Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF FREE PRESS

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Executive Summary

"Title II provides a flexible, light-touch approach for the preservation of open communications networks. Common carrier principles in general are both perfectly suited and absolutely necessary to maintaining nondiscrimination principles and nondiscriminatory outcomes. This is true not only in monopoly settings, but in deregulated and competitive markets too. It's true for all telecom services, not just those delivered on copper telephone wires."[1]

We wrote the preceding paragraph to open our *Open Internet Order* reply comments nearly a decade ago, and repeated it to open our reply comments in the Pai FCC's repeal and abdication proceeding nearly seven years ago. We repeat it again to open these reply comments because it contains important truths often lost in the rhetorical muck created by an ISP industry that wants to be free from any regulatory oversight. Though plenty has changed about the broadband market since the Commission initiated the first open internet proceeding in 2010, the fundamental nature of broadband internet access as a mass market transmission service has not changed. And while carriers have seemingly embraced some basic openness principles in recent years – in part due to the overwhelming market demand for high-capacity and neutral data carriage services that enable consumers to access the content of their choosing – ISPs still have strong incentives to discriminate in the pursuit of new revenue streams, particularly as the home internet market saturates and demand for ever-faster speeds at higher prices abates.

Consumer groups, free speech defenders, racial justice advocates, academic technology experts, and even some ISPs have made it clear in this docket that safeguarding and securing a free and open internet requires the protection of bright-line rules backed by the Commission's full authority to prevent unreasonable discrimination. The record reflects that Title II is vital for internet users and for the economy at large. The record supports the Commission's conclusion that Title II is a critical tool needed to promote universal deployment and adoption of affordable advanced telecommunications services. And the record supports the Commission's conclusion that Title II's duties prohibiting unreasonable discrimination by common carriers are crucial for preserving people's ability and freedom to speak, connect, communicate, and organize online.

These public policy justifications for the restoration of Title II directly reflect Congress's intent as it amended the Communications Act in 1996. However, as important as these policy justifications are, they are not the foremost question before the Commission in this proceeding.

The foremost question remains the correct interpretation of the Communications Act provisions that bound the agency's authority and bind its discretion. If broadband internet access service is mass-marketed and enables end-users to transmit the information of their choosing between points of their choosing, without change in the form or content of the information as sent and received, then the Commission must classify it as a telecommunications service and treat providers of this service as common carriers.

[1] *See* Reply Comments of Free Press, WC Docket No. 14-28, at 2 (filed Sept. 15, 2014); *see also* Reply Comments of Free Press, WC Docket No. 17-108, at 3 (filed Aug. 30, 2017).

Contrary to the overwrought claims of ISPs and their lobbyists in this proceeding, classifying broadband internet access providers as Title II telecom carriers does not mean that the Commission has to impose burdensome regulations, or any regulations at all. The Act gives the Commission the ability to forbear from applying any portions of Title II if "enforcement of a statutory provision is shown not to be necessary to ensure that charges, practices, classifications, and regulations are just and reasonable, and are not unjustly or unreasonably discriminatory."[2]

The Commission's proposals outlined in the *Safeguarding and Securing the Open Internet* Notice of Proposed Rulemaking (the "*Notice*")[3] follow this blueprint for reasoned deregulation. The *Notice* rightly concludes that retail broadband internet access services are telecommunications services, as defined in the Act. The ISPs' arguments that it is an information service are stale, rejected years ago by the D.C. Circuit, and even less applicable today than they were a few short years ago. Domain Name System services offered by ISPs are not inextricably intertwined with their broadband services' sole function: packet transmission. As we and others documented in our initial comments, third-party DNS services, including encrypted DNS, are increasingly popular and trivial to use in place of an ISP's DNS service. And in an environment where nearly all online data is encrypted, ISP caching is a bygone of a time long since past.

The statutory arguments against classifying broadband internet access service as a telecommunication service are so moribund that most ISP commenters did not bother addressing this central matter in their comments. They instead relied on their trade associations, who just repeat the same bogus and court-rejected assertion that DNS transmogrifies a transmission service into an information service. Because they can't plausibly argue as well that ISPs are caching content in today's encrypted content world, these trade associations made a slightly altered but even more bogus argument. They claim that since ISPs in some instances direct their users' requests to servers of CDN providers or edge companies that have localized content inside an ISP's network (reducing the ISPs own transit costs), this somehow also transmogrifies a transmission service into an information service.

These attempts to argue that broadband internet access services are not telecommunications services are doomed to fail, something that many ISP commenters seem to recognize. Indeed, many ISPs spend the bulk of their comments making arguments solely about which Title II-based policies should not apply to their services. Numerous ISPs cheerlead their own industry's trajectory, oblivious to the reality that broadband is in high demand precisely because it functions as an advanced telecommunications service and neutral conduit. They pretend to be unaware that this status quo was fought for, achieved, and preserved to this day by various FCC and state regulatory actions. And many ISPs engage in the time-honored political

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[2] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 19 (1998); *see also* 47 U.S.C. § 160(a).

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

tradition of concern-trolling, warning the Commission about what the courts might do if it proceeds with reclassification.

