

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

In the Matter of )
Safeguarding and Securing the Open Internet ) WC Docket No. 23-320

NOTICE OF PROPOSED RULEMAKING

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**I. INTRODUCTION**

1. Today we propose to reestablish the Federal Communications Commission’s (Commission) authority over broadband Internet access service by classifying it as a telecommunications service under Title II of the Communications Act of 1934, as amended (Act). While Internet access has long been important to daily life, the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers’ participation in our society and economy. Congress responded by investing tens of billions of dollars into building out broadband Internet networks and making access more affordable and equitable, culminating in the generational investment of \$65 billion in the Infrastructure Investment and Jobs Act.

2. But even as our society has reconfigured itself to do so much online, our institutions have fallen behind. There is currently no expert agency ensuring that the Internet is fast, open, and fair. Since the birth of the modern Internet in the 1990s, the Commission had played that role, but the Commission abdicated that responsibility in 2018, just as the Internet was becoming more vital than ever.

3. Restoring Title II authority will allow the Commission to safeguard and secure the open Internet in three significant ways. First, this authority will allow the Commission to protect consumers, including by issuing straightforward, clear rules to prevent Internet service providers from engaging in practices harmful to consumers, competition, and public safety, and by establishing a national regulatory approach rather than disparate requirements that vary state-by-state. Second, reclassification will strengthen the Commission’s ability to secure communications networks and critical infrastructure against national security threats. Third, the reclassification will enable the Commission to protect public safety during natural disasters and other emergencies. Our proposals to safeguard and secure the open Internet build on several other actions the Commission has taken since the onset of the COVID-19 pandemic to

ensure that the public has access to broadband.<sup>1</sup> We believe that the actions we propose today are critical to protecting the nation’s security and the public’s safety and to ensuring that consumers and competition can flourish in the modern Internet economy.

## II. BACKGROUND

4. As former Chairman Michael Powell noted in 2004, “ensuring that consumers can obtain and use the content, applications and devices they want . . . is critical to unlocking the vast potential of the broadband Internet.”<sup>2</sup> In recognition of this fact, in 2005, the Commission unanimously approved the *Internet Policy Statement*, which laid out four guiding principles designed to encourage broadband deployment and “preserve and promote the open and interconnected nature of the public Internet.”<sup>3</sup> These principles sought to ensure that consumers had the right to access and use the lawful content, applications, and devices of their choice online, and to do so in an Internet ecosystem defined by competitive markets.<sup>4</sup>

5. Over the next decade, the Commission consistently attempted to apply basic “rules of the road” protecting the openness of the Internet. From 2005 to 2011, the principles embodied in the *Internet Policy Statement* were incorporated as conditions by the Commission into several merger orders, including the SBC/AT&T, Verizon/MCI, and Comcast/NBCU mergers, and into the open platform requirements for a key 700 MHz license—the Upper 700 MHz C block.<sup>5</sup> Commission approval of these

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<sup>1</sup> See, e.g., *Affordable Connectivity Program Emergency; Broadband Benefit Program*, WC Docket Nos. 21-450 and 20-445, Report and Order and Further Notice of Proposed Rulemaking, 37 FCC Rcd 484 (2022) (taking steps to ensure broadband connections were affordable through the Emergency Broadband Benefit Program and successor Affordable Connectivity Program, as directed by Congress); *Establishing Emergency Connectivity Fund to Close the Homework Gap*, Report and Order, 36 FCC Rcd 8696 (2021) (extending the benefits of broadband connections available to schools and libraries to students and patrons who needed connections at home through the Emergency Connectivity Fund); *Promoting Telehealth for Low-Income Consumers; COVID-19 Telehealth Program*, WC Docket Nos. 18-213 and 20-89, Report and Order, 35 FCC Rcd 3366 (2020) (establishing the COVID-19 Telehealth Program to help health care providers provide connected care services to patients at their homes or mobile locations in response to the pandemic); *Improving Competitive Broadband Access to Multiple Tenant Environments*, WC Docket No. 17-142, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448 (2022) (taking steps to ensure that consumers in multi-tenant environments can obtain broadband service offerings from competing providers); *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking, FCC 22-98 (rel. Dec. 21, 2022) (exploring how to address digital discrimination to ensure every person has equal access to critical broadband connections).

<sup>2</sup> Michael K. Powell, Chairman, Federal Communications Commission, *Preserving Internet Freedom: Guiding Principles for the Industry 3*, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

<sup>3</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-337, 98-10, and 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (*Internet Policy Statement*).

<sup>4</sup> Subject to “reasonable network management,” the principles were intended to ensure consumers had the right to (1) “access the lawful Internet content of their choice;” (2) “run applications and use services of their choice;” (3) “connect their choice of legal devices that do not harm the network;” and (4) enjoy “competition among network providers, application and service providers, and content providers.” *Internet Policy Statement*, 20 FCC Rcd at 14987-88, paras. 4-5.

<sup>5</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18392, para. 211 & Appx. F (2005) (*SBC/AT&T Merger*

(continued....)

transactions was expressly conditioned on compliance with the *Internet Policy Statement*.<sup>6</sup> During this time, open Internet principles were also applied to particular enforcement proceedings aimed at addressing anti-competitive behavior by service providers.<sup>7</sup>

6. In 2010, the Court of Appeals for the D.C. Circuit rejected the Commission's attempt to enforce open Internet principles based on the Commission's Title I ancillary authority in *Comcast v. FCC*.<sup>8</sup> Following *Comcast*, the Commission adopted the *2010 Open Internet Order*,<sup>9</sup> a codification of the policy principles contained in the *Internet Policy Statement*. The *2010 Open Internet Order* was based on broadly accepted Internet norms and the Commission's extensive regulatory experience in preserving

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*Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18537, para. 221 (2005) (*Verizon/MCI Merger Order*); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4275, para. 94 & n.213 (2011) (*Comcast/NBCU Merger Order*); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; 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*, WT Docket Nos. 07-166, 06-169, 06-150, 03-264, and 96-86, PS Docket No. 06-229, CC Docket No. 94-102, Second Report and Order, 22 FCC Rcd 15289, 15364, paras. 203-204 (2007) (*700 MHz Second Report and Order*); see also 47 CFR § 27.16.

<sup>6</sup> *SBC/AT&T Merger Order*, 20 FCC Rcd at 18392, para. 211 & Appx. F; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18537, para. 221; *Comcast/NBCU Merger Order*, 26 FCC Rcd at 4275, para. 94 & n.213; *700 MHz Second Report and Order*, 22 FCC Rcd at 15364, paras. 203-204; 47 CFR § 27.16. Additionally, the Commission used the *Internet Policy Statement* principles as a yardstick to evaluate other large-scale transactions, such as an Adelphia/Time Warner/Comcast licensing agreement, and the AT&T/BellSouth merger. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8299, para. 223 (2006); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5726-27, para. 119 (2007) (*AT&T/BellSouth Merger Order*).

<sup>7</sup> These actions resulted in a 2005 consent decree by DSL service provider Madison River requiring it to discontinue its practice of blocking Voice over Internet Protocol (VoIP) telephone calls, and a 2008 Order against Comcast for interfering with peer-to-peer file sharing, which the Commission found "contravene[d] . . . federal policy" by "significantly imped[ing] consumers' ability to access the content and use the applications of their choice." *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (EB 2005) (*Madison River Order*); *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, 13052-54, 13057, paras. 43-44, 49 (2008) (*Comcast Order*).

