Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

The comments submitted in the record so far serve only to illustrate that the FCC was right in 2015 to classify broadband as a Title II service and to adopt Open Internet rules, and that the DC Circuit was right to uphold it. Because the facts continue to show a need for these rules, and because opponents have failed to substantiate any claims of alleged harms they cause, the Commission must keep them in place. As to legal arguments, it bears remembering that the Commission only arrived at Title II after exhausting all the alternatives.[1] The FCC has already tried, and failed, to protect net neutrality without Title II, and Title II opponents have singularly failed to explain how even "light-touch" rules would work in the absence of clear legal authority. Thus to the extent that the NPRM proposes to maintain even minimal net neutrality protections, it appears there is no way to do even that without Title II. The best course of action for the FCC is therefore to keep the current rules in place.

In a docket such as this one with millions of comments already filed, it is difficult to digest, much less rebut, every mistaken argument. These reply comments therefore address only a few particularly egregious points made by opponents of the Open Internet.

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[1] Israeli politician Abba Eban, not Winston Churchill, appears responsible for the quotation, "nations do behave wisely once they have exhausted all other alternatives," which is often given in variant forms. *See* Quote Investigator, Americans Will Always Do the Right Thing — After Exhausting All the Alternatives, https://quoteinvestigator.com/2012/11/11/exhaust-alternatives. But regardless of its source it is an accurate commentary on the FCC's process leading up to the reclassification decision.

II. Title II Continues to Be Necessary

AT&T claims that "[t]he historical record is devoid of market 'problems' requiring a regulatory solution…"[2] But there is an extensive record of actual ISP abuse as well as clear evidence of intention to commit such abuses. In fact, Verizon even admitted under oath that, "but for these rules, we would be exploring those commercial arrangements."[3] Without offering any evidence of its own, AT&T accused various consumer protection advocates for "peddling dystopian fantasies."[4] AT&T completely avoids addressing the long list of examples highlighting ISP abuses. In fact, the first major FCC action regarding net neutrality was in response to an ISP secretly throttling internet traffic—and then lying about it.[5] At the time, the Republican-led FCC issued an order concluding that "Comcast's discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."[6] The FCC further found that "Comcast's failure to disclose the company's practice to its customers ha[d] compounded the harm."[7] And this was hardly the last instance. In 2011, MetroPCS discriminated against video providers.[8] In 2012, AT&T blocked FaceTime on

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[2] AT&T 12. Unless otherwise noted all comments cited in this filing were filed in WC Docket No. 17-108 on July 17, 2017.
[3] Public Knowledge and Common Cause 15 (filed July 19, 2017) (citing *Verizon* Oral Arg. Tr. at 31 (D.C. Cir. Case No. 11-1355), https://www.cadc.uscourts.gov/recordings/recordings2014.nsf/DCD90B260B5A7E7D85257BE1005C8AFE/$file/11-1355.mp3.)
[4] *See* AT&T 12.
[5] *See In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C. Rcd 13,028, 13,034, ¶ 13 (2008).
[6] *See Id*. at 13,028 ¶ 1.
[7] *Id*.
[8] *See* Ryan Singel, *Metropcs Data Plans Violate Net-Fairness Rules, Groups Tell FCC*, Wired (Jan. 11, 2011), https://www.wired.com/2011/01/metropcs-net-neutrality-2/#seealso4caf81f8cdb49bca77d1d89d25ba3015.

Apple devices.[9] That same year, Verizon also blocked app downloads.[10] In 2013, ISPs blocked Google Wallet, a peer to peer payment service,[11] and in 2014, AT&T throttled the traffic of its Unlimited Data plans.[12] During this proceeding, Verizon began throttling online video traffic.[13] The list could go on—some of these behaviors might be covered by the Open Internet rules, some not, some may be attempts at network management, some not. But this pattern of ISP behavior at least requires oversight. With this context, the assertion that ISP abuses are "purely speculative," and that there is an absence of "actual market failures" is disingenuous. The harms are not speculative, nor are they a dystopian fantasy; they are the unfortunate reality of ISP behavior.

Furthermore, it is worth recalling that Title II regulations were essential for the development of modern internet, and that without common carriage, the modern commercial, consumer internet would never have existed. First, the FCC's decision in 1968 to require that telephone companies allow users to use equipment of their choice on the network, such as modems, ensured that it was possible for users to actually connect their computers to the networks.[14] This decision was a direct application of Title II. The FCC decided that there was "inherent unfairness of a system which permits the telephone

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[9] David Kravets, *Net Neutrality Groups Challenge AT&T Facetime Blocking*, Wired (Sept. 8, 2012), https://www.wired.com/2012/09/factime-fcc-flap/.
[10] *See In the Matter of Cellco Partnership d/b/a Verizon Wireless*, 20 F.C.C. Rcd 8936, ¶ 2,4 (2012).
[11] *See* Sarah Perez, *Google Wallet Rolls Out to More Devices – Nope, Still No Love For Verizon, AT&T Or T-Mobile Owners*, Tech Crunch (May 16, 2013), https://techcrunch.com/2013/05/16/google-wallet-rolls-out-to-more-devices-nope-still-no-love-for-verizon-att-or-t-mobile-owners/.
[12] *See* Jon Brodkin, Verizon accused of throttling Netflix and YouTube, admits to "video optimization," Ars Technica (July 21, 2017) https://arstechnica.com/information-technology/2017/07/verizon-wireless-apparently-throttles-streaming-video-to-10mbps/.
[13] *See* Jon Brodkin, *US Sues AT&T, Alleges Severe Throttling Of Unlimited Data Customers*, Ars Technica (Oct. 28, 2014) https://arstechnica.com/tech-policy/2014/10/us-sues-att-alleges-severe-throttling-of-unlimited-data-customers/.
[14] *See* Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C. 2d. 420, 423-424 (1968).

company to bar the use of equipment or services which compete with their own…"[15] Second, the requirement that telephone companies provide service to businesses of all kinds, even ones they saw as potential competitors, ensured that dial-up ISPs were able to stay in business.[16] During the early days of consumer internet access, telephone companies attempted to prevent consumers from using phone lines to connect to dial-up providers, which in the context of the time were "edge providers." But in 1997, the FCC rejected the telephone companies' argument that they should be able to block users from connecting to dial-up providers, or charge users prohibitively high rates to connect to them. The Commission specifically held that "[dial-up providers] should not be subject to interstate access charges [which would be drastically higher than the normal charge]…"[17] The FCC reasoned that "[it is] possible that had access rates applied to [dial-up providers] over the last 14 years, the pace of development of the Internet and other services may not have been so rapid...[and that] [m]aintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry."[18] This decision prevented telephone companies from using their bottleneck facilities to take away consumer choice. Through Title II, the FCC protected the ability of users to choose what they wanted to use their phone lines for, and was crucial for the development of the internet.

Just as telephone companies attempted to leverage their position in the 1990s to hinder consumer choice, modern ISPs would like to use their bottleneck status to extract

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[15] Carterfone 151.
[16] *See* Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure Pricing & End Use Common Line Charges, *First Report & Order*, 12 FCC Rcd. 16,133, ¶ 345 (1997).
[17] Access Charge Reform ¶ 345.
[18] Access Charge Reform ¶ 344.

payment from content providers in order to use their networks. Title II is as relevant today as it has always been when it comes to protecting consumer choice.

III. Arguments for Non-Title II Legal Authority for Open Internet Rules Fail

Attempts to justify net neutrality rules without Title II rest on incorrect and disingenuous arguments. Comcast baldly states that "the D.C. Circuit in Verizon authorized the Commission to prohibit blocking" without Title II.[19] Contradicting its past positions, Verizon now claims that "we support rules that prevent providers from blocking lawful Internet content, applications or services from consumers."[20]

AT&T provides more context for this claim, which makes it easier to demonstrate why it is baseless. It writes that "[t]he *Verizon* court ultimately invalidated the original no-blocking/no-throttling rule only because the Commission had not adequately explained why, given its 2010 near-ban on paid-prioritization, the rule did not constitute a form of common carriage regulation, which the Communications Act prohibits insofar as broadband Internet access is classified as a non-Title II information service."[21] But the court itself said that Verizon's argument that no-blocking rules themselves constitute common carriage (and are thus unlawful without Title II) "has some appeal" and that "anti-blocking rules. . .appear on their face to impose *per se* common carrier obligations[.]"[22] The court did not *agree* with the argument that AT&T now advances—it merely described it, before noting that the argument was irrelevant insofar as the FCC had not actually put it forward. Thus AT&T's argument is, at most, that the Commission, relying on uncertain and

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[19] Comcast 54.
[20] Verizon 19.
[21] AT&T 102.
[22] *Verizon v. FCC*, 740 F. 3d 623**,** 658 (DC Cir. 2014).

non-precedential dicta, with proper evidence and arguments might be able to overcome a *per se* assumption that anti-blocking rules are unlawful under Section 706. This is a slender reed to hang any rules on, much less rules as important as no blocking/no throttling.

