



April 18th, 2024

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Safeguarding and Securing the Open Internet, 23-320

On April 18th, Harold Feld and John Bergmayer of Public Knowledge (PK) met with Hayley Steffen of Commissioner Gomez's office to discuss the commission's draft Order to restore Title II authority over broadband services.

PK began by referencing a widespread 911 outage affecting several western states. Underscoring the importance of social media for emergency communications, public safety officials in several states used social media (Facebook and X) to inform the public of the issue and to provide alternate means of contacting emergency services.¹ As PK noted in its comments, "public safety entities rely on communications through social media in emergencies both to learn where danger is unfolding and to provide necessary instructions to members of the public as broadly as possible."² This example serves to show how an open internet is essential for public safety communication.

PK agreed with the Commission's application of the impossibility exception for preemption analysis, noting that states play an important role in broadband consumer protection.³ The draft Order rightly states that California's net neutrality law is consistent with the FCC's proposed rules, and that its prohibitions on zero-rating are also covered by the general conduct standard. For clarity, the Order could also note that state laws that go *further* than the FCC's rules are not incompatible with FCC rules, and are therefore not preempted. Laws that take the Commission's

¹ Marlene Lentheng and Brian Cheung, *Major 911 outages in 4 states leave millions without a way to contact local authorities* (April 18, 2024), <https://www.nbcnews.com/news/us-news/major-911-outages-4-states-leave-millions-way-contact-local-authoritie-rcna148345>.

² Comments of Public Knowledge in WC Docket No. 23-320 (December 14, 2023) at 6 (citing County of Santa Clara, et al., Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42).

³ See *Draft Order* ¶ 265.

rules as a regulatory floor do not meet the “impossibility” grounds for preemption, provided the state laws do not make it impossible to comply with the Commission’s rules.

The draft Order’s emphasis on forbearing from “*ex post*” as well as “*ex ante*” price regulation creates confusion with regard to the exercise of the Commission’s proposed exercise of consumer protection under Sections 201 and 202. The term “*ex post* price regulation” did not occur anywhere in the 2015 *Order*.⁴ It appeared solely in the dissents, in which the dissenters maintained that virtually any consumer protection amounted to “*ex post* price regulation” – an allegation denied in the concurring statements. It therefore falls to the Commission to explain this novel phrase and how it is otherwise consistent with the Commission’s declaration that it explicitly **does not** forbear from the power to protect consumers – beyond the protection of the bright line net neutrality rules adopted in the Order.⁵

Opponents of Commission consumer protection authority routinely characterize actions the Commission has already taken, or proposed to take, as “rate regulation.” For example, opponents of the Commission’s anti-digital discrimination rules characterize consideration of discriminatory pricing as “rate regulation.” They have characterized the proposed requirement to ban ETFs and to require all-in pricing as “rate regulation.” In short, without clear limits on what the never-before-used term “*ex post* rate regulation” actually means, the Commission leaves itself open to collateral attack on virtually any consumer protection action through a claim to a reviewing court that the Commission previously forbore from the remedy as “*ex post* rate regulation.”⁶

In particular, the Commission should clarify that forbearance from “*ex post* rate regulation” does not in any way interfere with the power of the Commission, state agencies, or other federal agencies, to require providers to offer discounted “affordability” programs for those who qualify. For example, the Commission should not forbear from its authority to impose (and enforce) low-cost offerings to qualifying individuals as merger conditions, or as conditions on subsidies.⁷

⁴ Indeed, the sole appearance of *ex post* in the text of the 2015 Order (as opposed to the dissents) is in Paragraph 451, where the Order concludes that *ex ante* regulations are unnecessary because of the authority to provide *ex post* remedies.

⁵ See *Draft Order* ¶¶ 317-324.

⁶ PK notes that, without some kind of limiting principle, even the most outrageous price gouging or deceptive fees could be protected from Commission action as a form of “*ex post* rate regulation.”

⁷ For example, as part of approving various mergers, the Commission has required the new entity to offer a low-cost stand alone broadband service for qualifying low-income customers. The Commission should clarify that its forbearance from “*ex post* price regulation” does not indicate any intent to avoid imposing such merger conditions going forward, or from enforcing such conditions post merger.

