

Before the
Federal Communications Commission
Washington, D.C. 20554

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

NOTICE OF PROPOSED RULEMAKING

Adopted: May 18, 2017

Released: May 23, 2017

Comment Date: July 17, 2017

Reply Comment Date: August 16, 2017

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements;
Commissioner Clyburn dissenting and issuing a statement.

TABLE OF CONTENTS

Table with 2 columns: Section Title and Page Number. Includes sections like I. INTRODUCTION, II. BACKGROUND, III. ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET, etc.

I. INTRODUCTION

1. Americans cherish a free and open Internet. And for almost twenty years, the Internet flourished under a light-touch regulatory approach. It was a framework that our nation's elected leaders put in place on a bipartisan basis. President Clinton and a Republican Congress passed the Telecommunications Act of 1996, which established the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”¹

2. During this time, the Internet underwent rapid, and unprecedented, growth.² Internet service providers (ISPs) invested over \$1.5 trillion in the Internet ecosystem³ and American consumers enthusiastically responded. Businesses developed in ways that the policy makers could not have fathomed even a decade ago. Google, Facebook, Netflix, and countless other online businesses launched in this country and became worldwide success stories. The Internet became an ever-increasing part of the American economy, offering new and innovative changes in how we work, learn, receive medical care, and entertain ourselves.⁴

3. But two years ago, the FCC changed course. It decided to apply utility-style regulation to the Internet. This decision represented a massive and unprecedented shift in favor of government control of the Internet.

4. The Commission's *Title II Order* has put at risk online investment and innovation, threatening the very open Internet it purported to preserve. Investment in broadband networks declined. Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to consumers. This is particularly true of the smallest Internet service providers that serve consumers in rural, low-income, and other underserved communities. Many good-paying jobs were lost as the result of these pull backs. And the order has weakened Americans' online privacy by stripping the Federal Trade Commission—the nation's premier consumer protection agency—of its jurisdiction over ISPs' privacy and data security practices.

5. Today, we take a much-needed first step toward returning to the successful bipartisan framework that created the free and open Internet and, for almost twenty years, saw it flourish. By proposing to end the utility-style regulatory approach that gives government control of the Internet, we aim to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015. Our actions today continue our critical work to promote broadband deployment to rural

¹ 47 U.S.C. § 230(b)(2).

² See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1383, para. 15 (2015) (*2015 Broadband Progress Report*) (noting that broadband providers recognized “both the value of and the need for continued investment to develop a robust broadband network that will meet consumers' demands,” and that between 2012 and 2013, broadband providers had increased their investments by approximately 10 percent, to \$75 billion).

³ USTelecom, Broadband Investment, Historical Broadband Provider Capex (2017) (data through 2015), <https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment> (last visited May 19, 2017).

⁴ See, e.g., Aaron Smith, Pew Research Center, Searching for Work in the Digital Era at 2 (2015), http://www.pewinternet.org/files/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf (detailing the importance of the Internet for job seekers); *Lifeline & Link Up Reform & Modernization*, Order on Reconsideration, 31 FCC Rcd 3962, 3967, para. 16 (2016) (discussing the benefits of telemedicine).

consumers and infrastructure investment throughout our nation, to brighten the future of innovation both within networks and at their edge, and to close the digital divide.⁵

II. BACKGROUND

6. Long before the commercialization of the Internet, federal law drew a line between the heavily regulated common carrier services and more lightly regulated services that went beyond mere transmission. Starting in 1966, the Commission initiated the *Computer Inquiries*,⁶ which created a dichotomy between basic and enhanced services.⁷ Basic services offered “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information”⁸ and were “regulated under Title II of the [Communications] Act.”⁹ Enhanced services were “any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber’s information.”¹⁰ Unlike basic services, the Commission found that “enhanced services should not be regulated under the Act.”¹¹

7. Just two years later, the federal courts would draw a similar line in resolving the government’s antitrust case against AT&T. The Modification of Final Judgment (MFJ) of 1982 distinguished between “telecommunications services,” which Bell Operating Companies could offer when “actually regulated by tariff,”¹² and “information services,” including “data processing and other computer-related services”¹³ and “electronic publishing services,”¹⁴ which Bell Operating Companies were prohibited from offering entirely.¹⁵

8. In the Telecommunications Act of 1996, intended to “promote competition and reduce regulation,”¹⁶ President Clinton and Congress drew a line between lightly regulated “information services” and more heavily regulated “telecommunications services.”¹⁷ They also found that the “Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum

⁵ We note that since this docket was opened on April 27, 2017, this matter has generated significant public interest. The public will continue to have opportunities to participate in this important proceeding following adoption and release of the text of this Notice through a robust comment and reply comment period. Moreover, presentations made by the public before or after the Sunshine Agenda period will be made a part of the formal record of the proceeding.

⁶ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966).

⁷ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980).

⁸ *Id.* at 420, para. 96.

⁹ *Id.* at 428, para. 114.

¹⁰ *Id.* at 420, para. 97.

¹¹ *Id.* at 428, para. 114.

¹² *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228–29 (D.D.C. 1982).

¹³ *Id.* at 179.

¹⁴ *Id.* at 180.

¹⁵ *Id.* at 228.

¹⁶ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as “[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

¹⁷ 47 U.S.C. § 153(24), (53).

of government regulation”¹⁸ and declared it the policy of the United States to “promote the continued development of the Internet and other interactive computer services and other interactive media” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁹ The 1996 Act went on to define “interactive computer service” to include “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”²⁰

9. Congress weighed in again two years later. Five Senators—John Ashcroft, Wendell Ford, John F. Kerry, Spencer Abraham, and Ron Wyden—wrote the Commission that “[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”²¹ These five members further warned that if the Commission “subject[ed] some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.”²²

10. For the next 16 years, the Commission repeatedly followed their advice, opting for a light-touch approach to the Internet that favored discrete and targeted actions over traditional pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the Commission comprehensively reviewed the Act’s definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service.²³ The *Stevens Report* exhaustively reviewed the text and legislative history of the Telecommunications Act, along with the agency’s own administrative precedent and the courts’ administration of antitrust law.²⁴ Looking to the Act’s text, the Commission concluded that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport,”²⁵ and it “recognize[d] the unique qualities of the Internet, and [did] not presume that legacy regulatory frameworks are appropriately applied to it.”²⁶ Further, even “address[ing] the classification of Internet access service *de novo*” the *Stevens Report* reached the same conclusion: Internet access service is an information service according to the statute.²⁷ The *Stevens Report* also found that subjecting Internet service providers and other information service providers to “the broad range of Title II constraints,” would “seriously curtail the regulatory freedom that the

¹⁸ 47 U.S.C. § 230(a)(4).

¹⁹ 47 U.S.C. § 230(b)(1), (2).

²⁰ 47 U.S.C. § 230(f)(2).

²¹ Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998) (Five Senators Letter), <http://apps.fcc.gov/ecfs/document/view?id=2038710001>.

²² *Id.*

²³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*).

²⁴ *See, e.g., id.*, 13 FCC Rcd at 11513-14, 11520, 11536–37, paras. 27, 39, 74–75. The *Stevens Report* also noted that “[s]ince *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced,” while “the matter is more complicated when it comes to offerings by facilities-based providers.” *Id.* at 11530, para. 60.

²⁵ *Id.* at 11536, para. 73.

²⁶ *Id.* at 11540, para. 82.

²⁷ *See, e.g., id.*

Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.”²⁸

11. In the 2002 *Cable Modem Order*, the Commission classified broadband Internet access service over cable systems as an “interstate information service.”²⁹ The Commission did so based on the “functions that cable modem service makes available to its end users,”³⁰ on the fact that the “telecommunications component is not, however, separable from the data-processing capabilities of the service,”³¹ and is an information service “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”³² The Commission was also guided by its belief that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market,”³³ and the knowledge that regulatory uncertainty “may discourage investment and innovation.”³⁴

12. In June 2005, the Supreme Court decisively upheld the Commission’s 2002 classification of broadband Internet access service over cable systems as a lightly-regulated Title I information service.³⁵

13. In 2004, then-FCC Chairman Michael Powell announced four principles for Internet freedom to further ensure that the Internet would remain a place for free and open innovation with minimal regulation.³⁶ These four “Internet freedoms” include the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.³⁷

14. In the 2005 *Wireline Broadband Classification Order*, the Commission classified broadband Internet access service over wireline facilities as an information service.³⁸ In reaching this conclusion, the Commission relied on the plain text of the Act, finding that “providers of wireline broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition,”³⁹ and that users of wireline

²⁸ *Id.* at 11524, para. 46.

²⁹ See *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802, para. 7 (2002) (*Cable Modem Order*).

³⁰ *Id.* at 4821, para. 35.

³¹ *Id.* at 4823, para. 39.

³² *Id.* at 4822–23, para. 38 (footnote omitted).

³³ *Id.* at 4802, para. 5.

³⁴ *Id.*

³⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

³⁶ Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

³⁷ *Id.* at 5.

³⁸ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Classification Order*), *aff’d Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

³⁹ *Id.* at 14860, para. 9.

broadband Internet access service were provided “more than [a] pure transmission” path whenever they accessed the Internet.⁴⁰

15. In 2005, the Commission also unanimously endorsed the four Internet freedoms in the *Internet Policy Statement*.⁴¹ The *Internet Policy Statement* announced the Commission’s intent to “incorporate [these] principles into its ongoing policymaking activities” in order to “foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition.”⁴²

16. In the 2006 *BPL-Enabled Broadband Order*, the Commission concluded that broadband Internet access service over power lines was properly classified as an information service.⁴³ This decision established “a minimal regulatory environment” which promoted “ubiquitous availability of broadband to all Americans.”⁴⁴ The Commission noted that broadband-powerline-enabled Internet access service “combines computer processing, information provision, and computer interactivity with data transport, [which] enable[es] end users to run a variety of applications,”⁴⁵ and concluded that classification as an information service “encourage[es] the deployment of broadband Internet access services.”⁴⁶

17. In the 2007 *Wireless Broadband Internet Access Order*, the Commission classified wireless broadband Internet access service as an information service, again recognizing the “minimal regulatory environment” that promoted the “ubiquitous availability of broadband to all Americans.”⁴⁷ Consistent with its prior interpretations, the Commission concluded that “wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.”⁴⁸ The Commission also found that “mobile wireless broadband Internet access service is not a ‘commercial mobile radio service’ as that term is defined in the Act and implemented in the Commission’s rules.”⁴⁹

18. In the 2008 *Comcast-BitTorrent Order*, the Commission sought to directly enforce federal Internet policy consistent with the *Internet Policy Statement*, finding Comcast’s actions “contravene[d] . . . federal policy” by “significantly impede[ing] consumers’ ability to access the content

⁴⁰ *Id.* at 14864, para. 15.

⁴¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

⁴² *Internet Policy Statement*, 20 FCC Rcd at 14988, para 5. The Commission did this, for example, by incorporating such principles in its rules governing certain wireless spectrum. *See Service Rules For the 698-746, 747-762 and 777-792 MHz Bands et al.*, WT Docket No. 06-150 et al., Second Report and Order, 22 FCC Rcd. 15289, 15361, 15365, paras. 194, 206 (2007).

⁴³ *See United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL-Enabled Broadband Order*).

⁴⁴ *Id.* at 13281, para. 2.

⁴⁵ *Id.* at 13826, para. 9.

⁴⁶ *Id.* at 13827, para. 10.

⁴⁷ *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902, para. 2 (2007) (*Wireless Broadband Internet Access Order*).

⁴⁸ *Id.* at 5911, para. 26.

⁴⁹ *Id.* at 5916, para. 41.

and use the applications of their choice.”⁵⁰ In 2010, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission’s action, holding that the Commission had not justified its action as a valid exercise of ancillary authority.⁵¹

19. In response, the Commission adopted the 2010 *Open Internet Order*, where once again the Commission specifically rejected more heavy-handed regulation of broadband Internet access service.⁵² Instead, the *Open Internet Order* relied on, among other things, newly-claimed regulatory authority under section 706 of the Telecommunications Act to establish no-blocking and no-unreasonable-discrimination rules as well as a requirement that broadband Internet access service providers “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services.”⁵³ In doing so, the Commission distinguished between fixed and mobile broadband Internet access services, reasoning that the latter “presents special considerations that suggest differences in how and when open Internet protections should apply.”⁵⁴

20. In 2014, the D.C. Circuit vacated the no-blocking and no-unreasonable-discrimination rules adopted in the *Open Internet Order*, finding that the rules impermissibly regulated broadband Internet access service providers as common carriers,⁵⁵ in conflict with the Commission’s prior determination that broadband Internet access service was not a telecommunications service and that mobile broadband Internet access service was not a commercial mobile service.⁵⁶ The D.C. Circuit nonetheless upheld the transparency rule,⁵⁷ claimed the Commission had authority to regulate broadband Internet access service providers under section 706 of the Telecommunications Act, and suggested that no-blocking and no-unreasonable-discrimination rules might be permissible if Internet service providers could engage in individualized bargaining.⁵⁸

⁵⁰ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13052, 13054, paras. 43, 45 (2008) (*Comcast-BitTorrent Order*).

⁵¹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*). Among other things, the court held that section 706 of the 1996 Act could not serve as the source of direct authority to which the Commission’s action was ancillary because the Commission was bound in *Comcast* by a prior Commission determination that section 706 did not constitute a direct grant of authority. *Id.* at 658–59.

⁵² *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972–80, 17981, paras. 124–35, 137 (2010) (*Open Internet Order*).

⁵³ *Id.* at 17992 (Appendix A).

⁵⁴ *Id.* at 17956, para. 94.

⁵⁵ *Verizon v. FCC*, 740 F.3d 623, 655–58 (D.C. Cir. 2014) (*Verizon*) (vacating the Commission’s rule prohibiting “unreasonable discrimination” by fixed broadband providers on the theory that it “so limited broadband providers’ control over edge providers’ transmissions that [it] constitute[d] common carriage *per se*” and finding that the no-blocking rules “would appear on their face” to impose common carrier obligations on fixed and mobile broadband providers).

⁵⁶ *Id.* at 650.

⁵⁷ *Id.* at 635–42.

⁵⁸ *See, e.g., id.* at 657 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012)).

21. Later that year, the Commission embarked yet again down the path of rulemaking, proposing to rely on section 706 of the Telecommunications Act to adopt enforceable rules using the court's "roadmap."⁵⁹

22. In November 2014, then-President Obama called on the FCC to "reclassify consumer broadband service under Title II of the Telecommunications Act."⁶⁰ Three months later, the Commission adopted the *Title II Order*, reclassifying broadband Internet access services from information services to telecommunications services.⁶¹ In doing so, the Commission found it necessary to forbear from enforcing the "vast majority of rules adopted under Title II," including "30 statutory provisions[.]" and to render "over 700 codified rules inapplicable."⁶² The Commission adopted no-blocking, no-throttling, and no-paid-prioritization rules, as well as a general Internet conduct standard and "enhancements" to the transparency rule.⁶³ In 2016, a divided panel of the D.C. Circuit Court of Appeals upheld the *Title II Order* in *United States Telecom Ass'n v. FCC*, with the D.C. Circuit denying petitions for rehearing of the case *en banc*.⁶⁴

III. ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET

23. Between enactment of the Telecommunications Act and the 2015 adoption of the *Title II Order*, the free and open Internet flourished: Providers invested over \$1.5 trillion to construct networks; high-speed Internet access proliferated at affordable rates; and consumers were able to enjoy all that the Internet had to offer. In 2015, the Commission abruptly departed from its prior posture and classified broadband Internet access service as a telecommunications service subject to public-utility regulations under Title II.

24. Today, we propose to reinstate the information service classification of broadband Internet access service and return to the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration. We also propose to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service.

A. Reinstating the Information Service Classification of Broadband Internet Access Service

25. Our proposal to classify broadband Internet access service as an information service is based on a number of factors. First, we examine the text, structure, and history of the Communications Act and the Telecommunications Act, combined with the technical details of how the Internet works. Second, we examine Commission precedent. Third, we examine public policy and our goal of benefiting consumers through greater innovation, investment, and competition. We seek comment on our proposals and these analyses.

⁵⁹ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Notice*).

⁶⁰ President Obama, Statement on Net Neutrality (Nov. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/10/statement-president-net-neutrality>.

⁶¹ *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

⁶² *Id.* at 5616, para. 51.

⁶³ *Id.* at 5607-09, paras. 15-24.

⁶⁴ *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) (*USTelecom*), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017) (stating that "[e]n banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order").

1. The Text and Structure of the Act

26. We start with the text of the Act itself. Section 3 of the Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁶⁵ Section 3 defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁶⁶ Section 3 also defines “telecommunications,” used in each of the prior two definitions, as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁶⁷

27. We believe that Internet service providers offer the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁶⁸ Whether posting on social media or drafting a blog, a broadband Internet user is able to generate and make available information online. Whether reading a newspaper’s website or browsing the results from a search engine, a broadband Internet user is able to acquire and retrieve information online. Whether it’s an address book or a grocery list, a broadband Internet user is able to store and utilize information online. Whether uploading filtered photographs or translating text into a foreign language, a broadband Internet user is able to transform and process information online. In short, broadband Internet access service appears to offer its users the “capability” to perform each and every one of the functions listed in the definition—and accordingly appears to be an information service by definition. We seek comment on this analysis. Can broadband Internet users indeed access these capabilities? Are there other capabilities that a broadband Internet user may receive with service? If broadband Internet access service does not afford one of the listed capabilities to users, what effect would that have on our statutory analysis? More fundamentally, we seek comment on how the Commission should assess whether a broadband provider is “offering” a capability. Should we assess this from the perspective of the user, from the provider, or through some other lens?

28. In the *Cable Modem Order*, the Commission recognized that broadband Internet users often used services from third parties: “[S]ubscribers, by ‘click-through’ access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast’s cable modem service may bypass that company’s web browser, proprietary content, and email. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft’s ‘Hotmail.’”⁶⁹ It nonetheless found the classification appropriate “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”⁷⁰ In the *Title II Order*, the Commission in turn found that “consumers are very likely to use their high-speed Internet connections to take advantage of competing services offered by third parties”⁷¹ and asserted the service “is useful to consumers today primarily as a conduit for reaching modular content, applications, and

⁶⁵ 47 U.S.C. § 153(24).

⁶⁶ 47 U.S.C. § 153(53).

⁶⁷ 47 U.S.C. § 153(50).

⁶⁸ 47 U.S.C. § 153(24).

⁶⁹ *Cable Modem Order*, 17 FCC Rcd at 4816, para. 25.

⁷⁰ *Id.* at 4822–23, para. 38 (footnote omitted).

⁷¹ *Title II Order*, 30 FCC Rcd at 5753, para. 347.

services that are provided by unaffiliated third parties.”⁷² We seek comment on how consumers are using broadband Internet access service today. It appears that, as in 2002 and 2013, broadband Internet users “obtain many functions from companies” other than their Internet service provider. It also appears that many broadband Internet users rely on services, such as Domain Name Service (DNS) and email, from their ISP. Is that correct? If not, what services are broadband Internet users accessing from what providers? More generally, we seek comment on the relevance of this analysis. The definition of “information service” speaks to the “capability” to perform certain functions. Is a consumer capable of accessing these online services without Internet access service? Could a consumer access these online services using traditional telecommunications services like telephone service or point-to-point special access?⁷³ Or are we correct that offering Internet access is precisely what makes the service capable of “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information” to consumers?

29. In contrast, Internet service providers do not appear to offer “telecommunications,” i.e., “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received,” to their users. *For one*, broadband Internet users do not typically specify the “points” between and among which information is sent online. Instead, routing decisions are based on the architecture of the network, not on consumers’ instructions, and consumers are often unaware of where online content is stored. Domain names must be translated into IP addresses (and there is no one-to-one correspondence between the two). Even IP addresses may not specify where information is transmitted to or from because caching servers store and serve popular information to reduce network loads. In short, broadband Internet users are paying for the access to information “with no knowledge of the physical location of the server where that information resides.”⁷⁴ We believe that consumers want and pay for these functionalities that go beyond mere transmission—and that they have come to expect them as part and parcel of broadband Internet access service. We seek comment on our analysis. How are broadband Internet users’ requests for information handled by Internet service providers today? What functionalities beyond mere transmission do Internet service providers incorporate into their broadband Internet access service? We particularly seek comment on the *Title II Order*’s assertion that the phrase “points specified by the user” is ambiguous⁷⁵—how should we interpret that phrase so that it carries with it independent meaning and is not mere surplusage? Is it enough, as the *Title II Order* asserted, for a broadband Internet user to specify the information he is trying to access but not the “points” between or among which the information will be transmitted? Does it matter that the Internet service provider specifies the points between and among which information will be transmitted?⁷⁶

⁷² *Id.* at 5755, para. 350.

⁷³ In the past, rate-of-return carriers have offered broadband Internet access transmission service as a common-carriage last-mile service that transmits data between and end user and an ISP. *Wireline Broadband Classification Order*, 20 FCC Rcd at 14899–900, paras. 86–88. Absent an ISP at the other end, however, broadband Internet access transmission service only transmits data to a carrier’s central office (or other aggregation point) as it does not itself offer the capabilities that come with Internet access.

⁷⁴ *Stevens Report*, 13 FCC Rcd at 11532, para. 64.

⁷⁵ *Title II Order*, 30 FCC Rcd at 5761–62, para. 361.

⁷⁶ We note that the *Title II Order* asserted that “[i]t is not uncommon in the toll-free arena for a single number to route to multiple locations, and such a circumstance does not transform that service to something other than telecommunications.” *Title II Order*, 30 FCC Rcd at 5761–62, para. 361. Despite that assertion, the Commission *has* expressly found that the management of toll-free numbers is “not a common carrier service” and that providers that manage toll-free numbers “do not need to be carriers.” *800 Data Base Access Tariffs and the 800 Service Management System Tariff; Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227, 15248–49, paras. 44–45 (1996).

30. *For another*, Internet service providers routinely change the form or content of the information sent over their networks—for example, by using firewalls to block harmful content or using protocol processing to interweave IPv4 networks with IPv6 networks. The Commission has acknowledged that broadband Internet networks must be reasonably managed since at least the *2005 Internet Policy Statement*.⁷⁷ We believe that consumers want and pay for these functionalities that go beyond mere transmission—and that they have come to expect them as part and parcel of broadband Internet access service. We seek comment on our analysis. What constitutes a “change in the form” of information? If not the protocol-processing for internetworking or other protocol-processing performed as part of Internet access service, how should we interpret this phrase so it carries with it independent meaning and is not mere surplusage? How could we plausibly conclude that it is not a “change in the . . . content” to use firewalls and other reasonable network management tools to shield broadband Internet users from unwanted intrusions and thereby alter what information reaches the user for the user’s benefit? We seek comment on other ways in which Internet service providers change the form or content of information to facilitate a broadband Internet user’s experience online.

