Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

Comments of the Electronic Frontier Foundation on Notice of Proposed Rulemaking

July 17, 2017

The Electronic Frontier Foundation (EFF) submits these comments in response to the Commission's May 12, 2017 Notice of Proposed Rulemaking.

Practices that favor certain content, applications, devices, or users over others violate the basic assumptions under which the Internet was created and which contributed to its success as a transformative force in commerce, communications, and much else. Three successive Chairmen in a ten-year dialogue with the courts developed the Commission's "net neutrality" policies from an aspirational statement into a set of enforceable rules with a solid legal foundation.

On balance, the rules adopted in the *2015 Open Internet Order*[1] represent the best net neutrality protections for Internet users in the United States to date. The prohibitions against blocking or throttling of content, the ban on paid prioritization, and the rules requiring more transparency regarding BIAS providers' practices are clear and create a predictable regulatory environment for BIAS providers and Internet users. This clarity and predictability are possible because the Commission decided to classify BIAS as a telecommunications service under Title II of the Communications Act, while forbearing from unnecessary regulation under that title. This approach was a significant improvement over the Commission's previous efforts, which were inaccurate with respect to the nature of the services at issue, ineffective at safeguarding net neutrality, and dangerously open-ended as to other regulation of Internet access.

Reversing course by reclassifying BIAS service as a Title I information service would be a profound mistake, as would repealing the bright-line rules against blocking, throttling, and paid prioritization. EFF urges the Commission to abandon any such plan. Instead, it should heed decades of court precedent, market developments, and expert

[1] *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) [hereinafter *2015 Open Internet Order*].

advice, all of which make clear that the best path for real net neutrality is to leave the *2015 Open Internet Order*, and the legal foundation on which it stands,[2] in place.

That said, current rules are far from perfect. Notably, the "general conduct" or "unreasonable interference" rule is overly complex, and its application to BIAS provider practices is unpredictable, which may chill speech and innovation. EFF appreciates the opportunity to work with the Commission to reform that rule, and we suggest a way forward in these comments.

I. EFF's Interest in This Rulemaking.

EFF is a member-supported nonprofit organization devoted to protecting civil liberties in the digital world. With over 36,000 dues-paying members, EFF is a leading voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment. Throughout its 27-year history, EFF has defended freedom of speech, freedom to read and access information, freedom of association, and personal control over privacy against threats arising from governments and the private sector.

EFF knows that unfair data discrimination by Internet service providers is a serious problem that, given the general lack of competition in the market for broadband Internet access, must be addressed by effective consumer protection rules. In 2007, EFF was among the first to discover and test Comcast's interference with BitTorrent and other peer-to-peer applications, a serious instance of data discrimination (and a violation of user privacy) that informed the Commission's development of net neutrality protections.[3]

At the same time, EFF has long expressed concern about the potential for overreach, inconsistency, and arbitrariness in FCC regulation.[4] Most relevant to this inquiry, EFF has criticized the use of Section 706 and "ancillary authority" as a basis for net neutrality rules because such authority is dangerously unbounded. In the 2014 rulemaking, EFF called for "light, limited, bright-line regulation" based on the Commission's Open Internet policies and grounded in Title II's explicit grant of authority, avoiding open-ended "ancillary" authority that could be misused.[5] We argued

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[2] *See Verizon v. FCC*, 740 F.3d 623, 651–59 (D.C. Cir. 2014) (finding that the enforceability of anti-blocking and anti-discrimination rules requires Title II common carrier status); *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 698 (D.C. Cir. 2016) (rejecting challenge to current Open Internet rules promulgated under Title II authority).

[3] *See In re Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, Report and Order, 25 FCC Rcd. 17905, 17926, ¶ 36 n. 111 (2010) [hereinafter *2010 Open Internet Order*]; *2015 Open Internet Order* ¶ 79 ("[B]roadband providers not only have the incentive and ability to limit openness, but they had done so in the past.") (citing EFF Comments at 23).

[4] For example, EFF joined in a successful legal challenge to the Commission's "Broadcast Flag" copy control mandate for digital broadcast TV. *See Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *see also* Seth Schoen, *Into the DTV era, with no broadcast flag mandate*, EFF (June 12, 2009), https://www.eff.org/deeplinks/2009/06/dtv-era-no-broadcast.

[5] *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the Electronic Frontier Foundation 16–17 (July 15, 2014).

that classifying broadband as a common carrier service while forbearing from unnecessary aspects of Title II regulation provides the best available means of protecting the open Internet while avoiding regulatory overreach.[6] EFF has also expressed concern over the "general conduct rule" catch-all,[7] which creates uncertainty for Internet providers and users.

II. The 2015 Open Internet Order Is a Crucial Consumer Protection.

A. The Commission Has Long Recognized the Need to Promote Net Neutrality Principles, and That Commitment Has Helped Shape the Modern Internet.

Thanks in part to the Commission's own efforts, net neutrality principles have been essential to the emergence and growth of the Internet. As the Commission stated in the *2015 Open Internet Order*, "Openness regulation aimed at safeguarding consumer choice has . . . been a hallmark of Commission policy for over forty years."[8] The rules set forth in the *2015 Open Internet Order* reflect the culminations of decades of Commission efforts to "ensure that American communications networks develop in ways that foster economic competition, technological innovation, and free expression."[9] BIAS providers, Internet users, and edge providers have relied on this consistent approach.

The 1968 *Carterfone* decision marks the beginning of the Commission's "openness regulation" efforts.[10] In *Carterfone*, the Commission struck down AT&T's rules prohibiting customers from attaching any non-AT&T equipment to their home telephone lines.[11] This decision laid the foundation for the no-blocking rules in the 2010 and 2015 orders,[12] and more broadly served as the beginning of the Commission's recognition that "communications networks are most vibrant, and best able to serve the public interest, when consumers are empowered to make their own decisions about how networks are to be accessed and utilized."[13]

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[6] *Id.* at 13–16.

[7] *See* Brief of Amici Curiae Electronic Frontier Foundation, American Civil Liberties Union, and American Civil Liberties Union of the Nation's Capital at 28–31, *United States Telecom Ass'n v. FCC*, F. 3d 674 (D.C. Cir. 2016) (No. 15-1063), *available at* https://www.eff.org/document/us-v-fcc-eff-aclu-amicus-brief.

[8] *2015 Open Internet Order, supra* note 1, at ¶ 60.

[9] *Id.*

[10] *See id.* at ¶ 61.

[11] *See In re Use of the Carterfone Device in Message Toll Telephone Service; Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants) (Carterfone)*, Docket Nos. 16942, 17073, Decision, 13 F.C.C.2d 420 (1968), *recon. denied*, 14 F.C.C.2d 571 (1968).

[12] *See 2015 Open Internet Order, supra* note 1, at ¶ 15.

[13] *Id.* at ¶ 60.

The Commission continued to actively promote the open network through the *Computer Inquiries*,[14] three important decisions that cemented its regulatory approach to digital services. In *Computer I*, the Commission sought to disaggregate computer processing from communications, which the Commission felt needed regulation to ensure a competitive environment and promote innovation.[15] Hybrid models would be evaluated on a case-by-case basis.[16] Those wishing to engage in both activities would have to create separate subsidiary entities.[17] In 1976, the Commission responded to rapidly improving terminals and problems with the hybrid model in *Computer II*, in which it separated basic services (the pure transmission of information and associated processing) from enhanced services (basic services layered with "applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information").[18] Finally, in *Computer III*, the Commission pulled back some of the structural regulations in favor of non-structural protections, such as the Open Network Architecture provision, which required carriers to "provide unbundled basic service 'building blocks' . . . to others on a tariffed basis" so that enhanced service providers can use network services in their products in a "flexible and economical manner."[19]

By the late 1980s, the *Computer Inquiries* had "separated the market for information services from the underlying network infrastructure, and imposed firm non-discrimination rules for network access."[20] These cases illustrate that even in the early stages of information services development, the Commission was committed to "[preventing] network owners from engaging in anti-competitive behavior and spurr[ing] the development and adoption of new technologies."[21]

Against a backdrop of increasing debate about the discriminatory and anti-competitive conduct of ISPs, in 2004 FCC Chairman Michael Powell laid out the "Four Internet Freedoms" that would be the foundation of the modern net neutrality rules.[22]

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[14] *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Commc'n Servs. & Facilities (Computer I)*, Docket No. 16979, Final Decision and Order, 28 F.C.C.2d 267 (1971); *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384 (1980); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations; and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations (Computer III)*, CC Docket No. 85-229, Report and Order, 104 F.C.C.2d 958 (1986).

[15] *See generally Computer I*, 28 F.C.C.2d 267.

[16] *See Computer I*, 28 F.C.C.2d at ¶ 27.