The Commission must ignore these results-oriented legal arguments of those who suggest – incorrectly – that Title II would have undesirable consequences. It must reclassify broadband internet access as a telecom service and concurrently reinstate the *Open Internet Order*'s rules prohibiting blocking, throttling, or paid prioritization.[4] The Commission should also reinstate the General Conduct rule that, among other things, ensures that ISPs cannot evade the prohibitions on blocking, throttling, and paid prioritization through abuses of their terminating access monopoly power when interconnecting with other carriers to receive the data requested by ISPs' end-user customers.

However, there are a number of other policy matters that also arise from the classification of broadband internet access service as a Title II telecommunications service, even with the sweeping forbearance proposed in the *Notice*. The Commission raised many of these questions in the *Notice*, but there's consensus in the record that most of these matters deserve further scrutiny in future proceedings. These include what specific *ex ante* policies should apply to carrier interconnection, how to address the matter of universal service contributions, what outage reporting requirements should apply to broadband internet access service providers, and whether or not small ISPs should be held to the same obligations as other broadband carriers.

In sum, the record is clear: broadband internet access services are telecommunications services. The Commission must restore this proper legal classification and reinstate the Open Internet rules in order to ensure that everyone in the nation can count on access to an affordable, open, and non-discriminatory communications pathway.

[4] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*").

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I. Broadband Internet Access Service is a Telecommunications Service that is Not Inextricably Intertwined with any other Information Service.

A. ISP Commenters Sidestep the *Notice*'s Central Definitional Questions, and Instead Let their Trade Associations Make the Same Discredited Arguments.

As we detailed in our initial comments, and have consistently explained throughout the full course of the Commission's series of open internet proceedings and related dockets, broadband internet access service ("BIAS") providers unambiguously offer telecommunications services.[5] Interestingly, many ISPs completely sidestep or outright ignore the classification question in their comments, even though it is the central issue in this proceeding. Some ISPs and their trade associations failed to address this central classification question and instead focus solely on policy arguments.[6] Other ISPs merely stated that broadband is an information service, and referred to their trade associations' comments, which contain the same tired and repeatedly discredited arguments that ancillary functions like DNS services and routing to nearby CDN caches somehow turn IP packet carriage into an inextricably intertwined information service.[7] Notably, several ISPs did not even contest that BIAS meets the statutory definition of a telecommunications service, and instead used their comments to argue for (or against) specific policies that might flow from that classification.[8]

It is not all that surprising to see ISPs leave this hopeless task of arguing that BIAS is an information service to their trade associations. ISPs large and small know that they're in the

[5] *See* Comments of Free Press, WC Docket No. 23-320, at 23-34 (filed Dec. 14, 2023) ("Free Press Comments"). Unless otherwise specified, all comments cited herein are initial comments in WC Docket No. 23-320, filed on or about December 14, 2023.

[6] *See, e.g.,* Space-X Comments; NTCA Comments.

[7] *See, e.g.,* Verizon Comments at 1 ("Verizon joins in full the comments of USTelecom and CTIA, which correctly explain that reclassification would be unlawful.").

[8] *See, e.g.,* Lumen Comments; T-Mobile US Comments; Comcast Comments.

business of offering a mass-market IP transmission service. They know that DNS service and caching "either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both."[9] These carriers know that even if a customer uses the ISP's DNS service (which fewer and fewer do), DNS service (and caching) "facilitate use of the network without altering the fundamental character of the telecommunications service."[10]

These ISPs also know full well that they market their BIAS products as pure transmission services, differentiated from other carriers' services primarily by transmission speeds between the customer's home and the servers hosting third-party content. Indeed, just prior to this proceeding's reply comment deadline, Comcast (the country's largest ISP) hosted the first-ever streaming-only NFL playoff game. It drew an audience of over 23 million households to Peacock, Comcast's subscription-based online video service.[11] And of course it almost goes without saying that Peacock clearly qualifies as an information service, but one that is available to customers of any ISP in the land – not merely to Comcast's own internet access customers – because ISPs can and do transmit third-party content to and from substantially all internet endpoints, they don't merely carry the content they produce themselves.

During that broadcast, Comcast repeatedly ran commercials that poked fun at 5G fixed wireless BIAS providers, implying that if customers wanted a flawless experience streaming live content they'd be better off signing up for Comcast's internet access service. The entire point of

[9] *See Notice* ¶ 75 (quoting from the 2015 *Open Internet Order* ¶ 365).

[10] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 705 (D.C. Cir. 2016).

[11] *See, e.g.*, Jordan Valinsky, "The Chiefs-Dolphins game on Peacock was the most-streamed live event in US history," *CNN* (Jan. 15, 2024).

the advertisement was to convey to viewers that Comcast offers a more reliable, higher quality transmission service than its 5G competitors.[12]

In comments filed in their own names, many ISPs have moved away from making these same tired and demonstrably false arguments that DNS service and caching transform a telecommunications service into an information service; but the dead-enders at their trade associations had no problem carrying this foul water for their members.[13] Yet even these attempts are half-hearted compared to the arguments made by these same trade associations in prior Commission classifications proceedings.[14] And that's to be expected: the arguments that DNS service or caching are "inextricably intertwined" with BIAS's packet transfer capabilities have been rejected by the courts, and they are simply wrong in 2024.