<sup>8</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

<sup>9</sup> *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (*2010 Open Internet Order*).

open and dynamic communications networks.<sup>10</sup> The *2010 Open Internet Order* adopted three fundamental rules governing Internet service providers: (1) no blocking; (2) no unreasonable discrimination; and (3) transparency.<sup>11</sup> The no-blocking and no-unreasonable-discrimination rules prevented broadband service providers from deliberately interfering with consumers' access to lawful content, applications, and services, while the transparency rule promoted informed consumer choice by requiring disclosure by service providers of critical information relating to network management practices, performance, and terms of service.<sup>12</sup> The anti-discrimination rule contained in the *2010 Open Internet Order* operated on a case-by-case basis, with the Commission evaluating the conduct of fixed broadband service providers based on a number of factors, including conformity with industry best practices, harm to competing services or end users, and impairment of free expression.<sup>13</sup>

7. In order to fit the technical and economic realities of the broadband ecosystem, the restrictions on blocking and discrimination were made subject to an exception for “reasonable network management,” allowing service providers the freedom to address legitimate needs such as avoiding network congestion and combating harmful or illegal content.<sup>14</sup> Additionally, in order to account for then-perceived differences between the fixed and mobile broadband markets, the *2010 Open Internet Order* exempted mobile service providers from the anti-discrimination rule, and only barred mobile providers from blocking “consumers from accessing lawful websites” or “applications that compete with the provider’s voice or video telephony services.”<sup>15</sup>

8. The *2010 Open Internet Order* was based in part on a revised understanding of the Commission’s Title I authority—as well as a variety of other statutory provisions including Section 706 of the Telecommunications Act of 1996 (Telecommunications Act or 1996 Act)—and was again challenged before the D.C. Circuit in *Verizon v. FCC*.<sup>16</sup> The *Verizon* court sustained the Commission’s findings that “absent rules such as those set forth in the [2010] *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment,”<sup>17</sup> and concluded that the Commission’s “finding that Internet openness fosters . . . edge-provider innovation . . . was . . . reasonable and grounded in substantial evidence” and that the Commission had “more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.”<sup>18</sup> The court also accepted the Commission’s reinterpretation of section 706 as an independent grant of legal authority over broadband services.<sup>19</sup> The court nonetheless vacated the no-blocking and anti-discrimination provisions of the *2010 Open Internet Order*, concluding that the rules imposed *de facto* common carrier status on providers of broadband Internet access service (BIAS) in violation of the

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<sup>10</sup> See *id.* at 17906, para. 1; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5568, para. 21 (2014).

<sup>11</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17906, para. 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 17946, paras. 74-75. The *2010 Open Internet Order* also addressed paid prioritization arrangements, and made clear that “pay for priority” deals and associated network practices were likely to be problematic in a number of respects. *Id.* at 17947, para. 76.

<sup>14</sup> *Id.* at 17951-56, paras. 80-92.

<sup>15</sup> *Id.* at 17962, 17959, paras. 104, 99.

<sup>16</sup> *Verizon v. FCC*, 740 F.3d 623, 635-42 (D.C. Cir. 2014) (*Verizon*).

<sup>17</sup> *Id.* at 645.

<sup>18</sup> *Id.* at 644.

<sup>19</sup> *Id.* at 642. The Court also found that that authority did not allow the Commission to subject information services or providers of private mobile services to treatment as common carriers. *Id.* at 650 (citing 47 U.S.C. §§ 153(51), 332(c)(2)).

Commission's classification of those services as information services.<sup>20</sup> The *Verizon* court explained that “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers,’” and held that the 2010 no-blocking and no-unreasonable-discrimination rules impermissibly “obligated [broadband providers] to act as common carriers.”<sup>21</sup>

9. Following the *Verizon* decision, the Commission adopted the *2015 Open Internet Order*, adopting carefully-tailored rules to prevent specific practices harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent deployment of new practices that would harm Internet openness, and enhancements to the transparency rule.<sup>22</sup> The Commission concluded that the Internet’s openness promotes innovation, investment, competition, free expression, and other national broadband goals, and found that the record supported the proposition that the Internet’s openness enables the virtuous cycle of innovation.<sup>23</sup> The Commission also found that broadband providers have both the incentives and ability to harm the open Internet.<sup>24</sup>

10. The Commission grounded its open Internet rules in multiple sources of legal authority, including both section 706 of the Telecommunications Act and Title II of the Act. As it had done previously, the Commission exercised its authority to interpret ambiguous language in the Act regarding the classification of broadband services, and classified broadband Internet access services, including Internet traffic exchange arrangements (or Internet interconnection arrangements), as telecommunications services under Title II of the Act.<sup>25</sup> Concurrently, the Commission exercised its forbearance authority to forbear from application of 27 provisions of Title II of the Act and over 700 Commission rules and regulations.<sup>26</sup> The Commission also reclassified mobile broadband service as a commercial mobile service.<sup>27</sup>

11. In 2016, the D.C. Circuit upheld the Commission’s *2015 Open Internet Order* in full.<sup>28</sup> The Commission had determined that consumer perception of broadband Internet access service supported classifying it as a telecommunications service, and the court agreed that those conclusions “find extensive support in the record” and “justify the Commission’s decision to reclassify broadband as a telecommunications service.”<sup>29</sup> Among other things, the court rejected claims that Domain Name System (DNS) and caching required BIAS to be classified as an information service, instead affirming the Commission’s view that DNS and caching “facilitate use of the network without altering the fundamental character of the telecommunications service.”<sup>30</sup> The court also rejected arguments that the grant of

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<sup>20</sup> *Id.* at 635-42, 656-59.

<sup>21</sup> *Id.* at 653.

<sup>22</sup> *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5603, para. 4 (2015) (*2015 Open Internet Order*), *pet. for review denied*, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*USTA*), *reh’g denied*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 453 (2018).

<sup>23</sup> *See 2015 Open Internet Order*, 30 FCC Rcd at 5625-27, paras. 76-77.

<sup>24</sup> *See id.* at 5628-43, paras. 78-101.

<sup>25</sup> *See id.* at 5743-45, paras. 331-35.

<sup>26</sup> *See id.* at 5603, 5838-64, paras. 5, 493-536.

<sup>27</sup> *Id.* at 5778-90, paras. 388-408.

<sup>28</sup> *See USTA*, 825 F.3d 674.

<sup>29</sup> *Id.* at 697-98; *see also id.* at 704-705 (“[T]he record contains extensive evidence that [BIAS] consumers perceive a standalone offering of transmission, separate from the offering of information services like email and cloud storage.”).