31. Other provisions of the Act appear to confirm our analysis that broadband Internet access services should be classified as information services. For instance, section 230 defines an interactive computer service to mean “*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.*”⁷⁸ On its face, the plain language of this provision deems Internet access service an information service. We seek comment on this analysis, on the language of section 230, and on how it should impact our classification of broadband Internet access service.

32. Section 231 is even more direct. It expressly states that “Internet access service” “does not include telecommunications services.”⁷⁹ And it defines Internet access service as one offering many capabilities (like an information service): “a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.”⁸⁰ Although inserted into the Communications Act one year after the Telecommunications Act’s passage⁸¹ and previously interpreted to “clarify that section 231 was not intended to impair our or a state commission’s ability to regulate basic telecommunications services,”⁸² this language on its face makes clear that Internet access service is not a telecommunications service. We seek comment on this analysis, on the language of section 231, and on how it should impact our classification of broadband Internet access service.

33. The structure of Title II appears to be a poor fit for broadband Internet access service. In the *Title II Order*, the Commission, on its own motion, forbore either in whole or in part on a permanent or temporary basis from 30 separate sections of Title II as well as from other provisions of the Act and

⁷⁷ *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 5 & n.5.

⁷⁸ 47 U.S.C. § 230(f)(2).

⁷⁹ 47 U.S.C. § 231(e)(4).

⁸⁰ 47 U.S.C. § 231(e)(4).

⁸¹ Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681–736, § 1403 (codified at 47 U.S.C. § 231), *enjoined from enforcement in alternative part by American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (2008) (prohibiting the enforcement of COPA’s civil and criminal penalties contained in 47 U.S.C. § 231(a)(1)), *cert. denied* 555 U.S. 1137 (2009).

⁸² *Cable Modem Order*, 17 FCC Rcd at 4799, para. 1 & n.2.

Commission rules.⁸³ The significant forbearance the Commission granted in the *Title II Order* suggests the highly prescriptive regulatory framework of Title II is unsuited for the dynamic broadband Internet access service marketplace. We seek comment on this analysis, and on what weight we should give this analysis in examining the future of this model of regulation.

34. The purposes of the Telecommunications Act appear to be better served by classifying broadband Internet access service as an information service. Congress passed the Telecommunications Act to “promote competition and reduce regulation”⁸⁴ and “[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”⁸⁵ Or as Senator John McCain put it, “[i]t certainly was not Congress’s intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation.”⁸⁶ Or as Congress codified its intent in section 230: It is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁸⁷ An information service classification would “reduce regulation” and preserve a free market “unfettered by Federal or State regulation”—but a telecommunications service classification would not. Indeed, as Judge Brown of the D.C. Circuit recently noted, “[b]y incorporating [the] FCC’s distinction between ‘enhanced service’ and ‘basic service’ into the statutory scheme, and by placing Internet access on the ‘enhanced service’ side, Congress prohibited the FCC from construing the ‘offering’ of ‘telecommunications service’ to be the ‘information service’ of Internet access.”⁸⁸ We seek comment on this analysis, as well as whether there are any other provisions of the Communications Act or Telecommunications Act that establish congressional intent with respect to the appropriate regulatory framework for broadband Internet access services.

35. More broadly, we seek comment on the text, structure, and purposes of the Communications Act and the Telecommunications Act, as well as any additional facts about what Internet service providers offer, how broadband Internet access service works, and what broadband Internet users expect that might inform our analysis.

36. We seek special comment on two aspects of the *Title II Order*’s interpretation of the Act. First, the *Title II Order* claimed its interpretation sprang in part from a change in “broadband providers’ marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer.”⁸⁹ It claimed this marketing “leaves a reasonable consumer with the impression that a certain level of transmission capability—measured in terms of ‘speed’ or ‘reliability’—is being offered in exchange for the subscription fee, even if

⁸³ See *Title II Order*, 30 FCC Rcd at 5834, para. 486 (sections 254(d), (g), and (k)); 5825, para. 470 (section 225(d)(3)(B)); 5835, para. 488 (section 254(d)’s first sentence); 5841, para. 497 (section 203); 5845, para. 505 (section 204); 5845, para. 506 (section 205); 5846, para. 508 (sections 211, 213, 215, 218, 219, 220); 5847-49, paras. 509-12 (section 214 except for subsection (e)); 5849-50, para. 513 & n.1571 (section 251 except for subsection (a)(2), section 256); 5852, para. 515 (section 258).

⁸⁴ Preamble, Telecommunications Act of 1996.

⁸⁵ *Five Senators Letter* at 1.

⁸⁶ *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

⁸⁷ 47 U.S.C. § 230(b)(1).

⁸⁸ *USTelecom*, 825 F.3d 674, *reh’g en banc denied*, No. 15-1063, 2017 WL 1541517, at *20 (D.C. Cir. May 1, 2017) (Brown, J., dissenting from the denial of rehearing en banc).

⁸⁹ *Title II Order*, 30 FCC Rcd at 5743, para. 330.

complementary services are also included as part of the offer.”⁹⁰ We note that even before the *Cable Modem Order*, the Commission recognized that Internet service providers marketed the speed of their connections.⁹¹ We seek comment on whether Internet service providers’ marketing has decidedly changed in recent decades.⁹² More generally, we seek comment on the relevance of this argument. Neither statutory service definition speaks of speed or reliability, and there is little reason to think consumers might want a fast or reliable “transmission . . . of information” but not a fast or reliable “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.” Indeed, many of the advertisements discussed by the *Title II Order* speak directly to the capabilities offered through high-speed service.⁹³ We seek comment on this analysis and on any other relevant facts regarding whether broadband Internet users receive the capabilities of an information service or the mere transmission between points of a user’s choosing of a telecommunications service.

37. Second, the *Title II Order* found that DNS⁹⁴ and caching⁹⁵ used in broadband Internet access service were just used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁹⁶ The Commission has previously held this category applies to “adjunct-to-basic” functions that are “incidental” to a telecommunications service’s underlying use and “do not alter [its] fundamental character.”⁹⁷ As such, these functions generally are not “useful to end users, rather than carriers.”⁹⁸ We seek comment on how DNS and caching functions are now used, whether they benefit end users, Internet service providers, or both, and whether they fit within the adjunct-to-basic exception. How would broadband Internet access service work without DNS or caching? Would removing DNS have a merely incidental effect on broadband Internet users, or would it fundamentally change their online experience? Absent caching, would broadband Internet users that now expect high-quality video streaming see only incidental changes or more fundamental changes? Are there other ways that DNS or caching are used for “for the management, control, or operation of a telecommunications system”? Are there any other aspects of the *Title II Order*’s treatment of DNS or caching that should be reconsidered here?

⁹⁰ *Id.* at 5757, para. 354.

⁹¹ See, e.g., *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*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, 20931, paras. 36–37 (2000).

⁹² We note that in conducting its review of the changed circumstances, the D.C. Circuit concluded that there was no need to decide whether there really was anything new because the Commission in the *Title II Order* “concluded that changed factual circumstances were not critical to its classification decision.” *USTelecom*, 825 F.3d at 709.

⁹³ See, e.g., *Title II Order*, 30 FCC Rcd at 5756, para. 352.

⁹⁴ *Title II Order*, 30 FCC Rcd at 5758, para. 356 & n.972 (defining DNS as services “most commonly used to translate domain names, [into] numerical IP addresses that are used by network equipment to locate the desired content”).

⁹⁵ *Id.* at 5758, para. 356 & n.973 (defining caching as “the storing of copies of content at locations in a network closer to subscribers than the original source of the content [, which] enables more rapid retrieval of information from websites that subscribers wish to see most often”).

⁹⁶ 47 U.S.C. § 153(24); *Title II Order*, 30 FCC Rcd at 5765–66, para. 366.

⁹⁷ See *North American Telecommunications Association Petition for Declaratory Ruling Under §64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349, 359–61, paras. 24, 27, 28 (1985).

⁹⁸ *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2639, para. 18 (Com. Car. Bur. 1998).

2. Commission Precedent Supports Classification as an Information Service

38. Our proposed classification of broadband Internet access service as an information service is firmly rooted in Commission precedent. For two decades, a consistent bipartisan framework supported a free and open Internet. That same consensus led to six separate Commission decisions confirming that Internet access service is an information service, subject to Title I. Chairman Kennard first led the FCC in determining that Internet access service is an information service in the *Stevens Report*.⁹⁹ Chairman Powell led the Commission to classify broadband Internet access service over cable systems as an information service in the *Cable Modem Order*.¹⁰⁰ Chairman Martin led the Commission to classify several broadband Internet access services as information services in the *Wireline Broadband Classification Order*,¹⁰¹ the *BPL-Enabled Broadband Order*,¹⁰² and the *Wireless Broadband Internet Access Order*.¹⁰³ Finally, Chairman Genachowski declined to reclassify broadband Internet access services in the *Open Internet Order*.¹⁰⁴

39. We believe the Commission under Democratic and Republican leadership alike was correct in these decisions to classify broadband Internet access service as an information service and that, 20 years after the passage of the Telecommunications Act, we should be reluctant to second-guess the interpretations of those more likely to understand the contemporary meaning of the terms of the Telecommunications Act. We seek comment on our assessment. Did the Commission's historical information service classification better enable flexibility in marketplace offerings?¹⁰⁵ Did the regulatory certainty of maintaining the same regulatory environment for approximately three decades (since the *Computer Inquiries*) foster additional investment or innovative business models to benefit consumers? How should we evaluate the prior Commissions' predictions of intermodal competition given the 4,559 Internet service providers now in the market? How many providers would likely have entered the market if traditional Title II regulation had been the norm? What actual harms, if any, resulted from light-touch regulation?

40. The Commission has previously concluded that Congress formally codified information services and telecommunications services as two, mutually exclusive types of service in the Telecommunications Act.¹⁰⁶ The *Title II Order* did not appear to disagree with this analysis, finding that broadband Internet access service was a telecommunications service and *not* an information service.¹⁰⁷ We believe this conclusion regarding mutual exclusivity is correct based on the text and history of the Act. We seek comment on this analysis.

⁹⁹ See *Stevens Report*, 13 FCC Rcd at 11503, para. 3.

¹⁰⁰ See *Cable Modem Order*, 17 FCC Rcd at 4802, para. 7.

¹⁰¹ *Wireline Broadband Classification Order*, 20 FCC Rcd 14853.

¹⁰² *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281

¹⁰³ *Wireless Broadband Internet Access Order*, 22 FCC Rcd 5901.

¹⁰⁴ *Open Internet Order*, 25 FCC Rcd at 17933, paras. 47–48.

¹⁰⁵ See, e.g., *Wireline Broadband Classification Order*, 20 FCC Rcd at 14891–92, para. 72 (eliminating the *Computer Inquiries* requirement to offer broadband transmission on a common carrier basis “will make it more likely that wireline network operators will take more risks in investing in and deploying new technologies than they are willing and able to take under the existing regime”); *Stevens Report*, 13 FCC Rcd at 11524, para. 46 (stating that “the Commission concluded in *Computer IP* that “regulatory freedom . . . was important to the healthy and competitive development of the enhanced-services industry”).

¹⁰⁶ See *Stevens Report*, 13 FCC Rcd at 11522–23, para. 43; see also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), as amended.

¹⁰⁷ *Title II Order*, 30 FCC Rcd at 5763–65, paras. 363–65.

41. The Commission has previously found that Congress intended the definitions of information service and telecommunications service in the Act to parallel those definitions in the MFJ and in the *Computer Inquiries*.¹⁰⁸ The *Title II Order* apparently accepted these parallels.¹⁰⁹ We thus seek comment on any evidence that the court in the MFJ thought that Internet access service was a telecommunications service. Did the court and the Department of Justice intend to exclude Internet access services from the prohibitions on what Bell Operating Companies could offer? Did the court and the Department of Justice intend for Internet access services to be regulated via tariff (as other telecommunications services were)? We similarly seek comment on any evidence that the Commission in the *Computer Inquiries* thought that Internet access service was a basic service. Did the Commission intend for facilities-based carriers to offer Internet access service without the protections of the *Computer Inquiries* (as they could for basic services)? The Supreme Court has said that statutory interpretation “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”¹¹⁰ How is that canon relevant here?

42. Finally, the *Title II Order* deviated further from Commission precedent to extend its authority to Internet traffic exchange or “interconnection,”¹¹¹ an area historically unregulated and beyond the Commission’s reach. We believe Internet traffic exchange, premised on privately negotiated agreements or case-by-case basis, is not a telecommunications service. Moreover, we find nothing in the Act that would extend our jurisdiction as previously suggested by the *Title II Order*. We further do not believe there exists any non-Title II basis for the Commission to exercise ongoing regulatory oversight over Internet traffic exchange. We accordingly propose to relinquish any authority over Internet traffic exchange. We seek comment on the consequences and implications of relinquishing the Commission’s regulatory authority in this manner.

43. We note that the Commission’s *Title II Order* also went well beyond agency precedent in important ways. For instance, the Commission did not limit its analysis to the “last mile” connections at issue in the *Brand X* and the FCC’s underlying proceeding in that case. Rather, the Commission’s *Title II Order* defined Internet access service as extending far deeper into the network. We seek comment on the significance of this expansive departure from agency precedent.

3. Public Policy Supports Classification as an Information Service

44. The Commission’s decision to reclassify broadband Internet access service as a telecommunications service subject to Title II regulation has resulted in negative consequences for American consumers—including depressed broadband investment and reduced innovation because of increased regulatory burdens and regulatory uncertainty stemming from the rules adopted under Title II. As providers have devoted more resources to complying with new regulations, the threat of regulatory enforcement of vague rules and standards has dampened providers’ incentive to invest and innovate. Additionally, although reclassifying broadband Internet access service as a telecommunications service has led to significant regulatory burdens, it has not solved any discrete, identifiable problems. Restoring broadband Internet access service to its previous status as an information service subject to Title I is in the public interest because it will alleviate the harms caused by Title II reclassification. We seek detailed comment on this analysis below.

45. Following the *2014 Notice* and in the lead up to the *Title II Order*, Internet service providers stated that the increased regulatory burdens of Title II classification would lead to depressed

¹⁰⁸ *Stevens Report*, 13 FCC Rcd at 11521–22, para. 42.

¹⁰⁹ *Title II Order*, 30 FCC Rcd at 5735-36, para. 312.

¹¹⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

¹¹¹ *Title II Order*, 30 FCC Rcd at 5690, 93, paras. 200, 203.

investment.¹¹² Recent data indicate how accurate those predictions were. A recent study indicates that capital expenditure from the nation's twelve largest Internet service providers has fallen by \$3.6 billion, a 5.6% decline relative to 2014 levels.¹¹³ Another study indicated that between 2011 and 2015, the threat of reclassification reduced telecommunications investment by about 20–30%, or about \$30–40 billion annually.¹¹⁴ Other sources also explain that other countries' experiences should caution the United States that ongoing utility-style regulation should be expected to have even more dramatic impacts on investment beyond what has already occurred.¹¹⁵ Other interested parties have come to different conclusions.¹¹⁶

46. We believe that these reduced expenditures are a direct and unavoidable result of Title II reclassification, and exercise our predictive judgment that reversing the Title II classification and restoring broadband Internet access service to a Title I service will increase investment.¹¹⁷ Among other things, Internet service providers have finite resources, and requiring providers to divert some of those resources to newly imposed regulatory requirements adopted under Title II will, unsurprisingly, reduce expenditures that benefit consumers. We seek comment on how the burdens associated with Title II

¹¹² See, e.g., ACA Comments at 60–66; Alcatel-Lucent Comments at 2; AT&T Comments at 51-53; CenturyLink Comments at 5-6; Charter Comments at 13, 15-16; Cisco Comments at 27; Comcast Comments at 46-50; Cox Comments at 34-36; CTIA Comments at 46-48; Ericsson Comments at 12; Frontier Comments at 2-4; Qualcomm Comments at 4-7; Verizon Comments at 57; Letter from Matthew A. Brill, Counsel for National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, GN Docket No. 10-127, at 3-5 (Dec. 23, 2014); Letter from Patrick S. Brogan, USTelecom to Marlene Dortch, Secretary, FCC, WC Docket No. 14-28 (Nov. 19, 2014) (attaching Kevin A. Hassett & Robert J. Shapiro, Sonecon, The Impact of Title II Regulation of Internet Providers on Their Capital Investment (Nov. 2014)); Letter from Laurence Brett Glass, d/b/a LARIAT to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, at 1 (Jan. 9, 2015); Letter from John Mayo, Exec. Director, Georgetown Center for Business and Public Policy to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28 (Jan. 16, 2015) (attaching Anna-Maria Kovacs, Regulatory Uncertainty: The FCC's Open Internet Docket (Jan. 2015)); Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models (June 2013), <http://bit.ly/1zJritJ>.

¹¹³ Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016) <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>.

¹¹⁴ See George S. Ford, Net Neutrality, Reclassification and Investment: A Counterfactual Analysis, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, <http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>.

¹¹⁵ Patrick Brogan, USTelecom, Utility Regulation and Broadband Network Investment: The EU and US Divide, Research Brief (Apr. 25, 2017), <https://www.ustelecom.org/sites/default/files/documents/Utility%20Regulation%20and%20Broadband%20Investment.pdf>.

¹¹⁶ See, e.g., Free Press, Internet Service Providers' Capital Expenditures (Feb. 28, 2017), https://www.freepress.net/sites/default/files/resources/internet_service_providers_capital_expenditures_2013-2016_reported_as_of_2_27_17.pdf (noting a decrease in investment from 2015 to 2016, but claiming an increase in investment in the 2-year period of 2015–16 compared to 2013–14). We observe, however, that these figures showing increased investment do not incorporate the generally accepted accounting practice of maintaining consistency over time, as they include AT&T's foreign capital expenditures in Mexico as well as expenditures related to DirectTV, see Hal Singer, Tracing AT&T's Capital Expenditures Over Time, <https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/>, and do not adjust for Sprint's changed accounting treatment of leased handset devices from an operating expense to a capital expense. See Hal Singer, 2016 Broadband Capex Survey: Tracking Investment in the Title II Era, <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>.

¹¹⁷ See, e.g., Letter from Kenneth Glueck, Senior Vice President, Oracle, to Ajit Pai, Chairman, FCC, WC Docket No. 14-28, at 2 (filed May 5, 2017) (“Reclassifying broadband internet access as an information service will eliminate unnecessary burdens on, and competitive imbalances for, ISPs while enhancing the consumer experience and driving investment.”).

regulation have impacted broadband investment and, as a result, consumers. Has the Commission's increased regulation of broadband adversely impacted broadband investment and innovation? What impact has Title II reclassification had on providers' business models, including any lost opportunity costs, and how has this impact been passed on to consumers? Is there any evidence that increased regulation has promoted broadband investment, as some claim? What are the long-term implications of utility-style regulation with respect to capital expenditures on high-speed networks?

47. We also seek specific comment on how the classification of broadband Internet access service as a telecommunications service has impacted smaller broadband Internet access service providers, many of whom lack the dedicated compliance staffs and financial resources of the nation's largest providers. Before the Commission adopted the *Title II Order*, many small providers made it clear that reclassification would harm their businesses and the customers they serve.¹¹⁸ Since reclassification, small providers—including non-profit, municipal ISPs—have been forced to reduce their investment and halt the expansion of their networks, and slow, if not delay, the development and deployment of innovative new offerings.¹¹⁹ For example, one small ISP had planned to “triple the number of new base stations” that would be deployed each month to provide fixed wireless broadband service to new customers, but put those plans on hold as a result of the Commission's reclassification.¹²⁰ Other small providers have had to modify or abandon altogether past business models to account for increased compliance costs and depressed investment from outside investors.¹²¹ This depressed investment has had

¹¹⁸ Letter from Barbara S. Esbin, Counsel, American Cable Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, at 2–5 (filed Feb. 2, 2015) (detailing how smaller Internet providers, such as Cedar Falls (IA) Utility already abided by Open Internet principles, but the added cost of defending its “practices, rates, terms and conditions of service” would be prohibitively expensive) (ACA *Ex Parte*); Letter from 43 Small ISPs to Chairman Wheeler, WC Docket Nos. 14-28, 10-127, at 1–2 (filed Feb. 10, 2015) (explaining that Title II regulation will raise costs and hinder broadband deployment, and create “deep and lasting regulatory uncertainty”).

¹¹⁹ See, e.g., Letter from Herb Longware, President, Cable Communications of Willsboro, Inc. et al. to Ajit Pai, Chairman, FCC, WC Docket No. 14-28, WC Docket No. 16-106, at 2 (filed Apr. 25, 2017) (Letter from 22 Small ISPs); Petition of American Cable Association and National Cable & Telecommunications Association For Stay Pending Judicial Review, WC Docket No. 14-28, Attach. 4, at 1–2 (Declaration of Michael Jensen, General Manager of Bagley, MN Public Utilities) (noting that Bagley Utilities offers broadband Internet access service to about 450 customers, and it has 7 full-time employees, and stating that in the past 3 years the company had invested approximately \$400,000 in its network, but that those investments are now likely to be curtailed due to the effects of Title II reclassification); Letter from William Bottiggi, General Manager, BELD Broadband et al. to Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1-2 (filed May 11, 2017) (explaining under the “straight-jacket of utility regulation” that municipal ISPs “must pay lawyers and consultants to provide advice and direction to minimize any risk that [they] will be judged after-the-fact to be out of compliance” and that “even with this advice, [they] often delay or hold off from rolling out a new feature or service because [they] cannot afford to deal with a potential complaint and enforcement action. As a result, [their] customers lose out on having access to innovations and new capabilities.”).

¹²⁰ See, e.g., Joint Petition For Stay of United States Telecom Association, CTIA, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, WC Docket No. 14-28, Exh. 1, at 5–6 (Declaration of Nathan Stooke, Founder and CEO of Wisper ISP, Inc.) (filed May 1, 2015) (Joint Stay Petition) (noting that Wisper had planned to “triple the number of new base stations” that would be deployed each month to provide fixed wireless broadband service to new customers, but the Commission's reclassification decision had forced Wisper to put those plans on hold).