[17] *See id.* at ¶ 29.

[18] *Computer II*, 77 F.C.C.2d at ¶ 5.

[19] *Computer III*, 104 F.C.C.2d at ¶ 214.

[20] *2015 Open Internet Order, supra* note 1, at ¶ 63.

[21] *Id.*

[22] *See* Remarks of Michael K. Powell, Preserving Internet Freedom: Guiding Principles for the Industry 5 (Feb. 8, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

Chairman Powell explained that Internet users should (1) "have access to their choice of legal content;" (2) "be able to run applications of their choice;" (3) "be permitted to attach any devices they choose to the connection in their homes;" and (4) "receive meaningful information regarding their service plans."[23]

In response to Chairman Powell's remarks, the Commission unanimously adopted the 2005 *Internet Policy Statement*[24] which, though it did not have regulatory force, reflected the Commission's commitment to "ensure that consumers had the right to access and use the lawful content, applications, and devices of their choice online, and to do so in an Internet ecosystem defined by competitive markets."[25] The Commission relied heavily on Chairman Powell's four freedoms, stating that users had the right to (1) "access the lawful Internet content of their choice;" (2) "run applications and use services of their choice, subject to the needs of law enforcement;" (3) "connect their choice of legal devices that do not harm the network;" and (4) "competition among network providers, application and service providers, and content providers."[26]

The *Internet Policy Statement* shaped the Commissions approach to a series of mergers in the years that followed. A central condition for Commission approval of the mergers of SBC with AT&T and Verizon with MCI the companies' agreement to comply with the *Internet Policy Statement*.[27] The Commission also conditioned the merger of Comcast with NBCUniversal on Comcast's adoption of the net neutrality rules laid out in the *2010 Open Internet Order*,[28] which were largely based on the *Internet Policy Statement*.[29] The Commission continued to use the *Internet Policy Statement* rules to "evaluate other large-scale transactions, such as an Adelphia/Time Warner/Comcast

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[23] *Id.*

[24] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, Policy Statement, 20 FCC Rcd. 14986 (2005) [hereinafter *Internet Policy Statement*].

[25] *2015 Open Internet Order, supra* note 1, at ¶ 64.

[26] *Internet Policy Statement, supra* note 24, at ¶ 4.

[27] *See In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18392, ¶ 211 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control,* WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd. 18433, 18537, ¶ 221 (2005).

[28] *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4275, ¶ 94 & n.213 (2011).

[29] *See 2010 Open Internet Order, supra* note 3, at ¶ 5.

licensing agreement, and the AT&T/BellSouth merger,"[30] and to suppress "anti-competitive behavior by service providers."[31]

The Commission formally adopted the net neutrality rules and principles in the *Internet Policy Statement* in the *2010 Open Internet Order*.[32] That order required ISPs to adhere to "high-level rules embodying four core principles: transparency, no blocking, no unreasonable discrimination, and reasonable network management."[33] The order did not impose a blanket ban on paid prioritization schemes but emphasized that such schemes would likely violate the "no unreasonable discrimination" provision.[34] The Commission also promised to "monitor the potential for anticompetitive or otherwise harmful effects from specialized services."[35] Though the blocking and discrimination prohibitions were later struck down by the D.C. Circuit in 2010 on the basis that the regulations could not be imposed on Title I carriers,[36] in 2014 the Commission announced a Notice of Proposed Rulemaking to reclassify ISPs and reinstate the principles of the *2010 Open Internet Order*.[37] These were eventually cemented in the *2015 Open Internet Order*.[38]

In short, the Commission has consistently implemented rules to promote a free and open Internet and competitive environment for over four decades. That backdrop, in turn, has helped discourage service providers from obvious data discrimination; even absent specific rules, the threat of regulation has kept service providers honest. It has not been entirely successful, however, and today mere threats and policy statements are not enough. Instead, Internet access must be protected with specific and clear rules.

B. In 2017, Consumers Need Net Neutrality Protections More Than Ever.

Bright-line net neutrality rules are essential to the protect the open Internet given continuing market consolidation and BIAS providers' stated intent to take advantage of their outsized gatekeeping power to engage in discriminatory practices.

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[30] *2015 Open Internet Order, supra* note 1, at ¶ 65 n.68.

[31] *Id.* at ¶ 65.

[32] *2010 Open Internet Order, supra* note 3at ¶ 5.

[33] *Id.* at ¶ 43.

[34] *Id.* at ¶ 76.

[35] *Id.* at ¶ 114.

[36] *See generally Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[37] *See generally In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

[38] *See generally 2015 Open Internet Order, supra* note 1.

1. The Market for Internet Access Grows Ever More Concentrated, and ISPs Are Ever More Integrated with Content Sources.

Upholding the Commission's *2015 Open Internet Order*, the Court of Appeals for the D.C. Circuit recognized that "the Commission's justification for those rules—'that they will preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet'—was reasonable and supported by substantial evidence."[39]

The open internet rules are intended to address the "fear that broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers' access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers."[40] Nothing suggests that the Commission's 2015 concern about anti-competitive consumer harm is less real or important today. To the contrary, the concern is more pressing than ever.

a. Consolidation in the Market for High-Speed Internet Access Service Is Increasing and Likely to Continue.

In 2015, the Commission predicted that the broadband market would continue to consolidate. That is exactly what has happened. In August 2016, 95% of the high-speed Internet access market was controlled by the 14 largest ISPs.[41] Indeed, high-speed Internet access has seen increased horizontal concentration. BIAS providers continue to merge and further concentrate the industry, giving the ISPs "more leverage as gatekeepers."[42]

Cable broadband, responsible for the majority of high-speed connections, is particularly concentrated. As of June 2016, cable represented 72% of all fixed connections with download speeds greater than 10Mbps, and almost 83% of all high-speed connections.[43] Ninety percent of the cable broadband market[44] is now controlled by four main players: Comcast (39%), Charter Communications (35%), Cox

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[39] *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 733–34 (quoting *Verizon*, 740 F.3d at 628).

[40] *See id.* (quoting *Verizon*, 740 F.3d at 629).

[41] *Top Broadband Providers Had Fewer Net Adds in 2Q 2016 Than in any Quarter in Years*, Leichtman Research Group (Aug. 16, 2016), http://www.leichtmanresearch.com/press/081616release.html.

[42] *See 2015 Open Internet Order*, *supra* note 1 at ¶ 78 n.122 (quoting Open Technology Institute at the New America Foundation and Benton Foundation (OTI) Comments at 11).

[43] Wireline Competition Bureau, Internet Access Services: Status as of June 30, 2016 (2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf. Cable and fiber together make up more than 98% of high-speed connections. *Id.* at 21.

[44] Cable broadband market share expressed as a percentage of subscribers unless otherwise stated.

Communications (8%), and Altice (7%).[45] In 2016, Charter acquired both Time Warner Cable and Bright House (now doing business as Spectrum);[46] as a result, Charter Communications and Comcast together make up approximately 75% of the cable broadband market, illustrating the extreme concentration in cable broadband.[47] In June 2016, Altice completed their takeover of Cablevision. Having already acquired Suddenlink the previous year, Altice now controls approximately 7% of the cable broadband market.[48]

Cable concentration is not the only problem. ISPs are also vertically integrating with media and content providers, giving ISPs "greater incentive to block competitors."[49] For instance, Verizon is currently finishing its major acquisition of Yahoo!'s media businesses.[50] Meanwhile, AT&T has announced its intent to merge with media giant Time Warner (which will apparently proceed without full review by the Commission.)[51]As the Commission explained in 2015 "vertically integrated providers can restrict access to affiliated content or block, degrade, or otherwise act contrary to open Internet principles with respect to delivery of unaffiliated online video to their broadband subscribers."[52]

In short, the Commission was correct in 2015 to fear increased concentration in the broadband market.

b. Most Consumers Continue to Have Few, If Any, Choices for High-Speed Access.

The NPRM suggests that broadband already has robust "intermodal competition given the 4,559 Internet service providers (ISPs) now in the market."[53] But if there is only one pizza shop that delivers to you, it doesn't matter that other parts of the country contain thousands of pizza shops; you don't enjoy a competitive market for pizza. As Commissioner Clyburn notes in dissent, most Americans have little or no choice of

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[45] Pete Bell, *Say Hello to the Newer, More Consolidated U.S. Cable and Broadband Sector*, TeleGeography (July 20, 2016), http://blog.telegeography.com/us-cable-and-broadband-sector-consolidation-news.

[46] Bell, *supra* note 45.

[47] *Id.*

[48] *Id.*

[49] *2015 Open Internet Order*, *supra* note 1 at ¶ 78 n.122 (quoting Open Technology Institute at the New America Foundation and Benton Foundation (OTI) Comments at 11).