<sup>30</sup> *Id.* at 705.

extensive forbearance demonstrated that Title II was a poor fit for BIAS, observing that the FCC merely “followed an express statutory mandate” in section 10 of the Act “requiring it to ‘forbear from applying any regulation or any provision’ of the Communications Act if certain criteria are met.”<sup>31</sup> Likewise, with respect to the Commission’s classification of mobile BIAS as a commercial mobile service, the court found that holding “reasonable and supported by the record.”<sup>32</sup> The court also rejected challenges to the Commission’s Internet conduct rules, concluding that those rules fell within the Commission’s statutory authority, provided adequate notice of the conduct that was restricted, and were consistent with the First Amendment.<sup>33</sup>

12. Despite the D.C. Circuit’s decision upholding the Commission’s *2015 Open Internet Order*, and after more than a decade of promoting and supporting policies to protect the openness of the Internet through basic conduct “rules of the road,” the Commission reversed course in the *2018 RIF Order*, reclassifying BIAS as an information service and eliminating the open Internet conduct rules.<sup>34</sup> The Commission asserted that a transparency rule, together with antitrust and consumer protection laws, would be sufficient to protect consumers’ use of the Internet.<sup>35</sup> It also included a directive that the *RIF Order* “preempt[s] any state or local measures that would effectively impose rules or requirements that [the Commission has] repealed or decided to refrain imposing . . . or that would impose more stringent requirements for any aspect of broadband service” addressed in the *RIF Order*.<sup>36</sup> The Commission further concluded that “the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority,”<sup>37</sup> departing from the Commission’s prior interpretation of those provisions.<sup>38</sup> Upon review in *Mozilla v. FCC*, the D.C. Circuit identified a number of shortcomings and limitations in the *RIF Order* and remanded to the Commission three matters requiring further consideration.<sup>39</sup> In several respects, the *Mozilla* court criticized the *RIF Order* or highlighted the limits of its analysis, even while concluding that it survived judicial review on those specific issues (if just barely). For example, regarding the effect of Title II on investment, the court emphasized that the “Petitioners’ skepticism” of evidence that Title II regulation affected BIAS investment was “echoed in the 2018 [*RIF Order*]” itself, which recognized the “quite modest probative value” of studies seeking to demonstrate that Title II classification depressed network investment.<sup>40</sup> Ultimately, the court found the dispute among competing studies “far too sophisticated for us to credibly take sides,” and given the “impenetrability of the matter,” the court “defer[red] to a reasonable judgment” of the agency.<sup>41</sup> The D.C. Circuit also found that the *RIF Order*’s analysis concerning the ability of antitrust and consumer protection law to obviate the need for Commission regulatory authority over BIAS was “no model of agency decisionmaking.”<sup>42</sup>

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<sup>31</sup> *Id.* at 706.

<sup>32</sup> *Id.* at 714.

<sup>33</sup> *Id.* at 733-44.

<sup>34</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (*RIF Order*).

<sup>35</sup> *Id.* at 450-52, paras. 239-45.

<sup>36</sup> *Id.* at 427, para. 195.

<sup>37</sup> *Id.* at 470, para. 268.

<sup>38</sup> In the *2010 Open Internet Order*, the Commission had made clear its interpretation of sections 706(a) and (b) of the 1996 Act as granting regulatory authority. *2010 Open Internet Order*, 25 FCC Rcd at 17969-70, para. 120.

<sup>39</sup> *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*Mozilla*).

<sup>40</sup> *Id.* at 51, 52.

<sup>41</sup> *Id.* at 52, 55.

<sup>42</sup> *Id.* at 59.

Ultimately, the *RIF Order*'s "anemic analysis" in that regard "barely survive[d] arbitrary and capricious review."<sup>43</sup> The court also vacated the *RIF Order*'s blanket preemption of inconsistent state laws,<sup>44</sup> opening the door for several states to develop their own policies.<sup>45</sup> In particular, the D.C. Circuit found that the Commission "fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority,"<sup>46</sup> and concluded that "in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."<sup>47</sup>

13. The *Mozilla* court had substantial concerns about the *RIF Order*'s failure to adequately evaluate the potential negative implications of moving away from a Title II regulatory framework for BIAS on the Commission's ability to: (1) adequately protect public safety; (2) promote infrastructure deployment through pole attachment regulation; and (3) ensure continued legal authority to provide Lifeline Support for BIAS through the universal service fund.<sup>48</sup>

- With respect to public safety, the *RIF Order* did not address the issue directly, and the court found "[t]he Commission's after-the-fact reasoning" inadequate because it "entirely misse[d] the fact that, whenever public safety is involved, lives are at stake."<sup>49</sup>
- Regarding pole attachments, "[t]he Commission offered, at best, scattered and unreasoned observations in response to comments on this issue," and at times "seemed to whistle past the graveyard," rather than adequately grappling with these concerns.<sup>50</sup>
- As to the issue of Lifeline Support, the court found that the *RIF Order* "backhanded the issue" with a response that "d[id] not work," and likewise "prove[d] unable to explain itself in this litigation either."<sup>51</sup>

The court therefore remanded to the Commission for further consideration of those issues.<sup>52</sup>

14. Finally, even the Commission's technological and marketplace evaluation of BIAS was subject to substantial criticism by a majority of the *Mozilla* panel. In her concurrence, Judge Millett explained that she was "deeply concerned that the result is unhinged from the realities of modern

<sup>43</sup> *Id.* at 59.

<sup>44</sup> *Id.* at 74.

<sup>45</sup> See, e.g., SB-822, 2017-2018 Reg. Sess. (Cal. 2018) (adopting open Internet-type requirements); H.B. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (similar); H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018) (requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government); S.289, No. 169, 2018 Sess. (Vt. 2018) (similar); LD 1364, 129th Leg., Reg. Sess. (Me. 2019) (similar); Colorado S.B. 19-078, 71st Leg., Reg. Sess. (Colo. 2019) (requiring compliance with certain open Internet-type requirements as a condition of state universal service support); NY Gen. Bus. § 399-zzzzz (N.Y. 2021) (restricting BIAS prices for low income consumers); Mont. Exec. Order No. 3-2018 (2018), <https://spb.mt.gov/docs/Laws-Rules-EOs/EOs/EO-03-2018-Net-Freedom.pdf> (amended by Mont. Exec. Order No. 6-2018 (2018), <https://spb.mt.gov/docs/Laws-Rules-EOs/EOs/EO-06-2018-Amended-Net-Freedom.pdf>) (requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government); N.J. Exec. Order No. 9 (2018), <https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf> (similar); N.Y. Exec. Order No. 175 (2018); R.I. Exec. Order No. 18-02 (2018), <https://governor.ri.gov/executive-orders/executive-order-18-02> (similar).

<sup>46</sup> *Mozilla*, 940 F.3d at 74. See also *ACA Connects v. Bonta*, 24 F.4th 1233, 1241-48 (9th Cir. 2022).

<sup>47</sup> *Mozilla*, 940 F.3d at 59.

<sup>48</sup> *Id.* at 18.

<sup>49</sup> *Id.* at 61-62.

<sup>50</sup> *Id.* at 65-67.

<sup>51</sup> *Id.* at 69.

<sup>52</sup> *Id.* at 18.



broadband service,” but due to Supreme Court precedent treating an information service classification of BIAS as permissible, she concluded that the *Mozilla* court was not free to act on its own “to require the Commission to bring the law into harmony with the realities of the modern broadband marketplace.”<sup>53</sup> Judge Wilkins likewise expressed agreement with Judge Millett’s views.<sup>54</sup>

15. The Commission responded to the three issues remanded by the D.C. Circuit in *Mozilla* in the 2020 *RIF Remand Order*, refusing to depart from its determinations in the *RIF Order*.<sup>55</sup> In February 2021, Common Cause, et al.; INCOMPAS; Public Knowledge; and the County of Santa Clara, et al. each timely filed petitions for reconsideration of the *RIF Remand Order*.<sup>56</sup>

### III. PROPOSED CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE

16. Today, we propose to return BIAS to its classification as a telecommunications service under Title II of the Act. We further propose to reclassify mobile BIAS as a commercial mobile service. In the time since the *RIF Order*, propelled by the COVID-19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission’s authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open Internet through a national regulatory approach. The Commission also has an important statutory mandate to protect “life and property” by supporting national security and public safety.<sup>57</sup> We anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission’s ability to advance these and other important interests, including protection of consumers’ privacy and data security interests and consumers’ ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today. Below, we seek comment on our proposed classification framework, and particularly seek comment on its benefits and burdens. Additionally, we seek comment on the impact of reclassification on small businesses and entities, including small ISPs.