But even if it were true that Section 706 provided statutory authority for no-blocking/no-throttling rules, it would still be an insufficient source of legal authority in general. First, of course, the Commission has proposed to interpret 706 in a way that would prevent it from using it as a source of authority in this way. But moving past that, it is not contested that the Commission cannot enact a rule against paid prioritization under Section 706—not, that is, without opening up a loophole for "commercially reasonable" paid prioritization that would make it meaningless in practice. For example AT&T states that "the Commission could craft no-blocking/no-throttling rules consistent with the Verizon decision simply by making clear that ISPs and edge providers can make use of [mass-market paid prioritization arrangements] if and when they become commercially feasible."[23] R Street likewise supports the commercial reasonableness loophole.[24] Such a rule would be like a diet that says you can't eat any chocolate cake, except for when you want to. Thus it is not surprising that when the Commission has imposed such a rule before, it has failed. For example, after the Commission's rule placing data roaming negotiations under a commercial reasonable standard, "real-world industry experience shows that providers continue to be stymied in their efforts to negotiate data roaming

[23] AT&T 103. Some commenters, it is worth noting, only support even a "no blocking" rule subject to a commercial reasonableness loophole. *See* ITIF 8.
[24] R Street 31-32.

agreements on commercially reasonable terms,"[25] and "[s]ince adoption of the data roaming rule ... carriers have continued to report that 'the negotiation of data roaming agreements has not meaningfully progressed.'"[26] One industry executive stated that "we feel that the rule mandating 'commercially reasonable rates' has been an utter failure in ensuring that reasonable rates are available."[27]

Supporters of the current NPRM's approach have thus only shown that, if it draws the right appellate panel, the FCC might be able to use Section 706 to support "rules" that don't work and don't actually ban the bad behavior the FCC previously recognized. Or, on the other hand, we have Title II, which is in place now, and which supports clear, effective and enforceable rules. If the Commission acts to remove its certain legal foundation in exchange for a nebulous fantasy of legal authority, it will be acting arbitrarily to undermine enforceable broadband rules of any kind, in exchange for mere political point-scoring.

IV. Broadband ISPs Have Gatekeeper Power

As Public Knowledge argued in its comments, broadband ISPs are gatekeepers that stand in between their residential customers and the internet at large. Some commenters attempt to challenge this. For example, USTelecom argues that the transit market somehow invalidates this view when it writes that "an edge provider can choose from a variety of alternative routes to convey its traffic to an ISP, removing the leverage of any particular

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[25] Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., Petition, WT Docket No. 05-265, 2 (2014), http://apps.fcc.gov/ecfs/document/view?id=7521151798 ("T-Mobile Petition").
[26] T-Mobile Petition 11.
[27] T-Mobile Petition 10 n.42 (2014), http://apps.fcc.gov/ecfs/document/view?id=7521151798 (citing Letter from Donald J. Evans, Fletcher, Heald & Hildreth, P.L.C., Counsel to Youghiogheny Communications, LLC, to Philip Verveer, Senior Counselor, FCC, WT Docket No. 13-193, at 4 (filed Feb. 6, 2014)).

ISP.... many alternative routes – created by a well-functioning market – prevent an ISP from acquiring monopolistic leverage over edge providers."[28] This argument is absurd—it is like claiming that the owner of the only bridge over a river has no market power as to what toll it charges because there are multiple roads that lead to the bridge. But the route taken to get to the toll is irrelevant; the toll is the same either way. USTelecom also confuses the extent of the leverage that an ISP may have as a gatekeeper with the existence of a gatekeeper role at all. The fact that some internet edge service companies are big and some ISPs are small does not mean that ISPs are not gatekeepers; it means at most that they do not always have the leverage to extract every concession from every edge service. Their customers, however, are still at their mercy. In any event, most broadband users are customers of large ISPs who do in fact possess significant leverage against any edge service.

V. Antitrust and Competition Law Cannot Substitute for Title II

Some commenters propose that general-purpose competition authorities rather than the FCC should enforce net neutrality.[29] But competition law is not a substitute for FCC rules, as even some hardened Title II critics recognize.[30] As Public Knowledge explained in its comments, case-by-case enforcement by general-purpose agencies is not the correct approach to remedy for the recurring kinds of harms that occur in specific markets such as telecommunications, where some industry players have enduring incentives and abilities to take actions that harm the public interest. Given the facts of the broadband and internet

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[28] USTelecom 20.
[29] *E.g.*, Verizon 15-17.
[30] Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, ANTITRUST SOURCE (Aug. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf

markets, and the large number of consumers and potential harms, a purely case-by-case approach would be un-administrable and would likely leave many harms unaddressed. In the words of future Justice Stephen Breyer, "law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[31] Rather, the current approach of clear, bright-line rules for the most egregious kinds of conduct (blocking, throttling, and paid prioritization) coupled with a general conduct rule that can account for unusual circumstances is the best way to minimize both false positives and false negatives while reducing the administrative costs of the system.

To add to this, it is also worth noting that antitrust law serves a different purpose than FCC policies designed to promote the public interest, and is simply not designed to remedy the same harms that net neutrality rules are intended to address. For example, while the consumer welfare standard under antitrust includes analysis and metrics beyond price as a theoretical matter, as a practical matter price is easier to measure than quality and has become the dominant consideration. As the OECD understands, "[w]hile the importance of quality is undisputed and issues about quality are mentioned pervasively in competition agency guidelines and court decisions, there is no widely-agreed framework for analysing it which often renders its treatment superficial....courts and competition

[31] *Barry Wright Corp. v. ITT Grinnell*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)

authorities rarely analyse quality effects as rigorously as they analyse price effects."[32] But many of the harms net neutrality rules seek to prevent may not immediately lead to higher costs (at least not on an individual basis) but harm consumer welfare in other ways—in addition to decreased quality, through a lack of variety, by creating excessive concentrations of private power, by preventing access to alternative points of view, or by inhibiting free expression. These are not the kinds of harms for which either the doctrine or the practice of antitrust is the appropriate remedy.[33] If the Commission now believes that these are unimportant goals, it should say so, rather than simply adopting a framework that cannot promote them.

What's more, while much of the debate around net neutrality concerns real or potential harms by ISPs, the rules are also intended to promote positive outcomes—specifically, to maximize the positive externalities that flow from open networks.[34] The FCC's public interest mission has always involved created and shaping markets, not merely policing them. A mission like this lies far beyond the scope of antitrust.

The most concrete suggestions for how to protect consumers without the FCC tend to involve the FTC somehow enforcing "commitments" made by ISPs which then become

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[32] OECD, The Role and Measurement of Quality in Competition Analysis 1 (2013), http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf.
[33] *See* Joshua D. Wright & Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 Fordham Law Review 2405, 2406 (rejecting the consumer choice standard and arguing that "economic welfare" not "social, political, and protectionist goals" is the proper focus of antitrust).
[34] *See Verizon v. FCC*, 740 F. 3d 623, 644-45 (DC Cir. 2014) (discussing the FCC's "virtuous cycle" theory); Gene Kimmelman and Mark Cooper, *Antitrust and Economic Regulation: Essential and Complementary Tools to Maximize Consumer Welfare and Freedom of Expression in the Digital Age*, 9 Harvard Law & Policy Review 403, 430 (2015) (promotion of positive externalities as a foundation of telecommunications law and policy).

legal obligations.[35] This is not a workable plan. No voluntary commitments would suffice to meet the criteria listed above, and it would not be possible for an ISP to "commit" not to violate a broader principle such as the general conduct rule or a commitment to user choice. Nor is there a legally-binding way to require that *all* ISPs make sufficient commitments or to keep them from changing them. Amusingly, Comcast claims not only to pledge "not to engage in blocking, throttling, or anticompetitive forms of paid prioritization,"[36] but also "to pledge to keep these commitments firmly in place and not alter them[.]"[37] But even if Comcast also pledges to keep that pledge in place while further pledging not to alter that pledge either, *ad infinitum*, the fact remains that only enforceable rules backed by the force of law will be binding on Comcast or any other ISP.

VI. Sections 230 and 231 Do Not Define BIAS As An Information Service.

Contrary to the NPRM, the record demonstrates that Sections 230 and 231 of the Communications Act do not define BIAS as an information service. As New Media Rights correctly points out, "attempting to rely on Section 230 exposes how specious the Commission's basis is for abandoning the [2015 Open Internet Order] rules."[38] The NPRM's supporters' halfhearted claims that Sections 230 and 231 define BIAS as an information service relies on preposterous "plain language" readings of the statute that courts have already rejected.

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[35] *See* Comcast 63; *see also* NCTA 7 ("public commitments by BIAS providers to adhere to open Internet principles ... provide a basis for the Federal Trade Commission ('FTC') to hold providers to their promises.").
[36] Comcast 63.
[37] Comcast 64.
[38] New Media Rights 6.

The absurdity of the NPRM's interpretation of the law, and the lack of support in the record for the NPRM's assertion that Section 230 and 231 clearly define BIAS as an information service, barely merits a response. Furthermore, the focus on untenable interpretations of Sections 230 and 231 underscores the complete lack evidence for the NPRM's other contentions that BIAS must be classified as an information service. For example, CenturyLink says that the "best evidence" that BIAS was not intended to be subject to Title II regulation is the plain language of Section 231.[39] Similarly, Comcast argues "[i]t is hard to imagine clearer statutory language" than the plain text of Section 231(e)(4), which allegedly clarifies that BIAS is not a telecommunications service.[40]

A handful of commenters offer varying degrees of lukewarm support for the NPRM's claim that Sections 230 and 231 clearly define BIAS as an information service. For example, several commenters flatly assert, without any support, that the plain text of Sections 230 and 231 show BIAS is properly defined as an information service.[41] Others explain that Section 230 was intended to be deregulatory, claiming this shows Congress intended BIAS to be classified as an information service.[42] These arguments are incorrect and inconsistent with courts' interpretation of the Communications Act and Section 230.

