Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Safeguarding and Securing the Open Internet	**WC Docket No. 23-320**
Restoring Internet Freedom	**WC Docket No. 17-108**
Bridging the Digital Divide for Low-Income Consumers	**WC Docket No. 17-287**
Lifeline and Link Up Reform and Modernization	**WC Docket No. 11-42**

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. INTRODUCTION AND SUMMARY.

The initial comments in this proceeding evince strong support for the Commission's proposed rules, as well as some important comments in support of changes the Commission should make to strengthen its protections for a healthy, fair, and open internet. There are also some incorrect and misguided arguments presented by industry groups and internet service providers (ISPs) that warrant responses.

First, and most importantly, Public Knowledge writes in support of the necessity of Title II classification and net neutrality rules, countering industry claims of their redundancy. This reply elevates comments that focus on the history of ISPs subverting open internet practices for profit and supports the adoption of rules to maintain net neutrality. Relatedly, this reply addresses misconceptions about Section 230 of the Communications Act, clarifying that it does not limit common carriage obligations. It argues against interpretations that broadband ISPs could evade their duties under the guise of Section 230 protections.

Public Knowledge also joins commenters in advocating for clear, explicit rules against practices like access fees, zero-rating, and paid prioritization. Section IV emphasizes the need for transparency and clarity in regulations to prevent violations of net neutrality principles.

Section V supports the view that both wholesale and resold Broadband Internet Access Services (BIAS) should be classified as telecommunications services, ensuring uniform application of Title II protections regardless of the business model.

Finally, Section VI stresses the importance of maintaining stringent standards for network management. It argues against allowing network management practices to be used as loopholes for anti-competitive behavior or subverting net neutrality.

II. THERE IS A CLEAR NEED FOR TITLE II CLASSIFICATION AND NET NEUTRALITY RULES.

Industry commenters and service providers have alleged in their comments that there is no need or rationale for the Commission to adopt net neutrality rules.[1] As a threshold matter, the argument that rules are unnecessary because of voluntary compliance—setting aside the role of political uncertainty and the role of state net neutrality laws in ensuring net neutrality practices were maintained—is self-defeating. As the Communications Workers of America point out, the apparent willingness of providers to uphold net neutrality means the proposed rules are "reasonable codifications of existing practice. By agreeing voluntarily to comply with net neutrality, providers have demonstrated it is economically feasible for them to comply with net neutrality and that there is public demand for open internet practices."[2] More importantly, history has shown that in the absence of rules, ISPs have the means, motive, and opportunity to subvert the open internet for profit.

Public Knowledge enthusiastically support the historical summary provided by Free Press where it articulates how only ISPs changed their tune on net neutrality in response to rules and then learning "what openness activists had said all along: Net Neutrality is good not only for internet users, it is good for ISPs and edge companies alike. The policy promotes innovation that ensures broadband is a valuable, essential service."[3] Additionally, despite ISP contentions that they are willingly and happily upholding net neutrality, the EFF included a list of known instances of known non-neutral, discriminatory practices by ISPs.[4] Public Knowledge shares the widely held perspective of these and other commenters in the docket that despite net neutrality being the best policy for the internet ecosystem, the Commission needs rules to ensure these

[1] *See e.g.* Comments of Verizon; Comments of USTelecom; Comments of NCTA.
[2] Comments of CWA at 11; see also Free Press at 42-43.
[3] Comments of Free Press at 4.
[4] Comments of EFF at 7-8.

smart policies are protected. Title II classification is critically important, both for ensuring net neutrality, and for protecting broadband internet access—the vital telecommunications service that is the foundation of our modern digital society.

A. Broadband Internet Access Service is Essential and Net Neutrality Rules Are Needed to Protect It.

It is an undisputed fact in the record that broadband internet service is an essential service for today's digital society. If there was any doubt, the COVID-19 pandemic threw that reality into stark highlight. Service providers and civil society net neutrality advocates alike are united in this core fact.

Comcast's submission to the FCC suggests that the essential nature of broadband does not justify its regulation under Title II,[5] comparing it to utility regulation that they claim stifles competition, dampens innovation, and harms consumers. However, this viewpoint conflates utility regulation with the proposed common carrier approach and overlooks the unique characteristics of the internet as a communications medium in its spurious comparisons to other utilities and essential services.