[50] Mark Sullivan, *Why 2017 Will Be a Huge Year for Telecom and Media Mergers*, Fast Company (Mar. 15, 2017), https://www.fastcompany.com/3068696/why-2017-will-be-a-huge-year-for-telecom-and-media-mergers.

[51] *Id.*

[52] *Id.* at ¶ 82 n.140 (quoting Consumers Union Comments at 3).

[53] NPRM ¶ 39.

ISPs.[54] For instance, the Commission's 2016 Broadband Progress Report states that 51% of Americans have only one choice of provider for high-speed Internet (download/upload speeds of 25Mbps/3Mbps).[55,56] Only 38% have access to more than one high-speed provider.[57] According to the latest *Internet Access Services* Report conducted by the Wireline Competition Bureau, 57% of residential census blocks have at most one provider offering high-speed broadband.[58]

Matters are worse for rural users. In urban areas, 44% of Americans have high-speed options; only 13% of rural Americans have access to more than one provider,[59] and 39% of the rural population have no access to high-speed internet at all.[60]

Thus, the absolute number of ISPs does not matter from the consumer's point of view. For consumers, the only ISPs that count are those that they can use; the other 4,558 or 4,557 ISPs are utterly irrelevant.

c. The *2015 Open Internet Order* Did Not Cause Market Concentration.

The NPRM incorrectly suggests that regulations in the *2015 Open Internet Order* are too burdensome for small ISPs, forcing them out of the market and reducing overall competition.[61] Dozens of ISPs say otherwise.[62]

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[54] NPRM, 2017 WL 2292181 at *55 ("By this logic, intermodal residential water competition must be even more robust than broadband competition, since there are over 156,000 public water systems in the United States. Yet everyone I know has one water line into their house.").

[55] *See In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, *2016 Broadband Progress Report*, 31 FCC Rcd. 699, 736, ¶ 86 (2016) [hereinafter *2016 Broadband Progress Report]*.

[56] While industry objected to the use of 25Mbps as the benchmark, the median speed of all fixed broadband consumers in 2016 was 39Mbps. *See* FCC, *2016 Measuring Broadband America Fixed Broadband Report* (2016), *available at* http://data.fcc.gov/download/measuring-broadband-america/2016/2016-Fixed-Measuring-Broadband-America-Report.pdf.

[57] *2016 Broadband Progress Report, supra* note 55 at ¶ 86.

[58] Internet Access Services, *supra* note 43, at 6. The report specifies that residential census blocks do not correspond directly to households, and this chart is not a measure of competition. *Id.* However, it reinforces the findings in the *2016 Broadband Progress Report* that the majority of the population still has only one choice of high-provider.

[59] *See 2016 Broadband Progress Report, supra* note 55, at ¶ 86.

[60] *Id.*

[61] NPRM, 2017 WL 2292181, at *69 (statement of Chairman Ajit Pai).

[62] *See* Letter of Internet Service Providers to Chairman Pai, *available at* https://www.eff.org/files/2017/06/27/isp_letter_to_fcc_on_nn_privacy_title_ii.pdf.

In fact, mergers by large providers are the primary driver of market consolidation. As stated above, 14 ISPs control approximately 95% of the high-speed broadband market.[63] Further, the top four cable companies now control BIAS for about 90% of broadband subscribers.[64]

Further, the Commission's own research shows that consolidation was already a problem at the time Title II regulations were imposed. The *2015 Broadband Progress Report*, heavily referenced in the *2015 Open Internet Order*, shows that between 2011 and 2013, 45% of households had only one choice of high-speed provider, and 16% had none.[65] In that light, the high-speed market was already consolidated at the time of the *2015 Open Internet Order*.

Finally, the Department of Commerce found that only 37% of Americans could choose between two or more providers of high-speed Internet at 25Mbps or greater in 2014, and only 9% had three or more ISP options.[66] Thus, even in 2014 the market was clearly already experiencing significant concentration.[67]

d. Antitrust Law Cannot Prevent the Negative Effects of ISP Integration.

The NPRM brushes off consolidation concerns, wrongly suggesting that antitrust law can address these issues.[68] However, antitrust law is an economic doctrine that gives little if any weight to freedom of expression and other noneconomic values secured by net neutrality. Antitrust law defines harm in terms of higher prices and diminished product quality. If antitrust law deems that a practice is not harmful to competition, it does not matter how much it represses speech, distorts access to knowledge, or intrudes on privacy.

In particular, antitrust law cannot adequately address the "gatekeeper" problem posed by an ISP's control over customers' access to information. On the economic side, the unique gatekeeper role of ISPs poses a potential threat to consumers and content owners whether or not the ISPs have the power to raise prices unilaterally. For example, if a nationally consolidated ISP wants to charge a content service to deliver data to the

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[63] Leichtman Research Group, *supra* note 42.

[64] Bell, *supra* note 45.

[65] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment,* 30 FCC Rcd 1375, 1421, ¶ 83 (2015).

[66] David N. Beede, U.S. Department of Commerce, *Competition Among U.S. Broadband Service Providers 2* (2014), *available at* http://www.esa.doc.gov/sites/default/files/competition-among-us-broadband-service-providers.pdf.

[67] *Id.*

[68] NPRM ¶ 78.

ISP's customers at a reasonable bandwidth, that content owner may have to agree to pay in order to reach a large portion of its potential user base.[69] Further, as the Commission noted in the *2015 Open Internet Order,* "limited competitive alternatives . . . may exacerbate other problems such as the ability to switch from one provider to another."[70]

As noted above, there is very little broadband competition to protect. More than 9 out of 10 Americans live in monopoly or duopoly markets for broadband. In most places, even lower-speed wireless service is available from only a handful of carriers, all of which oppose net neutrality and have pushed the boundaries of the *2015 Open Internet Order* with throttling or pay-to-play zero-rating schemes.[71]

Further, broadband service naturally tends towards monopoly. A large incumbent provider that can amass government permissions to use rights-of-way under public streets, on poles and antenna sites, and on the radio spectrum will always be able to offer cheaper service than a new entrant who has to pay to build the infrastructure and obtain new rights-of-way.[72] Combine that with customers' notoriously unreliable access to information about service quality and broadband speeds and the high costs of switching providers[73] and ISPs operate in a market that will not be competitive without intervention.

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[69] *See* John Bergmayer, *We Need Title II Protections in the Uncompetitive Broadband Market*, Public Knowledge (Apr. 26, 2017), https://www.publicknowledge.org/news-blog/blogs/we-need-title-ii-protections-in-the-uncompetitive-broadband-market.

[70] *2015 Open Internet Order, supra* note 1, at ¶ 84 n.152.

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

[72] *See* Bruce A. Kushnick, *The Book of Broken Promises: $400 Billion Broadband Scandal & Free the Net* (2005); Ex Parte Submission of the U.S. Dep't of Justice at 7, *In re Economic Issues in Broadband Competition, A National Broadband Plan for our Future* (GN Docket No. 09-51) (Jan. 4, 2010), *available at* https://www.justice.gov/atr/ex-parte-submission-united-states-department-justice-matter-economic-issues-broadband ("[T]he Department does not expect to see a large number of suppliers."); *id.* at 11 ("[L]arge economies of scale . . . preclude having many small suppliers and thus often lead to oligopolistic market structures.").

[73] Michael Nunez, *New York Sues Over Slow Internet Speeds: 'Time Warner Cable Has Been Ripping You Off'*, GIZMODO (Feb. 1, 2017), http://gizmodo.com/time-warner-cable-s-new-owner-is-being-sued-for-selling-1791867274; *see also* Prepared Remarks of FCC Chairman Tom Wheeler, The Facts and Future of Broadband Competition 4 (Sept. 4, 2014), *available at* https://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition ("Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees. And, if those disincentives to competition weren't enough, the media is full of stories of consumers' struggles to get ISPs to allow them to drop service.").

[73] Larua Dimon and Rich Schapiro, *AG Schneiderman sues Time Warner Cable for knowingly providing slower-than-advertised internet service*, New York Daily News (Feb. 2, 2017), http://www.nydailynews.com/new-york/ag-sues-spectrum-time-warner-slow-internet-speeds-article-1.2961418; Brian Fung and Craig Timberg, *The FTC is Suing AT&T for Throttling Its Unlimited Data Customers*, The Washington Post (Oct. 28, 2014), https://www.washingtonpost.com/news/the-

The market for DSL broadband was competitive in the 1990s because phone companies were required to allow other service providers to operate using their infrastructure. [74] We could have that kind of competition again if broadband providers were required to grant similar access. Absent such measures, the market is unlikely to enjoy the meaningful competition that antitrust law is designed to protect.