As we noted in our initial comments, DNS service is a directory function that is offered by many ISPs, but it is trivially easy for users to ditch the ISP's offer in favor of a different DNS provider's service.[15] As former FCC Chief Technologist Professor Jon Peha likewise noted in his

[12] *See* "XFinity: Don't Settle for 5G Home Internet," commercial advertisement (aired on Peacock, Jan. 13, 2024). Comcast also has a webpage on its "Discovery Hub" titled "5 Questions You Must Ask When Considering 5G Home Internet vs Cable," where it notes that its BIAS product "offers speeds that are between 6 [to] 36 times faster than 5G home internet and lower latency, and Xfinity's 99.9% reliability allows you to game and stream without frustrating dropped connections and interruptions." This is one of myriad examples of ISP advertisements that reflect how carriers convey their service as one offering reliable transmission speeds between the user and third-party content providers. To the extent that any carrier differentiates its service from that of competitors (in this case, unnamed 5G fixed wireless carriers), it is a differentiation based on the speed and reliability of that transmission service, and not on whether the other carrier has worse DNS service or routes to nearby CDN networks. *See* "5 Questions You Must Ask When Considering 5G Home Internet vs Cable," Comcast XFinity Discovery Hub (accessed Jan. 15, 2024).

[13] *See, e.g.,* USTA Comments at 9-28; CTIA Comments at 46-74.

[14] Indeed, the term "inextricable" and its variants are nowhere to be found in USTA's initial comment in this proceeding, but were used in its initial comment in the *Open Internet Order* proceeding, in WC Docket No. 14-28.

[15] Free Press Comments at 26-31.

comments, third-party DNS alternatives "have become even more accessible thanks to the emergence of new technology" such as DNS over HTTPS ("DOH") and DNS over TLS ("DOT") in the time following the prior Commission's late-2017 repeal of Net Neutrality rules and the Title II classification.[16] As Professor Peha explained, these third-party DNS alternatives are encrypted while the ISPs' DNS services are not, which makes those queries to ISPs' DNS service "vulnerable to certain kinds of attacks that undermine the requester's security."[17] Indeed, not so long ago a large number of U.S. ISPs were engaging in "DNS hijacking," which returned ads instead of returning a "404 error" for mistyped website names. In doing so, these ISPs created a security vulnerability that was a "dream scenario for phishers and cyber attackers looking for convincing platforms to distribute fake websites or malicious code."[18] It's no wonder users increasingly moved to third-party DNS providers if that's the sort of "service" that ISPs wish were "inextricably intertwined" with their basic packet transmission offering.

Professor Peha also noted that these third-party DOH and DOT IP address lookup services are increasingly easy to use. For example, Mozilla first began including DOH functionality in its browser in 2018; and shortly thereafter, DOH was made available in other web browsers including Chrome, the world's most popular browser. The major operating systems (Windows, MacOS, iOS, and Android) all make switching to secure third-party DNS a very simple process. As Professor Peha explained, "if all BIAS providers in the U.S. decided to stop

[16] Peha Comments at 5-6.

[17] *Id.* at 5.

[18] *See, e.g.*, Ryan Singel, "ISPs' Error Page Ads Let Hackers Hijack Entire Web, Researcher Discloses," *Wired* (Apr. 19, 2008).

offering DNS services," secure DNS would be set by default in operating systems, browsers, and applications, "and the typical internet user would not even notice the change."[19]

Perhaps sensing that the DNS argument is a losing one, certain commenters lean more heavily into their argument that ISPs are information service providers under the law because of content caching. But as we and others explained in initial comments, in a content market where most data is encrypted, ISPs have nothing to cache. Never deterred by reality, the lobbyists at CTIA acknowledged that most cached content is hosted by third parties; but then engaged in argument bootstrapping by suggesting that even "if the content server delivers encrypted traffic, the DNS request for the address of the server is not encrypted, and the DNS can direct the client to the appropriate server, such as a streaming server, whether located remotely or close by in a content delivery network."[20] As Professor Peha points out, this is essentially no different than a plain old telephone service provider arguing that if a customer first calls 411 to get a telephone number, that somehow should transform the telephony telecom service into an information service, even though the customer could have obtained the number from any number of other sources.[21]

CTIA also goes on to make the ridiculous argument that in the cases where the most popular edge providers have stored content "on hardware provided by third parties" but that is located inside a BIAS provider's network (saving both the ISP and the edge provider money),

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[19] Peha Comments at 6.

[20] CTIA Comments at 81.

[21] Peha Comments at 5 ("There are many ways to get that IP address. Similarly, if someone is making telephone calls, then it is necessary to look up the phone number associated with the person she wants to call. That look-up could employ a telephone company's 411 service, but it doesn't have to. DNS and 411 [ ] are essentially the same, and to claim that one is inextricably tied and the other is not would be arbitrary and capricious.").

that the cache somehow remains "a part of the [BIAS] offered by the ISP that is 'inextricably linked' to that service."[22] But just because the ISP does the job it's paid to do and transmits the information of it customers choosing between the points of their choosing (their home and the location that their third-party content provider subsequently identifies as the best quality), this does not somehow inextricably intertwine the content provider's information service with the BIAS provider's telecom service. That ISPs work with third-party CDNs is to everyone's benefit, especially the ISPs, as it helps improve their customers' experience. Nothing about these arrangements is "inextricably intertwined," as an ISP is still offering a pure transmission path between its customers and the servers that host the content those customers requested. Returning to the 411 analogy, just because the customer is eventually routed to a proximate location does not mean that this routing transforms the telecom service into an information service.[23] If a 411 caller asks the operator for the number of the nearest donut shop that certainly would not transform the telephony service into an information service.