First and most importantly, Comcast's argument overlooks the necessity of Title II regulation in ensuring a fair and open internet. Title II classification is not about applying monopoly-style utility models to the internet; it's about preserving the fundamental principles of net neutrality. This ensures that ISPs cannot throttle, block, or prioritize certain content, maintaining the internet as an equitable platform for all users. The principles of net neutrality are what has allowed the internet to flourish and develop into the vital channel for information that it is today, and Title II classification is necessary to protect that.

[5] Comments of Comcast at 5-18.

Second, Comcast continually conflates utilities with common carriers. While there are overlaps in regulatory approaches to both, the Commission's proposed rules are strongly in line with the long and successful history of regulating essential communication services as common carriers. The FCC's measured approach to Open Internet rules in 2015, and again in the NPRM, is a balanced attempt to apply Title II regulation while forbearing from provisions that would characterize a utility-style regulatory regime. While the Commission should remain armed with all of these tools as market conditions change, the current approach makes sense: it protects vital net neutrality, universal service, and other essential components of BIAS, while incentivizing competition and innovation. This approach recognizes the unique nature of the internet and the need to protect its openness and accessibility as well as the current state of the broadband ecosystem.

B. The Technical and Practical Features of Internet Access Require Classification as a Telecommunications Service.

Contrary to the comments of USTelecom and NTCA, the best interpretation of the Communications Act is not that BIAS is an information service, but that BIAS is a telecommunications service. As we wrote in our initial comments, the Commission not only has the authority to reclassify BIAS as a telecommunications service thanks to the broad deference granted to expert regulators to interpret statutory language, there is a compelling case that BIAS as understood today is *unambiguously* a telecommunications service, necessitating Title II classification.

This perspective was supported in the record by other commenters. As explained by Dr. Jon Peha, former chief technologist of the FCC, "the core function of BIAS is the transfer of one or more Internet Protocol (IP) packets from sender to intended recipient" which "clearly fits the legal definition of telecommunications" and as a result "[t]he law Requires the FCC to identify

BIAS as a telecommunications service."[6] Free Press also concludes that that "the only logical read of the Act is that broadband is a telecommunications service."[7]

C. The Use of Section 214 Authority Will Promote the Public Interest.

The ability to use Section 214 authority is another important reason for Title II classification. Section 214 is critical authority for the Commission to protect national security and public safety, promote competition, and protect consumers.

The Commission has convincingly explained how Section 214 is necessary to protect national security and public safety. Public Knowledge supports the comments of CWA which describe how Section 214 would allow the Commission to enforce the requirement that "that carriers may not discontinue service to the community without the Commission first determining that the public convenience or necessity will not be adversely affected by the discontinuation."[8] This is critical to public safety because "customers unable to connect to a POTS service may lose their ability to call 9-1-1 or access other emergency communications" if service providers are able to discontinue legacy internet systems thereby leaving communities without an available terrestrial fixed broadband to the home option. Additionally, Section 214 would allow for mandatory and detailed outage reporting requirements to bolster public safety and provider accountability. Finally, Section 214 also protects national security and competition by giving the Commission stronger merger review authority.

Industry opponents of its application to broadband hypothesize[9] that the Commission might use its authority in ways they disagree with. But they ignore both Section 214's benefits and how the Commission has tailored its rules and issued blanket authorizations to achieve

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[6] Comments of Jon Peha at 3-4.
[7] Comments of Free Press at 23.
[8] Comments of CWA at 8.
[9] Comments of AT&T at 28; Comments of NCTA at 22.

public interest goals while minimizing compliance costs. Regardless, any compliance costs are outweighed by the public benefit of safe, secure, reliable broadband networks, and Section 214 is among the tools the Commission needs to ensure they are delivered.

III. SECTION 230 DOES NOT LIMIT COMMON CARRIAGE REQUIREMENTS.

A few commenters posit that Section 230 precludes enforcement of the Commission's rules.[10] This is not the case, as Section 230 does not, and was not intended to, create an exception to common carrier duties.