Several of the commenters that claim the plain language of Section 230 requires BIAS be classified as information service undermine their argument by correctly pointing out that, to their dismay, the *USTelecom* court found BIAS can legally be classified as a

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[39] CenturyLink 29 (re-filed July 21, 2017).
[40] Comcast 25.
[41] *See e.g.* Comcast 24-25; Wireless Internet Service Providers Association 25; NCTA 26-27; AT&T 68, 71-72.
[42] *See e.g.*, CenturyLink 28-29, Free State Foundation 21; American Cable Association 54.

telecommunications service.[43] For example, Comcast explains that the *USTelecom* court ruled BIAS can be classified as a telecommunications service, and that Section 230(f)(2) does not define BIAS as an information service.[44] The Wireless Internet Service Providers Association writes, in *USTelecom*, the D.C. Circuit found Section 230 was not determinative on whether BIAS is an information or telecommunications service.[45] Opponents of the NPRM's implausible reading of Section 230 make precisely the same point – that the D.C. Circuit held that neither the plain language nor the policy statement in Section 230 dictates that BIAS must be classified as an information service.[46]

The American Cable Association ("ACA") makes a curious charge that the legislative history of Section 230 confirms that Congress intended BIAS to be classified as an information service. However, rather than citing to a conference report, House or Senate report, or even a committee report to support this claim, ACA points to a statement from a single member of Congress. This statement focused primarily on the issue of BIAS provider immunity from damages for blocking and screening offensive content, not on the appropriate legal classification of BIAS.[47] The Supreme Court has been clear that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history,"[48] and that floor statements "reflect at best the understanding of an individual Congressman,"[49] and are not controlling evidence of Congressional intent. The Conference

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[43] *See* Comcast 25, WISPA 25, AT&T 69, 72.
[44] *See* Comcast 25.
[45] *See* WISPA 25.
[46] *See e.g.*, INCOMPAS 67.
[47] *See* ACA 53-55.
[48] *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). *See also*, *SW General, Inc. v. N.L.R.B.*, 796 F.3d 67, 76-77 (D.C. Circ. 2015).
[49] *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

Report of the 1996 Act is completely silent on the definition of "interactive computer service" in Section 230(f)(2), and does not address any ramifications for the regulatory classification of BIAS. Instead, the relevant section of the Conference Report focuses entirely on the "Good Samaritan" protections in Section 230(c).[50] ACA is incorrect; neither the plain text, nor the legislative history of Section 230 supports a finding that the section was in any way intended to define BIAS as an information service.

Additionally, the record clearly demonstrates that neither Section 230 nor 231 are relevant to the appropriate classification of BIAS.[51] As New Media Rights explains, "Section 230 protects a variety of entities from legal claims based on the behavior and illegal acts of third parties online and has nothing to do with rules governing the behavior of broadband internet access providers."[52] INCOMPAS and The Open Technology Institute at New America both note that both Sections 230 and 231 are focused on access to indecent content on the internet, and not intended to affect the FCC's ability to regulate BIAS.[53] In *USTelecom*, the D.C. Circuit held that Congress doesn't "hide elephants in mouseholes," by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[54] Hiding the definition of BIAS in the bowels of Sections 230 and 231 of the Communications Act would certainly qualify as hiding an elephant in a mousehole. Thus, it implausible and inconsistent with *USTelecom* for the Commission to conclude that

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[50] *See* H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).
[51] *See e.g.*, INCOMPAS 65-67, New Media Rights 3, 6; Open Technology Institute at New America 34-36.
[52] New Media Rights 6.
[53] *See* INCOMPAS 65-68, OTI 35-36.
[54] *USTelecom* at 702-703 (citing *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).).

Congress intended Sections 230 and 231 to guide the FCC's decision making regarding the appropriate classification of BIAS.[55]

VII. Title II Has Not Harmed Broadband Providers

The NPRM and opponents of the Open Internet Order argue that the current regulatory regime, and its Title II legal underpinning, has created an overly burdensome and uncertain regulatory environment for BIAS providers that has harmed innovation and consumers. The facts and the record say otherwise.

The Open Internet Order, and the substantial forbearance therein, provides for narrowly-tailored regulatory treatment of BIAS providers. The record demonstrates that the burdensome, "utility-style" Title II regulation imagined by BIAS providers allege is essentially theoretical. Further, to the extent that proscriptive regulation does exist, it is in the form of the no-blocking and no-throttling anti-discrimination rules that BIAS providers universally claim to support.

The NPRM and many commenters also claim that the Open Internet Order has created significant regulatory uncertainty. However, many of the BIAS providers that claim that regulatory uncertainty has dissuaded them from investing in or deploying innovative new services have spoken of their familiarity with Title II regulation and made significant investments in acquisitions and new products and services, contradicting their present comments in the record. Additionally, numerous commenters correctly explain that adopting the proposals in the NPRM would create enormous uncertainty for the entire

[55] *See* OTI 35-36.

internet ecosystem, far outweighing any benefit of eliminating the 2015 rules and reclassifying BIAS as an unregulated information service.

A. The Open Internet Order and Title II Reclassification Did Not Impose Burdensome "Utility-Style" Regulation on BIAS Providers.

The NPRM claims, without explanation or definition, that the Open Internet Order applied "utility-style" regulation to the internet.[56] BIAS providers and supporters of the NPRM contend that the Open Internet Order and application of Title II to BIAS is harmful to innovation by BIAS providers.[57] However, the record contains scant details on which parts of the existing rules constitute burdensome "utility" regulations and how those rules specifically affect innovation by BIAS providers.

Some commenters describe any rules that apply to BIAS providers as "utility-style" simply because they claim there are compliance costs associated with the mere existence of rules.[58] Others commenters confuse the Commission's existing rules with hypothetical rules they fear the FCC could impose in the future – such as rate regulation and unbundling requirements.[59]

The record does not support the NPRM and BIAS providers' claims regarding the burdens of the existing open internet rules and Title II reclassification. The NPRM and BIAS providers point to hypothetical rules, such as rate regulation and shared access requirements. However, the Commission has not imposed those rules on BIAS providers.

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[56] NPRM at 4435, 4441 ¶¶ 3, 23.
[57] *See e.g.*, Comcast 34, 37, 44; AT&T 53, 55; Verizon 10-13; CTIA 21, NCTA 2, ITIF 8.
[58] *See e.g.*, Letter from Municipal BIAS Providers to Ajit Pai, Chairman, Federal Communications Commission, WC Docket No. 17-108, at 2 (filed May 11, 2017) ("Municipal BIAS Provider Letter"), Verizon 13.
[59] *See e.g.*, Verizon 10-11, CTIA 7-9.

The FCC has not set BIAS rates, required unbundling or open access requirements, or required BIAS providers to serve all customers within their territories.[60] Reality reflects the expectations of BIAS providers prior to the adoption of the 2015 rules, when they expressed confidence the FCC would not regulate BIAS pricing.[61] As twelve state Attorneys General ("AG") and the District of Columbia AG explain, the Open Internet Order "required ISPs to refrain from interfering with consumers' use of the Internet, it did not impose significant regulation on ISPs."[62]

Indeed, the Commission specifically tailored the common carrier obligations of Title II to lessen the potential burdens on BIAS providers,[63] forbearing from the aspects of Title II that BIAS providers claimed would hurt investment – rate regulation, unbundling requirements, and others.[64] BIAS providers supported extensive forbearance prior to the adoption of the 2015 Open Internet Order.[65] Statements from BIAS company executives show that the primary fears about Title II regulation were theoretical, and those fears have not been borne out.[66]

The reality – that the Open Internet Order and Title II reclassification have not adversely affected BIAS providers – is consistent with the expectations of BIAS providers

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[60] *See e.g.*, Free Press 34-35; AARP 9; AARP Reply Comments 79 (filed Aug. 16, 2017); Engine 13.
[61] *See* Statements of Robert Marcus, Chairman & CEO, Time Warner Cable at UBS 42nd Annual Global Media and Communications Conference (Dec. 8, 2014).
[62] Comments of the Attorneys General of the States of Illinois, California, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Mississippi, Oregon, Vermont, Washington, and the District of Columbia, WC Docket No. 17-108, at 8 (revised July 19, 2017) ("State AG Comments").
[63] *See* State AG Comments 7 (citing Open Internet Order at 5818, 5849-52 ¶¶ 458, 513.).
[64] *See e.g.*, Engine 13 (citing Open Internet Order at 5854-55 ¶ 519.); AARP Reply 25, 79; Consumers Union 6-7; Electronic Frontier Foundation 22.
[65] *See e.g.*, Statements of Tom Rutledge, CEO, Charter Communications at UBS 42nd Annual Global Media and Communications Conference (Dec. 8, 2014).
[66] Internet Association 15 (citing Comments of Mike Cavanagh, Senior EVP & CFO, Comcast Corp., at the UBS Global Media and Communications Conference (Dec. 7, 2016).

and market analysts prior to the adoption of the 2015 Open Internet Order. For example, in November 2014, J.P. Morgan analysts expected that BIAS provider business practices would be unaffected by the reclassification of BIAS as a telecommunications service, even though BIAS providers would paint a picture of doom and gloom.[67] Similarly, Paul Gallant explained to investors that Title II would not change the regulatory framework for cable broadband services.[68] Sprint's Chief Technology Officer actually wrote to the Commission to explain, "Sprint does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services."[69]