¹²¹ See Letter from 22 Small ISPs at 2 (explaining that the mere threat that the Commission may impose rate regulation affects small ISPs' ability to obtain financing); Joint Stay Petition, Exh. 5, at 4 (Declaration of Clay Stewart, CEO of SCS Broadband) (explaining that investors have already told SCS Broadband, a small ISP, that “projects that were viable investments under the regime that existed before the [*Title II Order*] will no longer provide the necessary returns to justify the investment”); Joint Stay Petition, Exh. 6, at 4 (Declaration of Forbes H. Mercy, President of Washington Broadband, Inc.) (explaining that the *Title II Order* has forced Washington Broadband, Inc., a small ISP, to give up its existing business model of constructing new towers that cover small areas based on a return on investment model of light density return).

particularly strong impacts on the deployment of broadband to previously unserved and rural areas.¹²² What other impacts have small providers felt as a result of reclassification? Have there been any corresponding benefits for small providers?

48. In addition to imposing significant regulatory costs on Internet service providers, Title II reclassification created significant regulatory uncertainty. USTelecom specifically identified “regulatory uncertainty” as one of the causes of reduced investment.¹²³ Regulatory uncertainty may have particularly significant effects on small Internet service providers, which may be poorly equipped to address the legal, technical, and financial burdens associated with an uncertain regulatory environment.¹²⁴ That uncertainty has directly led to reduced investment, which has harmed consumers.¹²⁵ We seek comment on what other effects regulatory uncertainty has had on broadband Internet access service providers’ investment decisions.

49. We also seek comment on other consumer benefits that would result from restoring broadband Internet access service classification to an information service, rather than subjecting these services to utility-style regulation. We note that increased investment is likely to lead to a faster closing of the digital divide for rural and low-income consumers, higher speeds and more competition for all consumers, as well as more affordable prices. We seek comment on the magnitude of these effects, and what further steps the Commission should take to maximize facilities-based investment and competition. Specifically, we seek comment on the trade-offs from changing the classification status. We also seek comment more broadly on the effects on innovation of regulatory uncertainty, and other examples of reduced innovation from Internet service providers as a result of the Title II classification.

¹²² Joint Stay Petition, Exh. 2, at 6 (Declaration of L. Elizabeth Bowles, President and Chairman of Aristotle Inc.) (explaining that Aristotle Inc., a small ISP in Arkansas, dialed back its plans to triple its customer base and expand service into unserved areas of rural Arkansas as a result of the *Title II Order*); Joint Stay Petition, Exh. 6, at 4 (Declaration of Forbes H. Mercy, President of Washington Broadband, Inc.) (explaining that the *Title II Order* has forced Washington Broadband, Inc., a small ISP, to scale back expansion to new, unserved, or underserved areas); *see also* Letter from S. Jenell Trigg, Counsel to the Wireless Internet Service Providers Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108, at 1 (filed May 10, 2017) (indicating that the Title II requirements “creat[ed] vast uncertainty and significant negative economic impact for WISPA members who have built their networks from scratch using their own at-risk capital without federal subsidies”); Letter from Robert Hunt et al., Chairman, USTelecom, to Ajit Pai, Chairman, FCC, WC Docket No. 17-108 at 2 (filed May 4, 2017) (encouraging the Commission to “mov[e] forward in a way that allows for vigorous, continued investment in rural broadband networks, and at the same time ensure a smarter path to net neutrality”).

¹²³ US Telecom, *Broadband Investment Remains Large, but Ticked Down in 2015* (Dec. 14, 2016), <https://www.ustelecom.org/news/press-release/broadband-investment-remains-large-ticked-down-2015>.

¹²⁴ *See, e.g.*, Letter from Ron Smith et al., President and CEO, Bluegrass Cellular, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (filed May 11, 2017) (“The uncertainty surrounding the Title II regulatory framework for wireless broadband services hinders our ability to meet our customers’ needs, burdens our companies with unnecessary and costly obligations and inhibits our ability to build and operate networks in rural America.”); Petition of American Cable Association and National Cable & Telecommunications Association For Stay Pending Judicial Review, WC Docket No. 14-28, Attach. 1, at 1 (Declaration of William D. Bauer, CEO of WinDBreak Cable) (filed May 1, 2015) (ACA Stay Petition) (noting that WinDBreak offers broadband Internet access service to about 440 customers, and it has 10 employees).

¹²⁵ *See, e.g.*, Michael Horney, Free State Foundation, *Broadband Investment Slowed by \$5.6 Billion Since Open Internet Order* (May 5, 2017), <http://freestatefoundation.blogspot.com/2017/05/broadband-investment-slowed-by-56.html> (estimating “that foregone investment in 2015 and 2016 was about \$5.6 billion, an amount providers likely would have invested in a business climate without Title II public utility regulation”); Letter from Mark Radabaugh, President, Amplex, to Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1 (filed May 9, 2017) (stating that “[o]ur challenges are exacerbated by the Title II Order the FCC adopted in 2015, which has significantly increased compliance burdens and regulatory risk through heavy-handed regulation that is rife with uncertainty. . . . [T]he regulatory burdens make it more difficult to attract capital, and less capital makes it more difficult to comply with regulatory burdens.”).

50. We also seek comment on specific ways in which consumers were harmed under the light-touch regulatory framework that existed before the Commission’s *Title II Order*. Much of the *Title II Order* focused extensively on hypothetical actions Internet service providers “might” take, and how those actions “might” harm consumers,¹²⁶ but the *Title II Order* only articulated four examples of actions Internet service providers arguably took to justify its adoption of the Internet conduct standard under Title II.¹²⁷ Do these isolated examples justify the regulatory shift that Title II reclassification entailed? Do such isolated examples constitute market failure sufficient to warrant pre-emptive, industry-wide regulation? Were pre-existing federal and state competition and consumer protection regimes, in addition to private sector initiatives, insufficient to address such isolated examples, and if so, why? What are the costs and benefits of pre-emptive, industry-wide regulation in such circumstances? In particular, does that approach deter competition and competitive entry, and does it have unintended consequences with respect to infrastructure investment? Do those unintended consequences outweigh any purported benefits in addressing such isolated cases pre-emptively? Is there evidence of actual harm to consumers sufficient to support maintaining the Title II telecommunications service classification for broadband Internet access service? Is there any evidence that the likelihood of these events occurring decreased with the shift to Title II?

51. Conversely, what, if any, changes have been made as a result of Title II reclassification that have had a positive impact on consumers? Was Title II reclassification necessary for any of those changes to occur? Is there any evidence, for example, that consumers’ online experiences and Internet access have improved due to policies adopted in the *Title II Order*?

4. The Commission Has Legal Authority to Classify Broadband Internet Access Service as an Information Service

52. As the D.C. Circuit has held, “[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”¹²⁸ And that authority is not unbounded. The Commission has authority, as the Supreme Court recognized in *Brand X*, to interpret the Communications Act, including ambiguous definitional provisions.¹²⁹ However, when interpreting a statute it administers, the Commission, like all agencies, “must operate ‘within the bounds of reasonable interpretation.’ And reasonable statutory interpretation must account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’”¹³⁰

53. An agency also is free to change its approach to interpreting and implementing a statute so long as it acknowledges that it is doing so and justifies the new approach.¹³¹ Evaluating the change in regulatory approach in the *Title II Order*, the D.C. Circuit majority in *USTelecom* applied a “highly deferential standard” to the agency’s predictive judgments regarding the investment effects of

¹²⁶ See, e.g., *Title II Order*, 30 FCC Rcd at 5652, para. 121 (stating that “the no-blocking rule will not be as effective because broadband providers might otherwise engage in conduct that harms the open Internet but falls short of outright blocking”); at 5656, para. 127 (stating that “because of the very real concerns about the chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment, we adopt a bright-line rule banning paid prioritization arrangements”).

¹²⁷ See *Title II Order*, 30 FCC Rcd at 5620, 5628, para. 65 & n.69 (discussing the *Comcast* and *Madison River* proceedings), para. 79 & n.123 (discussing AT&T blocking FaceTime and Comcast exempting its video service from data caps when streamed over an Xbox).

¹²⁸ *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

¹²⁹ *Brand X*, 545 U.S. at 980-81.

¹³⁰ *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (*Utility Air*).

¹³¹ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (*Fox*); *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24-25 (D.C. Cir. 2015).

reclassification,¹³² and deferred to the Commission’s “‘evaluat[ion of] complex market conditions’” underlying its rejection of providers’ reliance interests in the prior classification.¹³³ D.C. Circuit precedent also recognizes, however, that should the Commission’s predictions “prove erroneous, the Commission will need to reconsider” the associated regulatory actions “in accordance with its continuing obligation to practice reasoned decision-making.”¹³⁴ We believe that the Commission’s predictions and expectations regarding broadband investment and the nature and effects of reclassification on the operation of the marketplace were mistaken and have not been borne out by subsequent events. Moreover, we believe that a restoration of the information service classification for broadband Internet access service is likely to increase infrastructure investment. In such a case, principles of administrative law give us more than ample latitude to revisit our approach. We seek comment on this overall approach, and we seek comment on these specific issues in the sections below.

54. Even more fundamentally, we believe that the Commission’s statutory interpretation in the *Title II Order* did not adequately reflect proper standards of statutory construction, and that classifying broadband Internet access service as an information service is the better reading of the statute, independent of the factual developments subsequent to the *Title II Order*. We note that the Supreme Court has expressly upheld the Commission’s prior information service classification.¹³⁵ We seek comment on this analysis. Although the *Title II Order*’s telecommunications service classification was upheld in *USTelecom*, the court emphasized that it “sit[s] to resolve only legal questions presented and argued by the parties,” and not “‘arguments a party could have made but did not.’”¹³⁶ Many arguments as to why an information service classification of broadband Internet access service reflects the better reading of ambiguous provisions of the Act were not addressed by the court because the arguments were raised in support of a claim that the Act unambiguously required a particular service classification.¹³⁷ Thus, although we are in any case free to revisit previously affirmed interpretations of ambiguous statutory language, we note that the *USTelecom* decision did not reach many aspects of the statutory analysis we propose here. We seek comment on this analysis and on our reasoning that the statutory interpretation proposed in this Notice more faithfully adheres to the Act and reflects the better reading of the relevant provisions than the views adopted in the *Title II Order*.

B. Reinstating the Private Mobile Service Classification of Mobile Broadband Internet Access Service

55. We propose to classify all broadband Internet access services—both fixed and mobile—as information services. With respect to mobile broadband Internet access service, we further propose to

¹³² *USTelecom*, 825 F.3d at 707.

¹³³ *Id.* at 710 (quoting *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1322 (D.C. Cir. 2007)).

¹³⁴ *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991). See also, e.g., *American Family Ass’n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (“[T]he FCC’s ‘necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.’”) (quoting *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993)).

¹³⁵ *Brand X*, 545 U.S. at 986.

¹³⁶ *USTelecom*, 825 F.3d at 697 (citations omitted).

¹³⁷ Or, in other cases they were not addressed at all. See, e.g., *id.* at 701–04 (rejecting arguments that information service classification was unambiguously required based on the text, structure, and purpose of the Act); *id.* at 710–11 (highlighting the limited ways in which *USTelecom* challenged the *Title II Order* for failing to demonstrate that the *NARUC* test for common carriage was met); *id.* at 717–18 (rejecting arguments that the statute completely precludes the Commission from defining “public switched network” more broadly than the public switched telephone network); *id.* at 721 (rejecting arguments that the statute necessarily compels the Commission to distinguish between “mobile broadband alone enabling a connection” and “mobile broadband enabling a connection through use of adjunct applications such as VoIP”).

return it to its original classification as a private mobile service, and in conjunction to revisit the elements of the *Title II Order* that modified or reinterpreted key terms in section 332 of the Act and our implementing rules. We seek comment on that proposal, including on the specific issues discussed below. We also generally seek comment on whether certain and, if so, which, aspects of the D.C. Circuit’s analysis of mobile broadband Internet access service in *USTelecom* necessitate modifications or additions to the Commission’s proposals with respect to mobile broadband Internet access service here.¹³⁸ We also seek comment on the scope of the authority delegated by sections 332(d)(1)–(3) to the Commission to define or specify the terms used in section 332 and discussed below.

56. We propose to restore the meaning of “public switched network” under section 332(d)(2) to its pre-*Title II Order* focus on the traditional public switched telephone network.¹³⁹ We find persuasive the Commission’s reasoning when originally adopting the prior definition,¹⁴⁰ which also appears more consistent with the historical usage of the term “public switched network,”¹⁴¹ appears to better accord with the text of section 332(d)(2) by clearly covering only a single, integrated network,¹⁴² and was not disturbed by Congress in amendments to section 332 of the Act.¹⁴³ We seek comment on this analysis and our proposed approach.

57. We also propose to return to our prior definition of “interconnected service” by restoring the word “all” in the codified definition.¹⁴⁴ Although the court in *USTelecom* found the deletion of “all” to be “of no consequence” to the reclassification of mobile broadband Internet access service, it did so based on an argument that the Commission never mentioned in its brief—namely, that mobile broadband users can reach telephone customers “via VoIP” and that this determination is sufficient (regardless of the deletion of the word “all”) to render mobile broadband Internet access service interconnected with the public switched network.¹⁴⁵ We seek comment on that view and whether the Commission erred in 2015 by modifying the definition based on the view that two separate networks can be interconnected if they do not allow all users to communicate with each other.¹⁴⁶ The FCC’s prior decision in this respect appears to

¹³⁸ See generally *USTelecom*, 825 F.3d at 716–26 (addressing arguments regarding the *Title II Order*’s treatment of mobile broadband Internet access service).

¹³⁹ See 47 CFR § 20.3 (2014) (defining “public switched network”).

¹⁴⁰ See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1434, 1436–37, paras. 53, 59 (1994).

¹⁴¹ See, e.g., *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC 2d 689, 690, para. 2 & n.3 (1981); *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982); *Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, Report and Order, 7 FCC Rcd 719, 720, para. 9 (1992); *Provision of Access for 800 Service*, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5421, para. 1 & n.3 (1991); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, 7190, para. 20 (1990).

¹⁴² See 47 U.S.C. § 332(d)(2) (referring to “the” public switched network).

¹⁴³ See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b) (1996) (amending section 332 of the Communications Act).

¹⁴⁴ See 47 CFR § 20.3 (2014) (defining “interconnected service”).

¹⁴⁵ See *USTelecom*, 825 F.3d at 718–27.

¹⁴⁶ Had all the elements of the *Title II Order*’s mobile broadband Internet access service classification remained, a future Commission might have incentives to continue pursuing such an approach to avoid the potentially absurd result that traditional wireless voice service no longer constituted commercial mobile service. While not finding it a sufficient basis to reject the *Title II Order*’s treatment of mobile broadband Internet access service, the D.C. Circuit acknowledged the possibility that the revised definition of public switched network raised questions about whether

(continued....)

run contrary to the focus on a single, integrated network that we believe Congress likely intended in section 332(d)(2). We seek comment on these views. In the *Title II Order*, the Commission noted that the prior definition of “interconnected service” would encompass a service that “provides general access to points on the PSN [but] also restricts calling in certain limited ways” (such as blocking of 900 numbers), but cited no evidence that the prior definition led to any confusion.¹⁴⁷ We question the need for changes to the prior definition to account for that limited exception to general access, but nonetheless seek comment on whether modified rule language is warranted, and if so, what language targeted narrowly to that issue should be incorporated.

58. We also seek comment on whether any other interpretations of section 332 or our implementing rules from the *Title II Order* should be revisited here in connection with our proposed classification of mobile broadband Internet access service. For example, would a narrower interpretation of “capability” for purposes of the definition of “interconnected service” under our rules be warranted based on the Act or the regulatory history of that language? Are there other interpretations that should be reconsidered? In addition to the changes to the definitions in section 20.3 of the rules discussed above, would any additional changes to our codified rules be warranted?

59. In applying the definitions and interpretations of key terms in section 332 and our implementing rules under the proposals above, we also propose to reach the same conclusions regarding the application of those terms to mobile broadband Internet access service as we did in the *Wireless Broadband Internet Access Order*.¹⁴⁸ We seek comment on that proposal and whether there have been any material changes in technology, the marketplace, or other facts that would warrant refinement or revision of any of that analysis.

60. Furthermore, insofar as mobile broadband Internet access service is best interpreted to be an information service, we believe that likely also would counsel in favor of classifying it as a private mobile service to avoid the inconsistency of the service being both an information service and a common carrier service. The Commission explained this reasoning when originally classifying mobile broadband Internet access service as both an information service and a private mobile service, and we propose to apply that same reasoning again here.¹⁴⁹ We seek comment on this proposal.

61. We also believe that mobile broadband Internet access service is not the “functional equivalent” of commercial mobile service,¹⁵⁰ and seek comment on that view. The Commission previously has observed, in light of Congress’s determinations in section 332, that “very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service.”¹⁵¹ By contrast, we are concerned that the *Title II Order*’s test, which focuses on whether the service merely “enables ubiquitous access to the vast majority of the public,” would eviscerate the statutory scheme.¹⁵² We believe that the standard for demonstrating functional equivalency under our rules is instead more likely to properly implement section 332(d)(3) of the Act, and we thus propose to

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traditional wireless voice service was sufficiently interconnected with the public switched network to still constitute a commercial mobile service. See *USTelecom*, 825 F.3d at 722.

¹⁴⁷ *Title II Order*, 30 FCC Rcd at 5787, para. 402 & n.1172 (internal quotations and citation omitted).

¹⁴⁸ *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5915–18, paras. 37–45.

¹⁴⁹ *Id.* at 5919–21, paras. 48–56.

¹⁵⁰ See 47 U.S.C. § 332(d)(3) (stating that “the term ‘private mobile service’ means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission”).

¹⁵¹ *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1447, para. 79 (1994) (*CMRS Second Report and Order*).

¹⁵² See *Title II Order*, 30 FCC Rcd at 5790, para. 407.

reconsider the *Title II Order*'s position that the Commission is free to depart from that standard.¹⁵³ In addition, the *Title II Order* made no claim that the functional equivalency standard in our rules was met by mobile broadband Internet access service, and we similarly propose here that it does not meet that standard. We seek comment on these proposals and on any other or different definition of “functional equivalent” that the FCC should adopt.

62. Given the apparent historical success of the wireless marketplace prior to the *Title II Order*, we anticipate that returning mobile broadband Internet access service to its original classification of a private mobile service and restoring prior definitions and interpretations of key concepts in section 332 is likely to substantially benefit the wireless marketplace and consumers and have few, if any, policy disadvantages. We seek comment on this view. To the extent any commenters believe that these proposals will have negative policy consequences, we seek specific information regarding the scope or significance of any such consequences and whether they can be mitigated in whole or in part through modifications to our proposals.

C. Effects on Regulatory Structures Created by the *Title II Order*

63. The *Title II Order* imposed additional regulatory frameworks under Title II, including forbearance and privacy. We seek comment on how we should treat those structures and proceedings moving forward.

64. *Forbearance.* If we adopt our lead proposal to remove the Title II reclassification of broadband Internet access service, what effect does that action have on the provisions of the Act from which the Commission forbore in the *Title II Order*? We believe that restoring the classification status of broadband Internet access service to an information service will render any additional forbearance moot in most cases. We seek comment on this analysis. At the same time, we seek comment on whether, with respect to broadband Internet access service, the Commission should maintain and extend forbearance to even more provisions of Title II as a way of further ensuring that our decision in this proceeding will prove to reduce regulatory burdens.

65. We also seek comment on the effect of reinstating an information service classification on providers that voluntarily offered broadband transmission on a common carrier basis under the *Wireline Broadband Classification Order* framework.¹⁵⁴ The *Title II Order* allowed such providers to opt-in to the *Title II Order*'s forbearance framework.¹⁵⁵ Should providers voluntarily electing to offer broadband transmission on a common carrier basis be able to do so under the *Title II Order*'s forbearance framework if we reclassify broadband Internet access service as an information service? If not, what transition mechanisms are required for such providers that opted-in to the *Title II Order*'s forbearance framework to enable them to revert back to the *Wireline Broadband Classification Order* framework? Should we extend forbearance to any other rules or statutory provisions for carriers that choose to offer broadband transmission on a common carrier basis?

66. *Section 222 Regulations.* Historically, the Federal Trade Commission (FTC) protected the privacy of broadband consumers, policing every online company's privacy practices consistently and initiating numerous enforcement actions.¹⁵⁶ When the Commission reclassified broadband Internet access service as a common carriage telecommunications service in 2015, however, that action stripped FTC authority over Internet service providers because the FTC is prohibited from regulating common

¹⁵³ 47 CFR § 20.9(a)(14).

¹⁵⁴ *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900–03, paras. 89–95.

¹⁵⁵ *Title II Order*, 30 FCC Rcd at 5819, para. 460 & n.1378.

¹⁵⁶ See 15 U.S.C. § 45(a)(1) (prohibiting unfair or deceptive acts or practices in or affecting commerce); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911, 13945, para. 87 (2016) (*2016 Privacy Order*) (“the FTC has brought over 500 cases protecting the privacy and security of consumer information”).

carriers.¹⁵⁷ To address the gap created by the Commission’s reclassification of broadband Internet access service as a common carriage service, the *Title II Order* called for a new rulemaking to apply section 222’s customer proprietary network information provisions to Internet service providers.¹⁵⁸ In October 2016, the Commission adopted rules governing Internet service providers’ privacy practices and applied the rules it adopted to other providers of telecommunications services.¹⁵⁹ In March 2017, Congress voted under the Congressional Review Act (CRA) to disapprove the Commission’s *2016 Privacy Order*, which prevents us from adopting rules in substantially the same form.¹⁶⁰

67. We propose to respect the jurisdictional lines drawn by Congress whereby the FTC oversees Internet service providers’ privacy practices, given its decades of experience and expertise in this area.¹⁶¹ We seek comment on this proposal.

68. *Lifeline.* We propose to maintain support for broadband in the Lifeline program after reclassification. In the *Universal Service Transformation Order*, the Commission recognized that “[s]ection 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered”¹⁶² and “allows us to . . . require carriers receiving federal universal service support to invest in modern broadband-capable networks.”¹⁶³ Accordingly, as the Commission did in the *Universal Service Transformation Order*, we propose requiring Lifeline carriers to use Lifeline support “for the provision, maintenance, and upgrading” of broadband services and facilities capable of providing supported services.¹⁶⁴ We seek comment on this proposal. We also seek comment on any rule changes necessary to effectuate this change in our underlying authority to support broadband for low-income individuals and families.

