

ONE HUNDRED EIGHTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE

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October 17, 2023

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street, N.E.
Washington, DC 20554

Dear Chairwoman Rosenworcel:

We write to express our disappointment and opposition to your announcement that the Federal Communications Commission (FCC) will vote to reclassify fixed and mobile broadband as a telecommunications service under Title II of the Communications Act of 1934.¹ Not only is this bad public policy, but it is also unlawful. Reclassification and the associated heavy-handed regulations that accompany this action continues to be a solution in search of a problem.

American broadband networks have thrived under the current light-touch regulatory framework. Investment in our networks has reached record highs,² giving consumers faster speeds and lower prices.³ Indeed, since 2017, the cost of broadband (adjusted for inflation) has fallen while prices for electricity, water, and sewage have grown four to five times faster than prices for broadband.⁴ And these networks perform remarkably well, as shown during the Covid-19 pandemic.⁵ When work, school, and staying connected with loved ones moved online, traffic

¹ *Safeguarding and Securing the Open Internet*, WC Docket No. 23-230, Draft Notice of Proposed Rulemaking, FCC-CIRC2310-01 (rel. Sept. 28, 2023), <https://docs.fcc.gov/public/attachments/DOC-397309A1.pdf> (Draft NPRM).

² USTelecom – The Broadband Association, 2022 Broadband Capex Report (Sept. 8, 2023), <https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf>.

³ Arthur Menko, Business Planning, Inc., USTelecom 2023 Broadband Pricing Index, <https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf> (last accessed Oct. 16, 2023); Jason Shevik, Broadband Pricing Changes: 2016 to 2022, BroadbandNow (May 5, 2023), <https://broadbandnow.com/internet/broadband-pricing-changes>.

⁴ NCTA-The Internet & Television Association, Broadband Affordability (last accessed Oct. 4, 2023), <https://www.ncta.com/broadband-affordability>.

⁵ See Tom Wheeler, *Why the Internet Didn't Break*, The Brookings Inst. (Apr. 2, 2020), <https://www.brookings.edu/articles/why-the-internet-didnt-break/> (“Credit is due to the nation’s broadband providers. The fact we can work from home is the result of hundreds of billions of investment dollars and construction and operational skill.”).

over our broadband networks spiked—reaching over 27 percent more than pre-pandemic levels.⁶ American broadband networks withstood this increased traffic without interruption. This is unlike what happened in Europe, where heavy-handed regulations, similar to those you now propose, meant that networks could not bear the increased use, causing regulators to ask sites like Netflix and YouTube to degrade and throttle their service.⁷

Heavy-handed, utility-style regulation is not meant for today’s broadband market. Congress enacted Title II in 1934 to address a telephone market dominated by one company. In contrast, today’s broadband market is increasingly competitive—there is competition among different providers offering service via a variety of technologies.⁸ Further, your decision to forebear from twenty-seven provisions in Title II and over 700 regulations underscores that the Title II regime is not appropriate for broadband. You would not need to perform these legal gymnastics to make Title II work if Congress meant for it to apply. It clearly did not, as broadband service did not exist in its current form in 1934 or 1996, the last time the Communications Act was comprehensively updated. Forbearance also raises its own concerns because it is temporary.⁹ A future FCC could reverse this forbearance, exposing broadband providers to these burdensome regulations.

What is worse is your proposal leaves open the potential for the FCC to regulate broadband rates. Despite your numerous statements,¹⁰ including under oath to this Committee that you oppose rate regulation,¹¹ your proposal does not forebear from *ex-post* rate regulation.¹² Rate regulation is rate regulation, regardless of whether it happens *ex-ante* or *ex-post*. And there is no justification for the FCC to regulate rates, given the competitive marketplace and decreasing prices. Moreover, the mere potential for rate regulation, in addition to other regulations, is enough to create extreme uncertainty in the broadband market, making entry into this market more difficult, stifling competition and innovation, ultimately harming consumers.

⁶ USTelecom – The Broadband Association, Network Performance (Mar. 26, 2020), <https://ustelecom.org/research/network-performance-data/>; see also Leaders Reflect on Building the Network of Tomorrow, NCTA: The Internet & Television Association (Sept. 22, 2022), <https://www.ncta.com/whats-new/leaders-reflect-on-building-the-network-of-tomorrow> (“In Comcast’s case, the network experienced a 32% surge in traffic virtually overnight . . .”).

⁷ Hadas Gold, Netflix and YouTube Are Slowing Down in Europe to Keep the Internet from Breaking, CNN, March 20, 2020, <https://www.cnn.com/2020/03/19/tech/netflix-internet-overload-eu/index.html>.