A. *A Common Carrier That Violates Its Duties is Not Acting "In Good Faith."*

Section 230(c)(2) provides that "No provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]" Commenters posit that this language means that common carrier ISPs cannot be held liable for violating the Commission's rules against blocking or throttling content. Even assuming this applies to broadband ISPs, this still overlooks the provision's key qualification: any restrictions must be taken "in good faith." Blocking or throttling that is done in violation of the Commission's specific rules, Title II of the Communications Act, and longstanding common carrier obligations is not a "good faith" determination that content is "objectionable." Just as Section 230 does not settle the regulatory classification of broadband,[11] Congress did not intend for Section 230 to weaken or silently repeal other provisions of the Communications Act.

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[10] Comments of NCTA at 25; Comments of US Chamber of Commerce at 44; Comments of Digital Progress Institute at 8.

[11] *US Telecom v. FCC*, 825 F. 3d 674, 703 (D.C. Cir. 2016).

Most disputes concerning Section 230 are settled under 230(c)(1), which covers most content removals. But to the extent that Section 230(c)(2) has been litigated, courts have found that it leaves a covered provider "free to restrict access to material that, in good faith, it finds objectionable."[12] The Ninth Circuit in *Malwarebytes* found that a provider cannot in good faith find content "objectionable" if it is motivated by anti-competitive animus.[13] An ISP that blocks or limits access to material for competitive reasons would be covered by this principle and could not claim 230(c)(2) as a defense. But more fundamentally, an ISP that violates antitrust law, or its duties as a common carrier cannot be said to be acting "in good faith" in determining what content is "objectionable." While Section 230(c)(2) is a broad provision that protects covered providers from most forms of tort liability stemming from restricting access to content, the qualification that these restrictions must be undertaken in good faith ensures that it is not a general immunity from other legal duties, and does not insulate acts that would otherwise violate competition or communications law.

B. *Broadband ISPs Are Not "Publishers" of Content.*

Section 230(c)(1) provides that "interactive computer services" can publish third-party material without facing liability for its content. Most "interactive computer services" are publishers.[14] In the common law, to "publish" something is to communicate it to at least one other person.[15] Section 230 demonstrates that Congress also saw interactive computer services as "publishers." A liability shield against "treatment" as a publisher for third-party material presupposes that, absent the shield, there might be liability. Congress would not have enacted Section 230 unless interactive computer services were publishers, since unless they were

[12] *Domen v Vimeo*, 991 F. 3d 66, 67 (2d Cir. 2021) (emphasis added).
[13] *Enigma Software Group USA, LLC v. Malwarebytes*, 946 F. 3d 1040 (9th Cir. 2019).
[14] *Reno v. ACLU*, 521 U.S. 844, 853 (1997).
[15] Restatement (Second) of Torts §§ 577, 558 (1977).

publishers, they could not be liable to begin with. Prior to Section 230, these services in fact were held liable as publishers.[16] By contrast, common carriers like broadband and telephone companies are not publishers, because they do not have "a direct hand" in disseminating messages.[17] "The telephone company is not part of the 'media' which puts forth information after processing it in one way or another."[18]

The telephone company does not, and has no right to, decide what you can or cannot say on a call, nor does a broadband provider dictate the content you can access online. Nor do common carriers decide who speakers may communicate with.[19] Their responsibility is to provide equipment and services facilitating communication, but they have no say as to its content.[20] Thus, to the extent Section 230(c)(1) applies to broadband ISPs as "interactive computer services," it provides a primarily procedural benefit. Even without Section 230, broadband ISPs could generally not be liable for causes of action that seek to hold them liable as "publishers," since providing a common carrier service is a non-expressive activity, not a form of "publishing." Thus, a choice by an ISP to block or limit access to material as a common carrier is not a form of editorial discretion or publication to which 230(c)(1) would apply.

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[16] *See Stratton Oakmont v. Prodigy Serv.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).
[17] *Anderson v. N.Y. Tel. Co.*, 35 N.Y.2d 746, 750 (1974) (Gabrielli, J., concurring).
[18] *Id.*
[19] *See* 47 U.S.C. § 153(50) (telecommunications common carriers provide "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.").
[20] *Chi. Lawyers' Comm. for Civ. Rights Under Law v. Craigslist*, 519 F.3d 666, 668 (2008) ("common carriers such as telephone services … neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks. Ditto courier services such as FedEx and UPS, which do not read the documents inside packages and do not make or publish any of the customers' material.") *See also* Twitter v. Taamneh, 143 S. Ct. 1206, 1226 (2023) ("[W]e generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.")