Further, any actual burdens or costs for BIAS providers created by the Open Internet Order are relatively minor, and must be weighed against the potential harm that unregulated BIAS providers can inflict on consumers.[70] First, the Open Internet Order's prohibitions on harmful conduct, such as the no blocking, no throttling, and no paid prioritization rules, did not impose new costs on BIAS providers. "This is particularly true in light of the NPRM's acknowledgement that the principles underlying the rules have generally been accepted and followed by ISPs since at least 2010."[71] The bright line rules explicitly did not regulate rates or service quality standards. As Consumers Union correctly points out, BIAS providers who would have to change their behavior or face uncertainty

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[67] *See* Philip Cusick *et al*, "Net Neutrality: Prepared for Title II but We Take Less Negative View," J.P. Morgan, Nov. 11, 2014.
[68] *See* Paul Gallant, "Title 2 Appears Likely Outcome at FCC, but Headline Risk May Exceed Real Risk," Guggenheim Securities, LLC, Dec. 8, 2014.
[69] Letter from Stephen Bye, Chief Technology Officer, Sprint Corporation, to Tom Wheeler, Chairman, Federal Communications Commission, GN Docket No. 14-28 (filed Jan. 15, 2015).
[70] *See* State AG Comments 8.
[71] AG Comments 7 (citing NPRM at 4439, 4641-42 ¶¶ 15, 80, 85.).

regarding the application of the bright line rules are bad actors.[72] Indeed, BIAS providers have said publicly they will not block or throttle content, so it is difficult to see how bright line rules that merely prohibit such behavior is burdensome or onerous for those same providers.[73] As more than forty small BIAS providers explain, they "have encountered no new additional barriers to investment or deployment as a result of the 2015 decision to reclassify broadband as a telecommunications service."[74]

To the contrary, eliminating the existing rules and their Title II legal authority would create significant risk for content creators, consumers, and any company or speaker that relies on the internet to reach an audience. Without rules and sound legal authority, these stakeholders will be at the mercy of BIAS providers with gatekeeper power, without the assurance that the Commission can address anticompetitive and anti-consumer behavior.[75]

Claims that the threat of rate regulation, unbundling, or any other "utility style" regulation is actually burdening BIAS providers and hampering the development and deployment of new products and services are entirely unsubstantiated and without merit.

B. The Open Internet Order and Title II Reclassification Did Not Create Undue Regulatory Uncertainty for BIAS Providers.

The NPRM also alleges that the Open Internet Order's classification of BIAS as a Title II telecommunications service created regulatory uncertainty, which has had negative consequences for BIAS providers, harming consumers.[76] Some commenters claim, in

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[72] AARP 10.
[73] *See* CU 14.
[74] Letter by Internet Service Providers in Favor of *Open Internet Order* to Ajit Pai, Chairman, Federal Communications Commission, WC Docket No. 17-108, at 1 (filed June 27, 2017) ("Small BIAS Provider Letter").
[75] *See e.g.*, IA 1, 11; EFF 23; Free Press 24, 127; Engine 25-26.
[76] *See* NPRM 4448, 4451 ¶¶ 44, 48.

contrast to the allegations of actual harmful regulation, that Title II created unbearable "regulatory uncertainty".[77] Taken to its logical conclusion, this argument claims that BIAS providers face intolerable uncertainty merely because the FCC exists as a regulatory agency that could conceivably regulate some aspect of BIAS service at some point in the future. On their face, these arguments are absurd. The facts and record belie the specific causes of regulatory uncertainty BIAS providers claim.

Whereas the NPRM and BIAS providers rely on the notion of regulatory uncertainty to justify overturning the Open Internet Order, courts have expressed considerable skepticism toward a party's claims that regulatory uncertainty is a cognizable harm justifying relief. For example, in *New England Power Generators Ass'n, Inc. v. FERC*, the D.C. Circuit found a petitioner did not have standing in part because the petitioner's relied on claims of regulatory uncertainty, not actual injury, to show it had suffered harm.[78] The Court explained the petitioner's claim of harm was "predicated not on any injury legitimately traceable to the order, but on the potential for [the agency] to issue future, contrary orders," and that "broad-based market effects stemming from regulatory uncertainty are quintessentially conjectural."[79] The Court opined, "[i]t would be a strange thing indeed if uncertainty were a sufficiently certain harm to constitute an injury in fact."[80] In *Reily v. Ceridian Corp.*, the Third Circuit held that risk of future harm does not create a cognizable injury that would give a plaintiff standing.[81]

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[77] *See* Mobile Future 1-2; CenturyLink 12; ITIF 12.
[78] *See New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013).
[79] *Id*. (citing *Shell Oil v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995).).
[80] *Id*.
[81] *See Reily v. Ceridian Corp.*, 664 F.3d 38, 42 (3rd Cir. 2011).

C. BIAS providers are familiar with Title II, and application of Title II to BIAS does not create uncertainty.

Parties in the record point to multiple sections of the Open Internet Order as causes of regulatory uncertainty. Some commenters complain the "just and reasonable" and nondiscrimination" standards under Sections 201 and 202 are vague, creating uncertainty for BIAS providers.[82] However, contrary to their comments, BIAS providers have explained in various fora that application of Title II would not and has not created undue regulatory uncertainty.[83] As Verizon explained to investors in 2014, Title II is a predictable regulatory regime, particularly for parties familiar with the agency.[84] Title II gives the FCC specific authority so it can ensure that common carriers do not abuse gatekeeper positions within the U.S. telecommunications networks.[85] That is all.

Further, the record shows that uncertainty for BIAS providers regarding the application of Title II to BIAS is minimal. The Commission's application of Title II has been consistent with the FCC's prior application of Title II to other services that many BIAS providers also provide and that are regulated as common carrier services – including wireless voice, enterprise broadband, and retail rural DSL (some providers voluntarily

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[82] *See* AT&T 49-53.
[83] *See e.g.*, Statements of Fran Shammo, CFO, Verizon Communications at UBS 42nd Annual Global Media and Communications Conference (Dec. 9, 2014) (explaining Verizon's investment in its network and services was unlikely to be negatively affected by uncertainty regarding the application of Title II regulation to BIAS because "we were born out of a highly regulated company, so we know how this works.), Statements of Neil Smit, Senior EVP & President, CEO, Comcast Cable, Q1 2015 Comcast Corp. Earnings Conference Call (May 4, 2015) (explaining "on Title II, it really hasn't affected the way we have been doing our business or will do our business. . . . [W]e conduct our business the same we always have.").
[84] *See* Statements of Fran Shammo, CFO, Verizon Communications at UBS 42nd Annual Global Media and Communications Conference, Dec. 9, 2014.
[85] *See* EFF 22.

remained under Title II regulation).[86] Additionally, the extensive forbearance the FCC adopted in the Open Internet Order has been implemented consistent with Commission precedent.[87] While some commenters point to the application of extensive forbearance from Title II as problematic, BIAS providers have previously supported targeted forbearance.[88] Application of the longstanding nondiscrimination requirements of Sections 201 and 202 to BIAS have not created undo regulatory uncertainty for BIAS providers.

D. The general conduct standard applies a fact specific, case-by-case approach favored by BIAS providers, and includes measures that mitigate the risk of uncertainty.

Several commenters assert that the general conduct standard and its forward looking, case-by-case enforcement approach creates uncertainty, leading BIAS providers to delay, defer, or cancel new services, network improvements, or expansion.[89] Some groups claim that uncertainty about how the rules will be applied forces BIAS providers to spend money to ensure their business practices comply with the open internet rules.[90] Several commenters specifically point to the Commission's review of BIAS provider zero rating practices as an example of the uncertainty created by the general conduct standard and the type of produce or service that could be shelved as a result.[91] Sprint argues that the FCC's guidance process does not actually reduce regulatory uncertainty because the Enforcement

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[86] Free Press 35.
[87] Free Press 35.
[88] *See e.g.*, Statements of Tom Rutledge, CEO, Charter Communications at UBS 42nd Annual Global Media and Communications Conference (Dec. 8, 2014) (explaining "obviously forbearance done properly could work and we think that the fundamental objective seems reasonable.").
[89] *See* ACA 6-7, Comcast 36, 45, Verizon 13, NCTA 38-39, CTIA 9, NCTA 38, T-Mobile 8, 11; Municipal BIAS Provider Letter at 1-2.
[90] *See* ACA 7-8, Comcast 36-37, 45, CTIA 27, NCTA 38-40.
[91] *See e.g.*, CTIA 27, Verizon 11-12, Comcast 37.