Antitrust law has also developed gaps that could allow harmful, non-neutral practices of the types documented in this rulemaking. Under the "single entity doctrine," a company cannot be liable for illegal collusion with its subsidiary or parent companies. So, for example, Comcast could make an arrangement to favor NBC-Universal content it owns without much fear from antitrust law. Additionally, a pair of Supreme Court decisions in 2004 and 2007 made it much harder to bring antitrust cases against companies in regulated industries, even if the regulations themselves are minimal.[75] The dismal state of competition in broadband should make it obvious that current antitrust law isn't adequate even to protect competition, let alone to protect customers against data discrimination.

Antitrust law has a role to play, but it is not adequate on its own to protect the open Internet.

2. Lack of Competition Continues to Lead to Poor Service and High Prices.

The largest Internet Service Providers continue to earn extraordinarily low customer satisfaction ratings.[76] Those ratings are the result of years of poor customer service, from excessively long customer cancellation calls[77] to increasing prices at paces that have exceeded inflation for 20 years.[78]

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switch/wp/2014/10/28/the-ftc-is-suing-att-for-throttling-its-unlimited-data-customers/?utm_term=.abbdafba00b2; Kitty Mayo, *Switching to broadband? You might face termination fees*, BusinessNorth (March 17, 2016), http://www.businessnorth.com/businessnorth_exclusives/switching-to-broadband-you-might-face-termination-fees/article_8c93c992-ec41-11e5-a9f4-d74ae65fc31d.html

[74] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 96-98, Third Report and Order (rel. Nov. 18, 1999).

[75] *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Credit Suisse Securities v. Billing*, 551 U.S. 264 (2007).

[76] *See Internet Service Providers*, American Customer Satisfaction Index, http://www.theacsi.org/index.php?option=com_content&view=article&id=147&catid=&Itemid=212&i=Internet+Service+Providers.

[77] *See* Elise Hu, *Comcast 'Embarrassed' by the Service Call Making Internet Rounds*, NPR (July 15, 2014), http://www.npr.org/sections/alltechconsidered/2014/07/15/331681041/comcast-embarrassed-by-the-service-call-making-internet-rounds.

[78] *See* Alice Adamczyk, *Cable Prices Are Rising at 4 Times the Rate of Inflation*, Time (Feb. 7, 2016), http://time.com/money/4227133/cable-price-four-times-inflation/.

Yet those same massive ISPs such as Comcast,[79] AT&T,[80] and Verizon[81] also earn strong profits year after year because they do not have to worry about a competitor coming to help subscribers vote with their wallets.[82] That, in turn, is due in part to the Commission's facilities-based competition policy, which has failed to produce benefits by virtually every metric that measures speed and affordability.[83]

Eliminating the legal obligations of ISPs to maintain a neutral network at the height of their market concentration will do nothing to improve the competitive landscape. Instead, upending net neutrality rules will simply encourage ISPs to strike exclusive deals with major Internet companies, which will in turn create new barriers to entry into the Internet access marketplace.

If the public is clear about what it does not want—poor customer service and high prices—it is equally clear what it does want: net neutrality. Nearly three out of four

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[79] Comcast's net income indicates a remarkable level of resilience given that, unlike AT&T and Verizon the company suffered virtually no loss during the Great Recession. Net income attributable to Comcast was $8.695 billion in 2016, $8.163 billion in 2015, $8.380 billion in 2014, $6.816 billion in 2013, $6.203 billion in 2012,, $4.160 billion in 2011, $3.635 billion in 2010, $3.638 billion in 2009, $2.547 billion in 2008, and $2.587 billion in 2007. Comcast Corporation, *Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2016* (2017), *available at* http://files.shareholder.com/downloads/CMCSA/4768517110x0x926588/AC455B7D-A383-4D5F-B9C6-187B2417C61E/Comcast_10K_2016_filing.pdf; Comcast Corporation, *Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2011* (2012), http://files.shareholder.com/downloads/CMCSA/4768517110x0x561695/79426950-eb48-4e46-a761-f999d155a226/BookmarkedComcast10K.pdf.

[80] Net income attributable to AT&T from 2007–2016 shows strong profits under the Title II-supported network neutrality rules. In fact, it appears the Great Recession was the only event that resulted in a loss for the company for one single year. AT&T's net income was $12.976 billion in 2016, $13.345 billion in 2015, $6.452 billion in 2014, $18.418 billion in 2013, $7.299 billion in 2012, $3.944 billion in 2011, $19.864 billion in 2010, $12.138 billion in 2009, -$2.625 billion in 2008, and $17.032 billion in 2007. AT&T Inc., Annual Report (2011), *available at* https://www.att.com/Common/about_us/files/pdf/ar2011_annual_report.pdf; AT&T INC., Annual Report (2016), *available at* https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2016/att-ar2016-completeannualreport.pdf.

[81] Net income attributable to Verizon from 2007–2016 shows strong profit growth, dampened by the Great Recession and Hurricane Sandy in 2012. Verizon's net income, less its sizably profitable non-controlling interests, was $13.127 billion in 2016, $17.879 billion in 2015, $9.625 billion in 2014, $11.497 billion in 2013, $875 million in 2012, $2.404 billion in 2011, $2.549 billion in 2010, $4.894 billion in 2009, $2.193 billion in 2008, and $7.212 billion in 2007. Verizon, Annual Report (2016), *available at* http://www.verizon.com/about/sites/default/files/annual_reports/2016/downloads/Verizon-AnnualReport2016.pdf; Verizon, Annual Report (2011), *available at* http://www.verizon.com/about/sites/default/files/vz_ar_final_2011.pdf.

[82] *See 2016 Broadband Progress Report*, *supra* note 55 at ¶ 86 ("Approximately 51 percent of Americans have one option for 25 Mbps/3 Mbps fixed broadband service.").

[83] *See generally* Nick Russo et al., *The Cost of Connectivity* (2014), *available at* https://www.newamerica.org/oti/policy-papers/the-cost-of-connectivity-2014/ (comparing 24 cities across the world on speed and affordability); *see also* Hannah Yi, *This is how Internet speed and price in the U.S. compares to the rest of the world*, PBS NewsHour (Apr. 26, 2015), http://www.pbs.org/newshour/updates/internet-u-s-compare-globally-hint-slower-expensive/.

voters from across the political spectrum support network neutrality and the ability to access any website or online service without a gatekeeper, whether government or corporate, controlling their choices.[84] This public preference for network neutrality has grown over the years following the *2015 Order*.[85]

3. Evidence Of Non-Neutral, Discriminatory Practices By ISPs Abounds.

The Commission requests "comment on specific ways in which consumers were harmed" in the absence of net neutrality protections.[86] The comment filed in this proceeding by over 170 Internet engineers, pioneers, and technologists describes these specific consumer harms in detail.[87] The Commission is already aware of many of them. For example:

- Madison River (a BIAS provider) blocked Voice over Internet Protocol (VoIP) telephone calls;
- Comcast interfered with Internet traffic generated by certain applications, notably BitTorrent;
- AT&T blocked data sent by users of Apple's FaceTime software;
- Comcast announced a plan to favor its own video-on-demand service by charging customers more to use competing providers.[88]

Discriminatory conduct by BIAS providers has continued in recent years, potentially violating the net neutrality rules:

- Verizon and AT&T both distort customers' use of video and other data by exempting services that they own or are affiliated with from data caps.

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[84] Mozilla Blog, *New Mozilla Poll: Americans from Both Political Parties Overwhelmingly Support Net Neutrality* (June 6, 2017), https://blog.mozilla.org/blog/2017/06/06/new-mozilla-poll-americans-political-parties-overwhelmingly-support-net-neutrality/; Freedman Consulting, *New Poll: Americans Overwhelmingly Support Existing Net Neutrality Rules, Affordable Access, and Competition Among ISPs* (July 10, 2017), https://tfreedmanconsulting.com/reports/new-poll-americans-overwhelmingly-support-existing-net-neutrality-rules-affordable-access-competition-among-isps/.

[85] Peter Moore, *Public Tends to Support FCC Net Neutrality Ruling*, YouGov (March 10, 2015), https://today.yougov.com/news/2015/03/10/Public-tends-support-FCC-net-neutrality/.

[86] NPRM ¶ 50.

[87] *In re Restoring Internet Freedom*, WC Docket No. 17-108, *Joint Comments of Internet Engineers, Pioneers, and Technologists on the Technical Flaws in the FCC's Notice of Proposed Rule-making and the Need for the Light-Touch, Bright-Line Rules from the Open Internet Order* [hereinafter *Internet Engineers Comments*]

[88] *Id.* at 34-35.

- At least six BIAS providers interfere with customers' Web browsing by rerouting customer search requests to websites that the customers did not request or expect, sending search query data to third parties in the process.