⁸ See Jessica Dine and Joe Kane, The State of US Broadband in 2022: Reassessing the Whole Picture, ITIF: Information Technology & Innovation Foundation (Dec. 5, 2022), <https://itif.org/publications/2022/12/05/state-of-us-broadband-in-2022-reassessing-the-whole-picture> (“Despite populist rhetoric to the contrary, the U.S. broadband market is competitive, and private Internet service providers (ISPs)—fueled by their own investments and recent government funding for deployment to high-cost unserved areas—are continually improving the reach and quality of broadband service.”).

⁹ Draft NPRM ¶¶ 10, 103.

¹⁰ See, e.g., Jessica Rosenworcel, Chairwoman, FCC, Remarks at the National Press Club (Sept. 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf>.

¹¹ *Connecting America: Oversight of the FCC: Hearing Before the Subcomm. on Comm’n & Tech. of the H. Comm. on Energy & Commerce*, 117th Cong. (2022) (response of Jessica Rosenworcel, Chairwoman, FCC, to the Hon. Tim Walberg).

¹² Draft NPRM ¶ 104.

In addition, these regulations do not solve any problems. Contrary to what Title II proponents said would happen after its repeal in 2017, the Internet has not died,¹³ nor is it ruined forever.¹⁴ In fact, as we previously highlighted, it is performing better than ever. We are not receiving it one-word-at-a-time,¹⁵ nor are we seeing the proliferation of “fast lines.”¹⁶ Your oft-cited example of the throttling of service to the Santa Clara Fire Department during wildfires¹⁷ has no bearing on this debate.¹⁸ There, the fire department’s mobile provider throttled the department’s service because it had exceeded a monthly data cap, as outlined in the service agreement. Neither Title II nor net neutrality rules would have prevented this action; those rules prohibit throttling of “lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device,”¹⁹ which is not what happened. In this case, the fire department’s service was throttled, unfortunately, because it exceeded a contractual data cap and not for any other reason.

Further, your proposal could not have come at a worse time. The country is on the cusp of closing the digital divide. We should not burden broadband providers with unnecessary regulations as they seek to deploy broadband to unserved Americans. We know from experience that broadband investment decreases when regulations increase, as we saw when the FCC last reclassified broadband in 2015.²⁰ That network investment increased under the current regime undermines your argument that reclassification will “better support the deployment of wireline and wireless infrastructure.”²¹ And if the FCC truly wanted to support broadband deployment, its efforts would be better spent helping Congress enact legislation to streamline the broadband permitting process.²²

Moreover, your decision to reclassify mobile broadband as a commercial mobile service—for the first time—will seriously damage the country’s effort to lead the world in 5G. Mobile broadband providers are undertaking innovative uses of 5G to offer “network slicing” to manage network performance more efficiently.²³ Your proposal appears to bar such offerings,²⁴

¹³ Farhad Manjoo, *The Internet Is Dying. Repealing Net Neutrality Hastens That Death.*, N.Y. Times, Nov. 29, 2017, <https://www.nytimes.com/2017/11/29/technology/internet-dying-repeal-net-neutrality.html>.

¹⁴ Jack Moore, *How the FCC’s Killing of Net Neutrality Will Ruin the Internet Forever*, GQ (Nov. 30, 2017), <https://gq.com/story/fcc-killing-net-neutrality-explained>.

¹⁵ @senatedems, Twitter, (Feb. 27, 2018, 11:38 AM), <https://twitter.com/SenateDems/status/968525820410122240>.

¹⁶ Geoffrey A. Fowler, *The FCC’s net neutrality rules are gone. Now this is what could happen to the Web.*, Wash. Post, Dec. 14, 2017, <https://www.washingtonpost.com/news/the-switch/wp/2017/12/13/net-neutrality-keeps-the-web-from-running-like-an-airport-security-line-and-it-might-go-away/>.

¹⁷ See, e.g., *supra*, note 10.

¹⁸ See Daniel Lyons, *One More Time: The Verizon-Santa Clara Fire Dispute Has Nothing to Do with Net Neutrality*, Am. Enter. Inst., (Nov. 13, 2019), <https://www.aei.org/technology-and-innovation/one-more-time-the-verizon-santa-clara-fire-dispute-has-nothing-to-do-with-net-neutrality/>.

¹⁹ Draft NPRM, Appx. A (to be codified at 47 C.F.R. § 8.2(c)).

²⁰ See *supra*, note 2.

²¹ Draft NPRM ¶ 46.