Bureau can respond to those requests by initiating enforcement activity it believes might violate the net neutrality rules, and because there are no deadlines for advisory opinions, or certainty that parties can rely on those advisory opinions.[92]

Any type of case-by-case enforcement relies on the enforcement agency to investigate and analyze the specific facts at issue. However, BIAS providers' claims that case-by-case determinations under the general conduct standard create uncertainty are flatly inconsistent with their embrace of antitrust law as the primary regulatory system for BIAS. At its core, the application of antitrust law is a case-by-case endeavor.[93] Additionally, enforcement of any rules adopted by the Commission under legal authority other that Title II, or FTC enforcement in lieu of FCC authority, would necessarily occur on a case-by-case basis. The general conduct standard does nothing more than give the Commission flexibility to examine BIAS provider business practices that could harm consumers and the internet ecosystem, consistent with the long-established Open Internet principle that BIAS providers should not use their gatekeeper position to limit consumer choice[94]

Any uncertainty created by the case-by-case application of the general conduct standard is sufficiently mitigated by the Open Internet Order's process for BIAS providers to seek advisory opinions from the Commission. In *USTelecom*, the D.C. Circuit found that the ability to obtain guidance relieved ISPs from uncertainty.[95] Further, abuse or misuse of the FCC's discretion can is subject to judicial review.[96] Should the FCC determine that in

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[92] *See e.g* Sprint 6-7.
[93] *See* CU 12.
[94] *See* CU 13, Independent Film & Television Alliance 5.
[95] OTI 60-61.
[96] *See* CU 13.

practice, its process to provide guidance is not functioning optimally, it can adjust its practices to provide parties with additional clarity regarding the contours of the general conduct rule. Eliminating the general conduct rule and reclassifying BIAS to address alleged uncertainty under the general conduct standard is a case of throwing out the baby with the bath water.

BIAS providers are simply wrong in claiming that the uncertainty of the general conduct standard has substantially impeded the introduction of zero rating services. Instead of avoiding zero-rating after the adoption of the Open Internet Order, BIAS providers responded by "launching a plethora of zero-rating programs," including many that directly challenged the open internet rules by giving preference to vertically integrated content.[97] Claims that BIAS providers responded to Title II regulation and the general conduct standard by shelving new products and services also fail to recognize that, since 2015, BIAS providers and edge providers have introduced a dizzying array of online streaming video offerings, giving consumers more choices for content and innovative services than ever before.[98]

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[97] Engine 29-30.
[98] *See* IA 23-24, Free Press, It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era 46-61 (2017).

E. Overturning the Open Internet Order and reclassifying BIAS as a Title I service does not eliminate or minimize regulatory uncertainty for BIAS providers, but it creates significant uncertainty for the internet ecosystem.

Some commenters also charge that classifying BIAS as a telecommunications service creates the possibility that BIAS providers could at some point be subject to "public utility" requirements like rate regulation[99] or open access requirements.[100]

As discussed above, the Commission has not implemented the rate regulation or unbundling requirements that BIAS providers appear to fear most. Further, reclassifying BIAS as a Title I service will do nothing to alleviate this uncertainty. As the U.S. Chamber of Commerce correctly explains, a new FCC could reverse any changes adopted by this Commission.[101] To do so, a future FCC would have to go through a notice and comment process – the same process that a future Commission would employ to rescind the forbearance granted by the Open Internet Order. Thus, in practice,the current forbearance from significant portions of Title II provides BIAS providers with the same assurance against regulatory overhang and uncertainty as would adopting proposals in NPRM to rescind Title II classification altogether.[102]

Rather than creating uncertainty, the Open Internet Order actually settled a decade of prior uncertainty regarding whether the internet would remain open for all, or BIAS providers would be free to engage in discriminatory conduct.[103] The proliferation of pro-

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[99] *See e.g.*, *See* Letter from Chamber of Commerce of the United States of America to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-108, at 6 (filed July 17, 2017) ("U.S. Chamber Letter"), ACA 8, 14-15, AT&T 53-54, ITIF 6, Verizon 10-11
[100] *See e.g.*, Comcast 34-36, ITIF 6.
[101] *See* U.S. Chamber Letter at 8.
[102] *See* NCTA 37, EFF 22, Engine 13.
[103] Free Press 87, 108, New Media Rights 9.

consumer benefits and competitive products and services available to consumers is proof that the existing rules are an unmitigated success. Ironically, rescinding the 2015 Order and rolling back Title II classification of BIAS would create significant uncertainty across the internet ecosystem, for edge and BIAS providers alike. Without legally sound (i.e., rooted in Title II authority) Open Internet rules, content creators, consumers, and any business that reaches consumers via the internet faces significant uncertainty about the FCC's willingness and ability to address anticompetitive and anti-consumer behavior by the largest BIAS providers. This uncertainty would threaten the viability of competitive entry by small BIAS providers,[104] and create significant uncertainty for edge providers and BIAS providers that own vertically integrated content.[105]

VIII. States Have Authority Over Broadband ISP Practices

Some commenters claim that, because the Commission has consistently found that broadband traffic is interstate, "states have no jurisdiction or authority to impose their own conduct standards or other economic regulation on BIAS providers."[106] This is not correct.

First, as the Commission has stated,

> Notwithstanding the interstate nature of BIAS, states of course have a role with respect to broadband. As the Commission has stated "finding that this service is jurisdictionally interstate [] does not by itself preclude" all possible state requirements regarding that service.[107]

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[104] *See* Small BIAS Provider Letter at 1.
[105] *See* IA 1, 11, EFF 23, Free Press 24, 127, Engine 25-26, IFTA 6.
[106] Comcast 79.
[107] Open Internet Order ¶ 431, n.1276 (citing National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, 25 FCC Rcd 5051, 5054-55, ¶ 9 (2010) (NARUC Broadband Data Order) ("Given the specific federal recognition of a State role in broadband data collection, we anticipate that such State efforts will not necessarily be incompatible with the federal efforts or inevitably stand as an obstacle to the implementation of valid federal "polic[i]es.")).

Indeed, the Communications Act itself contains several presumptions against preemption that emphasize the role of states:

- "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[108]

- "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[109]

- "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans[.]"[110].

These provisions alone demonstrate that a flat, across-the-board preemption of states would be unlawful.

Second, the Commission has found that "Broadband Internet access service" is an interstate service because of its analysis of broadband traffic. As it wrote in the Cable Modem Declaratory Ruling,

> traffic bound for information service providers (including Internet access traffic) often has an interstate component." The Commission concluded that although such traffic is both interstate and intrastate in nature, it "is properly classified as interstate and it falls under the Commission's . . . jurisdiction." The jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries.[111]

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[108] 47 U.S.C. § 414.
[109] 47 U.S.C. § 253.
[110] 47 U.S.C. § 1302
[111] In the Matter of Internet Over Cable Declaratory Ruling, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd at 4832, ¶ 59 (2002).

Thus while the management of broadband traffic may be subject to federal preemption, not all of the practices of broadband providers are. Other aspects of broadband, and behaviors of broadband providers, such as marketing, billing, privacy, and equipment, are likely intrastate and generally immune from Commission preemption.[112]

Finally, even for services like BIAS where it would "be impractical, if not impossible, to separate the intrastate portions ... from the interstate portions,"[113] this determination merely *allows* the Commission to preempt.[114] The Commission still must still actively choose to preempt and meet all the usual preemption tests. The mere classification of a service as interstate does not by itself constitute a preemption.

IX. The Ban On Paid Prioritization Is Necessary to Protect Consumers from Anti-Competitive Practices by Large Broadband Providers Who Have Both the Incentive and The Means to Distort The Market

The current ban on paid prioritization is necessary given the admissions by various ISPs. The FCC has already determined that paid prioritization is harmful, and but for the current rules, ISPs would engage in it. Verizon admitted under oath that that, "but for these rules, we would be exploring those commercial arrangements."[115] In its comments, AT&T stated that paid prioritization arrangements may be commercially reasonable.[116] Considering the extensive record of other abuses and a historic lack of transparency from

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[112] See Computer & Commc'ns Indus. Ass'n, 693 F.2d 198, 214 (D.C. Cir. 1982) (The Commission may only preempt the state regulation of intrastate equipment when this "would interfere with achievement of a federal regulatory goal.").]
[113] Minnesota Public Utilities Com'n v. FCC, 483 F. 3d 570 (8th Cir. 2007) (VOIP in this case)
[114] Id. at 578
[115] Public Knowledge and Common Cause 15 (filed July 19, 2017) (citing *Verizon* Oral Arg. Tr. at 31 (D.C. Cir. Case No. 11-1355). https://www.cadc.uscourts.gov/recordings/recordings2014.nsf/DCD90B260B5A7E7D85257BE1005C8AFE/$file/11-1355.mp3.)
[116] AT&T 103.

ISPs, there is a demonstrated need for the ban on paid prioritization in order to protect consumers.

ISPs make multiple erroneous assertions regarding the need for paid prioritization. (1) They assert that paid prioritization is the same as network management. (2) They conflate paid prioritization with the use of Content Delivery Networks (CDNs). (3) They insist that paid prioritization is the only means of achieving optimized network service.

A. Paid prioritization is not the same as general network management techniques.

AT&T argued that "issues concerning paid prioritization of Internet traffic have had limited practical significance to date because the Commission has always allowed a more important type of "packet prioritization."[117] The fact that the FCC allows for some types of packet prioritization does not in any way limit the significance of *paid* prioritization restraints. The FCC has held specifically that paid prioritization is not an acceptable form of network management and would be harmful to consumers.[118] The emphasis here is on the "paid" aspect of paid prioritization. A band on paid prioritization does not rule out all forms of prioritization (e.g., prioritizing network control traffic or emergency communications) or other forms managing network traffic. Instead, it prohibits ISPs from monetizing scarcity by giving fast track service to edge providers who pay, effectively throttling those who do not. Paid prioritization would allow ISPs to discriminate between various providers in ways that have no bearing on network performance, simply because it was profitable. Any

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[117] AT&T 38.