- AIO and Cricket Wireless stripped encryption off of customers' communications with email servers, leaving their communications vulnerable to interception.

- Comcast modified third-party Web pages in transit to customers, inserting JavaScript code and introducing potential security vulnerabilities.

- Verizon Wireless added unique tracking ID numbers to Web requests sent by its customers, allowing those customers' Web browsing to be tracked across numerous websites without their knowledge, even when customers sought to avoid such tracking by deleting cookies.

- T-Mobile artificially throttled video data as part of its "Binge On" program, even in the absence of any network congestion.

- BIAS providers interfere with particular applications by blocking ports or otherwise disrupting the data they send, burdening users of new applications and protocols.[89]

4. Other Agencies Can't Adequately Substitute for FCC Regulation.

Congress explicitly created the Commission to be an overseer of communication networks, and the Communications Act is the core federal law that regulates the telecommunications industry.[90] It should do its job.

Certainly the Federal Trade Commission (FTC) cannot do it instead. While the FTC can censure providers for misleading their customers, the FTC does not have the power to enact baseline rules requiring neutral behavior.[91] As long as ISPs are open and transparent about their intent to engage in data discriminatory activity, their activity will likely be lawful under the FTC Act. The FTC might be able to intervene where broadband providers create legally binding contracts with consumers to preserve network

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[89] *Id.* at 36-40.

[90] *See* Charles B. Goldfarb, Cong. Research Serv., RL33034, *Telecommunications Act: Competition, Innovation, and Reform 1* (2006), *available at* http://net.educause.edu/ir/library/pdf/epo0635.pdf.

[91] *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Federal Trade Commission (2008), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

neutrality, but providers have refused to do so.[92] Nor can states fill the void. While states are generally tasked with regulating intrastate activities under the Communications Act,[93] the Interstate Commerce Clause creates enforcement difficulties for state-based network neutrality rules. Non-neutral traffic rerouting and traffic shaping activities might consist of a mix of interstate and intrastate activities that would be difficult for state agencies to regulate.[94] Without a clear legal route for network neutrality at the state level, consumers cannot rely on their state and local consumer protection agencies to defend their interests.

Finally, as noted, consumers can't discipline providers by voting with their wallets. As the Commission's own data demonstrates, most Americans live in duopoly markets while a majority only have one choice for high-speed broadband.[95] New competitive entrants have begun pulling back,[96] and some states are going so far as to ban competition from community providers on behalf of cable and telephone companies.[97] This level of concentration, barriers to entry, and regional monopolization of broadband assure dominant players that they can degrade or block access with little consequence, absent bright-line net neutrality rules.

III. The FCC Should Continue to Classify BIAS as a Title II Service.

The NPRM also asks whether the Commission should continue to classify BIAS as a telecommunications service under Title II of the Telecommunications Act. The answer is an unequivocal yes. Title II classification is supported by the language and history of the Act, its recent interpretation by the courts, technological reality, and consumers' expectations. And Title II classification, combined with robust forbearance,

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[92] *See* Kate Cox, *18 Cable Companies Promise To Support Net Neutrality; None Will Guarantee You In Writing*, N. Y. Times (May 19, 2017), https://consumerist.com/2017/05/19/18-cable-companies-promise-to-support-net-neutrality-none-will-guarantee-you-in-writing/.

[93] *See generally Global Tel*Link v. Federal Communications Commission*, 859 F.3d 39 (D.C. Cir. 2017); *see also* Colin Lecher, The FCC can't cap the cost of in-state prison phone calls, court rules (Jun 13, 2017), https://www.theverge.com/2017/6/13/15793550/fcc-prison-phone-calls-cap-court-decision; see also 47 U.S.C. § 224(c)(1) (2012) ("Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.").

[94] *See* 74 Am. Jur. 2d Telecommunications: Federal Preemption § 17 (2017).

[95] *2016 Broadband Progress Report, supra* note 55, at ¶ 86.

[96] *See* Daisuke Wakabayashi, *Google Curbs Expansion of Fiber Optic Network, Cutting Jobs* (Oct. 25, 2016), https://www.nytimes.com/2016/10/26/technology/google-curbs-expansion-of-fiber-optic-network-cutting-jobs.html.

[97] According to the Institute for Self Reliance, Alabama, Arkansas, Colorado, Florida, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin all impose barriers to the construction of Muni Broadband. *See Community Network Map*, Institute for Local Self-Reliance, https://muninetworks.org/communitymap (last updated May 2017); *see also* Jason Koebler, *The 21 Laws States Use to Crush Broadband Competition* (Jan 14 2015), https://motherboard.vice.com/en_us/article/qkvn4x/the-21-laws-states-use-to-crush-broadband-competition.

remains the best legal basis for clear, predictable, legally sound consumer protections against data discrimination by ISPs.

A. Broadband Internet Access Service Matches the Statutory Definition of a Title II Telecommunications Service.

A telecommunications service subject to Title II of the Telecommunications Act is defined as

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received[,][98]

while an information service, subject to Title I, is defined as

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[99]

As the Commission notes, these two categories can be traced to the Commission's *Computer Inquiries*, which distinguished "basic" and "enhanced" services.[100] But the roots of that distinction go much deeper. Classifying broadband as a telecommunications service is consistent with the centuries-old doctrine of common carriage. That legal doctrine proposes that transportation services and facilities (whether for goods, people, or information) should be operated under a norm of treating all customers equally, as well as all materials to be transported.[101] All other businesses, including users of common carrier services, may deal with customers as they see fit.

The Commission has consistently classified a service primarily "by reference to how the consumer perceives the service being offered."[102] Viewed in this light, the Commission's current classification of broadband Internet access as a Title II telecommunications service is the better classification. Subscribers use their broadband ISP service primarily to transmit information to and from their devices—the role of a

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[98] 47 U.S.C. § 153(50).

[99] 47 U.S.C. § 153(24).

[100] NPRM ¶ 6; *In re Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II")*, 77 F.C.C.2d 384, 420 ¶ 96 (1980).

[101] *Verizon*, 740 F.3d at 651 ("'[T]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.'") (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (1976)).

[102] *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 976 (2005); *2015 Open Internet Order, supra* note 1, ¶ 342.

Title II service. The functions of "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"—the hallmarks of a Title I information service—are primarily the role of third party providers on today's Internet.

This was not always so. Popular dial-up Internet service providers such as CompuServe, Prodigy, and America Online used their own content and applications as the primary customer draw, with access to third-party information services offered as a supplemental feature, if at all. A 1995 TV commercial for America Online prominently features proprietary content offered by the company itself, such as message boards and travel booking, with one offhand reference to "send[ing] email on the Internet."[103] Access to the World Wide Web was not mentioned, even though it was offered through the service.[104] Even around the time of the Commission's *2002 Cable Declaratory Ruling*,[105] many people obtained email and other content and applications directly from their broadband provider.[106]

But the world has changed. Today's BIAS providers, while they may offer email, are not marketed or perceived as providers of content, storage, data processing, or other information services. Indeed, unlike the America Online of two decades ago, today's BIAS providers advertise the speed and reliability of their data transmission, not the information services they offer.[107]

Indeed, BIAS providers themselves claim to be mere transmitters of information. For example, in 2003, Verizon argued that it was not subject to the subpoena provisions of 17 U.S.C. 512(h) (the Digital Millennium Copyright Act) because it is an "ISP acting as a conduit for . . . communications."[108] The D.C. Circuit agreed that Verizon was "an ISP functioning as a conduit for user-directed communications" and thus was not a proper recipient of a DMCA subpoena.[109] BIAS providers also regularly claim the liability protections of section 512(a) of the DMCA, which applies only to "transmitting, routing, or providing connections for, material through a system or network controlled or

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[103] mycommercials, *Early AOL Commercial (1995)*, YouTube (Nov. 16, 2009), https://www.youtube.com/watch?v=1npzZu83AfU.

[104] Lily Rothman, *A Brief Guide to the Tumultuous 30-Year History of AOL*, TIME (May 22, 2015), http://time.com/3857628/aol-1985-history/ (noting that AOL began offering its customers Web access in 1993).

[105] *In re Inquiry Concerning High–Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) [hereinafter *Cable Declaratory Ruling*].

[106] *Id.* at 4804–06 ("[S]ubscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web.").

[107] *See 2015 Open Internet Order*, *supra* note 1, at ¶ 351 n.948.

[108] *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229, 1234 (D.C. Cir. 2003).