²² See, e.g., American Broadband Deployment Act, H.R. 3557, 118th Cong. (2023); Closing Long Overdue Streamlining Encumbrances to Help Expeditiously Generate Approved Permits (CLOSE the GAP) Act, S. 2855, 118th Cong. (2023).

²³ See, e.g., Press Release, T-Mobile Launches First-Ever 5G Network Slicing Beta for Developers, T-Mobile (Aug. 2, 2023), <https://investor.t-mobile.com/events-and-presentations/news/news-details/2023/T-Mobile-Launches-First-Ever-5G-Network-Slicing-Beta-for-Developers/default.aspx>.

²⁴ Draft NPRM ¶ 158.

which have the potential to usher in a new era of wireless leadership. This is one of many innovations that could be left on the shelf in your pursuit of unnecessary regulations.

Your proposal also threatens to undermine investment and innovation in the emerging satellite communications industry by imposing 1930s era regulations on an industry that did not even exist until decades after those regulations were enacted. This contradicts your approach to other FCC actions to modernize outdated regulations to support growth and innovation in the satellite marketplace. In fact, you went so far as to suggest that “it is easy to see how here on the ground, the regulatory frameworks we rely on to shape space and satellite policy were largely built for another era” when discussing how to “renew and reinforce our commitment to serving the public interest.”²⁵

Finally, this proposal is unlawful. Regulation of broadband is undoubtedly a major question of economic and political significance. Under the major questions doctrine, articulated in *West Virginia v. EPA*, an agency must wait for Congressional authorization before acting.²⁶ In other words, if broadband needs to be regulated as a utility, that is a decision for Congress to make, not the FCC. Congress has not spoken on this issue. Although Congress has and will continue to debate this issue, we have never enacted legislation to expand your authority to regulate broadband. Thus, the FCC cannot act to do so on its own. Indeed, two former Solicitors General under President Barack Obama agree, arguing that reclassifying broadband as a Title II service without Congressional authorization would run afoul of the major questions doctrine.²⁷

Our country’s broadband networks have thrived under the existing light-touch regulatory approach and Americans have benefited greatly. This is no reason to change what is working well. Adding new regulations through reclassifying broadband is both unnecessary and unlawful. We urge you to reconsider your proposal.

In addition, we seek the following information by October 31, 2023:

1. When did the FCC begin drafting the *Safeguarding and Securing the Open Internet* Notice of Proposed Rulemaking (NPRM)? Please also provide each draft considered by your office and the Chief of the Wireline Competition Bureau (WCB).
 - a. Please provide the date and time that you shared the *Safeguarding and Securing the Open Internet* NPRM with each commissioner.
2. Which FCC employees, officials, or contractors participated in drafting the NPRM? Please provide their names and job titles.
3. Provide any FCC work product (emails, memos, documents, other written communications), including from the Office of General Counsel (OGC), raising potential legal or litigation concerns stemming from the NPRM.
4. Has the FCC conducted an economic analysis of this proposal? If so, please provide that analysis.

²⁵ Jessica Rosenworcel, Chairwoman, FCC, Remarks on Space Innovation and the FCC (Nov. 3, 2022), <https://docs.fcc.gov/public/attachments/DOC-388829A1.pdf>.

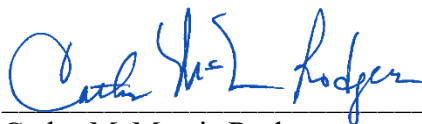
²⁶ 597 U.S. ____ (2022).

²⁷ Donald B. Verrilli, Jr. & Ian Heath Gershengorn, Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

5. Did anyone at the FCC discuss reclassification of broadband with the Executive Office of the President (EOP) before your September 26, 2023, announcement? If so, who from the FCC and EOP, and when? Please provide their names and job titles.
6. Which interest groups and stakeholders have met with your office or the WCB to discuss reclassification of broadband prior to your September 26, 2023, announcement?
 - a. Did any of these groups receive any funds from the Affordable Connectivity Outreach Grant Program? If so, please provide the name of the group and the amount of funding provided through the grant program.
7. Has the FCC received any formal complaints about broadband providers engaging in the blocking, throttling, and paid prioritization that you seek to prohibit? If so, please provide those complaints.
8. Do you commit to not regulate rates for broadband service *either ex ante or ex post*?
9. Do you agree with statements made by third parties that, “If we don’t save net neutrality, you’ll get the internet one word at a time” and that enacting the *Restoring Internet Freedom Order*²⁸ would cause the “end of the internet as we know it”?
 - a. Have these predictions come true?
 - b. Did anything change with the Internet’s performance following the adoption of the *Restoring Internet Freedom Order*?
10. Do you agree that our nation’s broadband networks withstood the challenge of increased usage during the Covid-19 pandemic without reclassifying broadband under Title II?
11. You concluded your dissent in the 2017 *Restoring Internet Freedom Order* by stating “So let’s persist. Let’s fight. Let’s not stop here or now. It’s too important. The future depends on it.”²⁹ That same day, FCC headquarters received a bomb threat and, days later, then-FCC Chairman Pai received a death threat. Do you believe your rhetoric and the rhetoric of your allies contributed to these acts?
 - a. Will you commit to using tamer and less hyperbolic language when discussing this proceeding?
 - b. Will you commit to disavowing any similar language used by supporters of your proposed actions?

