

1009

November 2, 2023

Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Dear Chairwoman Rosenworcel,

Since being elected to represent the State of Missouri in the United States Senate, I have remained laser-focused on reining in the powers of unelected bureaucrats in the administrative state. It is not hard to find examples of agencies with little oversight extending their power over the daily lives of Americans. As a member of the U.S. Senate Committee on Commerce, Science, and Transportation, I have seen the Biden Administration attempt to enact regulations that would ban gas stoves, mandate that domestic semiconductor manufacturers work with equity groups to promote gender ideology, and require internet service providers to develop plans to combat climate change when building out their broadband networks.

Administrative agencies have implemented these far-left regulations without any clear congressional delegation. Often, bureaucrats have relied on ambiguous terms in decades-old laws to push sweeping rules and regulations. These actions threaten our representative form of government, and directly harm my constituents.

As a result, it truly confounds the mind that under your leadership as chairwoman, the Federal Communications Commission (FCC) would attempt to reinstate failed net neutrality rules. As you well know, the FCC adopted a Notice of Proposed Rulemaking (NPRM) on October 19, 2023 to reclassify broadband internet access service (BIAS) as a Title II common carrier service in a divided vote.¹ On policy alone, I have strong concerns that a massive regulation such as net neutrality would erode all the gains providers have made to bridge the digital divide, stifle innovation, and deter further investments in U.S. networks. Title II is simply a Trojan horse to expand the federal government's reach over the internet and should alarm every American.

¹ Press Release, Federal Communications Commission, FCC VOTES TO START PROCEEDING ON REESTABLISHING OPEN INTERNET PROTECTIONS (Oct. 20, 2023), <https://docs.fcc.gov/public/attachments/DOC-397827A1.pdf>.

Beyond the harmful policy implications of net neutrality, moving forward with this divisive and intrusive regulation makes little to no sense given developments in the law via recent court decisions. Under previous attempts at the FCC to reclassify broadband internet access service as a utility, the reclassifications have only been upheld under the *Chevron* doctrine.² In past decisions, courts held that a single ambiguous term—“offering”—allowed the Commission to implement these regulations.³

However, the legal reasoning underlying the *Chevron* doctrine has changed significantly since the FCC’s last attempt to implement net neutrality in 2015. In 2022, the U.S. Supreme Court invoked the major questions doctrine to determine whether administrative agencies had congressional delegation to regulate.⁴ An agency may implement a regulation of “vast economic and political significance” *if and only if* Congress has expressly and clearly supported that regulation.⁵ Under the major questions doctrine, an administrative agency must be able to point to *clear* language to justify the regulation.⁶ With this doctrine, legal scholars have opined that “*Chevron* deference will play a diminished role going forward in the review of administrative agency actions.”⁷

As a former lawyer, I know you are familiar with the major questions doctrine. In the context of net neutrality and the application of the major questions doctrine, I suggest a recent analysis by two former Obama Administration solicitor generals.⁸ This report provides a simple conclusion of re-implementing net neutrality rules under this doctrine: “A Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine. It would be folly for the Commission and Congress to assume otherwise.”⁹ Your NPRM specifically states that you are relying on the same legal authority that the FCC relied on when it attempted to implement net neutrality rules in 2015.¹⁰ Despite the law and history, your FCC is acting as if the major questions doctrine and other decisions limiting agency authority since are merely footnotes that can be ignored in your unabashed power grab to regulate the internet. Let me be clear then: Because neither the Communications Act of 1934, the Telecommunication Act of 1996, nor any other act of Congress provides the FCC the clear authority to implement this massive regulatory scheme, the FCC does not have the ability to survive a legal challenge.¹¹ The definition of insanity is doing

² See *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005); *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016)

³ *Brand X*, 545 U.S. at 989-99.

⁴ *West Virginia v. EPA*, 597 U.S. ____ (2022).

⁵ *Id.*

⁶ *Id.*

⁷ Randolph J. May, *A Major Ruling on Major Questions*, *The Regulatory Review* (July 15, 2022).

⁸ Donald B. Verrilli, Jr. and Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine* (Sept. 20, 2023), <https://aboutblaw.com/baKo>.

⁹ *Id.* at 2.

¹⁰ Federal Communications Commission, Notice of Proposed Rulemaking, Safeguarding and Securing the Open Internet, WC Docket No. 23-320, 89 (Oct. 19, 2023) (“we propose to rely on the same sources of authority that the Commission relied upon when it adopted rules in the 2015 Open Internet Order.”).

¹¹ See *id.* at 13.

the same thing over and over and expecting a different result. Yet with net neutrality, it seems leftist insanity persists.

Your blind efforts to move forward ignores our separation of powers, and the will of the people through their elected representatives in Congress to determine how to best balance our economic and national security interests on the internet. The powers you seek firmly rest with Congress.

Earlier this year, an FCC commissioner nominee failed to be confirmed by the Senate.¹² This failed nominee testified in front of the U.S. Senate Committee on Commerce, Science, and Transportation that the FCC could act and implement net neutrality without any congressional authorization.¹³ I will pass along the same message I gave this failed nominee: *If you want to advocate and push for such a radical agenda, then you should run for elected office.*

I will not stand idly by as the FCC under your leadership attempts to usurp Congress and claim Article I Branch legislative authority for yourself. Over forty of my colleagues have written to you to demand you shelve your attempt to implement net neutrality.¹⁴ I hope you follow the recommendation of my Senate colleagues and me to stop this radical rulemaking. As a reminder, the U.S. Senate Committee on Commerce, Science, and Transportation has direct jurisdiction over your agency. If you decide to move forward with this reckless action, expect my colleagues and I on the committee to call for your appearance before the committee to be held accountable. Though your recent decisions demonstrate that you clearly believe that Congress is a mere speedbump, I will defend the will of Missourians who elected me to the Senate to stand up against economy killing regulations such as the one you are proposing. To ensure proper oversight, I ask that you provide the following no later than November 16, 2023:

- Please identify the specific authority granted by Congress that provides a legal justification to support the Commission's decision to move forward on net neutrality.
- Please confirm that you believe that reclassifying BIAS as a Title II common carrier service would be a regulation of "vast economic and political significance."
- Please provide a specific legal rationale as to why the FCC is able to move forward with rulemaking on net neutrality given the major questions doctrine as detailed in *West Virginia v. EPA*.
- Please explain how the Commission is preparing for an almost certain legal challenge under the major questions doctrine, including an estimated amount of staff time and resources to be spent on litigation.

I look forward to conducting proper oversight on this pressing matter.

¹² John Hendel, *FCC nominee Gigi Sohn withdraws after more than a year of fighting for post*, POLITICO (March 7, 2023).

¹³ Senator Eric Schmitt, *Senator Schmitt Grills Biden FCC Nominee Gigi Sohn*, YouTube (Feb. 14, 2023), <https://www.youtube.com/watch?v=r4GCFtoRNNE>.

¹⁴ Press Release, Senator Todd Young, *Young, Colleagues Oppose the FCC's Internet Takeover* (Oct. 6, 2023).

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric S. Schmitt", is positioned above a horizontal line.

Eric S. Schmitt

United States Senator