C. *There is little controlling precedent about BIAS and 230.*

It should be noted the scope of Section 230's applicability to broadband ISPs has not been well explored. The statute was enacted at a time when internet access was offered separately from telecommunications: most people used dial-up internet, ISPs were information services, and users separately provided telecommunications via their phone line. Telephone providers were subject to common carrier nondiscrimination rules with respect to users, and to dial-up ISP providers. A question before the Commission in this docket is whether nondiscrimination protections should evaporate when the telecommunications and ISP services merge. It is this context that should be kept in mind when reading Section 230's definition of the entities it applies to:

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

But after the Commission's reclassification, ISPs are no longer information services. Further, when enacted, "a service or system that provides access to the Internet " was a separate product from telecommunications, and now, it is not. Congress never considered the question of whether to include telecommunications providers under Section 230 because at the time of its enactment, telecommunications providers did not also provide Internet access. Now they do, and while Congress enacted a capacious statute, it is unlikely it intended it to limit enforcement of the Communications Act or weaken common carrier duties.

The thin authority provided by DPI does not settle the matter.[21] In *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008), the court examined Comcast's role as an email provider, not an ISP. And *Winter v. Bassett*, 2003 U.S. Dist. LEXIS 26904, is an

[21] Comments of Digital Progress Institute at 9.

unpublished opinion that presents a bizarre fact pattern where an individual sued many different entities for not cutting off access to individuals he was in a dispute with. In this case, the plaintiff himself argued that Section 230 applied to defendants, described by the court as "engaged in the business of providing access to the internet through e-mail services and websites," under a (rejected) theory that Section 230 created an affirmative duty for defendants "to limit an individual's internet access once the ISP is put on notice that the individual is using the internet for wrongful or criminal purposes."[22] Plaintiff would then enforce this duty under state law. Taking the plaintiff at his word, the court found that applying Section 230 would provide a complete defense to claims of a breach of this duty. Needless to say, this unpublished opinion with a unique fact pattern, where the question of Section 230's applicability was not in dispute between the parties, is not a compelling precedent.

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Congress did not intend for Section 230 to limit enforcement of the Communications Act.[23] To the extent it applies to broadband ISPs it does not permit them to evade their common carrier duties.

IV. THERE IS SUPPORT IN THE RECORD FOR ADDITIONAL CLEAR, BRIGHT-LINE RULES.

The Commission should adopt clear, bright-line rules to prevent practices that are clear violations of net neutrality principles. The General Conduct Rule originally adopted in 2015, and put forward again in the NPRM, is important for affording both the Commission and service providers flexibility in their policies, while staking out the essential principles of an open

[22] *Winter v. Bassett*, 2003 U.S. Dist. LEXIS 26904 at 21, 22.
[23] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.")

internet. Nevertheless, there is considerable support in the record for clear and specific bright-line rules.

The record here calls for the adoption (or readoption) of rules to prevent access fees, zero rating, traffic prioritization, and to strengthen transparency rules. Indeed, even some providers and industry groups recognize the value of bright-line rules. For example, WTA supports the proposed blocking, throttling, and paid prioritization prohibitions.[24] While they generally oppose reclassification, both CTIA and T-Mobile write in favor of regulatory approaches that promote clarity. CTIA, in its criticism of the General Conduct Rule, chiefly points to issues of uncertainty[25]—issues solved by layering more specific bright-line rules on top to create predictability and clear boundaries. T-Mobile writes that "[c]lear, well-defined rules will allow broadband internet service providers to continue investing in infrastructure and, just as important, to continue exploring and deploying new technological advances that expand capacity and accelerate service."[26] While our analysis of which rules are necessary may differ, Public Knowledge concurs with this principle. Clear rules concerning specific practices will create regulatory certainty that is critical to ensuring providers have a clear sense of the ground rules.

