions throughout the economy.¹¹³

The broadband market's competitiveness and dynamism are demonstrated by two seemingly contradictory, but completely consistent statements from WISPA. First, it notes that anticompetitive paid prioritization can harm smaller providers:

WISPA is concerned that preferential traffic management techniques that are anti-competitive can be used to disadvantage providers that are unable to secure access to

¹¹⁰ Comments of ITIF, *supra* n. 70, at 7-8.

¹¹¹ Comments of the Free State Foundation, *supra* n. 37, at 29. See also, Comments of the Scalia Law Clinic, *supra* n. 68, at 7 ("Prioritization can be helpful in the public safety context and allows for providers to make 'tradeoffs' that can help increase speed and accessibility for all.")

¹¹² Comments of NCTA, *supra* n. 9, at 72.

¹¹³ Comments of the Competitive Enterprise Institute, *supra* n. 104, at 15.

certain content or lack the leverage to obtain commercial terms afforded to broadband access providers with regional and national scope.¹¹⁴

At the same time, WISPA reports that there is no evidence of such anticompetitive conduct, and that if such conduct were found, it could be addressed under existing regulations:

These open internet principles can be preserved by maintaining the current light-touch regulatory approach. There is no market failure or evidence of blocking, throttling, paid prioritization or bad conduct from smaller providers that justifies saddling them with monopoly-based common carrier regulations.¹¹⁵

Comments in this proceeding reinforce our conclusions that, in nearly every case, paid prioritization benefits ISPs, consumers, and edge providers. To date, there has been no evidence of the anticompetitive use of paid prioritization or any harms to consumers or edge providers from the limited instances of above-board paid or affiliated prioritization arrangements. Thus, the Commission's proposal to ban such arrangements is based on mere speculation, rather than "reasoned analysis."

C. Blocking

The Commission proposes a "bright-line rule" prohibiting providers from "blocking lawful content, applications, services, or non-harmful devices."¹¹⁶ The Commission "tentatively" concludes that providers "continue to have the incentive and ability to engage in practices that threaten Internet openness."¹¹⁷ But, just two paragraphs later in the NPRM, the Commission reports:

As far back as the Commission's *Internet Policy Statement* in 2005, major providers have broadly accepted a no-blocking principle. Even after the repeal of the no-blocking rule, many providers continue to advertise a commitment to open Internet principles on their websites, which include commitments not to block traffic except in certain circumstances.¹¹⁸

At a conceptual level, issues like blocking and throttling could raise valid legal concerns when they are not done for valid network-management reasons. To date, however, there hasn't even been a potential harm raised that would, if proven, not be remediable under existing antitrust law. Thus, arrogating more power to itself will do little to enhance the FCC's ability to deter this conduct. The Providers' behavior is already scrutinized under the Commission's transparency rules, and any anticompetitive behavior can be pursued by antitrust enforcers.

¹¹⁴ Comments of the Wireless Internet Service Providers Association (WISPA), WC Docket No. 23-320 (Dec. 14, 2023) at 39.

¹¹⁵ *Id.* at 7.

¹¹⁶ NPRM at ¶150.

¹¹⁷ *Id.*

¹¹⁸ NPRM at ¶152.

But in practice, as the Commission notes, the providers have all committed to refrain from blocking and throttling unrelated to reasonable network management. This is akin to the old joke about clapping to keep away elephants.¹¹⁹ We not aware of any comment in this matter that offers reliable evidence that any provider currently blocks lawful content, applications, services, or non-harmful devices. As noted above, the NPRM does not identify any examples of blocking in the last 15 years since the Madison River and Comcast peer-to-peer matters, and most providers have adopted explicit no-blocking policies.¹²⁰ The Commission concludes “this principle is so widely accepted, including by ISPs, we anticipate compliance costs will be minimal.”¹²¹

In comments on the 2015 Order, ICLE and TechFreedom noted that (1) many internet users are tech-savvy, (2) blocking is easily detectable by even those users who are not tech-savvy, and (3) blocking is widely unpopular. Therefore, providers likely have more disincentives to block content than incentives to do so:

There are already millions of tech-savvy Americans on the web, and the tools necessary to detect a blocking or serious degradation of service are widely available, so there is every reason to suspect that any future instances of such blocking will also be detected. If they are truly nefarious (*i.e.*, the ISP is blocking a legal service/application that its customers are trying to access), then public outcry by the affected subscribers should likely be sufficient to convince the ISP to change its practices, rather than bear the brunt of public backlash, in hopes of pleasing its customers (and its investors).¹²²

Even so, the Commission nonetheless also asserts that Title II regulation is necessary to ban a practice in which no one engages. Such assertions venture far away from “reasoned analysis” territory and deep into “arbitrary and capricious” territory.