Indeed, consider a service that many podcast listeners are probably sick of hearing ads for: Virtual Private Networks ("VPNs").[24] VPNs could not exist if BIAS were not a telecom service. VPN users do not make use of their ISP's DNS servers, and certainly do not make use of ISPs' content caches. Indeed, VPNs are increasingly marketed as a way for people to evade geoblocks on content, by allowing users to choose which country their traffic is routed through. Remarkably, USTA noted that customers using VPNs do not use any of the ISP's ancillary

[22] CTIA Comments at 81.

[23] *See, e.g.*, USTA Comments at 20 ("While HTTPS is nearly ubiquitous on the internet, it has no effect on the ability of ISPs to optimize their customers' experience by directing them to the closest cached content.").

[24] *See, e.g.*, Owen Williams, "Why VPNs Are Suddenly Everywhere, and How to Pick the Best One," *Medium* (May 20, 2019).

functions. USTA fails to understand that this example is not an exception that proves its point, but one that demonstrably shows that BIAS providers are offering a pure transmission service that is not inextricably intertwined with any information service.[25]

B. Industry Commenters Raise Self-Interested Policy Arguments that are Not Germane to the Commission's Central Definitional Question.

As we note above, it is telling that so many ISPs avoided addressing the central "telecom or information service" question in their comments. Instead, they and their trade associations make self-interested arguments all ending with the same conclusion: that the Commission should do nothing, and should not bother following the law because it might get a bad decision from the Supreme Court.[26] Some ISPs even seemed resigned to the fact that the Commission will follow the law and reclassify BIAS as a Title II telecommunications service, and instead made arguments about how certain parts of the law shouldn't apply to them regardless.[27]

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[25] USTA Comments at 20 ("The only type of encryption that prevents an ISP from doing so is if the consumer is using a Virtual Private Network ('VPN'), and then only because the VPN integrates its own DNS server that, like all third-party DNS servers, lacks the capability to point customers to the content cached within the ISP's network.").

[26] *See, e.g.*, USTA Comments at 28-35; CTIA Comments at 74-78; ACA Comments at 35-40; FBA Comments at 12-14; NCTA Comments at 10-23.

[27] *See, e.g.*, T-Mobile US Comments at 23-24 ("If the Commission nonetheless decides to proceed with reclassifying broadband internet access service as a 'telecommunications service,' the Commission can minimize the risk that a reviewing court will characterize the Commission's action as one of 'vast economic and political significance' by tailoring the scope of the proposed rules to the narrowly defined risks that the Commission has identified."); *see also, e.g.*, National Rural Electric Cooperative Association Comments ("NRECA Comments") at 1 ("NRECA supports much of the rationale and many of the proposals set forth in the NPRM. However . . . NRECA has significant concerns about several of the proposed rules, particularly as they might apply to small service providers."); Comments of The California Independent Small LECs at 17 (supporting the Commission's reclassification proposal, but arguing that the Commission must "not ignore the threat that aggressive regulation poses to continued innovation and investment in modern telecommunications networks") (emphasis added). Comcast also made a similar argument by assuming its conclusion that restoring the successful 2015 framework would somehow burden the nation's ISPs. *See* Comcast Comments at 43 ("Comcast respectfully and strongly urges the Commission to decline to adopt its unjustified and counterproductive proposal to classify broadband as a Title II telecommunications service subject to heavy-handed utility

A surprisingly large portion of the ISP industry's comments are spent on recounting the market's progress in recent years.[28] But as we meticulously documented in our initial comments, "this progress was made in no small part because users and activists worked hard to protect the internet's default net neutral *status quo* against the stated plans of major ISPs to violate their basic common carrier duties."[29] This constant state of activism was also met by Commission actions to preserve the internet's openness. Indeed, as the D.C. Circuit noted in *Mozilla*, there is a throughline of openness policies that held this *de facto* (and for a time, *de jure*) status quo – from Chairman Powell's "four freedoms" to the 2015 *Open Internet Order*.[30] And after that order's repeal, various state laws filled the vacuum and helped to maintain the virtuous cycle of innovation and investment that the 2015 *Open Internet Order* had supercharged.

That the broadband market grew over the past two decades is simply evidence of the demand for open and non-discriminatory telecom services, and the importance of these telecom

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regulation.") (emphasis added). Fortunately for these ISP commenters worried about the nebulous "utility-style" regulatory phantom, the Commission's proposed policies would change very little about the current industrial status quo, and would not impact investment, just as the policies based on the Commission's classification decision in the 2015 *Open Internet Order* had no impact on ISP investments or deployment.

[28] *See generally* AT&T Comments, Comcast Comments, USTA Comments, CTIA Comments, NTCA Comments, Verizon Comments, and T-Mobile Comments.

[29] Free Press Comments at 5.