[109] *Id.* at 1235.

operated by or for the service provider, or . . . the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections."[110]

By contrast, the public is far more likely to look to edge providers for "information services." Today's successors to information services like America Online are not BIAS providers like Comcast, AT&T, and Verizon but rather social networks like Twitter and Facebook, search engines like Google and Bing, and content sources such as news, television, movie, and sports websites.[111] A large plurality of broadband users use third-party email services. Internet users interact with these well-known and lesser-known services through a variety of different Internet access providers. For example, a Facebook user typically that social network from a home computer connected to a cable Internet provider, a mobile phone, a public Wi-Fi hotspot, and perhaps an office computer.

The Supreme Court has described a Title I information service as one for which "the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering."[112] Even if "Internet service" was perceived as a "single, integrated offering" in 2002, today's BIAS service is perceived by consumers as a data transmission service, separate and distinct from the applications that it provides access to, even if a few of those applications, like email, are also offered by the BIAS provider.

Maintaining the regulatory distinction between Internet access on one hand and Internet services on the other is also consistent with the technical architecture of the Internet. As described in the comment submitted by computer scientists, network engineers, and Internet professionals, one of the fundamental design principles of the Internet is the "network stack," in which the functions of the network are separated into layers. The physical layer is "responsible for physically transmitting and receiving bits," the "network layer" sends packets of information between specific addresses, and the "transport layer" ensures that information arrives at its destination intact and in order.[113] Above these layers lie applications such as email, the World Wide Web, videoconferencing, and many others, which count on the lower layers to deliver information without regard to the specific technologies used.[114]

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[110] *See, e.g.*, Brief for Defendant-Appellant Cox Communications, Inc. at 45*, BMG Rights Mgmt. v. Cox Commc'ns, Inc.*, No. 16-1972 (4th Cir. Nov. 7, 2016) ("[T]he DMCA safe harbor for ISPs . . . protects Cox.").

[111] *2015 Open Internet Order, supra* note 1, at ¶ 349–50.

[112] *Brand X*, 545 U.S. at 990. Justice Scalia, writing in dissent, concurred with that definition: "The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer." *Id.* at 1006.

[113] *Internet Engineers Comments* at 7.

[114] *Id* at 7-8.

The functions of the lower levels of the stack correspond to the Telecommunications Act's definition of a telecommunications service. Their function is to transmit information of the user's choosing to points, identified by Internet Protocol addresses, specified by the user, while actively *avoiding* any "change in the form or content of the information."[115] Similarly, the functions of the application layer of the Internet track the definition of an information service. It is applications such as Web browsers, email clients, videoconferencing software, mobile apps, and specialized "Internet of Things" devices that generat[e], acquir[e], stor[e], transform,[] process[], retriev[e], utilize[e], or mak[e] available information." They do so "via telecommunications," in that they rely on the lower layers of the stack without regard to how those layers are actually implemented.

The layered architecture of the Internet frees application developers from the burden of adapting to many different kinds of physical and network architecture. That's why many vital Internet services, including email and the Web, work equally well over DOCSIS cable, fiber-to-the-home, DSL, wireless, and even satellite Internet service. The NPRM's proposal to classify BIAS service as a Title I information service would, by law, permit "individualized bargaining and discrimination in terms"[116] between providers at the application and network levels. If the network level made available by BIAS providers no longer behaves in the same way for all application developers (because some receive preferential or discriminatory treatment by the network), application development becomes much more difficult and uncertain.

The Engineers' Statement addresses several other misconceptions about Internet technology in the NPRM. The Commission asserts that BIAS is not a telecommunications service because "broadband Internet users do not typically specify the 'points' between and among which information is sent online."[117] This is incorrect. "Even with caching, DNS, CDNs, anycast networks, or any other type of information optimization for the benefit of network load or convenience, the user still has to specify the point where they expect to find the information."[118] Thus, the phrase "points specified by the user," as used in the definition of a telecommunications service, is not "surplusage" when applied to BIAS service.

The NPRM also incorrectly states that "Internet service providers routinely change the form or content of the information sent over their networks."[119] The examples given in the NPRM, firewalls and "protocol processing," either do not change the content

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[115] 47 U.S.C. § 153(50).

[116] *Verizon*, 740 F.3d at 658 (quoting *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)).

[117] NPRM ¶ 29.

[118] *Internet Engineers Comments* at 20.

[119] NPRM ¶ 30.

of information or constitute network management, which is specifically excluded from the definition of an information service.[120]

Finally, the presence in Title II of provisions that are not germane or sound policy for broadband does not suggest that Title I should apply. Congress anticipated that the Commission would need to keep up with technological change through the mechanism of forbearance. Like a rulemaking, forbearance is subject to notice and comment procedures governed by the Administrative Procedure Act.[121] Accordingly, it provides accountability and a basis for public reliance.

B. Title II Is A More Bounded and Predictable Authority for Light-Touch Net Neutrality Protections Than Ancillary Authority or Section 706.

Prior to reclassification, the Commission stretched general authorities such as ancillary authority or Section 706 to serve as the legal basis for net neutrality protections. These efforts failed, for good reason.

According to the D.C. Circuit, analysis of Section 706 begins from an extraordinarily broad baseline, allowing general regulation of "interstate and foreign communication by wire and radio" so long as the regulations are designed to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[122] But both the D.C. Circuit in *Verizon* and the Sixth Circuit in *Tennessee v. FCC* have developed new limiting principles to constrain Section 706. *Verizon* held that 706 did not authorize the Commission to treat information services as common carriers, while *Tennessee* held that Section 706 did not contain the "clear statement" of authority needed to support preemption of contrary state laws regarding municipal broadband.[123]

The claim of Section 706 authority and the years-long process of litigating its scope in the courts was in part a rehashing of the prior litigation over the scope of "ancillary" authority.[124] This "somewhat amorphous" authority provides a catch-all similar to 706, generally constrained by the Commission's subject matter jurisdiction over wire and radio communications and the requirement that the regulation be "reasonably ancillary to the effective performance of the Commission's various responsibilities."[125] As a general catch-all provision primarily bounded post hoc in the courts, ancillary authority is also a poor substitute for Title II.

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[120] *Internet Engineers Comments* at 24.

[121] 5 U.S.C. § 553.

[122] *Verizon*, 740 F.3d at 640.

[123] *Tenn. v. FCC*, 832 F.3d 597, 613 (6th Cir. 2016).

[124] *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 703–04 (D.C. Cir. 2005).

[125] *Id.* at 692–93.

The courts have not left the Commission room to make a good-faith attempt to defend net neutrality without Title II. In *Verizon*, the D.C. Circuit clearly explained that the Commission could not treat BIAS as an information service while also protecting users against discrimination at the hands of the ISP. If the Commission wanted to alleviate the harms to free expression, competition, and innovation that come with a non-neutral Internet, it had to reclassify BIAS under Title II. The *2015 Order* did this, and only then were net neutrality rules on a solid legal footing. The Commission should not undermine that approach by returning to purported powers that are ineffective at best and dangerously unbounded at worst.

What is more, Title II is a far more predictable regulatory vehicle. Title II provides for specific powers so the Commission can ensure that common carriers of information do not abuse their gatekeeper positions. The mechanism of forbearance allows Title II to be further narrowed so that the Commission has only the power necessary to address specific harms. Since a deviation from forbearance requires notice-and-comment, it provides just as much assurance against overbroad regulation as would a departure from Title II, without undermining the Commission's authority to address the proven harms resulting from non-neutral practices.

Relying upon Section 706 and ancillary authority is the worst of both worlds. First, the FCC must posit broad powers subject to few limits to support its rules. If these theories are accepted, the FCC's power expands without clear legal limits to keep it in check. If, however, the theory is again rejected in the courts, then the rule is ineffective, and the cycle begins anew, leading to regulatory uncertainty and wasted resources.

C. Reclassification, With Or Without Repeal Of The Open Internet Rules, Would Send A Message That Discriminatory Practices Are Acceptable.

As described in Part II, for forty years, the Commission has publicly committed to promote open networks and has acted to further that policy goal. The current proposal represents a radical departure from past efforts and would give a green light to discriminatory practices that have long been unlawful or at least subject to censure.

The reason is simple enough: net neutrality rules are, as the D.C. Circuit explained, common carrier rules. And as the court also explained, they cannot be applied to services that have been classified as information services.

BIAS providers know this.[126] In its own litigation against the Commission's *Internet Policy Statement,* Comcast asserted that the Commission cannot mandate nondiscrimination obligations if broadband providers are classified as information

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[126] *In the Matter of Protecting and Promoting the Open Internet*, GN Docket 14-28, Comments of AT&T Services, Inc. 11 (March 21, 2014) ("As it did in the *Data Roaming Order*, however, the Commission should explain that the commercial reasonability requirement does not amount to a Title-II-like obligation to treat like providers alike except where there is a special justification for treating them differently.").

services.[127] At the core of this assertion is the general understanding, reemphasized several times over now by the federal courts, that nondiscrimination obligations are akin to common carrier status and only Title II carriers are common carriers under the Communications Act.[128]

Thus, reclassification back into a Title I information service will send a clear signal to major ISPs that they will face few if any repercussions for engaging in data discrimination. No other federal law exists that would prohibit the outright blocking of websites by BIAS providers.[129] It will be their right to exert control over the Internet experience, as information services are not subject to nondiscrimination obligations in handling network traffic. Indeed, major Internet companies that can afford it are already preparing to pay extra fees for exclusive access.[130] Smaller companies, of course, don't have that option.