¹¹⁹ Patrick, *Chasing Away Elephants*, FAIRYTALENIGHT.COM (Apr. 16, 2020),

<https://www.fairytaledenight.com/2020/04/16/chasing-away-elephants> (“A man is walking down the street, clapping his hands together every ten seconds. Asked by another man, why he is performing this peculiar behavior, he responds: ‘I’m clapping to scare away the elephants.’ Visibly puzzled, the second man notes that there are no elephants there, where upon the clapping man replies: ‘See, it works!’”)

¹²⁰ There is, however, a pro-competitive explanation for Comcast’s alleged conduct. Comments of TechFreedom, *supra* n. 47, at 27 (Explaining that intensive file-sharing traffic was causing such severe latency and jitter that it made VoIP telephony unusable. Comcast wanted to launch its VoIP offering with dedicated network capacity but feared accusations of making it impossible for rival VoIP services to compete. Throttling BitTorrent was pro-competitive in that it allowed Comcast and its competitors to offer VoIP services.) In addition, in the wake of the Comcast matter, Micro Transport Protocol, or μ TP, was developed reduce congestion related to peer-to-peer file sharing. See, Drake Baer, *How BitTorrent Rewrote the Rules of the Internet*, FAST COMPANY (Mar. 5, 2014), <https://www.fastcompany.com/3026852/how-bittorrent-rewrote-the-rules-of-the-internet>.

¹²¹ NPRM at ¶152.

¹²² ICLE & TechFreedom, Policy Comments, GN Docket No. 14-28 (Jul. 17, 2014) at 15-16, <https://laweconcenter.org/resources/icle-techfreedom-policy-comments>.

D. Throttling

The Commission proposes to prohibit providers from “throttling lawful content, applications, services, and non-harmful devices.”¹²³ This is because the FCC “believe[s] that incentives for ISPs to degrade competitors’ content, applications, or devices remain”¹²⁴ even though the Commission also “believes” providers “have had a strong incentive to follow their voluntary commitments to maintain service consistent with certain conduct rules established in the 2015 *Open Internet Order*” during and after the COVID-19 pandemic.¹²⁵ TechFreedom concludes, “There is no real debate over these principles; everyone has agreed that blocking and throttling is such a bad idea that the marketplace has rejected it.”¹²⁶ Moreover, the Commission reports that the incidence and likelihood of provider throttling is so low that there will be “a minimal compliance burden” associated with the proposed ban:

Even after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we anticipate that prohibiting throttling of lawful Internet traffic will impose a minimal compliance burden on ISPs.¹²⁷

Consistent with ICLE’s comments in this matter, 5G Americas reports that the change in the competitive broadband landscape, along with existing transparency rules, render blocking and throttling prohibitions unnecessary:

Blocking and throttling prohibitions are not needed, because internet business models require delivering the lawful content consumers want, at the speeds they expect. There have been no instances of mobile broadband providers engaging in discriminatory conduct since the 2017 RIF Order. This is because the internet ecosystem is dramatically different from when Title II regulation was first discussed in the early 2000’s. Today it is widely understood that content providers have more market power than ISPs. Reimposition of the 2015 rules is a proposal in search of a problem that doesn’t exist in the vastly differentiated marketplace of today.

In addition, the existing transparency rule is sufficient to protect against unlikely discriminatory conduct, making the general conduct rule, as well as the blocking and throttling prohibitions, unnecessary. It is notable that the Notice of Proposed Rulemaking makes no attempt to argue that since the 2017 RIF Order broadband providers have engaged in anticompetitive or non-transparent conduct that would justify regulating the entire industry as common carriers subject to ex ante oversight.¹²⁸

¹²³ NPRM at ¶153.

¹²⁴ NPRM at ¶156.

¹²⁵ NPRM at ¶156.

¹²⁶ Comments of TechFreedom, *supra* n. 47, at 2.

¹²⁷ *Id.*

¹²⁸ Comments of 5G America, WC Docket No. 23-320 (Dec. 14, 2023) at 8.