[30] *Mozilla v. FCC*, 940 F.3d 1, 56 (D.C. Cir. 2019) ("We are, however, troubled by the Commission's failure to grapple with the fact that, for much of the past two decades, broadband providers were subject to some degree of open Internet restrictions. For example, from the late 1990s to 2005, Title II applied to the transmission component of DSL service. Even after the Commission issued the 2005 *Wireline Broadband Order*, which classified DSL as an integrated information service and thus further remov[ed] it from Title II's ambit, the Commission announced that should it 'see evidence that providers of telecommunications for Internet access or IP-enabled services are violating' the Internet Policy Statement, which reflected Chairman Michael Powell's four principles of Internet openness, it would 'not hesitate to take action to address that conduct.' In 2015, the Commission also claimed that 'Title II has been maintained by more than 1000 rural local exchange carriers that have chosen to offer their DSL and fiber broadband services as common carrier offerings.'") (internal citations omitted).

services to the nation's economic prosperity. But this history of innovation and investment has no bearing on whether or not BIAS is a telecommunications service as defined in the Act.

Similarly, ISPs arguing that there's no need for Title II-based rules and obligations are making policy arguments. These arguments in some cases deserve careful consideration, but are wholly irrelevant to the central classification question.

What policies should flow after the Commission follows the law and classifies BIAS as a telecommunications service? Those questions are of course important to consider, as are the questions about the parts of Title II for which the Commission should grant industry-wide and nation-wide forbearance. But these and all other policy questions are secondary to the classification question. This is of course how Congress wanted the Commission to approach regulation of telecom services as technology opened up monopoly markets, with an approach of reasoned but not automatic deregulation.

Indeed, as we noted in our comments, Congress did not authorize the Commission to do an end-run around Section 10 by defining all mass-market advanced telecom services as inextricably intertwined with information services.[31] Instead, Congress anticipated that many of the obligations in Title II would become unnecessary as markets moved towards greater facilities-based competition. But as we explained in our comments, Congress specifically crafted the 1996 Amendments to the Act so that non-discriminatory advanced telecom services (meaning broadband) would be universally available, and ensured that the Commission would retain the legal authority to take action if any provider were to act in an unreasonable or unreasonably discriminatory manner.[32]

[31] Free Press Comments at 13-23.

[32] *Id.*

The industry commenters that document the growth of the U.S. BIAS market simply ignore the reality that the market's evolution into the streaming media era was kicked off by the Commission's 2015 *Open Internet Order* and related deliberations. Those agency actions and inquiries eliminated the uncertainty created by the Bush FCC when it first classified BIAS as an information service, which was followed by various ISPs making clear their intent to seek new sources of revenue from discriminatory practices. Today's ISPs and ISP-affiliated commenters also ignore the reality that the Commission's 2015 *Open Internet Order* helped push the ISP industry into a new fiscal mindset, in which carriers thankfully understand that their self-interest is best served through offering the public affordable and open high-capacity connectivity. That service is in high demand precisely because it remains a pathway to third-party content and information services.

Some ISP commenters even trot out a tired rhetorical argument that is non-germane to this proceeding, and just as stale as the DNS and caching arguments debunked above. They suggest that even if broadband is an essential service, it is not a "utility" service that should be governed by "monopoly-era" law.[33] The word "utility" has no formal meaning under the Act that is germane to this proceeding; it is simply a rational but colloquial term used by some to convey the importance of broadband, which for many families is indeed just as important as access to electricity and water. ISPs of course invoke the term "utility" to scare those inside of the beltway who would be bothered by regulatory authority in the abstract, while laughably ignoring the question of whether anyone not on the ISPs' side already would be remotely concerned about having greater federal consumer protections for essential internet access service.

[33] *See, e.g.*, Comcast Comments at 5-18.

But as the Commission knows, and as we've previously explained, the common carrier policies in Title II were never confined to and ought not be confined to regulated utilities or monopolies. As we noted in our comments, "Title II common carriers include numerous companies, such as mobile phone and enterprise broadband carriers, that operate in competitive markets subject to very little affirmative regulation. It would be unthinkable to declare that mobile phone service is no longer a telecom service because there is more than one wireless carrier. It ought to be just as unthinkable to make that claim with regard to broadband."[34]

In sum, BIAS providers unambiguously offer telecommunications services. ISPs and their trade associations filed comments littered with tired arguments claiming otherwise, vainly re-litigating US Telecom's losing claim before the D.C. Circuit Court of Appeals that "broadband is unambiguously an information service."[35] We reply as the court did: None of these arguments are persuasive. And they're even less persuasive in today's market than they were a few years ago. The existence of third-party DNS service and encrypted DNS services, the decline of ISP caching, and the existence and increasing use of VPNs all conclusively demonstrate that BIAS perfectly fits the Act's definition of telecommunications service. Therefore BIAS providers are telecom carriers, who have the core obligation to offer this service on a just, reasonable and non-discriminatory basis.

II. The Commission Must Ensure that ISPs Do Not Evade Net Neutrality Rules by Abusing their Terminating Access Monopoly Power.

In our initial comments we noted that "though there were clear market failures in the interconnection markets prior to the adoption of the *Open Internet Order* in 2015, those issues

[34] Free Press Comments at 12.

[35] *U.S. Telecom Ass'n v. FCC*, 825 F.3d at 701.

disappeared immediately after the Commission restored its Title II authority."[36] We also stated that "[o]ur current sense is that the interconnection markets are functioning well, and that any specific Commission intervention into this aspect of the BIAS market would be best determined in a separate proceeding."[37] The record reflects this assessment, though there do seem to be some indications that certain large ISPs are abusing their terminating access monopoly power. And the record also reflects some partial agreement that certain interconnection practices should be deemed *per se* unreasonable.