Moreover, undermining network neutrality protections *now* would be particularly harmful. As ISPs began expanding their industry to merge suppliers with their distribution systems, the Department of Justice found that the incentive to favor affiliated content over alternatives was too great to ignore.[131] Thus, for example, the Department conditioned Comcast's merger with NBCU with the Open Internet requirements and prohibit the company "from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer. But those conditions are about to expire. Repealing network neutrality at a time when antitrust conditions placed on a major industry player will soon expire will result in a perfect storm of vertically integrated regional monopolies exhibiting anticompetitive behavior in ways that will eclipse past activities.

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[127] Reply Brief of Petitioner, *Comcast,* 600 F.3d 642, 2009 WL 3557932, at *26-27 (Oct. 26, 2009).

[128] 47 U.S.C. §§ 201–202.

[129] Fundamental premise of common carriage is the inability of the carrier to override the decision of the party that is being carried for a fee. James H. Lister, *The Rights of Common Carriers and the Decision Whether to Be a Common Carrier or a Non-Regulated Communications Provider*, 51 Fed. Commc'ns L.J. 91, 111 (2000).

[130] *See* Dieter Bohn, *Netflix CEO says net neutrality is 'not our primary battle,'* The Verge (May 31, 2017, 1:29 PM EDT), https://www.theverge.com/2017/5/31/15719824/netflix-ceo-reed-hastings-net-neutrality-not-our-battle.

[131] DOJ found it necessary to condition Comcast's merger with NBCU with the Open Internet requirements and prohibit the company "from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer." *See* Press Release, Department of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

D. Title II Classification of BIAS is Consistent with the First Amendment and Necessary to Uphold Its Values.

During the 2014 Rulemaking and the legal challenge to the *2015 Open Internet Order*,[132] EFF and other free speech organizations supported Title II and net neutrality rules to prevent BIAS providers from abusing their position as gatekeepers to the Internet in ways that would harm freedom of expression and access to knowledge.

The D.C. Circuit warned that ISPs can play a censorial role in part because each holds a unique position of centralized power over its customers.[133] In order to reach any endpoint on the Internet (such as a website), the customer must go through their ISP's network. The ISP has the power to downgrade or sever that link, so that its subscriber cannot reach a particular endpoint, access its content, or use a particular hardware device or software app to do so. As the court explained, this censorial power is not "merely theoretical," but has in fact been deployed to the detriment of end users and economic investment in Internet-dependent businesses.[134]

Because ISPs (1) operate as conduits for others' speech, and (2) do so via government-provided monopolies and infrastructure, Supreme Court precedent supports the constitutionality of tailored net neutrality rules. The regulation of broadband Internet access is governed by *Turner Broadcasting System, Inc. v. FCC*[135] and *Red Lion.*[136] Both *Turner* and *Red Lion* explain that tailored, fact-bound regulation of government-enabled mass media designed to promote a diversity of speech and speakers can not only survive First Amendment scrutiny, but vindicate expressive rights.

To being with, regulation based upon Title II regulates ISPs only when they act as *conduits*, rather than creators or endorsers, of information. Such regulations place only nominal restrictions on the expressive activities of ISPs.

Many ISPs play two roles: providing access to the Internet writ large and hosting their own content. For example, Verizon both provides Internet services and hosts its own speech on its website. The *2015 Open Internet Order* regulates Verizon and other ISPs in the former role as conduits of information,[137] and not in the latter.[138] There is no evidence

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

[133] *See Verizon*, 740 F.3d at 645–46.

[134] *Id.* at 648.

[135] 512 U.S. 622 (1994).

[136] 395 U.S. 367 (1969).

[137] *See 2015 Open Internet Order*, *supra* note 1, ¶ 270 (explaining that ISPs are only being regulated in their roles as conduits).

[138] *See Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945) (distinguishing between the AP's editorial and distributive roles).

that ISPs endorse speech—besides their own—that passes over their networks. In fact, ISPs insist that they do *not* exercise editorial discretion in this way.[139]

Thus, the *Order* on its face does not substantially burden ISPs' First Amendment rights because acting as a conduit *in itself* is not expressive. In *Turner*, the Court recognized that the cable television companies exercised their editorial capacities only to select programming, and otherwise served as "conduit[s] for the speech of others, transmitting it on a continuous and unedited basis to subscribers."[140] Even in the cable TV context, where companies actively select programming, the Court found "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator" and that therefore, the must-carry rules did not burden expression.[141] The *Order* applies only to services that allow customers to reach "substantially all Internet endpoints." *Id.* In doing so, the *Order* limits itself to regulating those ISPs that already hold themselves out as neutral conduits to all speech. Thus, the supposed expressive interests against net neutrality rules are no more present than they were in *Turner*.

To be clear, it is ISPs' gatekeeper role, not the speech beyond that gate, that provides a basis for regulation:

> Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications . . . .[142]

ISPs, as gatekeepers to the online world, function much more like cable companies than newspapers. Regulation of ISPs as neutral common carriers is therefore proper, and indeed necessary to ensure individuals retain a meaningful right to create, access, and view online content.

ISPs are a particularly appropriate subject of common carrier regulation because broadband is built atop existing common carrier infrastructure dependent on exclusive rights provided by the government.[143] ISP control of the Internet is "compounded by the

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[139] *See* Joint Brief for Verizon & MetroPCS at 43, *Verizon v. FCC*, 740 F.3d 623 (No. 11-1355), 2012 WL 9937411, at *43 (stating that ISPs "allow all content in an undifferentiated manner").

[140] 512 U.S. at 629.

[141] *2015 Open Internet Order, supr*a note 1, ¶ 25.

[142] *Turner*, 512 U.S. at 656.

[143] *Compare CBS, Inc v. FCC*, 453 U.S. 367 (1981), *and Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (permitting regulation of communications entities enjoying monopoly power due to government assistance), *with Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241 (1974), *Buckley v. Valeo*, 424 U.S. 1 (1976), *and First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (refusing to allow regulation of industries that did not have government assistance in gaining market power).

increasing concentration of economic power in the cable industry."[144] As discussed above, BIAS is dominated by a handful of incumbents that achieved their power thanks to government policy. The resulting "undue market power," as well as unfair competition exacerbated by horizontal and vertical integration,[145] were also hallmarks of the cable industry when Turner was decided.[146]

In addition, wireless broadband access operates over frequencies on the electromagnetic spectrum—and is dependent on government auctions of this scarce resource.[147] In *Red Lion*, the Court upheld rules mandating that radio stations give air time to opposing viewpoints against their commercial interests, in part, because "broadcast frequencies constitute[] a scarce resource whose use [can] be regulated and rationalized only by the Government."[148] Just as the scarcity rationale permitted the regulation of broadcast radio "in a manner responsive to the public convenience, interest, or necessity," so too does it permit the *2015 Open Internet Order*.[149]

Because BIAS operates through the cable lines and wireless spectrum, net neutrality regulations under Title II, such as the *2015 Order*, are not only permissible, but necessary to address "a market in dysfunction" and protect free speech. *Turner*, 512 U.S. at 635.

E. Undoing Title II Reclassification Will Not Improve Americans' Privacy.

The NPRM's suggestion that Title II reclassification "weakened Americans' online privacy by stripping the Federal Trade Commission . . . of its jurisdiction over ISPs' privacy and data security practices" is impressively misleading.[150]

First, it ignores history. After reclassification, the Commission put in place the strongest privacy protections ever for broadband subscribers. Congress then repealed those rules. Had it not done so, Americans' privacy would have been well protected, and the FTC's authority or lack of authority would not have been an issue.

Second, it ignores regulatory reality. The FTC is not a superior protector of broadband privacy in today's world. The FTC has no general jurisdiction over privacy

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[144] *Turner*, 512 U.S. at 632–33.

[145] *See 2010 Open Internet Order*, *supra* note 3, ¶ 21 n.46 (noting vertical integration of ISPs).

[146] *Turner*, 512 U.S. at 633.

[147] The FCC's 2015 auction for mid-band spectrum generated $44.9 billion, showing increasing demand for this public resource. Marguerite Reardon, *FCC rakes in $45 billion from wireless spectrum auction*, CNET (Jan. 29, 2015), http://www.cnet.com/news/fcc-rakes-in-45-billion-from-wireless-spectrum-auction/.