[118] Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 F.C.C. Rcd. 5601, ¶ 18 (2015).

sort of prioritization or traffic management that is not paid is not relevant to the discussion of paid prioritization.

ITIF stated that because "[n]etworks should have the flexibility to respect the diverse needs of applications," that "special treatment will justify payment from those application providers that desire more than best-efforts treatment."[119] There is no connection between these two concepts. Networks can be flexible and respond to diverse content and file types without requiring payment. While the current general conduct rule exists to protect against abuses here, it is simply confused to maintain that a ban on paid prioritization prevents "flexibility."

B. Content Delivery Networks (CDNs) are not equivalent to paid prioritization

In this proceeding as in past ones, ISPs attempt to conflate the use of CDNs with paid prioritization. But unlike paid prioritization, CDNs are a form of infrastructure investment that improves network performance. Paid prioritization, on the other hand, monetizes scarcity and makes it profitable for ISPs to have congested networks.

AT&T argued that, "content providers with the financial resources needed to buy sophisticated content delivery services—or to build out their own content delivery networks, as Google, Amazon, and Netflix have done—have always given consumers better performance…"[120] This assertion is true but irrelevant because CDNs are not an example of paid prioritization. When content providers use CDNs to improve delivery of their own content to last-mile networks, they do not impose any cost on other traffic. By contrast, ISP

[119] ITIF 23.
[120] AT&T 43.

paid prioritization necessarily implies that some traffic is prioritized *over other traffic*—and this is the case even if new "fast lanes" are built.

C. Paid prioritization is not necessary for effective network management and optimizing service.

ISPs insist that paid prioritization is necessary for effective network management. AT&T has claimed that without paid prioritization, they would be unable to determine one type of packet from another, and thus be unable to effectively manage network traffic.[121] It further asserts that paid prioritization is the only way to reliably know the source of the packets as well as the type of packet being sent. Essentially, ISPs attempt to argue that the only way they can properly identify different types of traffic data is to establish financial relationships with content providers. However, at no point do they explain or justify why charging money is inherently necessary for identifying a particular content provider as a traffic source, nor do they offer concrete evidence that packet differentiation is vital to performance optimization. Paid prioritization is simply not needed to accomplish either of these tasks.

Evidence shows that such traffic identification techniques not only exist, but are *already being used*.[122] Indeed, ISPs openly boast about the technologies they use to successfully differentiate types of packets without paid prioritization. For instance, since as

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[121] AT&T 40 (arguing that to solve [the] collective action problem [of mislabeled packet headers], industry participants might need to attach price signals to such QoS guarantees by charging for them).

[122] Deep packet http://www.wired.co.uk/article/how-deep-packet-inspection-works; Erik Hjelmvik & Wolfgang John, *Statistical Protocol IDentification with SPID: Preliminary Results*, https://pdfs.semanticscholar.org/0be7/40269da035317f3538553040371e4fa1de80.pdf; Comcast Corp., *Comcast Corporation Description of Current Network Management Practices* (2008), https://downloads.comcast.net/docs/Attachment_A_Current_Practices.pdf; *Sandvine Inc. ULC,* https://www.sandvine.com/solutions/traffic-optimization/ *(last visited Aug. 23, 2017).*

early as 2008, Comcast contracted with Sandvine to provide traffic identification for network management purposes.[123] In any event, to the extent that ISPs would like to communicate with edge providers in some way to more effectively identify traffic, doing this does not require payment on either side—as, for instance, T-Mobile's efforts with respect to its "Binge On" program, which included coordination between edge providers and T-Mobile, demonstrated.[124]

The technologies and methods needed for identifying traffic exist and have for years. It is therefore disingenuous for ISPs to assert that paid prioritization is necessary for network management.

X. The Fact that Bell Companies Once Wanted to Create a Minitel-like Service Has Little Bearing on Broadband Today

Even though the 1996 Telecommunications Act supersedes the MFJ, AT&T argues that the FCC is nonetheless bound by it.[125] Leaving aside the fact that the MFJ itself simply re-used existing categories the FCC itself created, as AT&T acknowledges,[126] AT&T's analysis of the MFJ is heavily influenced by the services at issue in *US v. Western Elec. Co.*[127] There, RBOCs wanted to provide a Minitel-like gateway service consisting of infrastructure and support, allowing customers to access third-party information services. The question was whether providing such access to information services was itself an information service. The court found that it was, at least for the purposes of modifying the MFJ.

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[123] *Id*.
[124] *See* T-Mobile "Binge On," (last visited Aug. 24, 2017), https://www.t-mobile.com/offer/binge-on-streaming-video.html.
[125] AT&T 61-62.
[126] AT&T 64.
[127] 673 F. Supp. 525 (DC Cir. 1987).

However, this does not support AT&T's contention that broadband internet access, because is also offers access to information services (websites, email, etc), is also an information service, because the kind of Minitel-like gateway "access" that the RBOCs wanted to provide in 1987 was significantly different than broadband access today. Specifically the "the infrastructure *necessary*" to provide it involved "(1) data transmission, (2) address translation, (3) protocol conversion, (4) billing management, and (5) introductory information content."[128] By contrast broadband internet does not provide, for example, "billing management" for all the edge services that users access, or "introductory information content." In short, modern broadband internet is not similar to Minitel, so legal opinions about a Minitel-like service (from before the passage of the current statute) are not particularly apt. Nevertheless the court was prophetic in one way—it limited its analysis of "gateways" "to facilities, similar to the French VAPs, that are described below. [The term 'gateways'] does not include other facilities that under other circumstances may be included within the meaning of that term."[129] AT&T wants to rip the *Western Electric* opinion out of its context and apply it to very different services and facilities, but the attempt fails.

XI. AT&T Mischaracterizes Pre-1996 Communications Law

AT&T also claims that "Congress intended to codify the pre-1996 Act tests for determining which services qualify as enhanced/information services. And no one can reasonably dispute that the most basic forms of broadband Internet access qualify as such

[128] *United States v. Western Elec. Co.*, 673 F. Supp. 525, 592 (D.C. Cir. 1987) (emphasis added).
[129] *Western Elec.*, 591 n.299.

under those pre-1996 Act tests."[130] Granting the first point for the sake of argument, the second one is easy to dispute.

The "tests" AT&T claims are still controlling do not require the outcome that AT&T claims because AT&T again fails to account for the significant differences between the services discussed in the precedent it cites and the modern services they are allegedly analogous to. The Bell Atlantic gateway service in question, for example, involved the "provision of descriptions and prices of available enhanced services involve subscriber interaction with stored information and content restructuring under the definition."[131] This is not "a direct analogue to today's DNS lookup functionality,"[132] as AT&T would have us believe.

Instead, DNS, as bundled with broadband, is more analogous to a service "designed merely to facilitate the completion of voice telephone calls"[133] than the gateway service at issue in the Bell Atlantic matter. The "key word" functionality of the Bell Atlantic gateway service, which AT&T makes so much of, is similar to a modern search engine or an internet index like the classic Yahoo! directory, not a DNS lookup table. Just read the Commission's description of how it operates:

> The processor will provide gateway service customers with a menu that lists enhanced service providers available through the gateway. Alternatively, the customer can access a "key word" index of specific services. From the menu, the customer may view a description of the provider's service and pricing structure.

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[130] AT&T 68.
[131] Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, Mem. Op. and Order, 3 FCC Rcd 6045, ¶ 7 (Sept. 30, 1988) ("Gateway Services Order").
[132] AT&T 67.
[133] AT&T 66.

> From the key word index, the customer can receive a second menu of providers of the selected service.[134]

AT&T's attempt to claim that a service where customers directly interact with a hierarchal menu of services and prices, and where Bell Atlantic itself "will bill the end user and the enhanced service provider for use of gateway service and will offer to bill end users for the enhanced service provider service,"[135] again demonstrates just how unlike modern broadband and DNS these "gateway," Minitel-like services are.

Even more fundamentally, AT&T spends a lot of effort proving a point that "no one can reasonably dispute"—that certain services that fall under the telecommunications management exception today, or that would be "adjunct-to-basic" under the Computer Inquiries analysis, would otherwise be information services. But that is the entire point of this category of service— a service that would otherwise be an information service is nevertheless treated as part of telecommunications service when it is used or offered in a specific context. Thus simply repeating the definition of "enhanced services" as AT&T does[136] is irrelevant—as the FCC stated in the *NATA Centrex* proceeding, "permissible adjuncts to basic services are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use and which bring maximum benefits to the public through their incorporation in the network."[137] Or, in the words of the MFJ, an enhanced service "does not include any use of

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[134] Gateway Services Order ¶ 4.
[135] Gateway Services Order ¶ 57.
[136] AT&T 66.
[137] N. Am. Telecommunications Ass'n Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Servs., & Customer Premises Equip., 101 F.C.C.2d 349, 359 (1985).

any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[138] To bring this into the realm of the current statute, in the *Non-Accounting Safeguards Order*, the Commission incorporated its previous analyses, writing:

> [t]hat services that the Commission has classified as "adjunct-to-basic" should be classified as telecommunications services, rather than information services. In the NATA Centrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services. Although the latter services may fall within the literal reading of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service. Similarly, we conclude that "adjunct-to-basic" services are also covered by the "telecommunications management exception" to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act.[139]

With respect to broadband, DNS fits clearly within the scope of the exception as variously described by these sources as it is "basic" in purpose (it simply facilitates the use of the internet), it facilitates the establishment of a transmission path, and it does not alter (indeed, it is part of) the fundamental character of broadband access.