First we note the comments of Lumen, an ILEC that offers residential BIAS service, enterprise telecom services, and internet "backbone" transit services. Lumen notably does not oppose restoration of Title II or the Open Internet rules, though it does make the typical unsupported statements of concern about "regulations that could chill investment and thwart innovation"[38] that are made by all ISPs. But Lumen cannot oppose reclassification, precisely because as a major backbone transit provider it needs the Commission to have Title II authority to address ISP abuses of their terminating access monopoly power, which are what Lumen describes as a "real threat[ ] to the open Internet."[39] According to Lumen, "some large BIAS providers continue to attempt to leverage their gatekeeper control over access to their customers to extract tolls, obstructing the virtuous cycle of innovation and investment the Commission's open Internet rules have historically been intended to protect."[40] Lumen notes that these unnamed BIAS providers "do this notwithstanding the fact that their customers have already paid them for

[36] Free Press Comments at 68.

[37] *Id.* at 68-69.

[38] Lumen Comments at 2.

[39] *Id.*.

[40] *Id.*

access to the Internet, not because there is a legitimate reason for them to do so, but simply because they can."[41]

Critically, Lumen notes (as Free Press did)[42] that these interconnection problems existed prior to the 2015 *Open Internet Order,* but went away following the Commission's restoration of Title II and codification of Net Neutrality rules, including the General Conduct rule.[43] Alarmingly, Lumen states that these terminating access monopoly power abuses have "now begun again following the Commission's abdication of this role," meaning with the 2017 repeal of the General Conduct rule and the classification of BIAS as an information service.[44]

This credible allegation requires further Commission investigation, which would help inform the Commission's approach to *ex ante* regulation of BIAS interconnection (and/or its approach in *ex post* adjudication of complaints alleging violations of Sections 201 or 202 arising from certain interconnection practices). However, there does appear to be ample support for the Commission to deem terminating access charges for local IP traffic delivery to be *per se* unreasonable.

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[41] *Id.*.

[42] Free Press Comments at 133-136.

[43] Lumen Comments at 12 ("Unsurprisingly, Lumen has first-hand experience with a small number of large BIAS providers, both in the United States and abroad, attempting to exploit these dynamics to impose unjustifiable access tolls. That first-hand experience has now extended more than a decade, notably interrupted in the United States (and only in the United States) when the Commission announced that it would put a stop to such abuses in 2015. Unfortunately, it has now begun again following the Commission's abdication of this role. . . . With the Commission poised to adjudicate complaints against BIAS providers[ ] relating to their Internet traffic exchange practices following the *2015 Open Internet Order*, Level 3 suddenly found itself able to resolve its disputes with those providers, whose negotiating position had seemingly overnight become much more reasonable.") (emphases added).

[44] *Id.*

As explained by former FCC Chief Technologist and current UC Irvine Professor Scott Jordan and co-author Ali Nikkhah, "[i]f an edge provider or transit provider provides sufficient localization of exchanged traffic, a broadband provider incurs the same cost as it does when it agrees to settlement-free peering with another broadband provider."[45] Thus as Lumen notes, "if the endpoint the end user wishes to reach is willing to exchange its traffic with the BIAS provider in the end user's own local market, it is improper, and a violation of the promise the BIAS provider made to its customer, for the BIAS provider to refuse to do so unless it is paid even more money by the endpoint or the endpoint's provider."[46]

For years, ISPs' advertisements and product marketing have centered on just how much content their customers can stream from third parties. BIAS is marketed as a transmission service, and most ISPs sell this service in tiers based on transmission speed (megabits per second) and/or capacity (gigabytes per month). Users that stream more generally pay more, either through higher prices for faster transmission speeds, or higher prices for additional or unlimited capacity. It would therefore clearly be unreasonable for ISPs to refuse to accept local delivery of that content unless the delivery provider (a transit provider, CDN provider, or edge content provider) pays the ISP for simply handing off the data that the ISP's customers requested, particularly when that localized delivery is the lowest-cost method for the ISP to carry the content to their own retail BIAS customers.

III. The Commission Should Issue Further Notices to Address Various Policy Questions That Arise from the Proper Classification of BIAS as a Telecommunications Service, and Should Not Exempt Small ISPs from Disaster Reporting and Other Public Safety and Transparency Obligations.

[45] Comments of Scott Jordan and Ali Nikkhah at 5.

[46] Lumen Comments at 6 n.6.

The central question in this proceeding is whether BIAS meets the Act's definition of a telecommunications service. In the *Notice*, the Commission once again proposes to harmonize its classification with the plain text of the Act and with Congress's clear intent: BIAS is a telecom service, and BIAS providers are common carriers.

This determination is of course not the end of the Commission's work. Title II contains obligations for common carriers; those obligations can be enforced on a case-by-case basis, with the Commission acting pursuant to formal complaints. However, it is far more efficient to adopt industry-wide rules if the Commission determines that certain actions are counter to the Act's requirements. In the *Notice*, the Commission proposes to do exactly that and reinstate the 2015 *Open Internet Order*'s rules prohibiting ISPs from blocking, throttling, or engaging in paid prioritization. The Commission also proposes to reinstate the General Conduct rule that, among other things, ensures that ISPs cannot evade the Open Internet rules through abuses of their terminating access monopoly power when interconnecting with other carriers to receive the data requested by the ISPs' end-user customers.