#### A. Broadband Internet Access Service is Essential

17. While BIAS connections have long been important to full participation in our society and economy, we believe the COVID-19 pandemic dramatically changed the importance of the Internet today, and seek comment on our belief. Not unlike other essential utilities, such as electricity and water, BIAS connections have proved essential to every aspect of our daily lives, from work, education, and

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<sup>53</sup> *Id.* at 87, 94 (Millett, J., concurring) (citation omitted).

<sup>54</sup> *Id.* at 94-95 (Wilkins, J., concurring).

<sup>55</sup> *Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, and 11-42, Order on Remand, 35 FCC Rcd 12328, 12329, para. 2 (2020) (*RIF Remand Order*), *pets. for recon. pending, pet. for review pending, Cal. Pub. Utils. Comm’n v. FCC*, No. 21-1016 (D.C. Cir.).

<sup>56</sup> Common Cause, et al., Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021); INCOMPAS, Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 4, 2021); Public Knowledge, Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021); County of Santa Clara, et al., Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, and 11-42 (filed Feb. 8, 2021). On October 19, 2023, the Wireline Competition Bureau sought comment on the Petitions for Reconsideration. See Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the *RIF Remand Order*, WC Docket Nos. 17-108, 170287, 11-42, Public Notice, DA 23-996 (rel. Oct. 19, 2023).

<sup>57</sup> See 47 U.S.C. § 151.

healthcare, to commerce, community, and free expression.<sup>58</sup> BIAS connections were so critical during the pandemic that Congress undertook a number of federal initiatives to improve the accessibility and affordability of BIAS across America,<sup>59</sup> finding in the preamble to section 60101 of the bipartisan Infrastructure Investment and Jobs Act (Infrastructure Act) that “access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States.”<sup>60</sup> A Pew Research Center survey highlighted this reality, showing that high speed Internet was essential or important to 90 percent of U.S. adults during the COVID-19 pandemic.<sup>61</sup> That finding is backed by the tremendous use during the pandemic of text messaging applications, voice services, and video conferencing for work, school, civic engagement, and connecting with family and communities, accessed through consumers’ fixed and mobile broadband connections.<sup>62</sup> The increased importance of BIAS connections has persisted post-pandemic. Compared to last year, nearly 45 percent of respondents to one survey said their Internet usage had increased, while the average amount of time respondents spent actively using the Internet on a phone, tablet, or computer was eight hours, excluding passive activities, such as streaming music or video in the

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<sup>58</sup> See Janna Anderson et al., *Experts Say the ‘New Normal’ in 2025 Will Be Far More Tech-Driven, Presenting More Big Challenges*, Pew Research Center (Feb. 18, 2021), <https://www.pewresearch.org/internet/2021/02/18/experts-say-the-new-normal-in-2025-will-be-far-more-tech-driven-presenting-more-big-challenges/>; Rahul De’ et al., *Impact of digital surge during Covid-19 pandemic: A viewpoint on research and practice*, (June 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7280123/>.

<sup>59</sup> See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (appropriating \$200 million to the Commission for telehealth support through the COVID-19 Telehealth Program); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 903, 134 Stat. 1182, (2020) (appropriating an additional \$249.95 million in funding for the Commission’s COVID-19 Telehealth Program); *id.*, § 904, 134 Stat. 2129 (establishing an Emergency Broadband Connectivity Fund of \$3.2 billion for the Commission to establish the Emergency Broadband Benefit Program to support broadband services and devices in low-income households during the COVID-19 pandemic); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 7402, 135 Stat. 4 (2021) (establishing a \$7.171 billion Emergency Connectivity Fund to help schools and libraries provide devices and connectivity to students, school staff, and library patrons during the COVID-19 pandemic); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102, 135 Stat. 429 (2021) (Infrastructure Act) (establishing grants for broadband deployment programs, as administered by NTIA); *id.* § 60401 (establishing grants for middle mile infrastructure); *id.* § 60502 (providing \$14.2 billion to establish the Affordable Connectivity Program).

<sup>60</sup> 47 U.S.C. § 1701(1) and (5) (finding also that the pandemic “has underscored the critical importance of affordable, high-speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing”). See also Digital Equity Act of 2021, 47 U.S.C. §§ 1722(1)(A)-(B) and 1722(5) (stating it is the sense of Congress that “a broadband connection and digital literacy are increasingly critical to how individuals (A) participate in society, economy and civic institutions of the United States;” and “(B) access health care and essential services, obtain education, and build careers” and “achieving digital equity is a matter of social and economic justice and is worth pursuing”).

<sup>61</sup> See Colleen McClain et al., *The Internet and the Pandemic: 1. How the internet and technology shaped Americans’ personal experiences amid COVID-19*, Pew Research Center (Sept. 1, 2021) (*Pew Research Center: The Internet and the Pandemic*), <https://www.pewresearch.org/internet/2021/09/01/how-the-internet-and-technology-shaped-americans-personal-experiences-amid-covid-19/>. See also *Responding to COVID-19*, NCTA, <https://www.ncta.com/covid-19-overview> (last visited Sept. 20, 2023) (“77% of adults think high-speed internet service is more important now than in the past.”); Ericsson, *Connected consumers getting through the pandemic* (June 2020), [https://www.ericsson.com/4ac68f/assets/local/reports-papers/mobility-report/documents/2020/emr-june2020-connectedconsumers\\_article.pdf](https://www.ericsson.com/4ac68f/assets/local/reports-papers/mobility-report/documents/2020/emr-june2020-connectedconsumers_article.pdf) (“Across all the surveyed markets, 83 percent of respondents claim that information and communications technology (ICT) has helped them a lot in coping with the impact of the pandemic in various ways”).

<sup>62</sup> See *Pew Research Center: The Internet and the Pandemic* (about eight-in-ten individuals say they connected with others via video calls during the pandemic, while 71 percent of adults share that text messages or group messaging apps have helped them at least a little to stay connected and 65 percent said the same about voice calls).

background.<sup>63</sup> OpenVault reports that almost 50 percent of fixed broadband subscribers in the U.S. used 533 gigabytes (GB) or more of bandwidth per month through the fourth quarter of 2022, compared to about 10 percent of subscribers in 2017.<sup>64</sup> From year-end 2020 to year-end 2021, monthly data usage per smartphone subscriber rose to an average of 12.1 GB per subscriber per month—an increase of approximately 12 percent.<sup>65</sup> We seek comment on how consumers’ usage and view of BIAS has changed since 2018, when Title II classification was reversed, and particularly since the onset of the pandemic in 2020. In what ways has the importance of BIAS to consumers stayed the same? How should any evolution in the importance of BIAS to consumers drive our analysis today? We also seek comment on how the importance of BIAS is expected to evolve going forward.