The NPRM cites a study published in 2019, using data mostly from 2018, that “suggested that ISPs regularly throttle video content.”¹²⁹ We urge the Commission to be skeptical of relying on this study. As we report above, several commenters report that it has been “debunked.”¹³⁰ Moreover, we note in our comments that, to the extent the study found throttling, the authors concluded it was “not to the extent in which consumers would likely notice.”¹³¹ In other words, the study does not reliably demonstrate “regular” throttling of content and any throttling detected was *de minimis*. CTIA’s comments provide a detailed summary of the study’s shortfalls:

The *Notice* also asserts that a study “suggested that ISPs regularly throttle video content,” but the Commission makes no findings and the *Notice* does not recognize the thorough rebuttal debunking the claims in the paper. The Li *et al.* Study purported to show throttling of video sites by wireless providers, but as CTIA noted at the time, the study used simulated traffic between artificial network end points and failed to account for basic network engineering, consumer preference, or how mobile content is distributed. Consumers, for example, have the ability to alter video resolution settings or sign up for steaming service plans that offer varying levels of resolution. Additionally, many video applications take actions themselves to automatically adjust to a network’s available bandwidth to improve the user experience. What the study identified, if found in a real-world setting, would be either reasonable network management, consumer choice, or data management practices used by content providers. allegation was therefore without merit and does not show harm to Internet openness.¹³²

As with its proposed ban on blocking, the Commission asserts that Title II regulation is necessary to ban throttling—a practice in which no one engages. Such assertions venture far from “reasoned analysis” territory and deep into “arbitrary and capricious” territory.

IV. General Conduct Standard¹³³

In this NPRM, the Commission seeks to revive the General Conduct Standard (also known as the Internet Conduct Standard) that was removed in the 2018 Order.¹³⁴ The General Conduct Standard is a catch-all rule that would allow the Commission to intervene when it finds that an ISP’s conduct generally threatened end users or content providers under some principle of net neutrality.¹³⁵ As

¹²⁹ NPRM at ¶128.

¹³⁰ See, Comments of CTIA, *supra* n. 33, at 11 (“[T]he Commission makes no findings and the *Notice* does not recognize the thorough rebuttal debunking the claims in the paper.”). See also, Comments of the U.S. Chamber of Commerce, *supra* n. 65, at 5 (“[T]he Commission cites a single 2019 study regarding alleged throttling practices by wireless ISPs in the U.S. and elsewhere—the methodology, veracity, and import of which has been contested by providers and others.”).

¹³¹ Comments of ICLE, *supra* n. 19, at 29.

¹³² Comments of CTIA, *supra* n. 33, at 10-11.

¹³³ Many of our findings and conclusion submitted during the 2018 Order’s rulemaking process remain true today and much of this section builds on those comments. ICLE, Policy Comments, *supra* n. 7

¹³⁴ NPRM at ¶166.

¹³⁵ NPRM at ¶165

“guidance,” the Commission proposes a non-exhaustive list of factors that could possibly (but not necessarily) be used to prove a violation.¹³⁶ The factors comprise an uncertain mashup of competition law, consumer-protection law, and First Amendment law and include 1) the effect on end-user control; 2) competitive effects; 3) effect on consumer protection; 4) effect on innovation, investment, or broadband deployment; 5) effects on free expression; 6) whether the conduct is application-agnostic; and 7) whether the conduct conforms to standard industry practices.¹³⁷

The U.S Circuit Court of Appeals for the D.C. Circuit rejected US Telecom’s arguments that the 2015 General Conduct Rule should be invalidated.¹³⁸ Notwithstanding that decision, the Commission should be wary in moving forward with this provision. While the court may have found the General Conduct Standard was not vague in all its applications, the Court did not consider that, under *State Farm*, the Commission’s choice to implement such a far-reaching, ambiguous standard lacked a rational connection with FCC’s proffered facts.¹³⁹

In the 2015 Order, the FCC claimed it had not created a novel, case-by-case standard, but rather that it was taking an approach similar to the “no unreasonable discrimination rule,” which was accompanied by four factors (end-user control, use-agnostic discrimination, standard practices, and transparency).¹⁴⁰ While the “no unreasonable discrimination rule” was grounded in Section 706 of the Telecommunications Act of 1996, basing the General Conduct Standard in Sections 201 and 202 of the Communications Act (in addition to Section 706) enabled an unprecedented expansion of FCC authority over the internet’s physical infrastructure.¹⁴¹ Then-Commissioner Ajit Pai noted at the time:

The FCC’s newfound control extends to the design of the Internet itself, from the last mile through the backbone. Section 201(a) of the Communications Act gives the FCC authority to order “physical connections” and “through routes,” meaning the FCC can decide where the Internet should be built and how it should be interconnected. And with the broad Internet conduct standard, decisions about network architecture and design will no longer be in the hands of engineers but bureaucrats and lawyers. So if one Internet service provider wants to follow in the footsteps of Google Fiber and enter the market incrementally, the FCC may say no. If another wants to upgrade the bandwidth of its routers at the cost of some latency, the FCC may block it. Every decision to invest in ports for interconnection may be second-guessed; every use of priority coding to enable latency-sensitive applications like Voice over LTE may be reviewed with a microscope. How will this all be resolved? No one knows. 81-year-old laws like this don’t self-execute,

¹³⁶ NPRM at ¶165.