69. *Other.* Beyond the issues raised above, we seek comment on the impact of reclassification on other Commission proceedings and proposals. For instance, how should we take into

¹⁵⁷ See 15 U.S.C. §§ 45(a)(2) (exempting “common carriers subject to the Acts to regulate commerce”), 44 (defining “Acts to regulate commerce” as including “the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto”); 47 U.S.C. § 153(51) (providing that “[a] telecommunications carrier shall be treated as a common carrier under [the Communications Act] only to the extent that it is engaged in providing telecommunications services”). One Ninth Circuit case held that the common carrier exemption precluded FTC oversight of ISPs that otherwise were common carriers with respect to non ISP services. See *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *reh’g en banc granted*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017). As the FCC recently explained in that case, the panel decision erred by overlooking the textual relationship between the statutes governing the FTC’s and FCC’s jurisdiction. See Letter Pursuant to Fed R. App. P 28(j) of *amicus* FCC, *FTC v. AT&T Mobility LLC*, No. 15-16585 (9th Cir. Apr. 21, 2017). The FCC’s letter called on the Ninth Circuit to grant rehearing, which it recently did, and in doing so it set aside the earlier and erroneous panel opinion. See Order, *FTC v. AT&T Mobility, LLC*, No. 15-16585 (9th Cir. May 9, 2017). The recent en banc order by the Ninth Circuit means that the *Title II Order*’s reclassification of broadband Internet access service serves as the only limit on the authority of the FTC to oversee the conduct of Internet service providers.

¹⁵⁸ *Title II Order*, 30 FCC Rcd at 5820, para. 462.

¹⁵⁹ *2016 Privacy Order*, 31 FCC Rcd at 14051, para. 334.

¹⁶⁰ 5 U.S.C. §801(b)(2) (“A rule that [was disapproved under the CRA] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule”).

¹⁶¹ See 5 U.S.C. § 801; Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Pub. L. No. 115-22, 131 Stat 88 (enacting S.J. Res. 34, 115th Cong. (2017)).

¹⁶² *Connect America Fund et al.*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17685, para. 64 (2011) (*Universal Service Transformation Order*).

¹⁶³ *Id.* at 17686, para. 65.

¹⁶⁴ See 47 U.S.C. § 254(e); see also Letter from Mitchell Brecher, Counsel for TracFone, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108, at 2 (filed May 10, 2017).

account our proposed reclassification in our proposals with respect to pole attachments and our inquiries with respect to preemption under Section 253 of the Act?¹⁶⁵ How should the Broadband Deployment Advisory Committee factor in the reduced regulatory burdens and increased investment that we anticipate will flow from reclassification?¹⁶⁶ More generally, if broadband Internet access service is classified as an interstate information service, how would that impact jurisdiction? We encourage commenters to offer specific recommendations as to how we can leverage our proposed reclassification in other proceedings to further encourage broadband deployment to all Americans.

IV. A LIGHT-TOUCH REGULATORY FRAMEWORK

70. Proposing to restore broadband Internet access service to its long-established classification as an information service reflects our commitment to a free and open Internet. Indeed, our lead proposal reaffirms the long-standing, bipartisan consensus begun in the Clinton Administration by restoring the Internet to the dynamic state that allowed it to flourish prior to the *Title II Order*. To determine how to best honor our commitment to restoring the free and open Internet, we propose re-evaluating the Commission's existing rules and enforcement regime to analyze whether *ex ante* regulatory intervention in the market is necessary. To the extent we decide to retain any of the Commission's *ex ante* regulations, we seek comment on whether, and how, we should modify them, specifically considering different approaches such as self-governance or *ex post* enforcement that may effectuate our goals better than across-the-board rules. Finally, we discuss the Commission's legal authority to adopt rules governing Internet service provider practices.

A. Re-evaluating the Existing Rules and Enforcement Regime

71. Below, we explore the best method to restore the long-standing consensus under both Democratic and Republican-led Commissions, represented by the four Internet Freedoms, that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service, all without deterring the investment and innovation that has allowed the Internet to flourish. We examine these freedoms and the Commission's current rules related to them, and for each, ask whether we should keep, modify, or eliminate them.

1. Eliminating the Internet Conduct Standard

72. In the *Title II Order*, the Commission created a catch-all standard intended to prohibit "current or future practices that cause the type of harms [the Commission's] rules are intended to address."¹⁶⁷ This standard allows the Commission to prohibit practices that it determines unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of online content, applications, and service providers to access consumers.¹⁶⁸ This standard also gives the Commission discretion to prohibit any Internet service provider practice that it believes violates any one of the non-exhaustive list of factors adopted in the *Title II Order*.¹⁶⁹

¹⁶⁵ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017).

¹⁶⁶ See FCC, Broadband Deployment Advisory Committee, <https://www.fcc.gov/broadband-deployment-advisory-committee> (last visited May 17, 2017).

¹⁶⁷ *Title II Order*, 30 FCC Rcd at 5659, para. 135.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 5661–64, paras. 138–45 (listing seven "non-exhaustive" factors to guide the application of the Internet conduct standard, including end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application/use-agnostic; and standard practices).

73. We propose eliminating this Internet conduct standard and the non-exhaustive list of factors intended to guide application of the rule, and we seek comment on this proposal. What are the costs of the present Internet conduct standard and implementing factors? Do the standard and its implementing factors provide carriers with adequate notice of what they are and are not allowed to do?¹⁷⁰ Does the standard benefit consumers in any way and, if so, how? We believe that eliminating the Internet conduct standard will promote network investment and service-related innovation by eliminating the uncertainty caused by vague and undefined regulation. Do commenters agree?

74. Because the Internet conduct standard is premised on theoretical problems that will be adjudicated on an individual, case-by-case basis, Internet service providers must guess at what they are permitted and not permitted to do.¹⁷¹ The now-retracted so-called Zero Rating Report issued by the Wireless Telecommunications Bureau illustrates the dilemma providers experience under a Title II regulatory regime.¹⁷² After a thirteen-month investigation, the Report did not specifically call for an end to any provider's practices or identify any particular harm from offering consumers free data. Instead, it stated that the free-data plans "may raise" economic and public policy issues that "may harm consumers and competition."¹⁷³ It then reiterated that any determination about the harm from free data offerings would be made by the Commission on a "case-by-case" basis, using a "non-exhaustive list of factors."¹⁷⁴ Instead of giving providers clear rules of the road to govern future conduct, this report put a provider on notice that an enforcement action could be just around the corner. The Report, and the investigation that preceded it, left Internet service providers with two options: either wait for a regulatory enforcement action that could arrive at some unspecified future point or stop providing consumers with innovative offerings. We seek comment on whether this roving mandate has impacted innovation, and what impact that has had on consumers. We seek comment on whether eliminating this vague standard will spur innovation and benefit consumers.

75. We propose not to adopt any alternatives to the Internet conduct rule, and we seek comment on this proposal. Is there a need for any general non-discrimination standard in today's Internet marketplace? If so, what would that general non-discrimination standard be? The *2014 Notice* proposed prohibiting "commercially unreasonable practices."¹⁷⁵ Should we consider that alternative? Or should we consider another general rule and framework (such as Commission adjudication of non-discrimination complaints)? If we adopt our proposals to eliminate the Internet conduct standard and not to adopt any alternative general requirement, we seek comment on how we can encourage innovative business models that give consumers more choices and lower prices while also promoting consumer freedom on the Internet.

¹⁷⁰ *Id.* at 5659, para. 135 (stating that the Commission could investigate and prohibit "on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet"); Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services, at 3–5 (WTB Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf (*Zero Rating Report*) (setting out 16 discrete criteria the Commission could use to evaluate offerings on a case-by-case basis).

¹⁷¹ See Letter from 22 Small ISPs at 2 (asserting that the general conduct rule is "so vague and open-ended that we are concerned that the Commission would invoke it to sanction conduct for which we have no advance warning").

¹⁷² See *Zero Rating Report*.

¹⁷³ *Id.* at 17.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ *2014 Notice*, 29 FCC Rcd at 5602, para. 116.

2. Determining the Need for the Bright Line Rules and the Transparency Rule

76. In the *Title II Order*, despite virtually no quantifiable evidence of consumer harm, the Commission nevertheless determined that it needed bright line rules banning three specific practices by providers of both fixed and mobile broadband Internet access service: blocking, throttling, and paid prioritization.¹⁷⁶ The Commission also “enhanced” the transparency rule by adopting additional disclosure requirements.¹⁷⁷ Today, we revisit these determinations and seek comment on whether we should keep, modify, or eliminate the bright line and transparency rules.

77. At the outset of our review of the Commission’s existing rules, we seek comment on whether *ex ante* regulatory intervention in the market is necessary in the broadband context. Beyond the few, scattered anecdotes cited by the *Title II Order*, have there been additional, concrete incidents that threaten the four Internet Freedoms sufficient to warrant adopting across-the-board rules? Is there any evidence of market failure, or is there likely to be, sufficient to warrant pre-emptive, comprehensive regulation? How have marketplace developments impacted the incentive and ability, if any, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms? Must we find that market power exists to retain rules in this space, and if so must the rules only apply to providers that have market power? Further, should any approach we adopt—whether *ex ante* rules, expectations regarding industry self-governance, or *ex post* enforcement practices—vary based on the size, financial resources, customer base of the broadband Internet access service provider, and/or other factors? Specifically, we seek comment on whether rules are necessary for or burdensome on smaller providers.

78. The Commission partially justified the 2015 rules on the theory that the rules would prevent anti-competitive behavior by ISPs seeking to advantage affiliated content.¹⁷⁸ With the existence of antitrust regulations aimed at curbing various forms of anticompetitive conduct, such as collusion and vertical restraints under certain circumstances, we seek comment on whether these rules are necessary in light of these other regulatory regimes.¹⁷⁹ Could the continued existence of these rules negatively impact future innovative, pro-competitive business deals that would not by themselves run afoul of merger conditions or established antitrust law?

79. In addition, the D.C. Circuit majority that reviewed the *Title II Order* stated that “[i]f a broadband provider . . . were to choose to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience,” then the *Title II Order* “excludes such [a] provider[] from the rules.”¹⁸⁰ Given that an ISP can avoid Title II classification simply by blocking enough content, are the purported benefits of the existing rules more illusory than they initially appear? By disclosing to consumers that it is offering a “curated internet experience,” can an ISP

¹⁷⁶ *Title II Order*, 30 FCC Rcd at 5644, para. 110; see 47 U.S.C. §§ 201, 202, 208.

¹⁷⁷ *Title II Order*, 30 FCC Rcd at 5672-77, paras. 162–71.

¹⁷⁸ *Title II Order*, 30 FCC Rcd at 5652, para. 123 (stating that “if a broadband provider and an unaffiliated entity both offered over-the-top applications, the no-throttling rule would prohibit broadband providers from constraining bandwidth for the competing over-the-top offering to prevent it from reaching the broadband provider’s end user in the same manner as the affiliated application.”).

¹⁷⁹ See generally 47 U.S.C. § 152(b) (“[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”). The *Title II Order* stated that it did not “preclude[] the Antitrust Division of the Department of Justice or the Commission itself from fulfilling their respective responsibilities under Section 7 of the Clayton Act (15 U.S.C. §18), or the Commission’s public interest standard as it assesses prospective transactions.” See *Title II Order*, 30 FCC Rcd at 5606, para. 13 n.12. See also Thomas W. Hazlett, and Joshua D. Wright, *The Law and Economics of Network Neutrality*, George Mason Law & Economics Research Paper No. 11-36, (September 12, 2011), <http://dx.doi.org/10.2139/ssrn.1917587>.

¹⁸⁰ *USTelecom*, 825 F.3d at 743 (emphasis omitted); see also *id.* (“Providers that may opt to exercise editorial discretion . . . would not offer a standardized service that can reach ‘substantially all’ endpoints.”).

escape from the ambit of the rules entirely? We seek comment on the implications of the D.C. Circuit's observation.

80. *Need for the No-Blocking Rule.* We emphasize that we oppose blocking lawful material. The Commission has repeatedly found the need for a no-blocking rule on principle, asserting that "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."¹⁸¹ We merely seek comment on the appropriate means to achieve this outcome consistent with the goals of maintaining Internet freedom, maximizing investment, and respecting the rule of law. We seek comment on whether a codified no-blocking rule is needed to protect such freedoms. For example, prior to 2015, many large Internet service providers voluntarily abided by the 2010 no-blocking rule in the absence of a regulatory obligation to do so.¹⁸² Do we have reason to think providers would behave differently today if the Commission were to eliminate the no-blocking rule? Is the no-blocking rule necessary for or burdensome on smaller providers?

81. We seek comment on the continuing need for a no-blocking rule. The no-blocking rule, originally adopted in 2010, invalidated by the *Verizon* court, and re-adopted in the *Title II Order*, prohibits Internet service providers from blocking competitors' content by mandating that a customer has a right to access lawful content, applications, services, and to use non-harmful devices, subject to reasonable network management.¹⁸³

82. If we determine that a no-blocking rule is indeed necessary to ensure a free, open, and dynamic Internet, what are the best means to achieve this outcome consistent with the goals of maintaining Internet freedom and maximizing investment? Should we consider modifying the existing no-blocking rule to better align with our proposed legal classification of broadband Internet access service as an information service? The *Verizon* court made clear that the Commission's 2010 no-blocking rule impermissibly subjected Internet service providers to common-carriage regulation.¹⁸⁴ We seek comment on whether there are other formulations of a no-blocking rule that are consistent with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority.

83. *Need for the No-Throttling Rule.* In the *Title II Order*, the Commission concluded that throttling was a sufficiently severe and distinct threat that it required its own, separate, codified rule.¹⁸⁵ The no-throttling rule mirrors the no-blocking rule and bans the impairment or degradation of lawful Internet traffic or use of a non-harmful device, subject to reasonable network management practices.¹⁸⁶ We seek comment on whether this rule is still necessary, particularly for smaller providers. How does the rule benefit consumers, and what are its costs? When is "throttling" harmful to consumers? Does the no-throttling rule prevent providers from offering broadband Internet access service with differentiated prioritization that benefits consumers? Does the no-throttling rule harm latency-sensitive applications and content? Does it prevent product differentiation among ISPs? If we eliminate the no-blocking rule,

¹⁸¹ *Title II Order*, 30 FCC Rcd at 5647–48, para. 111; *2014 Notice*, 29 FCC Rcd at 5593, para. 89; *Open Internet Order*, 25 FCC Rcd at 17941–42, para. 62.

¹⁸² *Title II Order*, 30 FCC Rcd at 5648, para. 112 & n.248.

¹⁸³ 47 CFR § 8.5; *Title II Order*, 30 FCC Rcd at 5648–49, paras. 112–13 ("A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.").

¹⁸⁴ *Verizon*, 740 F.3d at 658.

¹⁸⁵ 47 CFR § 8.7 ("A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."); *Title II Order*, 30 FCC Rcd at 5652, para. 121.

¹⁸⁶ *Title II Order*, 30 FCC Rcd at 5651–52, para. 120.

should we also eliminate the no-throttling rule? If we determine that a no-throttling rule is indeed necessary to ensure a free, open, and dynamic Internet, are there ways in which we could modify the no-throttling rule so it aligns with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority?

84. The Commission justified the separate, codified no-throttling rule on the theory of preventing anti-competitive behavior for broadband Internet access providers' affiliated content.¹⁸⁷ With the existence of antitrust and other regulations aimed at curbing collusion, we seek comment on whether a no-throttling rule is duplicative of these other regulatory regimes.¹⁸⁸ Could the continued existence of this rule negatively impact future innovative, pro-competitive business deals that would not by themselves run afoul of merger conditions or established antitrust law?

85. *Need for the No Paid Prioritization Rule.* The Commission concluded in the *Title II Order* that “fast lanes” or “paid prioritization” practices “harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment.”¹⁸⁹ The Commission adopted this *ex ante* flat ban on individual negotiations to address an apparently nonexistent problem. The ban on paid prioritization did not exist prior to the *Title II Order* and even then the record evidence confirmed that no such rule was needed since several large Internet service providers made it clear that they did not engage in paid prioritization¹⁹⁰ and had no plans to do so.¹⁹¹ We seek comment on the continued need for such a rule and our authority to retain it.

86. What are the trade-offs in banning business models dependent on paid prioritization versus allowing them to occur when overseen by a regulator or industry actors? Is there a risk that banning paid prioritization suppresses pro-competitive activity? For example, could allowing paid prioritization give Internet service providers a supplemental revenue stream that would enable them to offer lower-priced broadband Internet access service to end-users? What would be the impacts on new startups and innovation? Does a no-paid-prioritization rule harm the development of real-time or interactive services?¹⁹² Could allowing paid prioritization enable certain critical information, such as consumers' health care vital signs that are being monitored remotely, to be transmitted more efficiently or reliably? What other considerations mitigate any potential negative impacts from business models like paid prioritization? Should the Commission impose restrictions on these business models at all?

87. We seek comment on current traffic delivery arrangements online. How do content, application, and service providers host their data online? Do they rely on installing their own servers in data centers, content delivery networks, or cloud-based hosting? What are the varying service characteristics of these options and their varying costs? It appears that some larger online content providers like Netflix host their own data centers and interconnect directly with Internet service providers.¹⁹³ Is that still true? What are the service characteristics and costs of this option? How should the existence of these arrangement impact our evaluation of whether Internet service providers should be able to offer an alternative delivery option such paid prioritization?

¹⁸⁷ *Id.* at 5652, para. 123.

¹⁸⁸ *See supra* note 179.

¹⁸⁹ 47 CFR § 8.9; *Title II Order*, 30 FCC Rcd at 5653, para. 125.

¹⁹⁰ *See Title II Order*, 30 FCC Rcd at 5656, para 127 & n.301 (listing commenters that do not engage in paid prioritization).

¹⁹¹ *See id.* at 5656, para. 127 & n.302 (listing commenters that did not plan to engage in paid prioritization).

¹⁹² *See* Brent Skorup, The FCC's Misguided Paid Priority Ban, The Technology Liberation Front (Apr. 13, 2017), <https://techliberation.com/2017/04/13/the-fccs-misguided-paid-priority-ban/>.

¹⁹³ *See, e.g., Title II Order*, 30 FCC Rcd at 5690, para. 200 & n.504.

88. For those parties that believe an *ex ante* flat ban on paid prioritization is necessary, are there other formulations of a no-paid-prioritization rule that are consistent with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority? Are there any other formulations that are consistent with allowing pro-competitive or pro-consumer paid prioritization arrangements? Would we need to modify the rule and, if so, how?

89. *Need for the Transparency Rule.* We seek comment on whether to keep, modify, or eliminate the transparency rule.¹⁹⁴ When the Commission adopted the transparency rule in 2010 and enhanced it in 2015, it found that “effective disclosure of Internet service providers’ network management practices, performance, and commercial terms of service promotes competition, innovation, investment, end-user choice, and broadband adoption.”¹⁹⁵ We continue to support these objectives and seek comment on whether the existing transparency rule is the best way to accomplish them, or if there are other methods we can employ to achieve the goals of competition, innovation, investment, end-user choice, and broadband adoption.

90. Although we agree that the disclosure requirements were among some of the least intrusive regulatory measures imposed by the *Title II Order*,¹⁹⁶ we seek comment on whether the additional reporting obligations from that rule remains necessary in today’s competitive broadband marketplace. What are the benefits and drawbacks of those additional reporting obligations? Is the length of time necessary to obtain approval of these rules, first adopted in February 2015 and yet not going into effect until nearly two years later, illustrative of just how burdensome the new enhancements are in comparison to the 2010 rule?¹⁹⁷ Would the original transparency rule, which has been continuously operational since it came into effect following adoption of the *Open Internet Order*, be sufficient to protect consumers? Although the *Verizon* court upheld the 2010 transparency rule, we seek comment on our authority to retain the 2015 “enhancements” or to modify the transparency rule in a manner distinct from the *Open Internet Order* or *Title II Order*. For example, does the full and accurate disclosure of service plan information to consumers carry with it most of the benefits of the rule? How often do non-consumers rely on the additional disclosures required by the transparency rule? Are those additional benefits worth the additional cost of compliance, especially for small businesses?

91. Assuming we find a transparency rule necessary, how should we treat the additional guidance related to the transparency rule? For example, should we continue to enforce guidance from the Commission’s Chief Technology Officer regarding acceptable methodologies for disclosure of network performance to satisfy the enhanced transparency rule?¹⁹⁸ Is there merit in continuing to promote the broadband consumer labels that provided ISPs with a safe harbor—or do those standardized notices harm consumers by preventing them from obtaining additional information?¹⁹⁹ Does the repeated need for

¹⁹⁴ 47 CFR § 8.8.

¹⁹⁵ *Title II Order*, 30 FCC Rcd at 5670, para. 157; *Open Internet Order*, 25 FCC Rcd at 17938–39, para. 56.

¹⁹⁶ See *Title II Order*, 30 FCC Rcd at 5669, para. 154; *2014 Notice*, 29 FCC Rcd at 5585–86, para. 66.

¹⁹⁷ See *Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements*, WC Docket No. 14-28, Public Notice, 31 FCC Rcd 13218 (CGB 2016).

¹⁹⁸ See *Guidance on Open Internet Transparency Rule Requirements*, WC Docket No. 14-28, Public Notice, 31 FCC Rcd 5330 (2016) (*2016 Advisory Guidance*).

¹⁹⁹ See *Consumer & Governmental Affairs, Wireline Competition, & Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, 31 FCC Rcd 3358 (CGB 2016). Our seeking comment on the policy implications of the continued use of the broadband labels is not a reflection on the significant resource commitments from industry and consumer group representatives through the Commission’s Consumer Advisory Committee, whose dedication and work on a variety of issues we value and appreciate.

advisory guidance following the original 2010 transparency rule indicate that the rule itself is too open-ended?²⁰⁰

3. Additional Considerations Applicable to Existing Rules

92. Should we decide to keep or modify any of our existing open Internet rules, we propose and seek comment on several issues related to their continued operation.

93. *Scope.* Should we keep any of the existing bright-line rules or the transparency rule, we propose maintaining the definitions of the services applicable to the rules, the scope of the term “lawful content,” the exception for reasonable network management, and other provisions adopted in the *Title II Order* so as not to impact ISPs rights or obligations with respect to other laws or safety and security considerations.²⁰¹ Reasonable network management “allow[s] service providers the freedom to address legitimate needs such as avoiding network congestion and combating harmful or illegal content” without running afoul of the rules.²⁰² With respect to the definition of “reasonable network management,” we seek comment on whether we should eliminate the restriction imposed by the *Title II Order* that the exception will only be considered if used for a “technical management justification rather than other business justifications,”²⁰³ or if we should return to the 2010 definition of “reasonable network management” that did not contain that qualifier.²⁰⁴

94. For the reasonable network management exception and definition of non-broadband Internet access service data services that fall outside the scope of the rules, we seek comment on how we should view any additional guidance explaining those terms as set forth in the *Title II Order*, but not codified as part of the rules.²⁰⁵ Should we follow the case-by-case approach taken for evaluating reasonable network management?²⁰⁶ For non-broadband Internet access service data services, should we adhere to the characteristics of non-broadband Internet access service data services described in the *Title II Order*?²⁰⁷ Or, should we revert to the general concept of non-broadband Internet access service data

²⁰⁰ *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, WC Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411 (2011) (*2011 Advisory Guidance*); *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 (2014) (*2014 Advisory Guidance*).