A. The Commission Should Adopt Rules Against Access Fees and Zero Rating.

In our original comments, Public Knowledge advocated for clear rules that prohibit charging access fees and prevent "zero rating."[27] Commenters including The Electronic Frontier Foundation, New America's Open Technology Institute, and the American Civil Liberties Union all wrote in support of the Commission adopting explicit prohibitions against zero rating.[28] Commenters recognize that zero rating practices "push consumers towards certain websites and

[24] Comments of WTA at 1.
[25] Comments of CTIA at 97-98.
[26] Comments of T-Mobile at i.
[27] Comments of Public Knowledge at 73-87.
[28] Comments of EFF at 15; Comments of OTI at 51; ACLU at 6.

away from others"[29] and "that failing to clearly prohibit discriminatory forms of zero rating will incentivize mobile BIAS providers to invest in new ways to monetize the scarcity of their existing network rather than deploy new infrastructure."[30] In addition, Public Knowledge concurs with the analysis put forward by the ACLU and EFF that zero rating "disproportionately impact[s] low-income and marginalized consumers, because they are more likely to be subject to data caps in the first place. Low-income individuals more often must rely solely upon mobile internet, which in turn is more likely than fixed internet to have data caps."[31]

B. Throttling Rules Should Prevent Prioritization, Paid or Otherwise.

The current formulation of the no throttling rule expressly forbids ISPs from deliberately slowing down specific apps or categories of apps. However, it does not explicitly prevent ISPs from accelerating certain apps or types of apps. This creates a potential loophole that could be exploited to favor certain services over others. For instance, an ISP might choose to enhance the speed of its own online video service while neglecting platforms like Netflix, or prioritize online video conferencing apps over other app categories.

Therefore, to uphold the principles of net neutrality, it is essential that the new rules explicitly prohibit ISPs from both slowing down and speeding up applications and classes of applications in addition to the rules about paid prioritization. The 2015 Order aptly recognized that accelerating select applications is equally detrimental as slowing down others. Permitting ISPs to engage in one practice while banning the other opens the door to indirect methods of favoritism, essentially achieving the same end—unfair prioritization—through different means.

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[29] Comments of ACLU at 6.
[30] Comments of OTI at 59-60.
[31] Comments of ACLU at 7; Comments of EFF at 15 ("The end result is that users on zero-rated plans simply use the broader Internet far less than they would otherwise, especially low-income users.").

This issue is particularly relevant as some carriers are exploring strategies to create 'fast lanes' for specific applications by selectively speeding them up. As Free Press points out, in a broadband market that is saturated in terms of new subscriber growth, "[i]t is possible that BIAS providers would seek partnerships with major streaming services, and prioritize the delivery of those services as a way of product differentiation."[32] Even unpaid forms of prioritization like this would have the effect of creating a two-tiered internet, with fast-lanes that allow ISPs to pick winners and losers in other markets—and control what content is most readily accessed by their subscribers. Clear and comprehensive regulations are necessary to ensure that such practices are unequivocally prohibited. Ensuring that ISPs cannot manipulate internet speeds, either by throttling or preferential acceleration, is fundamental to maintaining a free and open internet where all applications are treated equally, irrespective of their source or nature.

C. The Commission Should Strengthen Transparency Rules.

Public Knowledge supports commenters like OTI, CWA and Dr. Peha in their commendation of the Commission for working to advance transparency rules and in their call for the Commission to take the next step and fully restore the transparency rule from the 2015 Order.[33] Even opponents of the 2015 Order—including the Pai FCC—recognized the importance of transparency rules, leaving some in place. In this proceeding, industry commenters like NCTA write of the effectiveness of transparency rules in "promoting Internet openness and preventing harmful conduct."[34] If transparency is something everyone can agree on, there is no reason for the Commission to hold back on using transparency rules to augment its other open internet protections.

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[32] Comments of Free Press at 71-72.
[33] Comments of OTI at 5-6; Comments of CWA at 14-16; Comments of Jon M. Peha at 13-14.
[34] Comments of NCTA at 98.

V. WHOLESALE AND RESOLD BIAS ARE BOTH "TELECOMMUNICATIONS."

PK agrees with INCOMPAS that "the Commission should consider deleting the word 'retail' from the definition of BIAS[.]"[35] This will ensure that Title II protections apply to broadband wholesalers, who sell access to retail ISPs that serve consumers.