18. We tentatively conclude that developments in the importance of the Internet to consumers demonstrate that consumers perceive and use BIAS as a standalone service that provides telecommunications. In the *2015 Open Internet Order*, the Commission concluded that consumers perceive BIAS both as a standalone offering and as providing telecommunications.<sup>66</sup> The D.C. Circuit found in *USTA* that these conclusions had “extensive support in the record and together justify the Commission’s decision to reclassify broadband as a telecommunications service.”<sup>67</sup> As the D.C. Circuit recognized, “[e]ven the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content.”<sup>68</sup> We believe that the increased importance of BIAS to consumers since the onset of the pandemic shows that consumers’ perception and use of BIAS as a standalone telecommunications service is even more pronounced now than it was in 2015. Indeed, consumers’ use of BIAS today appears to go to the very heart of the purposes for which consumers have historically utilized “telecommunication services”: to “transmi[t], 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.”<sup>69</sup> We seek comment on our tentative conclusion and this analysis.

19. We also believe that the COVID-19 pandemic, and the increased importance of BIAS to consumers, has spurred ISPs to market BIAS as a telecommunications service that is essential to accessing separate data-related “add-on” offerings. In the *2015 Open Internet Order*, the Commission concluded that ISPs “market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) ‘add-on’ applications, content, and services that are generally information services” separate from the underlying broadband service.<sup>70</sup> The Commission specifically found that ISPs market their BIAS “primarily as a conduit for the

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<sup>63</sup> Peter Christiansen, *2022 Internet Usage Survey*, HighSpeedInternet.com (Sept. 26, 2022), <https://www.highspeedinternet.com/resources/internet-usage-report>.

<sup>64</sup> OpenVault, *Broadband Insights Report (OVBI) 4Q22*, 11, 15, [https://openvault.com/wp-content/uploads/2023/02/OVBI\\_4Q22\\_Report.pdf](https://openvault.com/wp-content/uploads/2023/02/OVBI_4Q22_Report.pdf).

<sup>65</sup> *Communications Marketplace Report*, GN Docket No. 22-203, 2022 Communications Marketplace Report, FCC 22-103, 62, para. 80 (rel. Dec. 30, 2022) (*2022 Communications Marketplace Report*). See also Ericsson, *Mobility Report*, at 20 (June 2023) (showing mobile data traffic per smartphone in North America was 12.3 GB per month in 2020, was 19.6 GB per month in 2022, and is expected to reach 57.5 GB per month by 2028); CTIA, *2023 Annual Survey Highlights* (July 25, 2023) (showing that there was 73.7 trillion MB of U.S. wireless data traffic in 2022, representing a 38 percent increase from 20 trillion MB in 2021).

<sup>66</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5765, para. 365.

<sup>67</sup> *USTA*, 825 F.3d at 697-98.

<sup>68</sup> *Id.* at 698.

<sup>69</sup> 47 U.S.C. § 153(50) (definition of “telecommunications”); *id.* at § 153(53) (definition of “telecommunications service”).

<sup>70</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5750, para. 341.

transmission of data across the Internet,” with fixed providers distinguishing service offerings on the basis of transmission speeds, while mobile providers advertise speed, reliability, and coverage of their networks.<sup>71</sup> Although the *RIF Order* contended that “ISPs generally market and provide information processing capabilities and transmission capabilities together as a single service,” it did not provide examples.<sup>72</sup> Examples of ISP marketing today appear even more focused than in 2015 on the capability of BIAS to transmit information of users’ choosing between Internet endpoints,<sup>73</sup> rather than its capability to generate, acquire, store, transform, process, retrieve, utilize, or make available that information.<sup>74</sup> Such marketing emphasizes faster speeds aimed at connecting multiple devices,<sup>75</sup> unlimited data for mobile service,<sup>76</sup> and reliable and secure coverage.<sup>77</sup> At the same time, ISPs appear to advertise data-related offerings as separate services that can be bundled with or added on to their BIAS services, including subscriptions to unaffiliated video and music streaming services,<sup>78</sup> new devices,<sup>79</sup> access to Wi-Fi hotspots,<sup>80</sup> or mobile security apps.<sup>81</sup> We seek comment generally on how BIAS offerings are advertised

<sup>71</sup> *Id.* at 5757, para. 354.

<sup>72</sup> *RIF Order*, 33 FCC Rcd at 335, para. 46.

<sup>73</sup> 47 U.S.C. § 153(50) (definition of “telecommunications”); *id.* at § 153(53) (definition of “telecommunications service”).

<sup>74</sup> 47 U.S.C. § 153(24) (definition of “information service”).

<sup>75</sup> See, e.g., Comcast Xfinity, *Explore Speeds and Prices*, <https://www.xfinity.com/learn/internet-service> (last visited Sept. 20, 2023) (advertising speed tiers and the appropriate number of devices for each tier); Verizon Fios, *Get Verizon Fios*, <https://www.verizon.com/home/fios> [<https://perma.cc/6TSW-R663>] (last visited Sept. 20, 2023) (advertising fiber capacity as enabling “more bandwidth for everyone in your home at the same time”); AT&T, *AT&T Fiber® with All-Fi™*, <https://www.att.com/internet/fiber> [<https://perma.cc/NFZ9-QK2U>] (last visited Sept. 20, 2023) (advertising fiber service as a means to “[c]onnect all your devices”); see also Charter Spectrum, *4 Benefits of Faster Internet Speed at Home*, <https://www.spectrum.com/resources/internet-wifi/4-benefits-of-faster-internet-speed-at-home> (last visited Sept. 20, 2023) (“As we connect more users and more devices to our home networks, high-speed Internet is becoming essential to our lives.”).

<sup>76</sup> See, e.g., T-Mobile, *Compare our unlimited cell phone plans*, <https://www.t-mobile.com/cell-phone-plans> [<https://perma.cc/FNZ4-QATZ>] (last visited Sept. 20, 2023) (advertising all cell phone plans as including “unlimited 5G and 4G LTE data”); USCellular, *Unlimited Plans*, <https://www.uscellular.com/plans/unlimited> [<https://perma.cc/L7UJ-EF8D>] (last visited Sept. 20, 2023) (offering unlimited data plans) Verizon, *Unlimited*, <https://www.verizon.com/plans/unlimited> [<https://perma.cc/L7UJ-EF8D>] (last visited Sept. 20, 2023) (same).

<sup>77</sup> See, e.g., AT&T, *AT&T Wireless*, <https://www.att.com/wireless> [<https://perma.cc/Q643-NMVC>] (last visited Sept. 20, 2023) (advertising 5G service as fast, reliable, and secure); T-Mobile, *What is 5G?*, <https://www.t-mobile.com/5g> [<https://perma.cc/GP3B-ABZT>] (last visited Sept. 20, 2023) (advertising 5G as enabling “greater bandwidth and faster data transfer,” which “creates opportunity for quicker downloads, smoother streaming, and more responsive and reliable online experiences, even in spots with high network traffic”); Charter Spectrum, *Internet*, <https://www.spectrum.com/internet> (last visited Sept. 20, 2023) (“Surf, stream and stay connected with speeds and reliability you can count on, even when your whole family is online.”).