²⁰¹ 47 CFR § 8.2; *see Title II Order*, 30 FCC Rcd at 5696–99, paras. 207–13; *id.* at 5648–49, para. 113 (emphasizing that the no-blocking rule applies only to transmissions of lawful content “and does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials”); *id.* at 5731-33, paras. 299–305.

²⁰² *Title II Order*, 30 FCC Rcd at 5622, para. 69.

²⁰³ *Id.* at 5700, para. 216 (describing a non-technical management justification to be “a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed”).

²⁰⁴ *Compare* 47 CFR § 8.2 (defining a reasonable network management practice as, “a practice that has a primarily technical network management justification, but does not include other business practices,” which is “reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service”), *with* 47 CFR § 8.11 (2012) (defining a reasonable network management practice as a practice that, “is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service”).

²⁰⁵ *Title II Order*, 30 FCC Rcd at 5701–04, paras. 218–24.

²⁰⁶ *Id.*

²⁰⁷ *Title II Order*, 30 FCC Rcd at 5696–97, para. 208–09; *see also* Open Internet Advisory Committee, 2013 Annual Report at 69 (Aug. 20, 2013), <http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf> (2013 OIAC Annual Report) (stating that these characteristics include that non-broadband Internet access data services are not used to

(continued....)

services discussed in the *Open Internet Order* (and then known as “specialized services”)? Further, for non-broadband Internet access service data services, should we eliminate the guidance that if non-broadband Internet access service data services “are undermining investment, innovation, competition, and end-user benefits,” then the Commission will take enforcement action—including the particularized focus on ensuring that “over-the-top services offered over the Internet are not impeded in their ability to compete with other data services?”²⁰⁸

95. *Application to Mobile.* To the extent we keep or modify any of the existing rules, we seek comment on whether mobile broadband should be treated differently from fixed broadband. The *Title II Order* applied the Internet openness rules equally to both fixed and mobile broadband Internet access services.²⁰⁹ This approach departed from the *Open Internet Order*’s framework, which adopted a different no-blocking standard for mobile broadband Internet access service and excluded mobile from the no unreasonable discrimination rule.²¹⁰ Are there legal, technical, economic, and/or policy reasons to distinguish mobile and fixed broadband with respect to rules in this context, and if so how should we differentiate the two in any rules that we keep or modify? For instance, several mobile providers who opposed application of the broader rules in 2015 argued that additional rules were unnecessary because competition for mobile broadband service adequately restrained the behavior of mobile Internet service providers.²¹¹ We seek comment on whether this contention is correct in today’s marketplace.

4. Enforcement Regime

96. Should we keep or modify any of the Commission’s existing rules discussed above, we seek comment on how we should enforce them. In the *Open Internet Order* the Commission set forth procedures for filing both informal²¹² and formal²¹³ complaints. Commission rules currently provide for filing fees in the case of complaints to enforce Part 8 rules governing broadband Internet access service and in the case of data roaming complaints.²¹⁴ Would those rules need to be modified in the event that we reclassify broadband Internet access service? Could some rules subject to those complaint procedures remain? Are there other similar issues the Commission would need to address? The *Title II Order* also allowed the Enforcement Bureau to issue advisory opinions²¹⁵ and enforcement advisories,²¹⁶ and it created an ombudsperson position to provide effective access to dispute resolution.²¹⁷ We seek comment on whether advisory opinions or enforcement advisories have benefitted consumers or broadband Internet access service providers. If we restore the broadband Internet access service classification to an information service, should that alter our complaint and enforcement process in this context?

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reach large parts of the Internet, not a generic platform—but rather a specific “application level” service, and use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services).

²⁰⁸ *Title II Order*, 30 FCC Rcd at 5697, para. 210.

²⁰⁹ *Id.* at 5635–43, 5650, paras. 86–101, 117.

²¹⁰ *Open Internet Order*, 25 FCC Rcd at 17956–58, 17959–60, paras. 94–96, 99.

²¹¹ *Title II Order*, 30 FCC Rcd at 5638, para. 93.

²¹² *Open Internet Order*, 25 FCC Rcd at 17986–87, para. 153.

²¹³ *Id.* at 17987–89, paras. 154–59.

²¹⁴ 47 CFR §§ 8.13(b), 20.12(e)(2).

²¹⁵ *Title II Order*, 30 FCC Rcd at 5706, para. 229.

²¹⁶ *Id.* at 5709–10, para. 240.

²¹⁷ *Id.* at 5714, para. 254.

97. Additionally, we seek comment on streamlining future enforcement processes. For instance, we propose eliminating the ombudsperson role. Is the role of an ombudsperson necessary to protect consumer, business, and other organizations' interests when the Commission has a Bureau—the Consumer and Governmental Affairs Bureau (CGB)—dedicated to protecting consumer interests?²¹⁸ Our experience suggests that consumers are comfortable working with CGB, and typically did not call on the ombudsperson specifically. Has the ombudsperson been called to action to assist in circumstances that otherwise could not have been handled by CGB?

98. What have been the benefits and drawbacks of the complaint procedures instituted in 2010 and 2015? Since these rules were formally codified in 2010, only one formal complaint has been filed under them to date.²¹⁹ Can we infer that parties heeded the Commission's encouragement to "resolve disputes through informal discussions and private negotiations" without Commission involvement, except through the informal complaint process?²²⁰ Does the lack of formal complaints indicate that dedicated, formal enforcement procedures are unwarranted? If we restore broadband Internet access service's classification as an information service, should that alter our complaint and enforcement process in this context? If so, in what way should the processes be altered? Are there methods other than formal complaints we can employ to ensure a free and open Internet?

99. In addition to the enforcement regime, the *Title II Order* delegated authority to several Bureaus and Offices to make further decisions involving the rules following their adoption. For example, the *Title II Order* delegated authority to the Chief Technologist to provide guidance under the transparency rule and further delegated authority to several Bureaus to determine whether the safe harbor disclosures under the transparency rule aligned with the Commission's expectations.²²¹ If we determine there is no need for the existing transparency rule or enforcement regime, then we believe that the technological and safe harbor guidance would become irrelevant. We also believe that the safe harbor disclosure guidance would be rendered moot. We seek comment on this analysis and on whether there nonetheless are any affirmative steps the Commission should take with respect either to those delegations of authority or to actions already taken in reliance on that delegated authority.

B. Legal Authority to Adopt Rules

100. We seek comment on the legal authority that the Commission would have in this area if we adopted our lead proposal to classify broadband Internet access service as an information service.

101. *Section 706.* We seek comment on whether section 706(a) and (b) of the 1996 Act are best interpreted as hortatory rather than as delegations of regulatory authority. Such an interpretation generally is reflected in the Commission's approach to section 706 prior to 2010.²²² The text of these provisions also appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance. Although some courts have held that the Commission's post-2010 interpretation of section 706(a) and/or (b) as a grant of regulatory authority was not unreasonable, we seek comment on whether interpreting those provisions as hortatory nonetheless is the better reading.²²³ Or should we maintain our

²¹⁸ See *id.* at 5714–15, paras. 254–56.

²¹⁹ See Formal Complaint of Alex Nguyen, Docket No. 16-242, Bureau ID Number EB-16-MD-003 (filed July 26, 2016).

²²⁰ *Title II Order*, 30 FCC Rcd at 5704, para. 225 (citing *2014 Notice*, 29 FCC Rcd at 5618, para. 161; *Open Internet Order*, 25 FCC Rcd at 17986, para. 151).

²²¹ *Title II Order*, 30 FCC Rcd at 5673–75, 80–81, paras. 166, 180.

²²² See, e.g., *Comcast Corp. v. FCC*, 600 F.3d 642, 658–59 (D.C. Cir. 2010) (*Comcast*) (discussing *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24048, para. 77 (1998)).

²²³ See, e.g., *Verizon*, 740 F.3d at 636–42 (rejecting arguments that it was unreasonable for the Commission to interpret Sections 706(a) and (b) as granting regulatory authority); *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th

post-2010 interpretation of these provisions? Alternatively, we seek comment whether section 706 reflects a “deregulatory bent,”²²⁴ and, if so, how we should interpret that with respect to obligations for regulated entities. If section 706 reflects a deregulatory emphasis, what authority does it give the Commission, particularly in situations in which capital expenditures by Internet service providers have slowed, as they have in the past year under Title II regulation? If we interpret section 706(a) as a grant of authority, does that mean state commissions would have coequal authority? If we interpret section 706(b) as a grant of authority, what would happen to any rules adopted using that authority if the Commission later found that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion? Are there other interpretations of section 706 of the 1996 Act that we should consider?

102. *Section 230.* We also seek comment on whether section 230 gives us the authority to retain any rules that were adopted in the *Title II Order*. In *Comcast*, the D.C. Circuit observed that the Commission there “acknowledge[d] that section 230(b)” is a “statement [] of policy that [itself] delegate[s] no regulatory authority.”²²⁵ Are there grounds for the Commission to revisit that interpretation or otherwise invoke section 230 here? For example, the D.C. Circuit in *Comcast* speculated that “[p]erhaps the Commission could use section 230(b) . . . to demonstrate . . . a connection” to an “express statutory delegation of authority,” although it had not done so there.²²⁶ If the Commission were to demonstrate a connection to an express statutory delegation of authority, what would such a demonstration look like? What, if any, express statutory delegations of authority over broadband Internet access service exist?

103. *Other Sources of Legal Authority.* Should we determine rules are indeed necessary in this space, we seek comment on any other sources of independent legal authority we might use to support such rules. For example, we seek comment on the Communications Act authority cited by the Commission in its *Open Internet Order*.²²⁷ If any other sources of legal authority exist, to what extent could they be used? And, what are the trade-offs, including the advantages and disadvantages, of using any of these other sources of legal authority in lieu of Title II provisions that depend on the classification of broadband Internet access service as a telecommunications service and/or section 706 of the 1996 Act?

104. *Constraints on our Legal Authority.* The Commission has repeatedly recognized that adopting rules like these raises constitutional concerns.²²⁸ For example, some petitioners in the *USTelecom v. FCC* case argued that compelling an Internet service provider to carry all speech violates the First Amendment.²²⁹ Others have argued that “[t]here is no principled basis for distinguishing the

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Cir. 2014) (rejecting arguments that it was unreasonable for the Commission to interpret Section 706(b) as granting regulatory authority); *USTelecom*, 825 F.3d at 733–34 (reaffirming the holding in *Verizon* regarding Section 706).

²²⁴ See, e.g., Dissenting Statement of Commissioner Robert McDowell, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability To All Americans In A Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, As Amended By the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9693 (2010) (“The plain language of Section 706 was written with a deregulatory bent, but I am concerned that regulating with a light touch is not what this current Report will be used for in the future.”).

²²⁵ *Comcast*, 600 F.3d at 652.

²²⁶ See, e.g., *id.* at 654–55.

²²⁷ See *Open Internet Order*, 25 FCC Rcd at 17972–80, 17981, paras. 124–35, 137.

²²⁸ See, e.g., *2014 Notice*, 29 FCC Rcd at 5617, para. 159.

²²⁹ See Joint Brief for Petitioners Alamo Broadband Inc. and Daniel Berninger, *USTelecom v. FCC*, Case No. 15-1063, at 4–9 (July 30, 2015) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974), among other cases).

speech of broadband providers from other speakers using older technologies.”²³⁰ The D.C. Circuit Court of Appeals disagreed, finding that “the First Amendment poses no bar to the rules.”²³¹ However, at least one judge on the D.C. Circuit believes that the Commission’s current “net neutrality rule violates the First Amendment to the U.S. Constitution. . . . [because] the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market.”²³² We seek comment on whether the First Amendment or any other constitutional provision, or any other federal law, would constrain the Commission from adopting rules here. If a rule poses serious constitutional concerns, how should we modify it? Does the continued classification of broadband Internet access service as a common-carriage service itself raise any constitutional concerns?

C. Cost-Benefit Analysis

105. We propose as part of this proceeding to conduct a cost-benefit analysis (CBA). We propose to compare the costs and the benefits of maintaining the classification of broadband Internet access service as a telecommunications service (i.e. Title II regulation),²³³ maintaining the Internet conduct rule; maintaining the no-blocking rule; maintaining the no-throttling rule; maintaining the ban on paid prioritization; maintaining the transparency rules; and acting on the other interpretive and policy changes for which we seek comment above. We seek comment on how the CBA should be conducted to appropriately separate or combine the analyses of each piece discussed above. We also seek comment generally on the importance of conducting a CBA as well as the interaction between the Commission’s public interest standard and a weighing of the costs and benefits.

106. Given the size of the economic impacts due to our decisions in this proceeding, it is especially important to evaluate whether the decision will have net positive benefits. Our presumption is that the effects of the decision would have an annual effect on the economy of *at least* \$100 million which is the federal government’s standard threshold for requiring agencies covered by Executive Order 12866 to conduct a regulatory analysis.²³⁴ Executive Order 12866 indicates regulatory actions are economically significant if they “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”²³⁵ While the Commission is not required by law to comply with this Executive Order, we believe the \$100 million threshold

²³⁰ Harold Furchtgott-Roth, *Net Neutrality Violates First Amendment*, Hudson Institute (Nov. 23, 2015), <https://hudson.org/research/11977-net-neutrality-violates-first-amendment>.

²³¹ *USTelecom*, 825 F.3d at 739.

²³² *USTelecom*, 825 F.3d 674, *reh’g en banc denied*, No. 15-1063, 2017 WL 1541517, at *31 (D.C. Cir. May 1, 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

²³³ Throughout this section, when discussing maintaining broadband Internet access service as a telecommunications service, we mean as actually implemented by the *Title II Order*, where the Commission forbore from applying some sections of the Act and some Commission rules.

²³⁴ A “regulatory analysis” has three key components: (1) a statement of the need for a proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and the costs. See Office of Management and Budget, *Circular A-4*, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#a (last visited May 19, 2017) (*Circular A-4*). The other parts of this *Notice* effectively seek comment on the first and second pieces of the regulatory analysis.

²³⁵ For entities covered by Executive Order 12866, regulatory actions deemed economically significant must undergo review by the Office of Information and Regulatory Affairs (OIRA) and this review will typically require an accounting of the costs and benefits. See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sep. 30, 1993); <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

provides a helpful guideline for when a CBA is clearly appropriate.²³⁶ We seek comment on our assertion that conducting a CBA is appropriate and that the decision is likely to be economically significant.

107. In conducting the CBA, we propose to follow standard practices employed by the federal government. Specifically we propose to follow the guidelines in Section E (“Identifying and Measuring Benefits and Costs”) of the Office of Management and Budget’s Circular A-4.²³⁷ This publication provides guidelines that an agency can follow for identifying and quantifying costs and benefits associated with regulatory decisions while allowing for appropriate latitude in how the analysis is conducted for a particular regulatory situation. We seek comment on following Circular A-4 generally. We also seek comment on any specific portions of Circular A-4 where the Commission should diverge from the guidance provided. Commenters should explain why particular guidance in Circular A-4 should not be followed in this circumstance and should propose alternatives.

108. Any CBA should be conducted by comparing the costs and benefits relative to the “baseline” scenario. As OMB Circular A-4 explains, “[t]his baseline should be the best assessment of the way the world would look absent the proposed action.” Care should be taken to recognize that in certain cases repealing or eliminating a rule does not result in a total lack of regulation but instead means that other regulations continue to operate or other regulatory bodies will have authority. For example, as we evaluate the costs and benefits of maintaining the current classification of broadband Internet access service as a telecommunications service, the CBA should recognize that changing the classification of broadband Internet access service to an information service would result in the FTC having jurisdiction over certain aspects of such services. Therefore, the benefits and costs of the FCC maintaining Title II jurisdiction over broadband Internet access service should be calculated with FTC enforcement as the appropriate baseline. In this example, the benefits of maintaining the Commission’s Title II classification are those benefits that exist over and above the “baseline” scenario of FTC jurisdiction (and, at a minimum, FCC Title I protections). Likewise, the costs of maintaining Title II should be estimated as those costs of *ex ante* FCC regulation relative to FTC *ex post* regulation. We seek comment on the appropriate baseline scenarios that should be used and on our proposed course of action above.

109. In weighing the costs and benefits of any policy, there always exists an element of uncertainty. As commenters suggest costs and benefits the Commission should consider, we ask that to the extent possible information could also be provided about the level of certainty surrounding a scenario or particular value. Also, various costs and benefits are likely to occur at different points in time. When suggesting costs and benefits, we seek comment on the timing of those costs and benefits.²³⁸ We also seek comment on how uncertainty around and timing of costs and benefits should interact in the analysis.

110. *Costs.* There is evidence that the actions taken by the Commission in the *Title II Order* have reduced investments by ISPs.²³⁹ We presume that maintaining those actions would depress investment relative to the baseline. Many of the costs of lower or misallocated investment in networks and in other sectors of the digital economy will be due to consumers and businesses having less broadband Internet access service coverage and lower quality of service. Since the networks built with capital investments are only a means to an end, we believe that the private costs borne by consumers and businesses of maintaining the *status quo* result from decreased value derived from using the networks. We seek comment on this analysis. What approaches should we use to capture these costs? We seek

²³⁶ While we believe it is clearly appropriate for actions in excess of \$100 million, we make no suggestion here about whether the Commission should conduct CBAs below that threshold.

²³⁷ *Circular A-4*, Section E https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#e.

²³⁸ As explained in OMB Circular A-4, Section E, the timing of costs and benefits is important because ultimately the CBA will need to discount future costs and benefits for the purpose of calculating net present benefits.

²³⁹ See, e.g., Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era>.

comment on particular methods and data sources we might use to estimate the private costs of forgoing the building, maintaining, or upgrading of these networks.

111. In addition to the private costs discussed above, foregone networks may also impose additional societal costs. In particular, fewer network effects created by increased connectivity will occur. As another example, society will not realize some efficiencies and savings from governments delivering services over the networks. Additionally, there are likely long run costs due to forgoing better connectivity that would allow new products and services to be created. We seek comment on this analysis. How should our CBA incorporate these types of cost into the analysis? What other ancillary costs might exist? What data is appropriate to use?

112. It is also likely that the foregone investment *per se* results in economic costs (e.g., fewer network construction jobs), and we seek comment on how the Commission should incorporate any of these costs into the analysis. For example, should the Commission use a multiplier to account for economic activity missed due to tempered investment? If so, what are the appropriate multipliers to use? Commenters should provide sources to justify recommendations for multiplier values.

113. Lastly, there may be other costs that are not directly the result of decreased investment in networks. Maintaining current policies may prevent new business models or new products and services from being viable and ultimately delivering value to society. We seek comment on such costs and how we may incorporate them into our analysis.

114. *Benefits.* There are various theoretical possibilities for economic benefits created by the current policies. We therefore seek comment on these benefits. Commenters should identify these benefits relative to an appropriate baseline, not relative to a situation where there is no regulation or statute to govern behavior. For example, if the ban on paid prioritization is maintained but broadband Internet access service is classified as an information service, then commenters should identify the benefits a blanket ban on paid prioritization carries over the FTC's authority to police anticompetitive conduct.

115. We particularly seek comments that attempt to quantify the benefits rather than merely suggest the existence of benefits without any indication of their magnitude. We also ask commenters to particularly highlight benefits where *actual* misconduct has been observed. To the extent the baseline scenario allows any market failures to go unregulated, commenters should clearly identify the market failure and the estimated economic benefit associated with addressing it through the maintenance of current policies.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

116. As required by the Regulatory Flexibility Act of 1980 (RFA),²⁴⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this *Notice of Proposed Rulemaking*, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates on the first page of this *Notice of Proposed Rulemaking*. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).²⁴¹

²⁴⁰ See 5 U.S.C. § 603.

²⁴¹ See 5 U.S.C. § 603(a).

B. Initial Paperwork Reduction Act Analysis

117. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (“OMB”) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

118. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

C. Other Procedural Matters

1. Ex Parte Rules – Permit-But-Disclose

119. The proceeding this NPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁴² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

2. Comment Filing Procedures

120. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (“ECFS”). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>. Parties who seek to file a large number of comments or “group” comments may do so through the public API or the Commission’s electronic inbox established for this proceeding, called Restoring Internet Freedom Comments at <https://www.fcc.gov/restoring-internet-freedom-comments>. To ensure that bulk comments are properly recorded in ECFS, commenters must use the .CSV template provided.

²⁴² 47 CFR §§ 1.1200 *et seq.*

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

121. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be publically available online via ECFS.²⁴³ These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

122. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

VI. ORDERING CLAUSES

123. Accordingly, IT IS ORDERED that, pursuant to sections 3, 10, 201(b), 230, 254(e), 303(r), and 332 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 153, 160, 201(b), 254(e), 303(r), 332, 1302, this Notice of Proposed Rulemaking IS ADOPTED.

124. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before July 17, 2017 and reply comments on or before August 16, 2017.

125. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴³ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

APPENDIX A

Proposed Rules

The Federal Communications Commission proposes to amend 47 CFR Part 8 and 47 CFR Part 20 as follows:

PART 8: PROTECTING AND PROMOTING THE OPEN INTERNET

- 1. Repeal and reserve Section 8.11.

PART 20: COMMERCIAL MOBILE SERVICES

- 2. Amend Section 20.3 as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. * * *

* * * * *

- (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

* * * * *

Interconnected Service. A service:

- (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

- (b) * * *

* * * * *

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

* * * * *

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. With this Notice, the Commission initiates a new rulemaking that proposes to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for American consumers put into motion by the Commission in 2015. The Commission's *Title II Order* has put at risk online investment and innovation, threatening the very open Internet it purported to preserve. Investment in broadband networks declined. Internet service providers (ISPs) have pulled back on plans to deploy new and upgraded infrastructure and services to consumers. This is particularly true of the smallest Internet service providers that serve consumers in rural, low-income, and other underserved communities. This rulemaking continues the critical work to promote broadband deployment to rural consumers and infrastructure investment throughout our nation, to brighten the future of innovation both within networks and at their edge, and to close the digital divide.