The Commission has already proposed that resold BIAS is a telecommunications service.[36] This is correct legally, as the statutory definition of a telecommunications service does not hinge on its being facilities-based, and in fact applies "regardless of facilities used."[37]

The statutory definition of telecommunications service likewise includes wholesale providers. A telecommunications service is offered "to the public, or to such classes of users as to be effectively available directly to the public[.]" As the Commission has consistently found, this includes wholesale offerings.[38] In the Non-Accounting Safeguards Order Reconsideration Order, the Commission reiterated that there is no basis for the conclusion that the phrase "the offering of telecommunications for a fee directly to the public, . . . regardless of the facilities used" in the definition of telecommunications service "covers only retail services."[39] Proponents of this interpretation contended that wholesale telecommunication services are not offered directly to "the public," but only to other carriers. In the Non-Accounting Safeguards First

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[35] Comments of INCOMPAS at 36.
[36] *See* NPRM ¶ 61 ("Consistent with the existing definition, we propose to include within the definition of broadband Internet access service any such service, regardless of whether the ISP leases or owns the facilities used to provide the service").
[37] 47 U.S.C. § 153(54).
[38] *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033, ¶¶ 264-265 (1996) ("Non-Accounting Safeguards Order") (concluding that the phrase "the offering of telecommunications for a fee directly to the public, . . . regardless of the facilities used" in the definition of telecommunications service includes wholesale services offered on a common carrier basis).
[39] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Order on Reconsideration, 12 FCC Rcd 8653, 8670-71, ¶ 33 (1997).

Report and Order, the Commission addressed this argument at length and rejected it primarily on the ground that it could find no basis in the statute, legislative history, or FCC precedent for finding the reference to "the public" in the statutory definition to be intended to exclude wholesale telecommunications services. Rather, the Commission concluded that the phrase "the public" was meant only to exclude private carriage services, as opposed to common carrier services.[40]

Applying Title II to resellers is also sound as a policy matter, as ensuring that users get the same open Internet protections regardless of what ISP they choose, and regardless of its business model, is not only important from a consumer protection perspective, but allows for more, and more innovative, broadband competition. As the Commission has consistently held for decades, facilitating the resale and shared use of telecommunications networks results in greater competition, encourages new entry, lowers prices, and leads to more innovation and investment.[41] Consistent with this, in a footnote worth quoting at length, the Commission explained in 2015 that:

> The Commission has consistently determined that resellers of telecommunications services are telecommunications carriers, even if they do not own any facilities. Further, as the Supreme Court observed in Brand X, "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers." *Brand X*, 545 U.S. at 997. We note that the rules apply not only to facilities-based providers of broadband service but also to resellers of that service. In applying these obligations to resellers, we recognize, as the Commission has in other contexts, that consumers will expect the protections and

[40] *Id.* *See also* Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provider Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517, ¶ 11 (2007) (Wireline Competition Bureau) ("It is clear under the Commission's precedent that the definition of ""telecommunications services" is not limited to retail services, but also includes wholesale services when offered on a common carrier basis").

[41] *See also* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Report and Order, 83 FCC 2d 167, ¶ 41 (1980); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order, 60 FCC2d 261, ¶ 88 (1976).

> benefits afforded by providers' compliance with the rules, regardless of whether the consumer purchases service from a facilities-based provider or a reseller. We note that a reseller's obligation under the rules is independent from the obligation of the facilities-based provider that supplies the underlying service to the reseller, though the extent of compliance by the underlying facilities-based provider will be a factor in assessing compliance by the reseller.[42]

Removing the "retail" qualification from the definition of BIAS eliminates a potential loophole, where net neutrality violations occur upstream, outside of the control of the retail broadband provider. As Chairwoman Rosenworcel pointed out in response to a question from Rep. Eshoo, "The question of whether resellers or wholesalers own the facilities used to provide BIAS is a fact-specific determination. While it is often the case that the wholesaler will own the underlying facilities, resellers may own parts of the underlying infrastructure in some instances."[43] But it makes no difference to users whether their own ISP, or one of their ISP's suppliers, is throttling or blocking access to a service. The effect is the same on users, and user's rights should be the same.

As Chairwoman Rosenworcel also pointed out, "in 2015, the Commission placed an obligation on resellers to ensure that the wholesale service the reseller purchases is in compliance with the rules." This approach can be strengthened. As quoted above, in 2015 the Commission rightly noted that a reseller has an independent obligation to comply with the Commission's rules, but that "the extent of compliance by the underlying facilities-based provider will be a factor in assessing compliance by the reseller." But it is less than clear exactly what "compliance" means for a wholesale ISP, unless it is clearly subject to the same rules as retail ISPs under Title II. Removing "retail" from the definition of BIAS eliminates this potential ambiguity.