Whether or not the Commission decides to clarify the reach of its own forbearance from “rate regulation,” the Commission should be clear that states remain free to adopt affordability programs and that it does not preempt state affordability programs (whether as legislation or as a condition to receive grants or subsidies). The draft Order’s language stating that “... in contrast to our treatment of rate regulation, from which we have affirmatively forborne, we have not determined that regulation of zero-rating and interconnection is detrimental” presents another potential state preemption concern, as this language could undermine state broadband affordability measures in practice.⁸ Industry groups are currently arguing across the country that affordability requirements on broadband subsidies constitute “rate regulation”⁹—a radical view that would limit public oversight of public money, and one the Commission can push back on in its forthcoming order. Indeed, we have already seen such measures be inappropriately characterized as rate regulation, such as when the state of Virginia refused to specify an “affordable” price as required by NTIA on the grounds that setting an affordable price would constitute rate regulation.¹⁰

Elsewhere, the draft Order characterizes state affordability programs as a form of permissible state oversight, not rate regulation.¹¹ The Order should clarify that states are free to require affordable programs similar to the state of New York’s affordability program, which is currently challenged as rate regulation and therefore preempted. Congress has repeatedly, explicitly supported the creation and requirement of affordability programs; including through the Broadband Equity, Access, and Deployment Act, which required participating entities to address affordability through a middle-class affordability plan and a low-cost broadband service option.¹²

PK also argued that the Commission should avoid forbearance where a waiver is sufficient, or where statutory authority may overlap. Specifically, rather than forbear from the Section 214 exit requirements, the Commission should waive these requirements and consider whether forbearance is justified in the potential future Section 214 rulemaking mentioned in the draft Order. While it is true that ISPs have never been subject to Section 214 exit requirements, they have not been subject to any other Section 214 obligations. The Commission has elsewhere characterized the importance of Section 214 exit obligations to ensure that no one who has

⁸ *Draft Order* ¶ 271.

⁹ Tony Romm, Telecom fights price caps as U.S. spends billions on internet access, *Washington Post* (April 15, 2024), <https://www.washingtonpost.com/business/2024/04/15/telecom-lobbying-price-caps-broadband>.

¹⁰ Broadband Breakfast. *Virginia and NTIA at Odds on BEAD Low-Cost Option*. (Dec. 15, 2023.)

¹¹ See *Draft Order* ¶ 23 n.55, ¶ 54 n.195 (citing NY Gen. Bus. § 399-zzzzz (N.Y. 2021)).

¹² NTIA. *Notice of Funding Opportunity: Broadband Equity, Access, and Deployment Program* (May 12, 2022.)

service faces a future with no service options – and to allow the Commission to actively monitor the state of the market.¹³

Similarly, the Commission should not forbear simply because it believes it can replicate authorities via other statutory provisions. The provisions of Sections 211, 212, 213, 215, and 220 may today seem unnecessary and redundant. But they provide statutory mechanisms by which the Commission may – when necessary – procure information critical to its functions in monitoring communications markets. There is no reason to forbear simply for the sake of forbearing when a waiver will minimize any regulatory burden without depriving the Commission of useful tools for the future.

Finally, PK reiterated its prior remarks that although emerging “non-BIAS” technologies *can* be compatible with the new Open Internet rules, particularly in the development of industrial or enterprise services, innovation must not be used as a pretext to justify the creation of a two-tiered Internet.

The draft Order notes that offering paid prioritization would harm the open internet because it would give ISPs the incentive to “strategically degrade, or decline to maintain or increase, the quality of service to non-prioritized uses and users in order to raise the profits from selling priority access.”¹⁴ PK observed that these economic incentives to degrade service could be reconstituted through developments in “non-BIAS services,” such as network slices. As PK has stated in prior comments, the commission must ensure that new network technologies are deployed in a non-discriminatory way.¹⁵

Respectfully submitted,

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¹³ See generally *Tech Transition Proceedings*, Docket No. 13-5.

¹⁴ Draft Order ¶ 497.

¹⁵ Public Knowledge. *Ex Parte Re: Safeguarding and Securing the Open Internet*, 23-320; *Restoring Internet Freedom*, 17-108; *Bridging the Digital Divide for Low-Income Consumers*, 17-287; *Lifeline and Link Up Reform and Modernization*, 11-42 (Mar. 11, 2024.)