3. The Notice sets forth the following three main proposals: returning broadband Internet access service to its previously-settled classification as an information service, restoring the definition of "public switched telephone network" to its original meaning, and eliminating the Internet conduct standard. The Notice also seeks comment on a variety of issues relating to the effects of the Commission's *Title II Order*, including the burdens imposed by the *Title II Order* that have led to decreased investment and reduced innovation and have been felt by Internet service providers (ISPs) and consumers. Additionally, the Notice seeks comment on the effects of reclassifying broadband Internet access service as an information service on the existing enforcement regime and the necessity of the other rules adopted in the *Title II Order*. Specifically, the Notice seeks comment on the usefulness and necessity of the no-blocking rule, the no-throttling rule, the no paid prioritization rule, and the transparency rule.

B. Legal Basis

4. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 3, 10, 201(b), 230, 254(e), 303(r), 332, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 153, 160, 201(b), 254(e), 303(r), 332, 1302.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ *Id.*

C. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.⁶ A small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

1. Total Small Entities

6. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.⁸ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.⁹ These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.¹⁰ Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹¹ Nationwide, as of 2007, there were approximately 1,621,215 small organizations.¹² Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹³ U.S. Census Bureau data published in 2012 indicate that there were 89,476 local governmental jurisdictions in the United States.¹⁴ We estimate that, of this total, as many as 88,761 entities may qualify as “small governmental jurisdictions.”¹⁵ Thus, we estimate that most governmental jurisdictions are small.

⁴ See 5 U.S.C. § 603(b)(3).

⁵ See 5 U.S.C. § 601(6).

⁶ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷ See 15 U.S.C. § 632.

⁸ See 5 U.S.C. § 601(3)-(6).

⁹ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

¹⁰ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small business are there in the U.S.?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

¹¹ 5 U.S.C. § 601(4).

¹² Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

¹³ 5 U.S.C. § 601(5).

¹⁴ U.S. Census Bureau, *Statistical Abstract of the United States: 2012* at 267, Table 428 (2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

¹⁵ The 2012 U.S. Census Bureau data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government

(continued....)

2. Broadband Internet Access Service Providers

7. The proposed rules would apply to broadband Internet access service providers. The Economic Census places these firms, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,¹⁶ which has an SBA small business size standard of 1,500 or fewer employees.¹⁷ These are also labeled "broadband." The latter are within the category of All Other Telecommunications,¹⁸ which has a size standard of annual receipts of \$32.5 million or less.¹⁹ These are labeled non-broadband. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁰ For the second category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million.²¹ Consequently, we estimate that the majority of broadband Internet access service provider firms are small entities.

8. The broadband Internet access service provider industry has changed since this definition was introduced in 2007. The data cited above may therefore include entities that no longer provide broadband Internet access service, and may exclude entities that now provide such service. To ensure that this IRFA describes the universe of small entities that our action might affect, we discuss in turn several different types of entities that might be providing broadband Internet access service. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we include these entities in our Initial Regulatory Flexibility Analysis.

3. Wireline Providers

9. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including

(Continued from previous page) _____

organizations were small, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2011. See U.S. Census Bureau, City and Town Totals Vintage: 2011, <http://www.census.gov/popest/data/cities/totals/2011/index.html>. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small.

¹⁶ U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012%20NAICS%20Search>.

¹⁷ 13 CFR § 121.201, NAICS code 517110.

¹⁸ U.S. Census Bureau, 2012 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012%20NAICS%20Search>.

¹⁹ 13 CFR § 121.201, NAICS code 517919.

²⁰ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²¹ U.S. Census Bureau, 2012 *Economic Census of the United States*, Table EC0751SSSZ4, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table.

VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”²² The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²³ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁴ Thus, under this size standard, the majority of firms in this industry can be considered small.

10. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.²⁵ According to Commission data, census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁶ The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

11. *Incumbent LECs*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁷ According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.²⁸ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. Three hundred and seven (307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.²⁹ Of this total, an estimated 1,006 have 1,500 or fewer employees.³⁰

12. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees.³¹ U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.³² Based on this data, the Commission concludes that the majority of Competitive LECs,

²² <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²³ See 13 CFR § 120.201, NAICS Code 517110.

²⁴ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

²⁵ 13 CFR § 121.201, NAICS code 517110.

²⁶ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

²⁷ 13 CFR § 121.201, NAICS code 517110.

²⁸ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

²⁹ See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

³⁰ *Id.*

³¹ 13 CFR § 121.201, NAICS code 517110.

³² http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.³³ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.³⁴ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.³⁵ Also, 72 carriers have reported that they are Other Local Service Providers.³⁶ Of this total, 70 have 1,500 or fewer employees.³⁷ Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

13. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”³⁸ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.³⁹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁴⁰ U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.⁴¹ According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.⁴² Of this total, an estimated 317 have 1,500 or fewer employees.⁴³ Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed rules.

15. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a

³³ See *Trends in Telephone Service*, at tbl. 5.3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 5 U.S.C. § 601(3).

³⁹ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (filed May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

⁴⁰ 13 CFR § 121.201, NAICS code 517110.

⁴¹ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁴² See *Trends in Telephone Service*, at tbl. 5.3.

⁴³ *Id.*

business is small if it has 1,500 or fewer employees.⁴⁴ According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees.⁴⁵ Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

16. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.⁴⁶ Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁷ Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁴⁸ Of these, an estimated 279 have 1,500 or fewer employees.⁴⁹ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Notice.

4. Wireless Providers – Fixed and Mobile

17. The broadband Internet access service provider category covered by these proposed rules may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access service, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

18. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.⁵⁰ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁵¹ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁵² Of this total, 955 firms had employment of 999 or fewer

⁴⁴ 13 CFR § 121.201, NAICS code 517110.

⁴⁵ *Trends in Telephone Service*, tbl. 5.3.

⁴⁶ 13 CFR § 121.201, NAICS code 517110.

⁴⁷ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁴⁸ *Trends in Telephone Service*, at tbl. 5.3.

⁴⁹ *Id.*

⁵⁰ NAICS Code 517210. See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210>.

⁵¹ 13 CFR § 121.201, NAICS code 517210.

⁵² U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210” (rel. Jan. 8, 2016).

employees and 12 had employment of 1000 employees or more.⁵³ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

19. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today.⁵⁴ The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services.⁵⁵ Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.⁵⁶ Thus, using available data, we estimate that the majority of wireless firms can be considered small.

20. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.⁵⁷ The SBA has approved these definitions.⁵⁸

21. *1670–1675 MHz Services*. This service can be used for fixed and mobile uses, except aeronautical mobile.⁵⁹ An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

22. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁶⁰ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁶¹ According to Commission data, 413 carriers reported that they were engaged in wireless telephony.⁶² Of these, an

⁵³ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

⁵⁴ See <http://wireless.fcc.gov/uls>. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

⁵⁵ See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

⁵⁶ See *id.*

⁵⁷ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

⁵⁸ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

⁵⁹ 47 CFR § 2.106; see generally 47 CFR §§ 27.1-27.70.

⁶⁰ 13 CFR § 121.201, NAICS code 517210.

⁶¹ *Id.*

⁶² *Trends in Telephone Service*, tbl. 5.3.

estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁶³ Therefore, a little less than one third of these entities can be considered small.

23. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁶⁴ For F-Block licenses, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁵ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁶⁶ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.⁶⁷ On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.⁶⁸ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

24. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.⁶⁹ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.⁷⁰ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.⁷¹ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.⁷² On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block

⁶³ *Id.*

⁶⁴ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule*, Report and Order, 11 FCC Rcd 7824, 7850-52, paras. 57-60 (1996) (*PCS Report and Order*); see also 47 CFR § 24.720(b).

⁶⁵ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

⁶⁶ See *Alvarez Letter 1998*.

⁶⁷ See *Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

⁶⁸ See *C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

⁶⁹ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

⁷⁰ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

⁷¹ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

⁷² *Id.*

Broadband PCS licenses in Auction No. 78.⁷³ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.⁷⁴

25. *Specialized Mobile Radio Licenses.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.⁷⁵ The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.⁷⁶ The SBA has approved these small business size standards for the 900 MHz Service.⁷⁷ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.⁷⁸ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.⁷⁹

26. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the \$15 million size standard.⁸⁰ In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.⁸¹ Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

27. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard.⁸² We assume, for purposes of this

⁷³ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

⁷⁴ *Id.*

⁷⁵ 47 CFR § 90.814(b)(1).

⁷⁶ *Id.*

⁷⁷ See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Aug. 10, 1999) (*Alvarez Letter 1999*).

⁷⁸ See *Correction to Public Notice DA 96-586 “FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,”* Public Notice, 18 FCC Rcd 18367 (WTB 1996).

⁷⁹ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

⁸⁰ See *800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (2000).

⁸¹ See *800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (2000).

⁸² See generally 13 CFR § 121.201, NAICS code 517210.

analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

28. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.⁸³ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁸⁴ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁸⁵ Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“entrepreneur”—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁸⁶ The SBA approved these small size standards.⁸⁷ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.⁸⁸ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.⁸⁹ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.⁹⁰ On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

29. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.⁹¹ An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block.⁹² Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed \$15

⁸³ See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52–59 Report and Order*).

⁸⁴ See *id.* at 1087-88, para. 172.

⁸⁵ See *id.*

⁸⁶ See *id.*, at 1088, para. 173.

⁸⁷ See *Alvarez Letter 1999*.

⁸⁸ See *Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17272 (WTB 2002).

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ *Service Rules for the 698–746, 747–762 and 777–792 MHz Band; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule*, Second Report and Order, 22 FCC Rcd 15289, 15359 n. 434 (2007) (*700 MHz Second Report and Order*).

⁹² See *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

million and do not exceed \$40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) won 325 licenses.

30. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.⁹³ On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.⁹⁴ The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years) and winning five licenses.

31. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁹⁵ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁹⁶ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁹⁷ SBA approval of these definitions is not required.⁹⁸ An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000.⁹⁹ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.¹⁰⁰

32. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), i.e., an entity employing no more than 1,500 persons.¹⁰¹ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding

⁹³ *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

⁹⁴ *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

⁹⁵ *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

⁹⁶ *See id.* at 5343, para. 108.

⁹⁷ *See id.*

⁹⁸ *See id.* at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

⁹⁹ *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

¹⁰⁰ *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

¹⁰¹ 13 CFR § 121.201, NAICS codes 517210.

three years not exceeding \$40 million.¹⁰² A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁰³ These definitions were approved by the SBA.¹⁰⁴ In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

33. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)).* For the AWS-1 bands,¹⁰⁵ the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but proposes to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.¹⁰⁶

34. *3650–3700 MHz band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

35. *Fixed Microwave Services.* Microwave services include common carrier,¹⁰⁷ private-operational fixed,¹⁰⁸ and broadcast auxiliary radio services.¹⁰⁹ They also include the Local Multipoint

¹⁰² *Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28-42 (2005).

¹⁰³ *Id.*

¹⁰⁴ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Sept. 19, 2005).

¹⁰⁵ The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 CFR § 90.1301 *et seq.*

¹⁰⁶ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, Appx. B (2003), modified by *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058, Appx. C (2005); *Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 19 FCC Rcd 19263, Appx. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17035, Appx. (2007).

¹⁰⁷ See 47 CFR Part 101, Subparts C and I.

¹⁰⁸ See 47 CFR Part 101, Subparts C and H.

¹⁰⁹ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary

(continued....)

Distribution Service (LMDS),¹¹⁰ the Digital Electronic Message Service (DEMS),¹¹¹ and the 24 GHz Service,¹¹² where licensees can choose between common carrier and non-common carrier status.¹¹³ At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons.¹¹⁴ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹¹⁵ The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

36. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).¹¹⁶ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.¹¹⁷ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.¹¹⁸ After adding the number of small business auction licensees to the number of incumbent licensees not

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microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

¹¹⁰ See 47 CFR Part 101, Subpart L.

¹¹¹ See 47 CFR Part 101, Subpart G.

¹¹² See *id.*

¹¹³ See 47 CFR §§ 101.533, 101.1017.

¹¹⁴ 13 CFR § 121.201, NAICS code 517210.

¹¹⁵ 13 CFR § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

¹¹⁶ *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

¹¹⁷ 47 CFR § 21.961(b)(1).

¹¹⁸ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

37. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.¹¹⁹ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.¹²⁰ Auction 86 concluded in 2009 with the sale of 61 licenses.¹²¹ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

38. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.¹²² Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."¹²³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹²⁴ According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.¹²⁵ Of this total, 948 firms had annual receipts of under \$10 million, and 48 firms had receipts of \$10 million or more but less than \$25 million.¹²⁶ Thus, the majority of these firms can be considered small.

¹¹⁹ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

¹²⁰ *Id.* at 8296 para. 73.

¹²¹ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

¹²² The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

¹²³ U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>.

¹²⁴ 13 CFR § 121.201, NAICS code 517110.

¹²⁵ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS code 517510 (rel. Nov. 19, 2010).

¹²⁶ *Id.*

5. Satellite Service Providers

39. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. Both categories have a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.¹²⁷

40. *Satellite Telecommunications.* This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”¹²⁸ The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.¹²⁹ For this category, Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.¹³⁰ Of this total, 299 firms had annual receipts of less than \$25 million.¹³¹ Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

41. *All Other Telecommunications.* “All Other Telecommunications” is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.¹³² The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.¹³³ For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.¹³⁴ Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

6. Cable Service Providers

42. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

43. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or

¹²⁷ 13 CFR § 121.201, NAICS Code 517410.

¹²⁸ U.S. Census Bureau, 2012 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

¹²⁹ 13 CFR § 121.201, NAICS code 517410.

¹³⁰ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS code 517410 http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

¹³¹ *Id.*

¹³² <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹³³ 13 CFR § 121.201; NAICS Code 517919.

¹³⁴ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

fee basis. The broadcast programming is typically narrowcast in nature (.e.g. limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.¹³⁵ The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees.¹³⁶ The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees.¹³⁷ Accordingly we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

44. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.¹³⁸ Industry data indicate that there are currently 4,600 active cable systems in the United States.¹³⁹ Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard.¹⁴⁰ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹⁴¹ Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.¹⁴² Thus, under this standard as well, we estimate that most cable systems are small entities.

45. *Cable System Operators (Telecom Act Standard)*. The Communications Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁴³ There are approximately 52,403,705 cable video subscribers in the United States today.¹⁴⁴ Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁴⁵ Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.¹⁴⁶ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose

¹³⁵ <https://www.census.gov/agi-bin/ssd/naics/naicsrch>.

¹³⁶ 13 CFR § 121.201, 2016 NAICS Code 515210.

¹³⁷ http://factfinder.census.gov/faces/table/services/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

¹³⁸ 47 CFR § 76.901(e).

¹³⁹ August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS). See www.fcc.gov/coals.

¹⁴⁰ Data obtained from SNL Kagan data base on April 19, 2017.

¹⁴¹ 47 CFR § 76.901(c).

¹⁴² August 5, 2015 report from the Media Bureau based on its research in COALS. See www.fcc.gov/coals.

¹⁴³ 47 CFR § 76.90(f) and notes ff. 1, 2, and 3.

¹⁴⁴ See SNL KAGAN at <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx>.

¹⁴⁵ 47 CFR § 76.901(f) and notes ff. 1, 2, and 3.

¹⁴⁶ See SNL KAGAN at <http://www.snl.com/interactivex/TopCableMSOs.aspx>.

gross annual revenues exceed \$250 million.¹⁴⁷ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

7. All Other Telecommunications

46. *Electric Power Generators, Transmitters, and Distributors.* This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.¹⁴⁸ The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.¹⁴⁹ For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.¹⁵⁰ Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Notice.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

47. As indicated above, the Notice seeks comment on modifications to the Commission’s existing no-blocking rule, no-throttling rule, no paid prioritization rule, and transparency rule, and it proposes eliminating the Internet conduct standard. While we anticipate that the removal or modification of burdensome regulations will lead to a long-term reduction in reporting, recordkeeping, or other compliance requirements on some small entities, the potential modifications, if adopted, could initially impose additional reporting, recordkeeping, or other compliance requirements on some small entities.¹⁵¹ We seek comment on any other potential effects that could result from the changes proposed in the Notice, particularly as they relate to small businesses.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

48. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁵²

¹⁴⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission’s rules. See 47 CFR § 76.901(f).

¹⁴⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

¹⁴⁹ 13 CFR § 121.201; NAICS Code 517919.

¹⁵⁰ http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

¹⁵¹ See Notice, Part III.

¹⁵² 5 U.S.C. § 603(c).

49. The *Notice* specifically seeks comment on the reporting requirements imposed by the enhanced transparency rule, and whether modifying that rule would alleviate any regulatory burdens.¹⁵³ Additionally, we believe that the proposals contained within this *Notice* represent a significant consolidation and simplification for small entities from the rules imposed by the *Title II Order*. The rules imposed by the *Title II Order* created heavy compliance burdens, and those burdens were particularly onerous for smaller providers without dedicated compliance staffs.¹⁵⁴ By proposing the elimination of the general conduct standard, and seeking comment on the other rules imposed by the *Title II Order*, the *Notice* attempts to understand and mitigate the negative effects the *Title II Order* had on small businesses. More generally, by proposing to return to an information service classification for broadband Internet access services, the *Notice* seeks to reduce the burdens that Title II classification imposed.¹⁵⁵

50. The Commission also expects to consider the economic impact on small entities, as identified in comments filed in response to the Notice and this IRFA, in reaching its final conclusions and taking action in this proceeding. We note that numerous small providers have already filed comments with the Commission expressing their support for the Commission's proposed changes.¹⁵⁶

51. We seek comment here on the effect the various proposals described in the Notice, and summarized above, will have on small entities, and on what effect alternative rules would have on those entities. How can the Commission achieve its goal of protecting and promoting an open Internet while also imposing minimal burdens on small entities? We specifically note that within this *Notice*, we have sought comment on the effects on small business of the disclosures required by the transparency rule,¹⁵⁷ and we have emphasized the outsize regulatory burdens that Title II reclassification has placed on small internet providers.¹⁵⁸ What other specific steps could the Commission take in this regard?

52. Since this *Notice* seeks to reduce the compliance burdens of ISPs through the removal of unnecessary regulation, it does not propose any alternative methods of reducing those burdens. However, we seek comment from interested parties or any potential method of reducing compliance burdens and restoring Internet freedom that has not been proposed in this *Notice*.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

53. None

¹⁵³ Notice, Part IV.A.2.

¹⁵⁴ See, e.g., *ACA Ex Parte* at 2.

¹⁵⁵ See Notice, Part III.A.1 (noting that the *Title II Order* temporarily forbore from numerous sections of the Communications Act).

¹⁵⁶ See, e.g., Letter from Robert Hunt et al., Chairman, USTelecom, to Ajit Pai, Chairman, FCC, WC Docket No. 17-108 at 1-2 (May 4, 2017); Letter from Ron Smith et al., President and CEO, Bluegrass Cellular, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (May 11, 2017).

¹⁵⁷ See Notice, Part IV.A.2.

¹⁵⁸ See Notice, Part III.A.3.

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

For nearly two decades, the Internet flourished under a bipartisan, light-touch regulatory framework. In the span of recent memory, the Internet went from a university research project to an essential tool for participating in the modern world.

This success wasn't an accident. In 1996, President Clinton signed the Telecommunications Act of 1996 and established a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."¹ In 1998, Senators Ron Wyden and John Kerry, among others, said that if the FCC "suddenly subject[ed] some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services."² The next year, Democratic FCC Chairman Bill Kennard said that it "is not good for America" to "just pick up this whole morass of [telephone] regulation and dump it wholesale on the [Internet] pipe."³ This wasn't controversial. It was the consensus.

And so it would remain for almost two decades. Under this light-touch approach, the private sector invested in networks to the tune of \$1.5 trillion. Internet speeds accelerated from kilobits to gigabits per second. Mobile connectivity expanded from 1G to 2G to 3G to 4G. And an entire Internet economy sprung up to develop applications riding on those networks. Online companies like Google, Facebook, Netflix, and Amazon grew from scratch to become global powerhouses. In sum, we had a free and open Internet—one in which consumers reaped immense benefits.

The Internet wasn't broken in 2015. We were not living in a digital dystopia. Nonetheless, the FCC that year succumbed to pressure from the White House and changed course. Even though the FCC couldn't find any evidence of market failure, it turned its back on almost two decades of success. It imposed upon all Internet service providers (ISPs), big and small, the heavy-handed regulatory framework designed during the Roosevelt Administration to micromanage the AT&T telephone monopoly. These utility-style regulations, known as "Title II," were and are like the proverbial sledgehammer being wielded against the flea—except that here, there was no flea.

As a result of these rules, small ISPs faced new regulatory burdens associated with common carrier compliance. Innovative providers hoping to offer their customers new, even free services had to fear a Washington bureaucracy that might disapprove and take enforcement action against them. With the possibility of broadband rate regulation looming on the horizon, companies investing in next-generation networks hesitated to build or expand networks, unsure of whether the government would let them compete in the free market.

Today, we propose to repeal utility-style regulation of the Internet. We propose to return to the Clinton-era light-touch framework that has proven to be successful. And we propose to put technologists and engineers, rather than lawyers and accountants, at the center of the online world.

The evidence so far strongly suggests that this is the right way to go.

Among our nation's 12 largest Internet service providers, domestic broadband capital expenditures decreased by 5.6% percent, or \$3.6 billion, between 2014 and 2016, the first two years of the

¹ 47 U.S.C § 230(b)(2).

² Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998), *available at* <http://bit.ly/2qAlmqL>.

³ Remarks of William E. Kennard, Chairman, FCC at the National Association of Telecommunications Officers and Advisors (Sept. 17, 1999), *available at* <http://bit.ly/2rsoswL>.

Title II era.⁴ This decline is extremely unusual. It is the first time that such investment has declined outside of a recession in the Internet era. To be sure, a study released by a pro-Title II special interest this week claimed that there had been no such decline. But that report makes basic mistakes, like counting network investment in Mexico as network investment in the United States.

The investment pullback is affecting smaller providers too. We've received letters from dozens of small ISPs explaining how Title II hurts. Seventy fixed wireless Internet service providers say "[o]ur challenges are exacerbated by the *Title II Order* . . . which has significantly increased compliance burdens and regulatory risk through heavy-handed regulation that is rife with uncertainty."⁵ Seven smaller mobile wireless providers tell us that "[t]he uncertainty surrounding the Title II regulatory framework for wireless broadband services hinders our ability to meet our customer[s]' needs, burdens our companies with unnecessary and costly obligations and inhibits our ability to build and operate networks in rural America."⁶ Twenty-two of the nation's smallest ISPs report that they have "slowed, if not halted, the development and deployment of innovative new offerings."⁷ Thirty-two rural ISPs point to "the bureaucratic straightjacket of outdated regulations known as Title II" as a barrier to the vigorous investment they want to pursue.⁸ And 19 non-profit municipal ISPs—that is, government-owned broadband providers, often championed by Title II advocates—observe that "[f]or the past two years, the substantial costs of the 2015 decision have harmed our businesses."⁹

Consider for a minute why these statements are important. These are 150 small ISPs, most of which Americans have not heard of. These are the very companies that are critical to injecting competition into the broadband marketplace. These are the very companies that are critical to closing the digital divide by building out in lower-income rural and urban areas—areas that too often don't see investment or are the first to see investment dry up. And again, these are the very companies that are telling us that Title II makes it harder to connect Americans with digital opportunity. It puts consumers last, not first, to push these companies out of the marketplace and stifle competition.