¹³⁷ *Id.*

¹³⁸ *United States Telecom Ass’n v. Fed. Commc’ns Comm’n*, 825 F.3d 674, 736 (D.C. Cir. 2016).

¹³⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

¹⁴⁰ 2015 Order at ¶138.

¹⁴¹ Report and Order, In the Matter of Preserving the Open Internet Broadband Industry Practices, GN Docket No. 09-191, ¶68 (Dec. 23, 2010), [hereinafter “2010 Order”]; 2015 Order, *supra* n. 2, at ¶137.

and even in 317 pages, there's not enough room for the FCC to describe how it would decide whether this or that broadband business practice is just and reasonable. So businesses will have to decide for themselves—with newly-necessary counsel from high-priced attorneys and accountants—whether to take a risk.”¹⁴²

In the 2015 Order, the FCC relied on its 2010 findings, without advancing new evidence from the intervening five years of internet innovation to justify taking vastly greater authority over the physical infrastructure of the internet than it had in the 2010 Order.¹⁴³ In this NPRM, the Commission again advances no new evidence to justify such a massive takeover. The Commission contemplates using Sections 201 and 202 as the basis for the General Conduct Standard.¹⁴⁴ But when it previously invoked those sections and added more factors to the General Conduct Standard than were in the “no unreasonable discrimination rule,” it merely addressed the reason the rule was overturned by the D.C. Circuit in *Verizon*, rather than articulate a dire need to grab power.¹⁴⁵ Thus, the Commission again fails to articulate its need.

Vastly expanding the FCC's authority to implement a vague list of non-exhaustive factors is a terrible way to determine rules of conduct for firms that necessarily invest billions of dollars in infrastructure over the course of decades. Even on the relatively shorter timescale required to offer innovative new service packages to consumers, a tremendous volume of negotiations are required among the broadband networks, rights holders, and any other third parties. The only practical way to comply with the General Conduct Standard would be to involve the FCC in business decisions at every level. For providers, such a “standard” cannot help but chill innovation and ultimately harm consumers through higher prices, reduced quality, and limited choice.

In addition, unlike the General Conduct Standard, which applies to both fixed and mobile broadband providers, the “no unreasonable discrimination rule” adopted in the 2010 Order only applied to fixed broadband providers.¹⁴⁶ The D.C. Circuit in *US Telecom* did not consider the FCC's failure to create a rational connection between the facts the Commission found and its choice to establish a conduct standard for mobile in the 2015 Order. First, the FCC's reliance on the 2015 Broadband Progress Report to demonstrate that the “virtuous cycle” was in peril did not consider mobile broadband. Second, the FCC attempted to sidestep the need to perform competitive analysis for imposing the standard on mobile by stating, “even if the mobile market is sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness.”¹⁴⁷ Instead, the FCC stated that the General Conduct Standard

¹⁴² Dissenting Statement of Commissioner Ajit Pai, In the Matter of Protecting & Promoting the Open Internet, GN Docket No. 14-28, 30 F.C.C. Rcd. 5601, 5921 (2015).

¹⁴³ 2015 Order at ¶137-38.

¹⁴⁴ NPRM at ¶167.

¹⁴⁵ *Cellco Partnership v. Fed. Comm'n's Comm'n*, 700 F.3d 534, 548 (D.C. Cir, 2012); *Verizon v. F.C.C.*, 740 F.3d 623, 657 (D.C. Cir. 2014).

¹⁴⁶ 2010 Order at ¶168.

¹⁴⁷ 2015 Order at ¶148.

could apply to mobile based on a handful of “incidents.”¹⁴⁸ Closer inspection of the examples cited, however, critically undermine the foundation of the FCC’s argument.

One such example stated that “AT&T blocked Apple’s FaceTime iPhone and iPad applications over AT&T’s mobile data network in 2012.”¹⁴⁹ Already operating on Wi-Fi, Apple made FaceTime available over mobile operators’ networks starting with iOS 6, which launched in September 2012 and was designed to handle more data than previous iOS versions.¹⁵⁰ Sprint and Verizon announced that they would make the service available to mobile data subscribers of all data plans.¹⁵¹ AT&T maintained that it was taking a more cautious approach and only made FaceTime available on shared data plans, because it could not sufficiently model how much subscribers would use the app and thus its network impact.¹⁵²