These are the only rules the Commission proposes to adopt in the *Notice*. However, the Commission recognizes that reclassification coupled with broad forbearance still raises a number of issues that could require either additional rules, guidance, preemptions, or forbearances. In our initial comments, we discussed how even though many of these issues are raised in the *Notice*, it would be prudent for the Commission to proceed in an incremental manner on these matters.[47] Other commenters agreed that an incremental approach is warranted, with many of these matters requiring further notices to develop a more robust record.

[47] Free Press Comments at 68-70.

For example, Microsoft explained that the "current proceeding is not an appropriate venue for weighing and implementing regulatory proposals that go beyond the well-developed open internet conduct and transparency rules." And it notes that "serious consideration of any such proposals would require additional proceedings, with records focused on their technical aspects, specific costs and benefits, and legal considerations."[48] The Communications Workers of America suggested that the matter of USF contributions should be addressed in a separate proceeding.[49] The Electronic Privacy Information Center *et al.* urged the Commission to proceed with Title II reclassification, then "immediately initiate a consumer privacy and data security rulemaking."[50]

One area that garnered significant commenter attention was the Commission's proposal to not forbear from provisions of Section 214, keeping more than just subsection (e) in place. This would be a departure from the 2015 *Open Internet Order*'s broader forbearance approach to this statute.[51] The Ad Hoc Broadband Carrier and Investor Coalition, whose comments were largely based on the implications of this application of Section 214, argued that the Commission "should issue a further notice that further refines its proposals before adopting final rules that impose new licensing requirements or other national security restrictions on BIAS providers."[52] Speaking about the *Notice*'s Section 214 questions, INCOMPAS stated that "some of the

[48] Microsoft Corporation Comments at 14.

[49] Communications Workers of America Comments at 25.

[50] Comments of the Electronic Privacy Information Center, Public Knowledge, Consumer Federation of America, and Demand Progress Education Fund at 15.

[51] In the *Open Internet Order*, the Commission forbore from all of Section 214 except Section 214(e) (eligible telecommunications carrier designation for the purposes of participating in the Universal Service Fund). *See Open Internet Order* ¶ 456.

[52] Ad Hoc Broadband Carrier and Investor Coalition Comments at 9.

Commission's questions in these areas go beyond net neutrality into areas that are not sufficiently developed to produce rules. As such, they are simply ill-suited for a Notice of Proposed Rulemaking and would be more appropriate in a separate Notice of Inquiry."[53]

These requests for new proceedings or further development of the record in this proceeding are reasonable, and we urge the Commission to proceed incrementally on most matters that lie outside of the basic classification question and the full restoration of the Open Internet rules and guidance in the 2015 order.

We also note, however, that just as it would be premature to move to rules on these matters that require additional inquiry, it would be wrong to grant any ISP's or class of ISPs' requests for special treatment without further scrutiny. For example, NRECA urged the Commission to "adopt a size threshold of 100,000 broadband customers (all broadband affiliates included) for a BIAS provider to be [ ] considered a 'small entity' for purposes of the rules proposed in the NPRM, and for subsequent Title II regulations."[54] This is a wildly broad request with little public policy justification, other than the unsupported assertion that ISPs under this size would be overly burdened by the Open Internet rules – even though NRECA agrees that "the Commission's proposed Open Internet rules are necessary to protect against unreasonable disadvantage to consumers or edge providers."[55] As we noted in response to a similar proposal in past proceedings to grant broad exemptions to ISPs serving fewer than 100,000 customers, "vague assumptions that regulation is bad for business" are not a justification for blanket forbearance, even for small providers, which often serve rural customers who have no other

[53] INCOMPAS Comments at 33.

[54] NRECA Comments at 6.

[55] *Id.* at 3.

available provider.[56] NRECA also makes some very questionable claims about the need for small ISPs to report outages, but at least recognizes that such requirements could be considered in a separate proceeding.[57] These requests for such exemptions and loopholes are overbroad. Every ISP customer deserves the protections of Open Internet rules, not just those who purchase service from the largest providers.

IV. The Classification of BIAS is not a Major Questions Doctrine Issue.

ISP industry association commenters go to great lengths in their attempt to convince the Commission that its reclassification proposal would be overturned in the courts on grounds that it raises a so-called "Major Questions Doctrine" issue that can only be resolved by Congress.[58] But as the California Public Utilities Commission ("CPUC"), the National Association of Regulatory Utility Commissioners ("NARUC"), Public Knowledge, and other commenters note, "the FCC's proposed actions here do not implicate the major questions doctrine."[59] As the CPUC explained, the "factors that support application of the major questions doctrine" outlined in *West Virginia v.*

[56] *See* Letter from Matthew F. Wood, Policy Director, Free Press, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 1 (Dec. 11, 2015).

[57] NRECA Comments at 6-7. NRECA argues that "For such [small] providers, an obligation to report outages to the Commission creates zero additional incentive to offer reliable service, because they have sufficient incentive to do so already. It only adds bureaucracy and more burdens for a staff-constrained provider, especially smaller providers, including at the worst possible time when they are working to restore any outages that do occur quickly while continuing to devote resources to extending service into unserved areas." *Id.* at 7. This is frankly a bizarre argument that misunderstands the public policy rationale for reporting requirements. Outage reporting requirements are not required in order to incentivize carriers to offer reliable services. They are primarily a tool for state and federal regulators to monitor and coordinate disaster responses, to inform the public of outages in emergency situations, and to surface information that could be useful in the development of policies (including subsidy policies) that could ensure a more resilient communications infrastructure.