<sup>78</sup> See, e.g., Verizon Wireless, *Unlimited*, <https://www.verizon.com/plans/unlimited> [<https://perma.cc/GPG8-JLUN>] (last visited Sept. 20, 2023) (advertising Disney Bundle and Apple One with certain unlimited plans); Charter, *Spectrum*, <https://www.spectrum.com/packages/peacock-premium-trial> (last visited Aug. 24, 2023) (offering Peacock Premium 12-month subscription with an eligible Spectrum Internet package); T-Mobile, *Cell Phone Plans*, <https://www.t-mobile.com/cell-phone-plans> [<https://perma.cc/4F96-DHA3>] (last visited Sept. 20, 2023) (offering Netflix subscription with each plan).

<sup>79</sup> See, e.g., USCellular, *USCellular*, <https://www.uscellular.com> [<https://perma.cc/3KJQ-QQEH>] (last visited Sept. 20, 2023) (offering Samsung Galaxy phones with eligible service plan purchase).

<sup>80</sup> See, e.g., Comcast Xfinity, *Overview*, <https://www.xfinity.com/overview> (last visited Sept. 20, 2023) (offering Internet with “access 20+ million secure hotspots”); AT&T, *AT&T Wi-Fi*, <https://www.att.com/wi-fi/> [<https://perma.cc/69Z2-B7YE>] (last visited Sept. 11, 2023) (advertising “access to our nationwide Wi-Fi network . . . at no extra charge”); Charter Spectrum, *Spectrum Out-of-Home WiFi*, <https://www.spectrum.com/internet/wifi->

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today. Have fixed or mobile ISPs changed their marketing or advertising of BIAS since 2018? We seek evidence and examples of how the BIAS market is shaped today, and particularly how it has changed in response to developments in consumers' perception about the essential nature of BIAS connections. How does the current marketing of BIAS by ISPs bear on our tentative determination that such service is a telecommunications service? We also seek comment on ways ISPs' advertising of bundled services and devices as "add-ons" to their BIAS offerings has evolved as a result of recent changes in the importance of BIAS to consumers. How do these additional offerings modify the underlying BIAS offered by the ISP, if at all?

20. We further seek comment on the development of third-party services and devices that utilize BIAS. We believe that since the 2018 reclassification of BIAS, and particularly as a result of the COVID-19 pandemic, there is substantial market proliferation of third-party services and devices and that consumers' use of these offerings significantly outweigh their use of ISPs' affiliated offerings. We seek comment on this observation. How have trends in third-party services and devices impacted consumer use of BIAS? In what ways have these services and devices driven demand for fixed and mobile BIAS?

**B. Reclassification is Necessary to Ensure Internet Openness, Safeguard National Security, Protect Public Safety, and Support Other Public Interest Goals**

21. Given how essential BIAS is to consumers' daily lives, we believe that our proposed reclassification of BIAS as a telecommunications service is necessary to unlock tools the Commission needs to fulfill its objectives and responsibilities to safeguard this vital service. Critical among these is enabling the Commission to ensure that the Internet is open and fair, including by establishing a national regulatory approach that would provide consistent protections for consumers and certainty for ISPs. We also believe that the proposed reclassification would enhance the Commission's ability to safeguard national security and protect public safety. Further, we anticipate that returning BIAS to its telecommunications service classification would provide us with better tools to address policy initiatives to protect consumers when they use communications services and support their ability to access BIAS, including through the Commission's universal service programs. We believe the *RIF Order's* reclassification of BIAS as an information service not only inhibits the Commission's ability to achieve these outcomes, but that its policy rationales failed to support that reclassification. Below, we seek comment on these views and on any other considerations bearing on the grounds for us to return to a telecommunications service classification of BIAS, including the impact of our proposed reclassification on small ISPs and other small entities. In seeking comment on potential reclassification, we also welcome the submission of economic analyses that weigh the costs and benefits of the Commission taking such action. We also invite commenters to identify whether there are any other regulatory frameworks administered by the Commission, not discussed below, that might be affected by our proposed reclassification, and seek comment on how such reclassification would affect those frameworks.

22. Beyond these issues, we invite comment on additional public policy considerations we should examine in our analysis of BIAS classification. For instance, to what extent are there any reasonable reliance interests we should consider? We expect any commenters claiming reliance to submit evidence demonstrating the existence, magnitude, and reasonableness of any alleged reliance interests.

**1. Ensuring Internet Openness**

23. In light of how essential BIAS connectivity is to consumers following the COVID-19 pandemic, we believe that the open Internet must be protected to ensure consumers can use their BIAS

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[access-points](#) (last visited Sept. 11, 2023) (advertising "unlimited use of out-of-home Spectrum WiFi nationwide at no extra cost").

<sup>81</sup> *RIF Order*, 33 FCC Rcd at 335, para. 46. See, e.g., AT&T, *Compare our wireless plans*, <https://www.att.com/plans/wireless/> [<https://perma.cc/Q643-NMVC>] (last visited Sept. 20, 2023) (stating that all unlimited plans include AT&T ActiveArmor mobile security).

connections in all the lawful ways they see fit. We tentatively conclude that reclassification of BIAS as a telecommunications service will allow the Commission to safeguard the open Internet and seek comment on this tentative conclusion. As an initial matter, following Title II classification, the Commission could rely on its authority in sections 201 and 202 of the Act to address practices that are unjust, unreasonable, or unreasonably discriminatory.<sup>82</sup> Below, we also propose to reinstate rules that prohibit ISPs from blocking or throttling the information transmitted over their networks or engaging in paid or affiliated prioritization arrangements.<sup>83</sup> Additionally, we propose to reinstate a general conduct standard that would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers.<sup>84</sup> Our proposal would leave the existing transparency requirements undisturbed.<sup>85</sup> The proposed rules would establish clear standards for ISPs to maintain Internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents consumers from fully accessing all of the critical services available through the Internet. We seek comment on this analysis. In particular, how would these rules ensure that consumers can continue to use their Internet connections for healthcare, education, work, commerce, and civic engagement? What would be the potential impact on these uses if the open Internet is not secured?

24. We further believe reclassification would enable the Commission to establish a nationwide framework of open Internet rules for ISPs.<sup>86</sup> In both the *2015 Open Internet Order* and the *RIF Order*, the Commission expressed concern that potentially inconsistent state laws could increase burdens for ISPs and hinder the broadband market.<sup>87</sup> With the goal of avoiding this, the Commission, in each instance, attempted to establish a framework that would preempt any inconsistent state laws.<sup>88</sup> However, by reclassifying broadband as a Title I service and eliminating the conduct rules established in the *2015 Open Internet Order*, the *RIF Order* failed to achieve this goal, because the *Mozilla* court vacated the *RIF Order*'s blanket preemption of inconsistent state laws, concluding that the Commission "fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority."<sup>89</sup> Thus, instead of creating "a uniform set of federal regulations,"<sup>90</sup> the *RIF Order*'s hands-off approach to

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<sup>82</sup> 47 U.S.C. § 201(b); 47 U.S.C. § 202(a).

<sup>83</sup> See *infra* section V.

<sup>84</sup> See *infra* section V.

<sup>85</sup> See *infra* section V.

<sup>86</sup> See *infra* section V.

<sup>87</sup> See *RIF Order*, 33 FCC Rcd at 426-27, para. 194; *2015 Open Internet Order*, 30 FCC Rcd. at 5804, para. 433 ("[S]hould a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.").