If FaceTime use were to exceed modelled expectations, AT&T claimed that its network data usage may have adversely impacted voice quality.¹⁵³ In November 2012—two months after the release of a cellular version of FaceTime and without threat of FCC action—AT&T announced its network would support FaceTime on all tiered data plans with an LTE device, and would continue to monitor its network to expand the availability of FaceTime to customers on other billing plans.¹⁵⁴ An additional plausible explanation for AT&T’s actions is that it made FaceTime available over its mobile network four months after competitors Sprint and Verizon also announced they would make FaceTime available over on all data plans. On balance, in a year in which AT&T doubled its nationwide 4G LTE coverage, this example hardly seems the nefarious “they’ve done it before and will do it again” rationale trotted out in this and the handful of other examples cited by the FCC as justification for including mobile broadband under the Internet Conduct Standard.¹⁵⁵

Theoretically, such a case-by-case standard should focus on the market’s ability to mitigate any alleged harms through competition. The General Conduct Standard is instead a novel, catch-all standard

¹⁴⁸ *Id.*

¹⁴⁹ 2015 Order at n. 123. *See also*, Comments of the Electronic Frontier Foundation, WC Docket No. 23-320 (Dec. 14, 2023) at 7.

¹⁵⁰ Jordan Crook, *Apple Introduces iOS 6, Coming This Fall*, TECHCRUNCH (Jun. 11, 2012), <https://techcrunch.com/2012/06/11/apple-announces-ios-6-wwdc>.

¹⁵¹ 9to5Mac, *Sprint Says It Will Not Charge For FaceTime Over Network, Verizon Calls iOS 6 Pricing Conversations ‘Premature’*, 9TO5MAC (Jul. 18, 2012), <https://9to5mac.com/2012/07/18/sprint-says-it-will-not-charge-for-facetime-over-cellular-verizon-calls-talk-premature>; Jon Brodtkin, *Verizon Will Enable iPhone’s FaceTime On All Data Plans, Unlike AT&T*, ARSTECHNICA (Sep. 13, 2012), <https://arstechnica.com/apple/2012/09/verizon-will-enable-iphones-facetime-on-all-data-plans-unlike-att>.

¹⁵² Jim Cicconi, *A Few Thoughts On FaceTime*, AT&T PUBLIC POLICY (Nov. 8, 2012), <https://www.attpublicpolicy.com/broadband/a-few-thoughts-on-facetime>.

¹⁵³ *Id.*; At the time, a FaceTime call consumed on average 2-4 times more bandwidth than a similar call carried out via Skype. FCC, Open Internet Advisory Committee – 2013 Annual Report, at 3.

¹⁵⁴ Jim Cicconi, *A Few Thoughts On FaceTime*, AT&T PUBLIC POLICY (Nov. 8, 2012), <https://www.attpublicpolicy.com/broadband/a-few-thoughts-on-facetime>.

¹⁵⁵ Press Release, AT&T, *AT&T 4G LTE Coverage Double In 2012* (Nov. 16, 2012), <https://www.att.com/gen/press-room?pid=23553&cdvn=news&newsarticleid=35717>.

established without input from Congress.¹⁵⁶ It contains no insight as to which factor is most important, how the FCC will resolve the inevitable conflicts among factors, or even if the factors are dependent on one another or disjunctive.

This General Conduct Standard, in short, provides no meaningful guidance for firms or consumers, and leaves regulation up to the Commission's whim.

V. Data Caps and Usage-Based Pricing

The NPRM is virtually silent on the topic of data caps, asserting only that individuals with disabilities “increasingly rely” on internet-based communications that are “particularly sensitive to data caps,”¹⁵⁷ and asking whether the Commission should require more detailed disclosures regarding the “requirements, restrictions, or standards for enforcement of data caps.”¹⁵⁸

But this near silence in the NPRM appears to belie the Commission's deep interest in regulating data caps. In June 2023, Chair Rosenworcel announced she would ask her fellow commissioners to support a formal notice of inquiry to learn more about how broadband providers use data caps on consumer plans.¹⁵⁹ The same day, the FCC launched a “Data Caps Stories Portal” for “consumers to share how data caps affect them.”¹⁶⁰ It would not be a stretch to surmise that the Commission intends to regulate data caps under the “general conduct” rules in its proposed Title II reclassification.

The NPRM is similarly silent on the issue of usage-based pricing and zero rating, with only a passing reference in a footnote¹⁶¹ and a request for comments regarding whether “any zero rating or sponsored data practices that raise particular concerns under the proposed general conduct standard.”¹⁶² Nevertheless, since the 2015 Order, at least some members of the Commission appear to have maintained keen interest in scrutinizing providers' zero-rating offerings, with an eye toward regulating them. For example, in the last days of the Obama administration, the Commission released a report of a staff review of sponsored data and zero-rating practices in the mobile-broadband market.¹⁶³ In a letter to Sen. Edward Markey (D-Mass.), the Commission summarized its conclusions:

¹⁵⁶ And note, such a vast arrogation of power surely will factor into a “major questions analysis.” See, Comments of ICLE, *supra* n. 19, at nn. 153-185, and accompanying text.