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[42] 2015 Order ¶ 188, n.458 (cleaned up).
[43] QFR Responses, https://www.congress.gov/118/meeting/house/116602/witnesses/HHRG-118-IF16-Wstate-RosenworcelJ-20231130-SD156164.pdf.

This change will have numerous other benefits. Wholesale BIAS sellers might benefit from expanded MTE rules, for instance, expanding choice for residents of apartments. The privacy protections of Section 222 (and any later privacy rules) would automatically apply to wholesale as well as retail ISPs, ensuring there is no "wholesale loophole" for privacy protections, where a wholesale ISP can monitor and exploit the traffic, usage patterns, or personal information of retail customers. It would also ensure that, to the extent that certain provisions of Section 222 apply to interconnection between telecommunications carriers, that they apply to the interconnection between the wholesale and retail ISPs themselves. It would also give the Commission the ability to ensure that wholesale ISPs are living up to their common carrier obligations to their own customers, namely, retail ISPs, and do not unlawfully discriminate between them in how they offer wholesale service.

VI. NETWORK MANAGEMENT LOOPHOLES CANNOT BE PERMITTED TO SWALLOW THE NET NEUTRALITY RULES.

Historically, the FCC's 2008 Comcast Order set a precedent for reasonable network management, ensuring that ISPs manage congestion by reducing each user's bandwidth in a non-discriminatory manner.[44] This approach, grounded in the principle that users, not ISPs, should determine how to use the internet bandwidth, was reinforced in the 2015 Order, which mandated that network management be "as application-agnostic as possible."[45]

The current NPRM, however, lacks this critical requirement. Public Knowledge advocates for the inclusion of the 2015 Order's stipulation in the new reasonable network management exception. This provision is essential to prevent ISPs from selectively throttling specific applications (e.g., favoring Netflix over YouTube) or types of applications (such as gaming) during high traffic periods, regardless of whether such measures are necessary for

[44] 2008 Comcast Order, paras. 47-51; 2010 Open Internet Order, para. 87.
[45] 2015 Open Internet Order, paras. 220, 221.

managing congestion. Furthermore, it is crucial for the FCC to reinstate the 2015 Order's criterion that network management practices be primarily technically justified.

Recent efforts by ISPs to dilute this requirement raise concerns about the potential misuse of network management as a pretext for implementing practices that primarily benefit their commercial interests, rather than serving the broader goal of fair and efficient network management. For example, CTIA argues for even fewer restrictions, pushing the Commission to return to the 2010 framework which they interpret as allowing for network management decisions based on "business models" and "customer's interests."[46]

Similarly, the Commission should reject T-Mobile's proposed redefinition of "reasonable network management."[47] The NPRM proposes that "reasonable network management" be defined as "a network management practice that has a primarily technical network management justification, but does not include other business practices." T-Mobile proposes that this be changed to, "a network management practice that has a technical purpose."

The Commission's existing language is necessary because any traffic management practice, including one that is nakedly anticompetitive, can be characterized as having *some* technical purpose—for example, to slow down a rival's traffic. By restricting the scope of "reasonable network management" to practices that are *primarily* justified as traffic management techniques, the Commission's current proposed definition prevents reasonable network management from being a loophole permitting otherwise unlawful business and traffic management practices. Further, T-Mobile and other industry commenters fail to show why the Commission should weaken its rules in consideration of newer network management techniques.[48] The Commission's approach to reasonable network management and the scope of

[46] Comments of CTIA at 100-101.
[47] Comments of T-Mobile at 41.
[48] Comments of T-Mobile at 40-45.

non-BIAS services are technology-neutral, and newer network management technologies such as network slicing do not merit revisiting this approach.

The Commission should adhere to a definition of reasonable network management that centers technical considerations and specifically excludes business practices, and reintroduce the requirement to be "as application-agnostic as possible." By adhering to these principles, the FCC can ensure that internet access remains open, fair, and in the best interest of all users, particularly during times of network congestion.