In addition to proposing to reverse the Title II classification, we are also proposing to eliminate the so-called "Internet conduct standard." This standard gives the FCC a roving mandate to review business models and prohibit service plans that benefit consumers. With this expansive authority, the FCC could investigate any provider for offering the public virtually any service that the agency might find problematic.¹⁰ And that's in fact what the FCC did. Within months of conferring this new authority upon itself, the FCC met the enemy: consumer-friendly free data programs offered by several companies. Despite the then-leadership of the agency having deemed some of these programs "highly innovative and

⁴ See Hal Singer, 2016 Broadband Capex Survey: Tracking Investment in the Title II Era, *available at* <http://bit.ly/2reYks0>.

⁵ Letter from Mark Radabaugh, President, Amplex, to Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1 (May 9, 2017).

⁶ Letter from Ron Smith et al., President and CEO, Bluegrass Cellular, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (May 11, 2017).

⁷ Letter from Herb Longware, President, Cable Communications of Willsboro, Inc. et al. to Ajit Pai, Chairman, FCC, WC Docket No. 14-28, WC Docket No. 16-106, at 2 (Apr. 25, 2017).

⁸ Letter from Robert Hunt et al., Chairman, USTelecom, to Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1–2 (May 4, 2017).

⁹ Letter from William Bottiggi, General Manager, BELD Broadband et al. to Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1–2 (May 11, 2017).

¹⁰ To be sure, the *Title II Order* did allow a company to seek an "advisory opinion" as to the propriety of a particular business practice or service. 47 CFR § 8.18. However, seeking the government's blessing in advance is precisely the opposite of permission-less innovation.

competitive,” the FCC began investigating them. Preventing consumers from getting something for free doesn’t benefit consumers.

Additionally, this authority lets bureaucrats question whether literally every network management decision is “reasonable.”¹¹ This is especially unwise when it comes to the networks of the future. Consider 5G, for instance—the next generation of wireless service. *The Economist* recently explained what this technology will require: “slic[ing] the network into multiple ‘logical’ networks, each optimised for a different user’s needs.”¹² Having to hire lawyers to make sure your engineers don’t run afoul of the FCC while pulling that off sounds like a recipe for disaster. That helps explain why Marc Andreessen, the creator of the Netscape browser and a prominent Silicon Valley venture capitalist, has said: “If you have these pure net neutrality rules . . . you’re not ever going to get a return on continued network investment—which means you’ll stop investing in the network.”¹³

* * *

Today’s *Notice* is the start of a new chapter in the public discussion about how we can best maintain a free and open Internet while making sure that ISPs have strong incentives to bring next-generation networks and services to all Americans.

To reiterate, this is the beginning of the process, not the end. The FCC is simply seeking comment on these proposals. We also ask questions about the existing bright-line rules. Over the next 90 days, the American public will then have a chance to share its views on them. And in the time to come, the FCC will follow the facts and the law where they take us.

Additionally, there are a few things that are different from the last time around.

First, we are proceeding in a far more transparent way than the FCC did in 2015. Back then, it pushed through the 317-page *Title II Order* before anyone outside this building was allowed to see it. The draft document I proposed to my colleagues has been available to the public online for three weeks. Indeed, the public has already submitted over one million comments on that draft. And I will go one step further and publicly commit to this: On my watch, any order we may adopt in this proceeding will also be made widely available well before a vote is called. You may agree or disagree with what the FCC is doing, but you have been and will be able to see what it is we’re doing and why.

Second, we aim to conduct a credible cost-benefit analysis of our policy decisions. This simply wasn’t done back in 2015. Indeed, the economic analysis in the *Title II Order* was called “wrong, unsupported, and irrelevant”—by the FCC’s own chief economist at the time. This time, as we make our decisions, we will have our expert staff carefully review the evidence on investment and other variables. We will rely not on hyperbolic statements about “the end of the Internet as we know it” and 140-character commentary, but on the data.

Finally, I’d like to thank the staff of the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of General Counsel for their work on this document: Nathan Eagan, Kristine Fargotstein, David Horowitz, Madeleine Findley, Dan Kahn, Melissa Kinkel, Doug Klein, Marcus Maher, Rick Mallen, Kris Monteith, Linda Oliver, Bill Richardson, Suzanne Tetreault, and Ryan Yates. I am deeply grateful to you for your hard work on this important issue.

¹¹ 47 CFR § 8.11.

¹² Makeover for Mobile Phones, *The Economist* (Apr. 20, 2017).

¹³ Brian Fung, “Marc Andreessen: In 20 years, we’ll talk about Bitcoin like we talk about the Internet today,” *The Washington Post* (May 21, 2014), available at <http://wapo.st/2rsb5w2>.

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

“Going forward, I hope that we will not rush headlong into enacting bad rules. We are not confronted with an immediate crisis that requires immediate action.”¹

– Commissioner Pai, *2014 Open Internet NPRM Dissent*

Last Wednesday, I took part in a public listening session in Skid Row. For those unfamiliar, Skid Row is a Los Angeles community, housing one of the largest homeless populations in the United States. It was there I met a fascinating woman who calls herself “Frenchie.” She would stop me about three times over the course of the evening; first going on about how much I looked just like my picture; next letting me know, how happy she was that someone like me would not only visit, but listen; but the third time turned out to be the most telling.

I was moments away from politely but firmly asking to be excused, when Frenchie said something that made me pause: When she was without a home in the traditional sense, she was able to secure an address, a stable, personal email address, which helped to ground her and enabled her to keep in touch with the world, through the power of the internet. That continuity, that identity, that stable electronic footprint, was at times the only permanent presence she had when much in her physical life was in turmoil. She got through the hardest times, she said, thanks to an open internet because those very same connections, led her to the services that appear to be providing her a more stable life.

I also heard from Marco that night. The former filmmaker lost his family, his livelihood, and for a time, struggled with mental health issues. He lived in Skid Row, but the doctor who made the greatest headway with his recovery was more than 200 miles away in Fresno.

Rather than having to spend hours on public transportation, he was able to Skype with his therapist, and along with a friend in Argentina who spoke his language, and a clinician who was willing to pronounce his name correctly, he has gotten through the hardest of times, thanks to the power of an open internet.

Denise, an artist, writer and mother of six, felt separated from the world because of the challenges of being a stay-at-home mom. She first turned to blogging as an avenue of expression, but that blog eventually became a retail outlet for her artistic work, as well as a source of income, that has enabled her and her husband, to support their family, thanks to the power of an open internet.

These are just three of the millions of examples of those whose lives have been uplifted by one of the most enabling platforms for speech, commerce, and innovation of our time. Like the nearly four million voices who weighed in on the previous proceeding just over two years ago, these three individuals asked that this agency keep the internet open and free.

We can get hung up on semantics, debate classification, or whether the internet is a luxury, but broadband is a necessity in the 21st century and access to it allows the most vulnerable among us to hold on during our darkest moments, and lift ourselves up to a brighter tomorrow.

For those of us who are fortunate enough to have broadband access at home, and do not have to trek to a library and wait for a free terminal or troll for free Wi-Fi on street corners or fast food establishments, not only are you fortunate, but you know that it is among the first utilities you make sure is working, right after your electricity and water. And just what does one expect when you get connected?

¹ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 29 FCC Rcd 5561, 5657 (2015) (Dissenting Statement of Commissioner Ajit Pai) (*Pai OI NPRM Dissent*).

That you can run your online business, access content over the internet, and exercise free speech, without your service provider or anyone else getting in the way.

Those expectations, it pains me to say, are now, at risk.

Today's Notice of Proposed Rulemaking, more appropriately known as the *Destroying Internet Freedom NPRM*, deeply damages the ability of the FCC to be a champion of consumers and competition in the 21st century. It contains a hollow theory of trickle-down internet economics, suggesting that if we just remove enough regulations from your broadband provider, they will automatically improve your service, pass along discounts from those speculative savings, deploy more infrastructure with haste, and treat edge providers fairly.

It contains ideological interpretive whiplash, boldly proposing to gut the very same consumer and competition protections that have been twice-upheld by the courts. And it contains an approach to broadband that will throw universal service money to broaden its reach, but abandon users, when something goes wrong, particularly if they are faced with anti-competitive or anti-consumer practices. It jeopardizes the ability of the open internet to function tomorrow as it does today. But if you unequivocally trust that your broadband provider will always put the public interest over their self-interest or the interest of their stockholders, then the *Destroying Internet Freedom NPRM* is for you.

I find it ironic, however, that many of the voices who support this item, including the majority at the Commission, said that it should be Congress's place to decide the future of broadband regulation. If that is so, then why are we debating this today? Just why is it that the majority proposes to undo a twice-affirmed classification, and twice-affirmed rules? Is it so Congress can act? A vacuous assertion.

But what I find particularly troubling, is that this proposal has the potential to damage our authority to help provide broadband for the poorest and most remotely-located Americans, unless the underlying goal, is to actually weaken our ability to support broadband through our universal service programs.

The future of the internet is under attack. And so, I must vociferously dissent.

Process

This NPRM has all the indicia of a political rush job. Month after month, I listened to repeated calls from the current leadership, about how economic analyses were missing from the last administration's items, how troubling that was, and because of the absence of this analysis, we were jeopardizing our ability to make sound decisions. But unless I missed it, and I would welcome a correction if I am in error, there was no FCC staff economist or technologist, consulted during the drafting of this item. If they were, and I majored in Banking, Finance and Economics, but admittedly, I am out of practice, I cannot find any evidence of it, given the dearth of economic and technical depth in this NPRM.

For one, there is no cogent economic analysis to be found in this item. There is no discussion of consumer welfare, of two-sided markets, of market power, or any other standard economic concept that an item dealing with the regulatory structure of an entire industry would contain. While there is discussion of doing a cost-benefit analysis in the ultimate order, the NPRM does not seem to grapple with the fact that it is proposing an entirely different regulatory structure for the most vital communications service of the 21st century.

As an example of the lack of depth, the NPRM contains a question that asks whether we have robust "intermodal broadband competition given the 4,559 Internet service providers now in the market?" This factoid fails to consider that most Americans lack options for robust fixed broadband because most of these providers are not competing against each other. By this logic, intermodal residential water

competition must be even more robust than broadband competition, since there are over 156,000 public water systems in the United States.² Yet everyone I know has one water line into their house.

Nor is there any technical depth to the item either. There are passing descriptions and assertions regarding how technology works, but for an item that purports to change direction based on how broadband technologies map onto technology-neutral regulatory definitions, there is precious little work done to show how that is the case.

For example, one paragraph asserts that broadband providers change the “form or content” of information and then cites firewalls and IPv4 and IPv6 address translation as proof of that assertion. Aside from the fact that firewalls generally function by blocking information that is *not* requested by the user, and that such firewalls usually are located at CPE at the demarcation point between the local area network and the wide area network (i.e., not within the broadband provider’s network), the NPRM does not even cite a technical basis for this contrary assertion. And, it similarly proclaims that dual-stack IP addressing somehow transforms the broadband service into an information service. This kind of protocol processing was always treated as a basic service.³

And that is entirely apart from the process associated with this proceeding. The last time we started a proceeding like this, then-Commissioner Pai had some choice words for the Chairman on process. Let’s see whether he takes his own advice this time around:

- “I recommended that the Commission seek guidance from Congress instead of plowing ahead yet again on its own. In my view, recent events have only confirmed the wisdom of that approach.”⁴
- “I am therefore disappointed that today, rather than turning to Congress, we have chosen to take matters into our own hands. It is all the more disappointing because we have been down this road before. Our prior two attempts to go it alone ended in court defeats.”⁵
- “We should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem.”⁶
- “We should also engage computer scientists, technologists, and other technical experts to tell us how they see the Internet’s infrastructure and consumers’ online experience evolving.”⁷
- “And [decisions made] should avoid embroiling everyone, from the FCC to industry to the average American consumer, in yet another years-long legal waiting game.”⁸

² EPA, Building the Capacity of Drinking Water Systems, <https://www.epa.gov/dwcapacity/learn-about-small-drinking-water-systems> (last visited May 16, 2017).

³ In the past, the Commission identified three categories of protocol processing services that would be treated as basic services. These categories include protocol processing: (1) involving communications between an end user and the network rather than between or among users; (2) in connection with the introduction of a new network technology which requires protocol conversion to maintain backwards compatibility; and (3) involving internetworking (conversions taking place solely within carrier networks to facilitate provision of a basic service that results in no net protocol conversion). *Computer III Phase II Order*, 2 FCC Rcd at 3081-82, paras. 64-71; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. IPv4/IPv6 conversion neatly falls into one of these categories, depending on how the protocol processing is utilized.

⁴ *Pai OI NPRM Dissent*, 29 FCC Rcd at 5653.

⁵ *Id.* at 5654.

⁶ *Id.* at 5656.

⁷ *Id.*

⁸ *Id.* at 5657.

How did the Chairman fare against the standard he himself set? He fails on all accounts. Deciding to go it alone rather than wait for Congress to act? Check. No evidence of consultation with FCC staff economists or other outside economists? Check. No consultation of FCC staff technologists or other technologists? Check. More litigation on the horizon despite the D.C. Circuit's double-stamp of approval? Check.

Now, let's see whether some of Chairman Pai's predictions when we adopted the *2015 Open Internet Order* came true:

- “The courts will ultimately decide this Order's fate. And I doubt they will countenance this unlawful power grab.”⁹
- “[T]he FCC will regulate the rates that Internet service providers may charge.”¹⁰
- “[I]t's actually quite easy to envision this same Commission deciding to discard the predictive judgment that *ex ante* rate regulation is unnecessary.”¹¹

Again, he was wrong on all counts. The courts have upheld the *2015 Open Internet Order*, and the FCC has not regulated rates for broadband any more than they have regulated rates for mobile voice service, which was originally subjected to Title II over two decades ago.

Economics

Despite all of the misleading talk about a lack of economic analysis in the *2015 Open Internet Order*, this NPRM fares much worse. One would think that this would be a prime candidate for waiting until the Chairman's Office of Economics and Data was stood up, but since this is such a political rush job, it is unsurprising that the Chairman declined to wait. Since this item fails to discuss the economics of an open internet, let me be the one to do so.

Today's broadband networks are multi-sided platforms. They create value by bringing together customers, services, and devices and facilitate interactions between all of them to create value for the entire internet ecosystem. When there is no platform competition, consumer and social welfare can suffer.

Most platform economics discussion relates to paid prioritization, which is offered up as a paean to standard economic theory of differential pricing, and of letting a two-sided market work to its fullest. The theory goes that by allowing payment for broadband providers prioritizing traffic, it incentivizes efficient use of the network by the application and services side of the market. But, this argument ignores that it is generally impossible for a customer or edge service to avoid going through the broadband provider, and thus survive a small but significant non-transitory increase in price (SSNIP). This pricing power has significant ramifications for the edge-side of the market, a point over which venture capitalists and edge providers have expressed significant concern.

A broadband provider is a monopoly platform when it comes to connecting edge providers to the broadband providers' end-user customers. Every internet business depends on externalities associated with the broadband provider platform in order to function. If the broadband provider demands payment, the internet service must either pay, or lose a potential portion of its customer base. This is precisely the risk that the *2015 Open Internet Order* sought to address: that a broadband provider as platform will set its overall price level in a way that does not maximize social welfare. And, there is no guarantee that introduction of additional friction into the broadband delivery model, by permitting broadband providers to erect tolls for content, will benefit anyone except the broadband provider and their shareholders.

Take the following example. If Netflix wishes to reach Comcast's broadband customers, it cannot avoid going through Comcast. If Comcast begins imposing a toll for access to its customers, Netflix must

⁹ *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5921 (2015) (Dissenting Statement of Commissioner Ajit Pai) (*Pai 2015 OI Order Dissent*).

¹⁰ *Id.* at 5922.

¹¹ *Id.*

make the decision either to pay the toll or to forego accessing Comcast's millions of broadband customers. The choice is clear, if unsavory: You pay the toll. That is why it is particularly concerning that this item proposes to decline to assert jurisdiction over interconnection. Even if the end-game of this proceeding is to adopt open internet rules—a proposition which I seriously doubt—this gives broadband providers a loophole big enough to drive a truck through. Indeed, we have seen evidence of these actions at the interconnection point in the past.¹² Consider how much more a small content provider would have to worry about tolls or interconnection blockades when it does not even have the clout of a much larger company.

Or, on the other end of the platform, consider a rural consumer with just one option for broadband. In order to save money, the consumer would like to use free or lower cost over-the-top voice services rather than subscribe to the local broadband provider's voice service. But the provider blocks the ports necessary for that competing service to function. That is again leveraging the consumer-facing side of the two-sided market to harm edge competition and reduce consumer welfare. Each member of this Commission—myself included—feels strongly about not supporting multiple broadband providers in a given geographic area with federal universal service money. But it makes no sense to stand up a broadband monopoly in an area and simultaneously be unwilling to provide consumer protections to prevent that broadband provider from leveraging its market position to reduce consumer welfare.

More broadly, permission-less innovation has been the bedrock of American internet policy for decades. The principle is simple: those at either end of the network should not have to worry about actions of those in the middle to negatively impact their business. The construct the majority would stand up here would ensure that, on the content and device side, the little guys on the edge of the network will have to worry about negotiating with thousands of broadband providers to ensure their services reach their customers. And, on the consumer side, customers with little to no choice of broadband providers will have to live with whatever their broadband provider decides to enable them to access. That is entirely inconsistent with consumer and business expectations about the open and free nature of the internet.

Debunked Predictions about Title II

There have been so many false claims about what reclassification would do to the internet, the economy, and the consumer. None has come to pass.

For example, leading up to the adoption of the *2015 Open Internet Order*, detractors of Title II predicted that consumer broadband would become significantly more expensive. The Progressive Policy Institute claimed that \$15 billion in new state and federal taxes would be imposed as a result of the decision to adopt strong, Title II open internet rules.¹³ One company's CEO claimed that average household broadband bill would increase by \$19 a month as a result of these new taxes and fees.¹⁴ Those predictions did not come to pass. Not surprising, they do not merit a mention in this NPRM.

Then-Commissioner Pai devoted his entire dissent to *2015 Open Internet Order* on legal disagreements with the majority.¹⁵ Twice, the D.C. Circuit upheld the Order. Yet, we move forward into the breach with more uncertainty and legal risk.

¹² See, e.g., Zachary M. Seward, *The Inside Story of How Netflix Came to Pay Comcast for Internet Traffic*, Quartz (Aug. 27, 2014), <https://qz.com/256586/the-inside-story-of-how-netflix-came-to-pay-comcast-for-internet-traffic/>.

¹³ Hal Singer & Robert Litan, *Outdated Regulations Will Make Consumers Pay More for Broadband*, Progressive Policy Institute (Dec. 1, 2014), <http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband/>.

¹⁴ Randall Stephenson, CEO, AT&T, Interview on MSNBC News (Dec. 3, 2014), <http://www.nbcnews.com/video/cnbc/56544551/#56544551> (at 1:05).

¹⁵ See *Pai 2015 OI Order Dissent passim*.

Another amorphous allegation is that the *2015 Open Internet Order* puts the brakes on numerous new features and services that people are now afraid to roll out. Yet, I have not heard a single concrete example a service or feature that was not offered because of the open internet rules.

The only factual question about the effects of the *2015 Open Internet Order* that the majority keeps trying to drive home is their assertion that it has harmed investment. But the NPRM presents at most one third of the economic picture of the market. From reading the item, it would be reasonable to assume that the key open internet policy question is whether a policy increases or decreases broadband provider capital expenditures. It is a relevant question, but the only econometric analysis that the majority cites for support clearly states that it is “inappropriate [to] use . . . investment as a policy objective.”¹⁶

The NPRM trots out numerous anecdotes of harmed investment, but even these are of questionable value. For example, Wisper is a wireless ISP that filed for stay of the *2015 Open Internet Order*, stating it that planned to expand its network but the Commission’s reclassification decision had forced Wisper to put those plans on hold.¹⁷ But just one month later, Wisper decided to purchase another broadband provider. “We look forward to upgrading the network, expanding coverage and providing super-fast speeds in the Lincoln County areas,” their CEO said in a statement.¹⁸ Then, a year ago, they bought another provider. “Wisper plans to upgrade the current Stouffer network to Wisper standards and hopes to offer faster speeds in the future,” their CEO said again.¹⁹ As with Wisper, I wonder how many ISPs simply made the minor adjustments necessary to adapt to the new regulatory reality and moved on with their business. I suspect that many signatories of the letters that the Chairman cites as concrete evidence that Title II has hurt investment will do the same.

Even if I accepted the majority’s premise that the key question is investment, the NPRM’s analysis fails to take into account what entrepreneurs invest in their internet business, what risk venture capitalists plow into the internet and telecom market, and what consumers pay for and how they use all these services to create economic value. It even fails to account for broadband investments made beyond narrow capital expenditures, including spectrum purchases and M&A, both of which are indicia of a robust and profitable market for broadband services. The majority seems willfully blind to these aspects of broadband investment.

Even if we were to ignore all those points and narrowly focus on the affirmative case that the majority puts forth, it is lackluster at best. As I have mentioned previously, I have yet to see a credible analysis that suggests that broadband provider capital expenditures have declined as a result of our *2015 Open Internet Order*. But of course, that does not keep those dead set on dismantling the open internet protections as we know them from repeating the same tired and unproven talking points.

For example, Chairman Pai told the Mobile World Congress in Barcelona this year that investment in broadband was down. The source of his statistic? USTelecom, a group that lobbied against net neutrality at the FCC and Congress, and sued the Commission over its imposition of strong net

¹⁶ See George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2 (April 25, 2017), <http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>.

¹⁷ See, e.g., Joint Petition For Stay of United States Telecom Association, CTIA, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GNWC Docket No. 14-28, Exh. 1, at 5–6 (Declaration of Nathan Stooke, Founder and CEO of Wisper ISP, Inc.) (filed May 1, 2015).

¹⁸ Press Release, Wisper ISP, Inc. Acquires Troy, MO Internet Provider, Thunderbolt Broadband (June 1, 2015), <http://www.wisperisp.com/wp-content/uploads/2014/10/Thunderbolt-Broadband-Press-Release.pdf>.