¹⁵⁷ NPRM at ¶120.

¹⁵⁸ NPRM at ¶175.

¹⁵⁹ FCC, Chairwoman Rosenworcel Proposes to Investigate How Data Caps Affect Consumers and Competition (Jun. 15, 2023), available at <https://docs.fcc.gov/public/attachments/DOC-394416A1.pdf>.

¹⁶⁰ FCC, FCC Launches Data Cap Stories Portal (Jun. 21, 2023), <https://www.fcc.gov/consumer-governmental-affairs/fcc-launches-data-cap-stories-portal>.

¹⁶¹ NPRM at ¶534.

¹⁶² NPRM at ¶166.

¹⁶³ FCC, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services* (Jan. 11, 2017), available at <https://docs.fcc.gov/public/attachments/DOC-342987A1.pdf>.

While reiterating that zero-rating *per se* does not raise concerns, it finds that two of the programs reviewed, AT&T's "Sponsored Data" program and Verizon's "FreeBee Data 360" program, present significant risks to consumers and competition. In particular, these sponsored data offerings may harm consumers and competition by unreasonably discriminating in favor of downstream providers owned or affiliated with the network providers. The Commission has long been concerned about the ability and incentives of network owners to thwart their downstream competitors' ability to serve consumers.

In the early days of the Trump administration, the Commission announced it would end its inquiry into zero rating.¹⁶⁴ Chair Rosenworcel has added her view that: "A lot about zero net rating is about data caps."¹⁶⁵ She also had expressed her concerns with zero rating:

But over the long haul, what that does is it constrains where you can go and what you can do online. Because you'll get a fast lane to go to all of those sites that your broadband provider has set up a deal with, and you'll get consigned to a bumpy road if you want to see anything else. And that erodes net neutrality over time.¹⁶⁶

AT&T, probably more familiar than most with the Commission simultaneously declaring that it abjure rate regulation only to shoehorn such regulation into catch-all General Conduct rules, notes in comments to this proceeding:

For example, the proposed conduct rule raises the investment-killing specter of rate regulation, despite the Commission's empty assurances to the contrary. ISPs have seen this movie before. The Commission similarly forswore rate regulation in 2015, yet it followed up a year later with threats to punish ISPs under the conduct rule for the rate structure of their sponsored data programs, which offered consumers the economic equivalent of bundled discounts and thus provided more broadband for less. Indeed, even while denying plans for rate regulation, the NPRM itself vows to scrutinize the structure of broadband pricing plans for evidence of "prohibit[ed] unjust and unreasonable charges." Long-term revenues are difficult enough to project even in the absence of such unpredictable regulatory prohibitions. But the prospect of creeping rate regulation would further imperil the business case for investment by threatening to upend assumptions about future revenue streams.¹⁶⁷

The Commission appears to be playing coy. It gives the impression that it has little interest in regulating data caps or zero rating, yet it also has a long and ongoing history of making moves to regulate such practices. In the remainder of this section, we explain that, in most cases, nonlinear

¹⁶⁴ FCC, Statement of Commissioner Michael O'Rielly on Conclusion of Zero Rating Inquiries (Feb. 3, 2017), *available at* <https://docs.fcc.gov/public/attachments/DOC-343340A1.pdf>.

¹⁶⁵ *Full Transcript: FCC Commissioner Jessica Rosenworcel Answers Net Neutrality Questions on Too Embarrassed to Ask*, VOX (Dec. 20, 2017), <https://www.vox.com/2017/12/20/16797164/transcript-fcc-commissioner-jessica-rosenworcel-net-neutrality-questions-too-embarrassed-to-ask>.

¹⁶⁶ *Id.*

¹⁶⁷ Comments of AT&T, *supra* n. 46 at 5-6.

pricing models like zero rating are pro-competitive and benefit ISPs, consumers, and edge providers alike.

A. Nonlinear Pricing Models Are Pro-Consumer

Forbidding usage-based pricing for internet service can actually frustrate consumer demand for data and content. With so-called “neutral” pricing, consumers have little ability or incentive to prioritize their own internet use based on preferences, beyond simply consuming or not consuming the service altogether. This creates deadweight loss, as users forgo benefits from services they cannot afford under an all-or-nothing full-access model. It also encourages inefficient network-usage patterns since consumers cannot signal their priorities. Additionally, restricting pricing models limits innovation in offerings that could leverage more nuanced pricing approaches. The rigid one-size-fits-all nature of “neutral” pricing can negatively impact consumer welfare and network efficiency.