Thank you for your attention to this matter.

Sincerely,



Cathy McMorris Rodgers
Chair
Committee on Energy and Commerce



Robert E. Latta
Chair
Subcommittee on Communications and
Technology

²⁸ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017).

²⁹ *Id.* (dissent of Commissioner Jessica Rosenworcel).



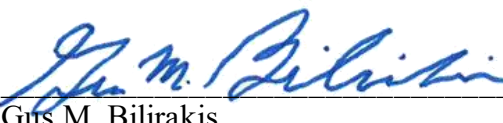
Michael C. Burgess, M.D.
Member of Congress




Brett Guthrie
Member of Congress



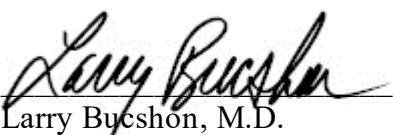
H. Morgan Griffith
Member of Congress



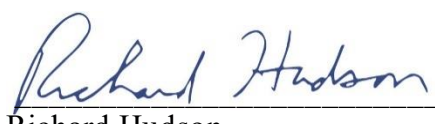
Gus M. Bilirakis
Member of Congress



Bill Johnson
Member of Congress




Larry Bucshon, M.D.
Member of Congress



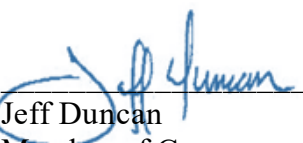
Richard Hudson
Member of Congress




Tim Walberg
Member of Congress



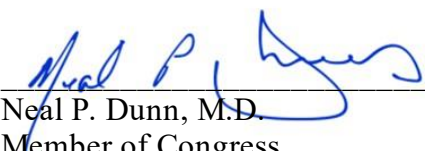
Earl L. "Buddy" Carter
Member of Congress



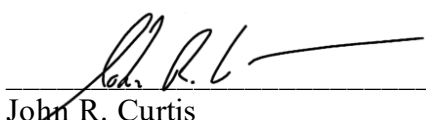
Jeff Duncan
Member of Congress



Gary J. Palmer
Member of Congress



Neal P. Dunn, M.D.
Member of Congress



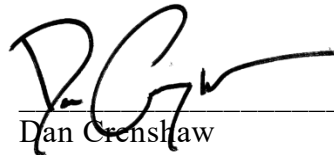
John R. Curtis
Member of Congress



Debbie Lesko
Member of Congress



Greg Pence
Member of Congress



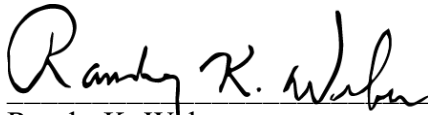
Dan Crenshaw
Member of Congress



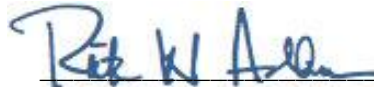
John Joyce
Member of Congress



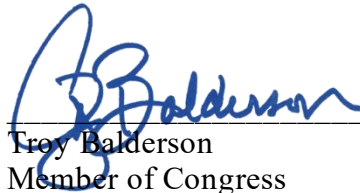
Kelly Armstrong
Member of Congress



Randy K. Weber
Member of Congress



Rick W. Allen
Member of Congress



Troy Balderson
Member of Congress



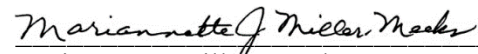
Russ Fulcher
Member of Congress



August Pfluger
Member of Congress



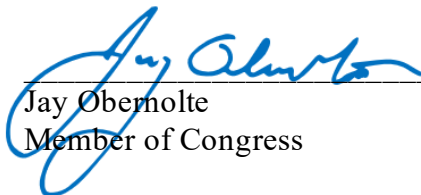
Diana Harshbarger
Member of Congress



Mariannette Miller-Meeks, M.D.
Member of Congress



Kat Cammack
Member of Congress



Jay Obernolte
Member of Congress