¹⁹ Todd Nighswonger, *Wisper ISP acquires Stouffer Communications*, Neosho Daily News (Mar. 19, 2016), available at <http://www.neoshodailynews.com/article/20160319/NEWS/160318919>

neutrality protections.²⁰ So, in this NPRM, the Commission adds a new source—the author of the study that made the now-debunked “\$15 billion in new taxes” prediction.²¹ While alternative analyses have suggested investment increases,²² underlying that approach is a methodology that ignores the need for advance capex planning and other forms of capital expenditures that are not neatly captured on the single line of a provider’s 10-K statement. Even if this analysis was correct that broadband investment has decreased, it is still deeply flawed because it assumes correlation is causation. Using the same logic that the NPRM uses, one could suggest that the FCC’s classification of cable modem service as an information service in 2002 resulted in an even more precipitous drop in broadband provider investment.²³ *Indeed, the highest levels of broadband investment in the past two decades were under the Title II line sharing and network unbundling regime in the late 1990s and early 2000s.*²⁴ The NPRM cites only *one* econometric study that purports to use a causative approach to investment, and even it uses too broad a time period for Title II treatment and does not use telecommunications data for the counterfactual to analyze the impact of Title II, subjecting the regressions to all sorts of errors.

The most recent analysis on the market suggests that total capital investment by publicly-traded ISPs was up five percent since the *2015 Open Internet Order* was adopted. Edge investments are up. Broadband revenues are up. This makes sense, since *no broadband provider has ever told Wall Street or the Securities and Exchange Commission that the 2015 Open Internet Order was responsible for decreases in capital expenditures.*

So why is it literally a he-said she-said exchange on this issue? One analyst articulates that “it’s impossible to tell whether the open internet rules have affected investment. There’s no way to provide a serious answer that rises above simply trying to reverse engineer the answer you want to find.”²⁵ There simply has not been enough market experience with this framework in order to tell what caused what.

So what then should we look to for answers on this question?

With all of the assertions about how burdensome and draconian the current framework is, what should be instructive is that the Title II framework the FCC adopted for broadband in 2015 was actually less intrusive than the one that was applied to mobile voice in the early 1990s. Now we all know how much of a bust that wireless industry has been, right? Between 1993 and 2009, the mobile industry invested more than \$271 billion, in building out networks. During the same time period, industry revenues increased by 1300 percent, and subscribership grew over 1600 percent. So answer this: why is it that the leadership is now proposing to get rid of what is essentially the same legal framework that we know was a highly successful driver in the mobile industry context?

²⁰ Chris Moran, *FCC Chair Claims Broadband Investment at Historic Low Level Because of Net Neutrality; That’s Not What the Numbers say*, Consumerist (Feb. 28, 2017), <https://consumerist.com/2017/02/28/fcc-chair-claims-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/>

²¹ *NPRM* at para. 45.

²² S. Derek Turner, *It’s Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, Free Press (May 2017), <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

²³ USTelecom, *Historical Broadband Provider Capex* (last visited May 20, 2017), <https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (comparing \$72 billion of broadband investment in 2002 to \$57 billion in 2003). One could argue that the information service classification spree in 2002-2008 resulted in essentially flat investment ever since.

²⁴ *Id.*

²⁵ David Kaut, *Broadband Investment Seen Key to Pai FCC Plan on Title II Net Neutrality*, Comm. Daily (May 10, 2017) (quoting Craig Moffett).

Whither Telecommunications Services?

On to the legal analysis.

It is clear that this majority is willing to read the definition of telecommunications service out of the Communications Act altogether—not only for broadband, but for all consumer telecommunications services. *Show me one modern consumer service that the majority will unequivocally say is a telecommunications service and its provider should be regulated as a common carrier.* Broadband, VoIP, VoLTE messaging—all of these I suspect the majority would say are either unequivocally or most likely information services. There is much sound and fury about applying a Depression-Era Communications Act to modern communications services, but none about applying the Revolutionary-Era First Amendment to speech on the Internet. The point is this: technology-neutral definitions do not become obsolete by advances in technology.

How can we give meaning to all statutory language if we decide to read, not only a word or phrase, but an entire Title out of the Communications Act? Rather than recognizing this and having an honest conversation about the underlying technology and consumer broadband market, statutory definitions are twisted to fit a deregulatory bent. But, by declining to classify VoIP, messaging, VoLTE and other services, the majority chips away at Congressionally-delegated authority service-by-service. The end-game is this: get the FCC out of the business of regulating in the public interest. This reclassification is but a step towards that goal.

But, let us turn to broadband specifically. Those in lock-step with the majority seem to be on board—at least so far—with a whiplash about-face on Title II and net neutrality under this Administration. But many are forgetful that their lodestar for Constitutional and statutory interpretation would conclude they are engaging in “interpretive jiggery-pokery”.

The Heritage Foundation called the late Supreme Court Justice Antonin Scalia “a standard-bearer” for conservative legal theory, and a “champion[] of originalism and textualism.”²⁶ FreedomWorks heralded his “enormous intellect and untiring devotion to objective, text-based interpretation.”²⁷ His guiding framework for legal interpretation was that “laws should be interpreted based on their actual text and original public meaning.”²⁸ But how quickly people forget when it comes to an issue where they have a preferred policy outcome that diverges from rigorous textualism.

Remember, we have been here before. The FCC went before the Supreme Court in 2005 when it attempted to classify cable broadband as an information service. The majority of the court felt that such an interpretation was within the interpretive discretion of the FCC. But not Justice Scalia. In his withering dissent in *NCTA v. Brand X*, he accused the Commission of attempting to “concoct a whole new regime of regulation . . . under the guise of statutory construction.”²⁹ And its attempt to achieve this scheme of non-regulation? Done so “through an implausible reading of the statute.”³⁰ It is unsurprising that his opinion is not mentioned once in the NPRM.

²⁶ Elizabeth Slattery et. al., *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, Heritage Foundation (Aug. 30, 2016) <http://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>.

²⁷ Jason Pye, *FreedomWorks Foundation Mourns Loss of Justice Antonin Scalia*, FreedomWorks (Feb. 13, 2016), <http://www.freedomworks.org/content/freedomworks-foundation-mourns-loss-justice-antonin-scalia>.

²⁸ Elizabeth Slattery et. al., *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, Heritage Foundation (Aug. 30, 2016) <http://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>.

²⁹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Scalia, J., dissenting).

³⁰ *Id.*

Congress in its wisdom tied many of our competition and consumer protection functions to the nature of the service being offered. And indeed those services are changing, but the underlying transmission remains largely the same. Innovation, has, and will continue in the network. We have moved from copper to glass, and from circuit-switching to packet-switching. But using interpretive gymnastics to shirk those responsibilities is the antithesis of putting #ConsumersFirst. We cannot let broadband providers define the rules of engagement when Congress has clearly entrusted the Commission with that responsibility.

The arc of technology continues to bend away from legacy protocols like TDM and SS7 and towards modern ones like IPv6 and MPLS. Indeed, the majority believes that those trends should be supported and encouraged. Just last month we voted to explore ways to accelerate those transitions. But the majority forgets a simple fact: A shift in technology that powers the transmission of information via telecommunications does not alter the fact that telecommunications is occurring. We saw this in the shift from semaphore to telegraph, telegraph to telephone, and telephone to broadband.

But, the Commission here looks to skip down the same mistaken path of statutory interpretation that Justice Scalia complained of in 2005. Then, it was the word “offer.” Now, it is the words “capability” and “points.” If you were to believe the majority, broadband providers only offer you the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” There are two major problems with these readings: one legal, one practical.

First, the legal. Interpreting “capability” this broadly reads “via telecommunications” out of the definition of information service all together. It is a basic canon of construction that we must read meaning into all parts of the statute. Putting aside that the majority would read the entirety of Title II out of the Act for all modern consumer services, under the majority’s proposed reading of the definition of information service, there is no provider of telecommunications whatsoever. And it would read into the term “capability” all of the functionality at the endpoint of the telecommunications.

And, interpreting the definition of “telecommunications” so narrowly as to require consumers to specify the points along which they would like their communications routed would effectively read the definition out of the statute for any telecommunications service except for the most basic. No, users *almost never specify the physical points to and by which their communications should be routed*. Nor should they. It would be like ordering a package from Amazon and telling the USPS what warehouse you would like your package to originate from and what intermediate depots along the way you would like your package to terminate. The genius of the Telecommunications Act of 1996 is that definitions permit abstraction.

Second, the practical. No one seriously suggests, that by signing up for AT&T’s mobile broadband product that you will automatically be able to watch the latest episode of “Orange is the New Black”. Nor does anybody seriously suggest that by hopping in your car and driving to McDonalds that you automatically get a Big Mac. We do not conflate the origination of a separate service that utilizes the telecommunications network with the ability of a network to get you to that point in the first place.

For example, telegraph service was always considered a Title II service. No one seriously argued that, for example, because wireless telegraph service was a broadcast service and the user did not know who would receive the telegraph signal, that it was any less a Title II service. Indeed one of the most famous uses of the telegraph was from the Titanic, a broadcast S.O.S. and several follow-up conversations with individual ships.³¹ Nor did the advent of the Telecommunications Act of 1996 bring the underlying nature of the service into question.

³¹ Megan Garber, *The Technology that Allowed the Titanic Survivors to Survive*, The Atlantic (Apr. 13, 2012), <https://www.theatlantic.com/technology/archive/2012/04/the-technology-that-allowed-the-titanic-survivors-to-survive/255848/>.

Similarly, telephone service was always considered a Title II service. A telephone subscriber never knew exactly where geographically she was dialing when she dialed an 800 number, but that did not change the fact that she was using a telecommunications service. A telephone subscriber never knew exactly where geographically a voice commercial mobile radio service (CMRS) customer was located, but that did not change the fact that she was using a telecommunications service. Nor did a telephone subscriber know what “points” along the network she was using when she used her telephone service as a dial-up internet service, but that did not change her telephone service into an information service. All this suggests that “points” should be interpreted much more abstractly than the actual physical location of a server, switch, or end-user. This is entirely consistent with viewing a service from the perspective of a consumer: they always know what they want to do, but they need the telecommunications service to make that happen.

But, if we take the NPRM’s logic at face value, legacy voice providers would have always been information services providers, because a voice subscriber could acquire information from another person on the other end of the phone line. As the logic goes, dialing a random phone number and asking someone a question is just like typing in a random website and seeing what pops up on your screen. News flash: the advent of the internet and the ability to utilize the same sort of telecommunications service used for making voice calls for broadband access did not somehow transform the underlying network itself. This was the genius of the basic and enhanced distinction, transmuted into the telecommunications and information service distinction (courtesy of Congress).

The NPRM purports to use other contortions to find that broadband is not a telecommunications service. This includes relying on a facially unconstitutional statute,³² an unenforceable policy statement,³³ and lawfully delegated and exercised Congressional authority,³⁴ as support for the “fact” that broadband is an information service.

Just what are we doing here?

Would the same logic hold for mobile services? Do we seriously believe that mass-market mobile broadband, the broadband service that is most highly-adopted by Americans, is a “private carrier”-like service? The *2015 Open Internet Order* offered independent justifications as to why this service is a CMRS.³⁵ The D.C. Circuit upheld these findings. We will certainly see logical contortions to find that a broadband service that runs over the exact same infrastructure as a voice CMRS service, and uses NANP numbers or IP addresses, is not interconnected with the public switched network. We will also see arguments that it is not even a functional equivalent of a CMRS service. Finally, we will even see efforts to write “telephone” into “public switched network” when Congress did no such thing and was more than capable of doing it themselves. They certainly knew how to do so with the multiple provisions in the Communications Act.³⁶

And, just to make it absolutely clear that this is an ends-justified than a legally-justified proceeding, one need only look to the toll-free numbering database for answers. That *database* is a tariffed common carrier service.³⁷ If mass-market broadband, which transmits data across the globe in the blink of an eye, is *not* a common carrier service and numbering database access *is*, this classification exercise is just an expedition into whimsical absurdity.

³² *NPRM* at para. 32.

³³ *Id.* at para. 31.

³⁴ *Id.* at para. 33.

³⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5778-90, paras. 388-408.

³⁶ *See, e.g.*, 47 U.S.C. §§ 221, 226, 227.

³⁷ *Toll Free Service Access Codes et al.*, CC Docket No. 95-155, 15 FCC Rcd 11939, 11940, para. 1 (2000).

In sum, it simply makes no sense in the era of 21st century connectivity to say that there is no such thing as a telecommunications service. What are consumers purchasing, when they sign-up for broadband, if not the ability to transmit and receive?

The majority claims it has an eye towards the future, but both feet are firmly stuck in the past, hearkening back to dial-up days where a subscriber purchased both a basic TDM telephony service, and a separate dial-up service in order to access the internet. No matter that most of us no longer dial-up to the internet, no matter that consumers buy broadband because all the information services they want to access and use, require the broadband subscription as a necessary prerequisite. But I should not be surprised that the majority is peering through the lens of yesteryear, for we just revived a 1985 technologically-obsolete UHF discount, so why not continue to wind back the clock and base our regulatory structure on a 1990's version of the internet?

Rules, or No Rules?

As far as the open internet rules go, this is Schrödinger's NPRM: the text devoted to the open internet rules is so open-ended that the rules are both alive and dead until the Commission adopts an Order in this proceeding.

Will any of the open internet rules survive this rulemaking? I am doubtful given both the tenor of the questioning, and the fact that the rulemaking is proposing to get rid of the only authority that would underpin strong open internet rules. Tellingly, the majority does not propose any provision of law to underpin any of the open internet rules on which it seeks comment.

The need for, and value of the open internet rules was lucidly articulated in both the *2010 Open Internet Order* and *2015 Open Internet Order*, so I will not repeat those here.

However, this proposal is frightening in its disregard for the actual experiences of consumers. How else could the majority suggest that basic transparency to consumers be more burdensome than it is worth? Rather than having to advertise and disclose in concrete detail what service is actually sold, we will see even more important consumer information buried in monolithic terms of service, enforceable via mandatory arbitration. That is, if such information is even disclosed at all.

The proposal to eliminate the general conduct rule is precisely in line with an end-game of ensuring there is no referee on the field for broadband. Many of the complaints regarding the rule, which simply states that a broadband provider may not unreasonably interfere or disadvantage the ability of consumers and edge providers to reach one another, could just as easily be levied at the statutory language that the Commission has interpreted and applied for decades—sections 201 and 202 of the Act. Using adjudication to define the contours of permissible conduct is a textbook example of well-functioning administrative law.

As far as the bright line rules go, even the most vocal advocates for rolling back Title II are generally in favor of those rules. Why are we seeking comment on getting rid of them? In part, because we are getting rid of the authority for strong bright line rules, and even proposing to get rid of the authority that would have underpinned the weaker rules that were proposed in the *2014 Open Internet NPRM*.

Of course, I am talking about section 706 of the Telecommunications Act of 1996. While paying lip service to the idea that we could ground open internet rules in other forms of statutory authority, like section 230(b)—which the *Comcast* court rejected—I am also concerned at the proposal to reinterpret section 706 as merely hortatory. We have litigated the statutory history, and courts have upheld our use of section 706 as a substantive grant of authority. Walking that interpretation back—particularly in a world where we do not have Title II—is a sure death sentence for any open internet rules.

Undermining Universal Service

Like many of the Chairman's other actions regarding Lifeline, I am concerned that the proposal to support broadband in the Lifeline program without Title II is a proposal to gut the program couched in

language that is masked as a desire to keep the program. The Chairman has said that “It’s vital that low-income Americans have access to . . . broadband Internet, which Lifeline helps to achieve.” But, he kicked providers out of the program, shut the door on others trying to get in, and made clear he wants to revisit the mechanism for allowing broadband providers into the Lifeline program.

Section 254 requires support to go to telecommunications services and facilities supporting those services. It is clear that if broadband is a telecommunications service, it can be a Lifeline-supported service. But if broadband is not a telecommunications service, I ask: how will we bridge the affordability gap for those who cannot afford advanced telecommunications services?

We have confronted this problem before in the high-cost context in 2011. Then, it was logical and upheld by the courts that we could support a telecommunications service, but condition that support on the provision on funding broadband-capable networks and offering broadband service. But as networks continue to evolve, legacy voice popularity continues to decline, and VoIP and broadband become the communications services of the day, I again ask: what services can we legally support? In addition, many states have prohibited their public utility commissions from giving VoIP or broadband ETC designations. How will a broadband provider become certified to provide Lifeline broadband if there is no state authority to designate it as an ETC?

The proposal in the NPRM also seems to unduly limit the ability to participate in Lifeline to only facilities-based providers. This appears to be yet another way to undermine the program. It seems unthinkable to limit participation in the program in this way, particularly when some facilities-based providers are actively seeking to relinquish their Lifeline ETC designations.

This reclassification also goes to the core of our universal service programs more generally. At a time when Members of Congress on a bicameral, bipartisan basis are en-masse suggesting that the FCC address the rural broadband issue, it seems odd that the Commission would propose moving forward on an item that would undermine our legal authority to support broadband in rural areas. As telephone service (i.e., the supported telecommunications service) continues to go the way of the dodo, can we support broadband-capable networks (i.e., the supported facilities) when there is no lawfully supported telecommunications service to which universal service funding will attach? Given that no modern communications service is a telecommunications service in the eyes of this Commission majority, how do we continue to base our universal service policies on the *2011 USF/ICC Transformation Order’s* support of broadband networks and voice services?³⁸ Again, what is the supported telecommunications service?

No More Privacy?

The item proposes to quietly ensure that broadband customers have no privacy protections whatsoever, shirking our privacy responsibilities under the Communications Act. The majority knows that we cannot simply let the Federal Trade Commission (FTC) take the helm on broadband provider privacy practices while there is still a chance that if a provider offers legacy voice their broadband service—irrespective of classification—is likely out of bounds for the FTC. While it is heartening for consumers that the case that limits the FTC’s authority is slated for rehearing, it is still unclear whether the FTC can enforce broadband privacy until the full 9th Circuit opines.³⁹

Cost-Benefit Analysis

I am supportive of properly evaluating the costs and benefits of proposed regulations. However, in the case of this proceeding, calls for a cost benefit analysis appear to be no more than a charade to suggest that open internet regulation has onerous effects.

First, the Chairman has not sought any credible economic input on the NPRM we are adopting today. Again, my understanding is that no staff economist or technologist at the FCC was consulted on

³⁸ *Connect America Fund et. al.*, 26 FCC Rcd 17663, 17685, para. 64 (2011).

³⁹ *FTC v. AT&T Mobility*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

the details of this item. This is contrary to his dissent of the *2014 Open Internet NPRM* where he suggested we needed ten independent economic studies before moving forward on an item. Might makes right, apparently, since we are willing to dispense with what he previously suggested we should do simply because he believes the FCC did the wrong thing and he is now in charge.

Second, the NPRM waxes eloquent about needing to select the correct baseline, but then proposes to select the wrong baseline. As OMB Circular A-4 explains, “[t]his baseline should be the best assessment of the way the world would look absent the proposed action.”⁴⁰ The proposed action here is reversing the telecommunications service classification for broadband, and eliminating all open internet rules. Yet the item says it proposes to select the regulatory state of affairs at the end point of this proceeding (i.e., a world without open internet rules) as the baseline for judging the action taking during this proceeding.

Conclusion

While the majority engages in flowery rhetoric about light-touch regulation, and so on, the endgame appears to be no-touch regulation and a wholesale destruction of the FCC’s public interest authority in the 21st century: Undermining the ability of poor people to get broadband, knee-capping funding for rural telecommunications, declining to review an \$85 billion transaction with massive public interest implications, encouraging consolidation and higher prices in business broadband, enabling massive broadcasting conglomerates to gobble up more local voices. Each action is a cut against the public interest, and the majority will keep it coming, unless Americans stand up, make their voices heard and challenge the FCC in court, because it is glaringly obvious, with each open meeting, that the willingness and the ability of the majority to protect consumers and competition in a broadband era, has come to a screeching halt.

Nonetheless, I thank the staff of the Wireline Bureau and Office of General Counsel for their work on this item. I may think this rulemaking takes us down a horrible path, but your hard work should be recognized, regardless.

⁴⁰ OMB, Circular A-4 (Sept. 17, 2003), available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

Today we formally initiate the proceeding to consider reversing the 2015 *Net Neutrality Order*. I dissented from that prior decision because I was not persuaded, based on the record before us, that there was evidence of harm to businesses or consumers that warranted the adoption of net neutrality rules, much less the imposition of heavy handed Title II regulation on broadband providers. Now that we are commencing a new proceeding, I will once again fulfill my obligation under the Administrative Procedure Act. While I certainly have my views on the topic, I restate my approach to look to the law, the necessity for any rules and record of substantive comments that accumulates. Thankfully, our rulemaking process is not decided like a Dancing with the Stars contest, since counts of comments submitted have only so much value.

At the outset, I want to commend the Chairman for his leadership and staff for their excellent work on this item. This proceeding is being conducted in an open and transparent manner, and all interested parties will have a full and fair opportunity to present comments, data, and analysis. One of the reasons why I welcome the opportunity to revisit these rules is that the prior Commission changed course so abruptly that it did not take the time to sufficiently examine the law and record and did not adequately respond to opposing viewpoints and alternative proposals. This time, I am confident that whether you agree or disagree on the need for net neutrality rules or our legal authority, you will see an order that fully and fairly responds to all substantive arguments.

To help bring order and rigor to the debate to come, the Notice proposes to conduct an actual cost benefit analysis. This is a critical improvement. Instead of operating in an “economics free zone” where the benefits of rules are assumed to outweigh any costs, commenters will need to provide evidence to support their arguments that rules are, or are not, needed. It will enable the Commission to ground its decision in facts rather than hypotheticals.

The Notice also asks a full range of questions on the proper legal classification of broadband Internet access service. These include critical questions that should have been explored and answered by the Commission before it barreled down the Title II path, disavowing decades of precedent and contrary interpretations that stood in its way. Now the Commission presents the case that it previously ignored – that the text of the Act, Commission precedent, and public policy support classification of broadband Internet access service as an information service.

My primary goal with respect to this Notice has been to ensure that the Commission asks sufficient questions to lay the groundwork for a legally sustainable final decision. Accordingly, any issue that is related to this proceeding and could be part of the decision should be on the table here. One such issue concerns jurisdiction over broadband Internet access service. If the Commission decides that it is an interstate information service, then states and localities should be foreclosed from regulating it, as some states are currently attempting to do with new broadband privacy laws, fees, approval processes, and other requirements. I thank the Chairman for working with me by including a question to enable parties to submit comments and proposals on this issue.

I vote to approve.