With undifferentiated pricing, the cost to users is the same for high-value, low-bandwidth data (e.g., telehealth) as it is for low-value, high-bandwidth data (e.g., photo hosting), so long as the user's total bandwidth allotment is not exceeded. Undifferentiated pricing can lead consumers to overconsume lower-value data like photo sharing while under-consuming higher-value uses like telehealth. Content developers respond by overinvesting in the former and underinvesting in the latter. The end result is a net reduction in the overall value of both available and consumed content, along with network underinvestment.

The notion that consumers and competition benefit when users lack incentives to consider their own usage runs counter to basic economic principles. Evidence does not support the proposition that preventing consumers and providers from prioritizing high-value uses leads to optimal outcomes. More flexibility in pricing and service tiers could better align investment and usage with true value.

The goal of broadband policy should be to optimize internet use in a way that maximizes value for consumers, while offering incentives for innovation and investment. This requires usage-based pricing and prioritization models tailored to address congestion issues efficiently. Since consumer preferences are diverse, a flexible approach is needed, rather than one-size-fits-all mandates. ISPs should have room to experiment with options that encourage users to prioritize data based on their individual needs and willingness to pay. Effective policy aims for an internet that maximizes benefits and incentives for all through flexible, value-driven models.

Evidence does not support claims that restricting providers from accounting for externalities improves outcomes. In fact, usage-based pricing and congestion pricing could, in many cases, encourage expansion of network capacity.¹⁶⁸ It is possible that, under some conditions, differential

¹⁶⁸ See generally, Robert D. Willig, *Pareto Superior Nonlinear Outlay Schedules*, 11 BELL J. ECON. 56 (1978).

pricing could provide incentives for artificial network scarcity.¹⁶⁹ If that is the concern, however, economic analysis should clearly establish when such risks exist before regulating. Additionally, regulation should be narrowly targeted to address only proven harms, while avoiding constraints on beneficial incentives for investment, usage, and innovation.

Importantly, limiting ISP pricing flexibility may hinder faster network construction and ultimately reduce consumer welfare. In a 2013 paper, former DOJ Chief Economist and current FTC Chief Economist Aviv Nevo (and co-authors) explained:

Our results suggest that usage-based pricing is an effective means to remove low-value traffic from the Internet, while improving overall welfare. Consumers adopt higher speeds, on average, which lowers waiting costs. Yet overall usage falls slightly. The effect on subscriber welfare depends on the alternative considered. If we hold the set of plans, and their prices, constant, then usage-based pricing is a transfer of surplus from consumers to ISPs. However, if we let the ISP set price to maximize revenues, then consumers are better off.¹⁷⁰

The authors further note that overall (and ISP) welfare could be increased further with \$100/month flat-rate pricing on a Gigabit network. But as the authors note, “[f]rom the ISP’s perspective, the capital costs of such investment would be recovered in approximately 150...months. Similarly, this estimate is a lower bound on the actual time required.”¹⁷¹

While such cost recovery is feasible, it assumes no significant changes in technology, regulation, or demand that would alter the calculation; relatively high population density; and, most importantly, the ability to charge relatively high rates, leading to decreased penetration. And the authors further note that the *optimal* fixed fee for Gigabit was almost \$200/month. While:

[t]his revenue-maximizing price is in the middle of the range of prices currently offered for Gigabit service in the US..., due to restrictions on rates from local municipalities, an ISP may have a difficult time charging this rate.¹⁷²

The bottom line is that regulatory restrictions on pricing generally serve to reduce welfare and incentives for broadband investment. The FCC should avoid adopting such restrictions, particularly without the evidence or economic analysis sufficient to justify them.

¹⁶⁹ See Nicholas Economides, *Why Imposing New Tolls on Third-Party Content and Applications Threatens Innovation and Will Not Improve Broadband Providers’ Investment* (NYU Center for Law, Economics & Organization Working Paper No. 10-32, Jul. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627347.

¹⁷⁰ Aviv Nevo, John L Turner, & Jonathan W. Williams, *Usage-Based Pricing and Demand for Residential Broadband* 38 (Working Paper, Sep. 12, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330426.

¹⁷¹ *Id.* at 37.

¹⁷² *Id.* at 38.

B. The Record Reflects that the Commission Should Not Interfere with Usage-Based Pricing

Data caps lay at the heart of zero rating and usage-based pricing. Thus, it is unsurprising that the Commission has taken the first steps to inquire about consumers' experiences with data caps, especially given its demonstrated antagonism toward zero rating. But without data caps, zero rating certain applications is irrelevant because, effectively, every application is zero rated. Similarly, without data caps, usage-based billing is meaningless from the consumer's standpoint, as data would be "too cheap to meter."