Finally, AT&T also attempts to maintain, based again on context-free snippets, that "to fall within the 'adjunct to basic' or 'network management' exceptions, a functionality needed to enable the telephone company to prescribe, *for its own benefit*, a clear dedicated path for any given call through the company's network *without user interaction*."[140] But the un-elided version of the language AT&T cites is as follows:

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[138] *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982).
[139] Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Commc'ns Act of 1934, As Amended., 11 F.C.C. Rcd. 21905 (1996); *see* 47 U.S. Code § 153(24).
[140] AT&T 77 (citing Mem. Op. and Order, Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act, 13 FCC Rcd. 2627, ¶ 18 (Feb. 6, 1998) ("Bell Companies Petition").

> Although the 'telecommunications management exception' encompasses adjunct services, the storage and retrieval functions associated with the BOCs' automatic location identification databases provide information that is useful to end users, rather than carriers.[141]

In a footnote the Commission explains:

> For instance, when an individual calls 911 to report a fire, the PSAP and its associated emergency service providers respond to the call using the database information identifying the location from which the call was placed.[142]

The "rule" that AT&T attempts to extract from this is simply another paraphrase of the telecommunications management exception which, applied to DNS, still does not lead to the result it wants. The 911 location service at issue provides information about the caller to the PSAP—important information for emergency response purposes, to be sure, but not information that involves "the management, control, or operation of a telecommunications system or the management of a telecommunications service." It is in this sense that the lookup service is not "useful" to carriers—it does not involve the routing of a communication. The 911 location information service is more analogous to the "location services" that smartphone platforms make available to apps, than to DNS.[143] By contrast, DNS lookup is directly "useful" to an ISP for routing purposes—when a user types in a URL or clicks a link, DNS enables an ISP to establish the communication link the user has requested. To maintain, as AT&T does, that something that is "useful" to an end user cannot fall under the management exception is absurd, as the entire purpose of broadband is to be useful to end users, as is the entire purpose of telephony. The only question is whether the

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[141] Bell Companies Petition ¶ 18.
[142] Bell Companies Petition ¶ 18 n.70.
[143] *E.g.*, Apple, Location and Maps Programming Guide, https://developer.apple.com/library/content/documentation/UserExperience/Conceptual/LocationAwarenessPG/CoreLocation/CoreLocation.html.

service in question involves the establishment and routing of communication, or does not. As Public Knowledge and many others have explained before and as the FCC has previously found, and as the DC Circuit has agreed, it does.

XII. Title I Classification Will Create Harms In Consumer Protection, Universal Service, and Competition In The Broadband Marketplace

The record demonstrates that the Commission's proposal to classify broadband as a Title I service will create harms in consumer protection, universal service, and competition in the broadband marketplace. Specifically, the FCC's plan to return broadband privacy jurisdiction to the FTC would leave consumers with inadequate privacy protections on broadband networks. Title I would also lead to regulatory uncertainty for standalone broadband services ready, willing, and able to participate in the Lifeline program. Further, competition in the broadband marketplace would be reduced without key regulatory protections that are lacking within Title I. Title II classification ensures consumer privacy is protected, universal service advances, and there is growing competition in the broadband marketplace. The record in this proceeding indicates that all of these principles, which are critical to the Commission's mission would be significantly undermined.

A. The Record Demonstrates Consumers Would Have Inadequate Privacy Protections If The FTC Retained Jurisdiction Over Broadband Privacy.

The Commission proposes to return broadband privacy authority to the FTC explaining that the agency has decades of experience and expertise in protecting consumer privacy.[144] However, the record demonstrates that consumers would have inadequate privacy protections if the FTC retained jurisdiction over broadband privacy. Several

[144] *See* 2017 NPRM, 32 F.C.C. Rcd. at 4456-57 ¶¶ 66-67.

commenters correctly point out the FTC's lack of rulemaking authority combined with the limits of its section 5 authority under the Federal Trade Commission Act make it insufficient to protect consumer privacy on broadband networks.[145] The FTC is constrained by the limits of section 5 to apply the same, general "unfair and deceptive standard" to all online privacy issues. As commenters explain, the limits of section 5 authority only allow the FTC to pursue enforcement actions only after consumers have been harmed and their privacy has been compromised in some way.[146] Further, section 5 requires the FTC to conduct a cost-benefit analysis prior to pursuing an enforcement action. This analysis treats consumer privacy as a "commodity to be balanced against other considerations rather than a fundamental right."[147] Consequently, the FTC's enforcement actions usually involve broken privacy promises[148] or determining whether companies' are adhering to general industry practices rather than what practices would best protect consumers.[149] Consumers expect adequate privacy protections when accessing broadband networks. Unfortunately, enforcement actions without the ability to adopt bright line rules are not enough to protect consumer broadband privacy.

Commenters who believe the FTC is better suited to oversee broadband privacy misconstrue the role of the FTC and FCC in protecting consumer privacy. Some

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[145] *See, e.g.,* Center for Democracy and Technology Amended Comments 14-17; Free Press 73; Electronic Information Privacy Center 3-6; Electronic Frontier Foundation 26-28 ; Ranking Member Frank Pallone, Jr. et al Comments 8.
[146] *See* CDT 15-16; EPIC 4; Pallone et al 8; PK and Common Cause 93-94.
[147] CDT 15.
[148] *See* FTC, Enforcing Privacy Promises, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises.
[149] *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Collum. L. Rev. 583, 627-43 (2014).

commenters assert that the FTC's technology-neutral approach to privacy is better for consumers because it places all online entities under the same framework.[150] This argument fails to consider that not all online entities are the same. As the FCC has already concluded, broadband service providers hold a unique position in the internet ecosystem that sets them apart from other online entities.[151] Broadband service providers have access to enormous quantities of internet data that their subscribers transmit. While internet traffic splinters among edge providers, all data—sensitive, non-sensitive, and everything in between—must pass through the hands of a broadband service provider. As the record thoroughly demonstrates, broadband service providers hold a 'gatekeeper' position in the internet ecosystem.[152] Their role as gatekeepers limits the amount of choices consumers have between broadband providers.[153] Therefore, most consumers cannot change providers if they are unhappy with their current providers' privacy practices compared with a variety of edge services they can choose from. The nature of broadband networks is precisely why the FCC is better equipped to retain jurisdiction over broadband privacy. The FCC has a thorough understanding of how broadband networks operate through a number

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[150] Verizon 23-24; Cox 4; American Cable Association 70.

[151] *See Protecting the Privacy of Customers of Broadband and other Telecommunications Services*, Report and Order, WC Docket No. 16-106, 31 F.C.C. Rcd. 13911, 13920, ¶ 30 (2016) (stating that "the record is clear that [broadband service] providers' gatekeeper position allows them to see every packet that a consumer sends and receives over the Internet while on the network, including, absent encryption, its contents.").

[152] *See, e.g.*, OTI 51; Engine 20; Vimeo 21; PK and Common Cause 73-77; Vimeo 21.

[153] *See 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*, 2016 Broadband Progress Report, GN Docket no. 15-191, 31 F.C.C. Rcd. 699, 702, ¶ 6 (2016) (finding that "only 38 percent of Americans have more than one choice of providers for fixed advanced telecommunications capability.") ("*2016 Broadband Progress Report*").

of broadband-oriented programs the agency has put in place.[154] Further, the FCC has decades of sector-specific experience protecting consumer privacy on communications networks and has consistently updated its rules to reflect changes in technology.[155] Given the inherent differences between edge services and broadband service providers, the FTC's technology-neutral approach simply would not work to adequately protect consumer broadband privacy.

Other commenters argue that granting the FTC broadband privacy jurisdiction would allow broadband service providers to engage in data-sharing business models that would benefit consumers.[156] This reasoning is flawed for several reasons. First, the FCC's jurisdiction does not prevent broadband service providers from selling customer data. Instead, the FCC's statutory authority under Section 222 requires telecommunications carriers to protect the proprietary information of their customers and sets up an opt-in framework for sensitive information.[157] This framework allows consumers to be the ultimate arbiter over their own data. If a consumer wants their service provider to sell their data because they believe they will receive a benefit, it should be the consumer's decision to do so. This principle is critical in the broadband service provider context given the unfettered access these carriers have to consumer data compared to other online entities.

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[154] *See, e.g.,* FCC, *Connecting America: The National Broadband Plan* (Mar. 17, 2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf ("*National Broadband Plan*"); *Connect America Fund et al*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al, 26 F.C.C. Rcd. 17663 (2011) ("*Universal Service Transformation Order*"); *Lifeline and Link Up Reform and Modernization et al*, Third report and Order, Further Report and Order, and Order on Reconsideration, WC Docket Nos. 11-42, 09-197, 10-90, 31 F.C.C. Rcd. 3962 (2016) ("*Lifeline Modernization Order*").
[155] *See* PK and CC 92-93.
[156] ITIF 15.
[157] *See* 47 U.S.C. 222(c).

Second, this argument fails to consider the inherent differences between edge services that operate on a data-sharing business model and broadband service providers. Dominant platforms such as Google and Facebook are entirely ad-supported and rely on collecting and sharing user-data to operate. In contrast, consumers pay a fee to access broadband networks, and in return do not expect their personal information will be used as an additional revenue stream by their broadband service provider.