[148] 395 U.S. at 376.

[149] *Id.* (quotation marks omitted).

[150] NPRM ¶ 4; *see also id.* at ¶ 66 (reclassification "stripped FTC authority over Internet service providers because the FTC is prohibited from regulating common carriers") (footnote omitted).

aside from specific delegations from Congress, such as the Children's Online Privacy Protection Act (COPPA).[151] The majority of the FTC's privacy work arises out of its authority over unfair, deceptive or misleading trade practices, such as when a company fails to live up to a promise about its privacy practices.[152] But the company must make a representation about privacy, such as in a privacy policy, and then violate it in a discernable way before the FTC can take action. Clever lawyers will make sure that BIAS providers' policies are indefinite enough to permit whatever actions the companies take.

Moreover, the FTC has relatively limited power to regulate even where it has jurisdiction. Unlike the typical federal administrative agency, the FTC cannot use § 553 APA notice-and-comment rulemaking; in the trade protection area, it is "saddled with"[153] more onerous rulemaking procedures under the Magnuson-Moss Act[154] and the additional procedures added by the FTC Improvements Act.[155] As a leading scholar has observed, these procedures that have "built-in time lags and a myriad of opportunities to slow down a proceeding."[156]

Partly as a result, aside from one spin-off rule, the FTC hasn't initiated any *new* rulemakings under the Magnuson-Moss Procedures since 1980.[157] Instead, the FTC has resorted to issues various forms of nonbinding guidance.[158]

And even when the FTC does trade protection rulemakings, such as when amending some of its original trade regulation rules, it takes a remarkably long time. The average length of the proceeding for these rule amendments was "just over 1922 days or 5.26 years."[159] By contrast, when Congress exempted the FTC from the Magnuson-Moss procedures, the rulemaking was far more efficient: "twelve rules were issued according to the APA's basic rulemaking procedures, and averaged 287.25 days—less than one year—from NPRM to final rule."[160]

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[151] 15 U.S.C. §§ 6501–6505.

[152] *See* 15 U.S.C. § 45(a)(1) (prohibiting unfair or deceptive acts or practices in or affecting commerce).

[153] Jeffrey Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 Geo. Wash. L. Rev. 1979–80 (2015); *see also id.* at 1982–84 (bulleted list of fifteen differences between ordinary rulemaking under § 553 of the Administrative Procedure Act and FTC rulemaking).

[154] Magnuson-Moss Warranty Act—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193–95 (1975).

[155] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7–12, 15, 21, 94 Stat. 374, 376–80, 388–90, 393–96.

[156] Lubbers, *supra* note 153, at 1996.

[157] *Id.* at 1989 (footnote omitted).

[158] *Id.* at 1990; *see also Application of Guides in Preventing Unlawful Practices*, 16 C.F.R. pt. 17 (2015).

[159] Lubbers, *supra* note 153, at 1991 (footnote omitted).

[160] *Id.* at 1995 (footnote omitted).

Unsurprisingly, then, FTC efforts have produced weak outcomes. A recent empirical analysis of 261 privacy policies across seven markets "gives a sobering picture of compliance with guidelines. The average policy in the sample complies with only 39% the 2012 FTC guidelines, the operational regime for the firms in our sample, although drafts have been circulating since 2010. Only 66 out of 261 policies comply with even half of the 2012 FTC guidelines. Also, only 12 out of 56 policies that claim to adhere to US-EU Safe Harbor requirements actually contain text that complies with even half of its requirements."[161]

The FTC cannot replace the FCC as a source of net neutrality protection.

IV. The "General Conduct" Rule Should Be Amended to Better Advance Free Expression and Reduce Regulatory Uncertainty.

The meaningful exercise of our constitutional rights—including the freedoms of speech, assembly, and press—has become dependent on broadband Internet access.[162] Accordingly, the touchstone of net neutrality rules must be whether they preserve and promote opportunities for online expression. In general, the *2015 Open Internet Order*, and its bright-line rules, do so.

The *Order*'s additional guidance regarding the "rule of general conduct" or "unreasonable interference" rule, however, raises concerns because of its sheer complexity.[163] This guidance includes seven factors to weigh in assessing whether particular practices run afoul of the bright-line rules: impact on competition; impact on innovation; impact on free expression; impact on broadband deployment and investments; whether the actions in question are application-specific; whether they comply with industry best standards and practices; and whether they take place without the awareness of the Internet subscriber. While each is potentially objective, the Commission nevertheless has significant discretion to weigh these factors in every case. Accordingly, the burden on regulated providers in litigating such cases *ad hoc* could discourage innovation and impede the Internet's continued growth as a platform for speech, commerce, and social activity.

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[161] In terms of substance, data collection practices are extensive and often appear to violate regulatory guidelines. The overwhelming majority of policies report that they collect contact information, computer information (such as IP address and browser type) and interactive information (such as browsing behavior or search history). Relatively few firms claim to limit the use of personally identifiable information to internal or context-specific purposes. More than two-thirds state that they share information with third parties, but do not report having a contract with those parties to limit the use of the shared data or bind those parties to its own privacy policy. Simply put, many companies in the sample collect a lot of information but consumers have no way to know where it goes, how it is used, or whether the chain of custody even ends.

Florencia Marotta-Wurgler, *Understanding Privacy Policies: Content, Self-Regulation, and Markets 4* (2016) (emphasis added), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736513.

[162] *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

[163] *2015 Open Internet Order, supra* note 1, at ¶ 21.

To alleviate such concerns, the Commission should replace the general conduct rule with a simpler assessment of whether (1) the practice at issue promotes or hinders free expression; and (2) whether the practice is "application agnostic." Doing so will ensure that the general conduct rule is tailored to its core purposes—without creating a vague standard.

The free expression impact factor is the rationale for the *Order* itself, and its primacy needs no justification. Application agnosticism, meanwhile, is an objective standard that the Commission, providers, and courts can readily apply. The *Order* defines an application-agnostic practice as one that either "does not differentiate in treatment of traffic or, if it differentiates in treatment without reference to content, application or device."[164] An application-agnostic standard would forbid providers from treating

> Vonage differently from Skype, or Comcast's XfinityTV.com differently from Hulu. That would be discrimination based on application. Nor would [they] be allowed to treat online video differently from e-mail, treat applications that use the BitTorrent protocol differently. . . . But [they] would be allowed to treat data packets differently based on criteria that have nothing to do with the application or class of application.[165]

Service providers can still manage congestion, offer varying tiers of service and products—they simply cannot target specific applications for different handling.

Focusing on application-agnosticism vindicates the interests of both speech and innovation. By definition, application-agnostic practices are unlikely to disfavor certain sites, applications, or services based on content; in other words, application agnostic practices are content-neutral. They are also less likely to create unfair barriers to innovation, because they help ensure that users can access new sites, services and applications on the same terms as established ones. The marketplace of ideas should decide which applications and speech rise to the top.

Application-agnosticism also largely incorporates the other guiding factors listed in the *Order*. An application-agnostic practice is highly likely to promote competition and protect consumers because it ensures that users, rather than providers, decide what content to favor. Indeed, application-agnosticism may be the most effective way to promote end-user control. For example, the *Order* suggests that "transparent" practices might pass muster under this factor, but in practice transparency is a poor substitute for meaningful choice. Providers may simply ask users to agree to complex contracts in which they unknowingly sign away many of their rights and interests, and then claim that the users consented to the providers' practices. As long as such contracts of adhesion are upheld as fair bargains by the courts, "user control" is unlikely to hold much weight as an independent factor.

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[164] *Id.* at ¶ 144 n.344.

[165] Barbara van Schewick, *Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like*, 67 Stan. L. Rev. 1 (2015).

Tying the rule closely to free expression and application agnosticism will provide much-needed certainty and further the *Order*'s three bright-line rules.

Conclusion

The 2015 Open Internet rules were a welcome and much-anticipated step in the direction the Commission has followed for over forty years: establishing clear, predictable, effective protections that give consumers the ability to access the data, applications, and endpoints of their choosing without interference from their access provider. The classification of BIAS service as a Title II telecommunications service was a sensible recognition of the practical realities of the BIAS service today. It is also the only effective legal foundation establish those protections. Moreover, forbearance from other sections of Title II has kept the scope of the rules narrow and predictable.

The Commission's proposal to remove net neutrality's legal foundation by moving broadband access to Title I would give a green light to BIAS providers' frequent interference in their customers' Internet use. It would accelerate the use of unwanted blocking, throttling, and modification of others' data transmissions, whether for commercial advantage or private preference. It would threaten freedom of speech—a core American value—and smother innovation by those without the cash or luck to affiliate with major Internet access providers. The Commission should turn away from this reckless course.

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