Practically speaking, data caps are one of many ways in which providers can use pricing and data allowances to manage network congestion. Even so, it appears that consumer demand is guiding providers away from data caps. According to Statista, 45% of mobile consumers say they have unlimited data plans.¹⁷³ It should be axiomatic that consumers who subscribe to unlimited data plans prefer those plans over the alternatives.¹⁷⁴ Perhaps that's why OpenVault reports a "trend" among many operators to provide unlimited data to their gigabit subscribers.¹⁷⁵ If this continues, data caps and, in turn, zero rating and usage-based billing may soon be practices of the past, much like long-distance telephone charges.¹⁷⁶ EFF's comments in this matter echo this observation:

Given abundant capacity, throttling, paid prioritization, and data caps become all the more unreasonable. This is already apparent in broadband plans, both wireline and mobile, where increasingly there are very high to no data caps. As more fiber is laid, data caps should disappear altogether. Certainly, the need to manage the volume of traffic as a matter of "reasonable network management" will be even less plausible than it is today as time goes on.¹⁷⁷

Until the day that data caps "disappear altogether," however, providers will likely continue offering plans with zero rating or usage-based pricing. Because we still live in a world of limited capacity and periodic congestion, zero-rating policies provide a benefit to many consumers, as reported in our comments in this matter.¹⁷⁸ Free State Foundation's comments support our conclusion:

¹⁷³ *Most Common Mobile Data Plans in the U.S. as of September 2023*, STATISTA (Nov. 2023), <https://www.statista.com/forecasts/997206/most-common-mobile-data-plans-in-the-us> (Response to the question, "How large is your monthly data volume according to your main smartphone contract/prepaid service?").

¹⁷⁴ Comments of CTIA, *supra* n. 33, at 102-103 ("[U]sage-based pricing and zero-rating are quintessential examples of offers that facilitate choice. Usage-based pricing plans involve customers paying a fixed monthly fee for a fixed amount of data per month, so that consumers do not need to choose between "all you can eat" or nothing. Zero-rating involves certain traffic that does not count towards any usage-based pricing limit, meaning consumers get the benefits of more choice of price points and extra data").

¹⁷⁵ OpenVault (2023), *supra*, n. 27.

¹⁷⁶ See, Comments of AT&T, *supra*, n. 46 at 26-27 (describing zero-rating as the "equivalent of toll-free calling").

¹⁷⁷ Comments of Electronic Frontier Foundation, *supra* n. 149 at 14-15.

¹⁷⁸ ICLE comments, *supra* n. 19 at 30-32 (summarizing and FCC report concluding data caps provide revenues to fund

The regulatory uncertainty caused by the *Title II Order*'s general conduct standard and the Wheeler FCC's investigation of free data plans effectively halted new offerings for unlimited data plans. But the Pai FCC' rescission of the Wheeler FCC's report and the *RIF Order*'s repeal of the *Title II Order* provided a market climate hospitable to innovative "free data plans."¹⁵⁶ And there is no evidence in the Notice of anyone being harmed by the offering of such plans. Accordingly, the Commission should not risk the elimination of "free data plans" by reimposing public utility regulation and the vague "general conduct" standard. The existing policy of market freedom should be retained to the benefit of consumers. Or at the most, the Commission should analyze future complaints involving innovations like "free data" plans under a commercially reasonable standard such as the one addressed later in these comments.¹⁷⁹

Layton & Jamison further highlight the benefits of zero rating in encouraging U.S. veterans to connect with U.S. Department of Veterans Affairs health-care providers:

The US Department of Veteran's Affairs (VA) video app which is called VA Video Connect and is offered in partnership with US broadband providers, allows veterans and caregivers to meet with VA healthcare providers via a computer, tablet, or mobile device without data charges. The VA reported that more than 120,000 veterans accessed the app (Wicklund, 2020), which was important because VA hospitals were under high stress during the pandemic and could not maintain their prior level of routine care. The VA also reported that the app increased the VA's ability to reach roughly 2.6 million veterans from remote locations with limited transportation or hesitancy over in-person, medical visits. Politico reported, "Officials at the Department of Veterans Affairs are privately sounding the alarm that California's new net neutrality law could cut off veterans nationwide from a key telehealth app."¹⁸⁰

The Commission's antagonism toward data caps and zero rating has always been somewhat misguided. Past and future investments in broadband capacity, however, have and will render efforts to regulate, reign in, or eliminate such practices increasingly unnecessary, unwarranted, and quixotic.

broadband buildout, provide incentives to develop more efficient ways of delivering data-intensive services, and enable business-model experimentation).

¹⁷⁹ Comments of the Free State Foundation, *supra* n. 37 at 55-56.

¹⁸⁰ Layton & Jamison, *supra* n. 73, at 199.