<sup>88</sup> See *2015 Open Internet Order*, 30 FCC Rcd. at 5804, para. 433 ("The Commission has used preemption to protect federal interests when a state regulation conflicts with federal rules or policies, and we intend to exercise this authority to preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law."); *RIF Order*, 33 FCC Rcd at 427, para. 195.

<sup>89</sup> *Mozilla*, 940 F.3d at 74. See also *ACA Connects v. Bonta*, 24 F.4th 1233, 1241-48 (9th Cir. 2022). But see *N.Y. State Telecomms. Ass'n v. James*, 544 F. Supp. 3d 269, 283 & n.10 (E.D.N.Y. 2021) (granting a preliminary injunction of enforcement of a New York law restricting the price of BIAS for low income consumers, concluding among other things that the petitioners were likely to succeed on the merits of their preemption claim, distinguishing *Mozilla* on the theory that it only rejected the FCC's attempted express preemption there but did not foreclose case-by-case preemption decisions, and distinguishing the district court decision in *ACA Connects* based on the understanding that the California law did not restrict BIAS prices), *appeal pending*, No. 21-1975 (2d Cir. Argued Jan. 12, 2023).

<sup>90</sup> *RIF Order*, 33 FCC Rcd at 426-27, para. 194.

BIAS has led to the existence of state-by-state open Internet requirements it sought to avoid.<sup>91</sup> We remain concerned that differing state open Internet requirements may be burdensome for ISPs, particularly small ISPs, thus hindering the broadband market, and at the same time, fail to ensure that all consumers are protected from conduct harmful to Internet openness. We believe that reclassification will put our authority to preempt any inconsistent state laws on substantially stronger legal footing,<sup>92</sup> thereby enabling the Commission to create a set of open Internet standards that will apply nationwide. We seek comment on this analysis.

## 2. Safeguarding National Security and Preserving Public Safety

25. We tentatively conclude that the demonstrated need to address national security and public safety concerns makes it necessary and timely to revisit the statutory classification of BIAS. The D.C. Circuit criticized the *RIF Order* for giving short shrift to the evidence of public safety concerns in the record before it.<sup>93</sup> The *RIF Remand Order*, in declining to reclassify BIAS as a telecommunications service on that basis, largely dismissed such concerns as speculative.<sup>94</sup> But developments in recent years have highlighted national security and public safety concerns arising in connection with the U.S. communications sector, ranging from the security risks posed by malicious cyber actors targeting network equipment and infrastructure to the loss of communications capability in emergencies through service outages. We believe it is now timely for us to reevaluate the classification of BIAS to ensure the Commission can use all of its capabilities to address threats to national security and public safety.

26. *National Security and Law Enforcement.* We tentatively conclude that authority under applicable Title II provisions, reinforced by the Commission's existing authority, would enhance the Commission's efforts to protect the national defense. The Commission's attention to national security is a responsibility that underlies its other statutory obligations, as evidenced by Congress's statement in the Communications Act that among the reasons it created the Commission was "for the purpose of the national defense."<sup>95</sup> This responsibility was affirmed by Presidential Policy Directive 21, which described how the FCC could, to the extent permitted by law, exercise its authority and expertise to identify and address vulnerabilities in the communications sector.<sup>96</sup> We seek comment generally on how reclassification would advance the Commission's fulfillment of its national security responsibilities and

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<sup>91</sup> In particular, a number of states adopted laws that conditioned receipt of state funds on compliance with open Internet principles. *See, e.g.*, SB-822, 2017-2018 Reg. Sess. (Cal. 2018) (adopting open Internet-type requirements); H.B. 2282, 65<sup>th</sup> Leg., 2018 Reg. Sess. (Wash. 2018) (similar); H.B. 4155, 79<sup>th</sup> Leg. Assemb., Reg. Sess. (Or. 2018) (requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government); S.289, No. 169, 2018 Sess. (Vt. 2018) (similar); LD 1364, 129<sup>th</sup> Leg., Reg. Sess. (Me. 2019) (similar); Colorado S.B. 19-078, 71<sup>st</sup> Leg., Reg. Sess. (Colo. 2019) (requiring compliance with certain open Internet-type requirements as a condition of state universal service support); NY Gen. Bus. § 399-zzzzz (N.Y. 2021) (restricting BIAS prices for low income consumers). Similarly, some states issued executive orders requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government. *See, e.g.*, Mont. Exec. Order No. 3-2018 (2018), <https://spb.mt.gov/docs/Laws-Rules-EOs/EOs/EO-03-2018-Net-Freedom.pdf> (amended by Mont. Exec. Order No. 6-2018 (2018), <https://spb.mt.gov/docs/Laws-Rules-EOs/EOs/EO-06-2018-Amended-Net-Freedom.pdf>); N.J. Exec. Order No. 9 (2018); N.Y. Exec. Order No. 175 (2018), <https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf>; R.I. Exec. Order No. 18-02 (2018), <https://governor.ri.gov/executive-orders/executive-order-18-02>.

<sup>92</sup> *See infra* section F.

<sup>93</sup> *Mozilla*, 940 F.3d at 59-63.

<sup>94</sup> *See, e.g., RIF Remand Order*, 35 FCC Rcd at 12356-68, paras. 49-66.

<sup>95</sup> 47 U.S.C. § 151 (explaining that among the reasons Congress created the Commission was "for the purpose of the national defense").

<sup>96</sup> *See* The White House, Presidential Policy Directive 21: Critical Infrastructure Security and Resilience (PPD-21) (Feb. 12, 2013).

how it specifically would affect the Commission's efforts, in coordination with other agencies, and with ISPs themselves, to protect the nation's communications networks from entities and equipment and services that pose threats to national security and law enforcement.

27. We tentatively conclude that our proposed reclassification would enhance the Commission's ability to protect the nation's communications networks from entities that pose threats to national security and law enforcement pursuant to its authority under section 214 of the Act, and we seek comment on this tentative conclusion. Under section 214, carriers must be authorized by the Commission to provide domestic and international telecommunications service in the United States.<sup>97</sup> Section 214, however, applies to common carriers,<sup>98</sup> and thus does not apply to BIAS under its current classification as an information service, potentially exposing the nation's communications networks to national security and law enforcement threats by entities providing BIAS. In the *China Telecom Americas Order on Revocation and Termination*, *China Unicom Americas Order on Revocation*, and *Pacific Networks and ComNet Order on Revocation and Termination*, the Commission extensively evaluated national security and law enforcement considerations raised by existing section 214 authorizations and determined, based on the record, that the present and future public interest, convenience, and necessity was no longer served by those carriers' retention of their section 214 authority.<sup>99</sup> In particular, the Commission identified national security and law enforcement concerns with respect to those entities' access to Internet Points of Presence (PoPs) (usually located within data centers)<sup>100</sup> and other harms in relation to the services

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<sup>97</sup> 47 U.S.C. § 214. Section 214 applies to carriers, which the Act defines as a person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio. *Id.*; 47 U.S.C. § 153(11). *See also Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Report and Order, 35 FCC Rcd 10927 (2020) (*Executive Branch Process Reform Order*) (adopting rules and procedures that streamline and improve the timeliness and transparency of the process by which the Commission coordinates with the Executive Branch agencies for assessment of any national security, law enforcement, foreign policy, or trade policy issues regarding certain applications filed with the Commission); *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Erratum, 35 FCC Rcd 13164 (2020).