B. The Record Demonstrates Maintaining Support For Standalone Broadband Services In The Lifeline Program Under Title I Would Lead To Regulatory Uncertainty.

The Commission proposes to maintain support for broadband services in the Lifeline program after Title I classification.[158] However, the record demonstrates that the Commission's authority to do so under Title I would lead to regulatory uncertainty for standalone broadband services.[159] Under its Universal Service Transformation Order, the Commission has interpreted its authority under Section 254 to provide universal service support to both voice telephony services and the facilities over which they are offered, which include broadband services.[160] However, as commenters correctly point out, carriers must still qualify as an 'eligible telecommunications carrier' under Section 214(e) in order to receive support for the High Cost and Lifeline program. [161] Pursuant to this statutory framework, the Commission's rules have traditionally required carriers to bundle their broadband service with voice in order to receive universal service support. As the record

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[158] *See 2017 NPRM*, 32 F.C.C. Rcd. at 4457, ¶ 68.
[159] *See* OTI 3; Voices For Internet Freedom Coalition 54-62; National Consumer Law Center, on behalf of its low-income clients, and the United Church of Christ, 5-8; Free Press 71; PK and Common Cause 95-99.
[160] *See Universal Service Transformation Order*, 26 F.C.C. Rcd. at 17685 ¶ 64.
[161] *See* National Consumer Law Center 5; *see also* Free Press 56; Voice for Internet Coalition 57-58.

illustrates, Title II classification of broadband lifted these statutory constraints and allowed the Commission to provide Lifeline support for broadband-only networks on strong legal footing.[162] Indeed, in its *2016 Lifeline Modernization Order* the Commission expanded the Lifeline program to include support for broadband-only services with the understanding that it would be legally permissible under Title II.[163] Without this foundational legal authority, it is unclear how the Commission can continue providing support for standalone broadband.

Some commenters assert that the Commission can maintain support for standalone broadband services under Title I. Verizon specifically cites to the FCC's 2012 *Lifeline Pilot Program Order* where the Commission offered support to both bundled and broadband-only services pursuant to Sections 254 and 706.[164] However, Verizon fails to acknowledge that the Commission relied on Sections 254 and 706 to support standalone broadband services "as part part of a discrete, time-limited Pilot Program structured to determine how best to bring advanced services to low-income consumers."[165] Indeed, the Commission was not expanding the Lifeline program to fully integrate broadband services but rather relying on its legal authority to create a pilot program. The Commission acknowledged it was using its authority for the sole reason of creating a "time-limited broadband pilot program"[166]

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[162] *See* Voices for Internet Freedom Coalition 54, OTI 3; Free Press 71-72.
[163] *See Lifeline Link Up Reform and Modernization et al*., Third Report and Order, Further Report and Order, and Order on Reconsideration, *Lifeline Modernization Order*, 31 F.C.C. Rcd. at 3962, 3965, 3980 ¶¶ 8, 49 (2016) ("*2016 Lifeline Modernization Order*") ("By allowing support for standalone broadband services with Lifeline, we add an additional measure of consumer choice as well as the opportunity for innovative providers to serve low-income consumers in new ways.").
[164] Verizon 26-27; *Lifeline and Link-Up Modernization,* Report and Order and Further Notice of Proposed Rulemaking, 27 F.C.C. Rcd 6656, 6797, ¶ 328 (2012) ("*Lifeline Pilot Program Order*").
[165] *Lifeline Pilot Program Order*, 27 F.C.C. Rcd at 6797, ¶ 28.
[166] *Id.* at 6798, ¶ 330.

and specifically declined at the time to "amend the definition of Lifeline … to include broadband for the existing low-income program."[167] It was not until Title II classification that the Commission permanently expanded the Lifeline program to include support for all broadband services. Further, the Commission specifically worked within the statutory constraints of Sections 254 and 214, which limits support to eligible telecommunications carriers, to establish a Lifeline Broadband Provider ("LBP") designation process for broadband-only providers.[168] It is unclear nor does Verizon provide any explanation to how the Commission can continue maintaining the LBP designation process under Title I. CenturyLink also acknowledges that while the Commission may have authority to provide universal service support under Title I, this authority has its limits.[169] CenturyLink goes on to explain that the Commission can use its ancillary authority to provide universal service support for low-income broadband services pursuant to the Universal Service Transformation Order.[170] However, this is an example of the limits of Title I authority CenturyLink refers to as the Commission's Universal Service Transformation Order only extended support to broadband services that were bundled with voice.

As the Commission contemplates how to get around the legal constraints of Sections 254, and 214, it is simultaneously undermining the current framework set in place by the *2016 Lifeline Modernization Order*. Since the LBP designation was established, several

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[167] *Id.* at 6795, ¶ 323.
[168] *See 2016 Lifeline Modernization Order*, 31 F.C.C. Rcd at 3965, 4039-40, 4053-54, ¶¶ 8, 215-219, 252-254.
[169] CenturyLink 53-57.
[170] *Id.* at 56-57.

broadband-only carriers have applied to receive Lifeline support.[171] In late 2016 and January 2017, the FCC certified nine LBP applications, and those companies prepared to offer Lifeline-supported BIAS to eligible, low-income families.[172] However, in February 2017, shortly after Chairman Pai was named acting Chairman, the Wireline Competition Bureau rescinded those LBP certifications.[173] In March, Chairman Pai announced the FCC would soon initiate a proceeding to eliminate the LBP designation altogether.[174] The record shows that affordability remains a key barrier to broadband adoption,[175] and Chairman Pai has repeatedly claimed that closing the digital divide is his top priority.[176] In reality, this FCC has repeatedly undermined affordable broadband access and expanding universal service to low-income households. The NPRM's proposal to reclassify BIAS as a Title I service will create significant uncertainty regarding the legality of Lifeline-supported standalone BIAS, contradicting the Chairman's stated goals and the Commission's mission to promote universal service.

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[171] *See* FCC, Lifeline Broadband Provider Petitions and Public Comment Periods, available at https://www.fcc.gov/lifeline-broadband-provider-petitions-public-comment-periods.
[172] *See* Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197, *Order*, 32 FCC Rcd 784 (2017); Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197, *Order*, 31 FCC Rcd 12736 (2016).
[173] *See* Telecommunications Carriers Eligible for Universal Service Support, Lifeline and Link Up Reform and Modernization, WC Docket Nos. 09-197, 11-42, *Order on Reconsideration*, 32 FCC Rcd 1095 (2017).
[174] *See* Statement of FCC Chairman Ajit Pai On the Future of Broadband in the Lifeline Program (March 29, 2017).
[175] *See* Voices for Internet Freedom Coalition Comments at 59-62.
[176] *See e.g.*, Letter from Chairman Ajit Pai to Senator Tammy Baldwin (February 21, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0303/DOC- 343756A3.pdf; Remarks of Ajit Pai, Chairman, Federal Communications Commission (Jan. 24, 2017) at 2, https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf.

C. The Record Demonstrates Title I Classification Would Impact Competition In The Broadband Marketplace By Reducing Access To Infrastructure.

The Commission asks what effect Title I classification would have on access to broadband infrastructure.[177] The record demonstrates that Title I would negatively impact competition in the broadband marketplace by reducing access to infrastructure.[178] Section 224 authorizes the Commission to regulate pole attachments.[179] With Title II classification, the Commission can promulgate rules under Section 224 to require legacy telecommunications carriers to provide non-legacy broadband service providers non-discriminatory access to poles and other rights of way owned by utilities.[180] As commenters explain, Section 224 allows the Commission to promote competition in the broadband marketplace. The California Public Utilities Commission conducted a study of the telecommunications market in California and found that access to utility poles is a competitive bottleneck that "limits new network entrants and may raise prices for some telecommunications services."[181] Smaller broadband providers also attest to the regulatory benefit of Section 224 that allows them to better compete with incumbent carriers.[182]

Despite professing to enjoy the regulatory benefits of Section 224, WISPA argues that the Commission can regulate pole attachments and other rights of way under its Section 706 authority. However, it is unclear if the FCC can ensure nondiscriminatory access to poles under a Section 706 theory. The plain language of Section 706 does not

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[177] *See 2017 NPRM*, 32 F.C.C. Rcd. at 4457-58, ¶ 69.
[178] *See* California Public Utilities Commission 6-9; National Association of State Utility Consumer Advocates 5; Wireless Internet Service Providers Association 19; Cogent Communications 32.
[179] *See* 47 U.S.C. 224(b).
[180] *See* 47 U.S.C. 224(f).
[181] CPUC 6-7.
[182] WISPA 19.

mandate the Commission to regulate pole attachments nor has the agency traditionally applied the statute to do this in such a way. In contrast, Section 224 gives Commission direct authority. Indeed, the agency is currently relying on Section 224 to propose pole attachment reforms in its wireline infrastructure proceeding.[183] Overall, Section 224 provides the Commission with clear authority and there is direct evidence in the record that competition in broadband marketplace would be reduced without this statutory protection, ultimately limiting the amount of choices consumers have.

XIII. Conclusion

For the foregoing reasons and for the reasons described in the Comments of Public Knowledge and Common Cause already submitted in this proceeding, the Commission should leave in place the classification of broadband internet access as a Title II telecommunications service and keep in place the existing rules that prevent ISPs from blocking and discriminating online.

Respectfully submitted,

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30 August 2017

[183] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 F.C.C. Rcd. 3266, 3267 ¶ 3.