[58] *See, e.g.*, CTIA Comments at 74-78; USTA Comments at 28-36.

[59] *See, e.g.*, CPUC Comments at 41-44; *see also* NARUC Comments at 5-12; Public Knowledge Comments at 30-46; Comments of Tejas N. Narechania, Professor of Law, UC Berkeley, at 2-13.

EPA "involve an agency's claim to new regulatory powers, cases where an agency lacks expertise specific to the issue it seeks to regulate, or a new program that moves beyond the agency's traditional authority. None of these situations apply [to the instant *Notice*]."[60] The CPUC also notes that "[o]ne of the cases relied on in the majority opinion in *West Virginia* is *Gonzalez v. Oregon*, which in turn referred to *Brand X* as an example of when congressional delegation is clear."[61]

NARUC notes that the courts "including the Supreme Court have never applied the Major Questions Doctrine before in this context – despite significant changes in regulatory treatment allegedly based on ambiguous statutory text."[62] NARUC also rightly notes that if "the Major Question[s] Doctrine is applicable to high speed access to the internet, it certainly should have been applied in the first instance in 2005 when the FCC took the first step to move away from the existing 'telecommunications service' classifications for both DSL service and, of course, the competing service provided by cable companies via cable modem raised in *Brand X*. If the doctrine were applied today, and logic prevails, the Court[s] would require the FCC to revert to the status quo ante – which in this case is precisely what the FCC is proposing to do."[63]

UC Berkeley Law professor Tejas N. Narechania's comments contain a similarly thorough legal analysis reaching the same conclusion as NARUC, the CPUC, and others. Professor Narechania notes as we did in previous proceedings that "[t]he 1996 Act reflects the

[60] CPUC Comments at 42.

[61] *Id.* at 43.

[62] NARUC Comments at 8.

[63] *Id.* at 9-10.

Commission's *Computer II* framework,"[64] and that if "*Brand X* or *Chevron* are no longer precedential . . . [in] this context, Congress has, in the 1996 Act, provided clear direction – the text, structure, and history of the 1996 Act all confirm that BIAS is a 'telecommunications service.'"[65]

Public Knowledge fully addressed the Major Questions Doctrine arguments in its comments, noting that "application of MQD to reclassification of broadband as Title II would contradict everything the Supreme Court has said to date regarding the application of the doctrine."[66] It points out that this is the case in part because "[e]ven if 'classification' were considered an exercise of authority rather than a function as a prelude to application of the Communications Act, the Commission has engaged in classification of services since its inception. It is therefore neither 'newfound,' 'rarely used,' or 'ancillary.' It is a frequently used tool of the agency which Congress has expressly delegated to the agency."[67] Public Knowledge also rightly points out that "[i]n the more than 25 years since the FCC classified DSL as a Title II service, Congress has not interfered in the FCC's assertion of classification over broadband. Under *West Virginia v. EPA*, this silence constitutes ratification of the FCC's authority."[68]

The Commission should adopt these arguments. We doubt the industry trade associations that argued the opposite will be swayed; indeed, the fact that USTA and CTIA – but not their members – raised the Major Questions Doctrine issue in their comments is probably a sign that

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[64] Tejas N. Narechania Comments at 9; *see also* Free Press 2014 Open Internet Comments at 35-62.

[65] Tejas N. Narechania Comments at 9.

[66] Public Knowledge Comments at 31.

[67] *Id.*

[68] *Id.* at 32 (internal citations omitted).

one of these associations (or both) will take the Commission to court if it proceeds with the *Notice*'s reclassification proposal. That's to be expected, and thus unless the Commission agrees with USTA's and CTIA's analysis (which is clearly not the case), it should proceed to a declaratory ruling confirming that BIAS is properly classified as a telecommunications service.

V. Conclusion

The record is clear: BIAS is a telecommunications service and BIAS providers are common carriers. When it overhauled the Communications Act in 1996, Congress affirmed that the basic common carriage duty to serve all users on a just, reasonable, and non-discriminatory basis remains vital for all telecommunications services, regardless of changes in technologies. Congress specifically applied basic common carrier duties to mobile wireless and advanced communications services, which of course includes broadband. Furthermore, Congress specifically intended for the FCC to retain basic authority to prevent unreasonable discrimination, even after markets become fully competitive and largely deregulated.

Common carriage and Title II have promoted investment and economic growth by ensuring universal access to a nationwide, fully interconnected infrastructure. Because of common carriage, Americans are able to utilize basic communications networks to access other essential services that educate, inform, entertain, and enrich our lives. The principle of non-discrimination at the heart of Title II ensures that entrepreneurs have access to networks they can utilize to innovate, without permission of the network operator. This principle also ensures that every person in this country can freely communicate with others without worrying about undue interference from their ISP, based on the carrier's economic, political, or other reasons.

The Commission now has a chance once more to reverse its past mistakes and harmonize its policies with the law. In doing so it will not only provide a solid foundation for Open Internet

rules, but will also restore its ability to promote universal deployment and adoption of competitive and affordable broadband services, protect internet users' privacy rights, and more effectively safeguard and secure the open internet for future generations. We urge the Commission to act without delay.

Respectfully Submitted,

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