<sup>98</sup> *See* 47 U.S.C. § 153(51) (providing that a telecommunications carrier is a common carrier only insofar as it is providing telecommunications services).

<sup>99</sup> *See China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285, Order on Revocation and Termination, 36 FCC Rcd 15966 (2021) (*China Telecom Americas Order on Revocation and Termination*), *aff'd China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256 (D.C. Cir. 2022); *China Unicom (Americas) Operations Limited*, GN Docket No. 20-110, File Nos. ITC-214-20020728-00361, ITC-214-20020724-00427, Order on Revocation, 37 FCC Rcd 1480 (2022) (*China Unicom Americas Order on Revocation*), *argued* 9th Cir. Argued Feb. 15, 2023; *Pacific Networks Corp. and ComNet (USA) LLC*, GN Docket No. 20-111, File Nos. ITC-214-20090105-00006, ITC-214-20090424-00199, Order on Revocation and Termination, 37 FCC Rcd 4220 (2022) (*Pacific Networks and ComNet Order on Revocation and Termination*), *aff'd Pacific Networks Corp. and ComNet (USA) LLC v. FCC*, No. 22-1054 (D.C. Cir. 2023).

<sup>100</sup> Today, ISPs provide BIAS through PoPs. *See China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16027, paras. 91-92 ("PoPs . . . are physical locations where the network service provider offers or avails of interconnection or other Internet-related services. To optimize connectivity among providers, the industry has established 'Internet Exchange' or 'IX' points, which are physical data centers in which carriers who wish to participate in public peering can connect to a shared local area network or optionally avail of point-to-point interconnects for private peering."); *see also* Colocation America, *What is a Point of Presence (PoP)?* (Oct. 11, 2018), <https://www.colocationamerica.com/blog/point-of-presence> ("These Internet POPs usually hold multiple servers, routers, and all other interface equipment. These physical locations are usually located within data centers. ISPs typically have multiple POPs located around in many different areas. Some [ISPs] have thousands of POP locations usually located at Internet Exchange Points (IXP) and colocation centers. These physical locations allow people to be interconnected to others around the world.").



provided by those entities pursuant to section 214 authorization.<sup>101</sup> The Commission concluded that China Telecom Americas' (CTA) provision of services pursuant to its section 214 authority, "whether offered individually or as part of a suite of services—combined with CTA's physical presence in the United States, CTA's ultimate ownership and control by the Chinese government, and CTA's relationship with its indirect parent [China Telecommunications Corporation], which itself maintains a physical presence in the United States—present unacceptable national security and law enforcement risks to the United States,"<sup>102</sup> and it reached similar conclusions in the other proceedings.<sup>103</sup> We believe the same national security and law enforcement threats identified in those proceedings equally exist with respect to entities providing BIAS, and that reclassifying BIAS as a telecommunications service would allow the Commission to use its section 214 authority to address those threats and other threats to our communications networks. We seek comment on this analysis.

28. We also seek comment on other ways the proposed reclassification would enhance the Commission's ability to address national security and law enforcement threats by entities providing BIAS. Are there other specific national security and law enforcement risks in connection with the provision of BIAS resulting from the current classification of BIAS as an information service? Have there been relevant and demonstrable changes with respect to how nation-states have sought to exploit the technological convergence of broadband and other services that present vulnerabilities affecting the national defense? We ask commenters to provide detailed comments on any regulatory requirements designed to address such risks that would newly apply to these entities if the Commission were to reclassify BIAS as a telecommunications service. For instance, could the Commission prohibit ISPs from entering into Internet traffic exchange arrangements with certain companies that operate data centers or other Internet Exchange Points in the U.S.? Would reclassification enable the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector to review telecommunications licenses or authorizations meeting appropriate thresholds of foreign ownership or control for national security and law enforcement concerns? Would reclassification increase law enforcement agencies' ability to seek lawful assistance, including identification and disruption of illegal activity, for investigations involving ISP networks? For mobile BIAS, would reclassification extend the foreign ownership restrictions for wireless common carriers that the Commission applies under section 310(b) of the Act and its implementing rules?<sup>104</sup> In the absence of reclassification, does the Commission have other authority that it could use that is sufficient to protect the nation's communications networks against ISPs that pose national security and law enforcement threats? If so, we ask commenters to indicate the statutory authority and how the Commission could use such authority to ensure national security and law enforcement concerns are addressed.

29. We also seek comment on how reclassification would support the Commission's efforts to safeguard the nation's communications network infrastructure from equipment and services that pose a

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<sup>101</sup> For instance, in the *China Telecom Americas Order on Revocation and Termination*, the Commission addressed concerns that China Telecom (Americas) Corporation's (CTA) PoPs in the United States "are highly relevant to the national security and law enforcement risks associated with CTA" and that "CTA's PoPs in the United States provide CTA with the capability to misroute traffic and, in so doing, access and/or manipulate that traffic." See *China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16027, paras. 91-92 ("In cases where CTA's PoPs reside in IX points, CTA can potentially access and/or manipulate data where it is on the preferred path for U.S. customer traffic."). The Commission also stated that "CTA, like any similarly situated provider, can have both physical and remote access to its customers' equipment needed to provide such services," and "[t]his physical access to customers' equipment would allow CTA to monitor and record sensitive information." *Id.* at 16027, para. 93.

<sup>102</sup> *China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16029, para. 98.

<sup>103</sup> See *China Unicom Americas Order on Revocation*, 37 FCC Rcd at 1565, para. 127; *Pacific Networks and ComNet Order on Revocation and Termination*, 37 FCC Rcd at 4134, para. 113.

<sup>104</sup> 47 U.S.C. § 310; 47 CFR §§ 1.5000-1.5004, 20.5.

security threat. Pursuant to its universal service authority in section 254 of the Act, its authority to regulate equipment in sections 302 and 303 of the Act, and new mandates established by Congress through the Secure and Trusted Communications Networks Act of 2019, as amended, and the Secure Equipment Act of 2021 to address communications equipment and service that poses an unacceptable risk to national security, the Commission has undertaken significant efforts to improve supply chain security.<sup>105</sup> In particular, the Commission has: prohibited the use of universal service fund (USF) support to purchase or obtain any equipment or services produced or provided by companies posing a national security threat;<sup>106</sup> prohibited the use of federal subsidies administered by the Commission and used for capital expenditures to provide advanced communications service to purchase, rent, lease, or otherwise obtain such equipment or services;<sup>107</sup> created and maintained a list of communications equipment and services that pose an unacceptable risk to the national security (“covered equipment and services”);<sup>108</sup> established the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) to reimburse the costs providers incur to remove, replace, and dispose of covered Huawei and ZTE equipment and services from their networks;<sup>109</sup> and prohibited the authorization of equipment that poses a threat and the marketing and importation of such equipment in the United States.<sup>110</sup> We seek comment on how reclassification may allow the Commission to further these efforts. For instance, would reclassification give the Commission additional authority to restrict a larger class of entities from using equipment and services that pose a threat? Additionally, would reclassification give the Commission

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<sup>105</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, 11434-35, para. 31 (2019) (*Supply Chain First Report and Order*); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 35 FCC Rcd 7821, 7826-27, para. 20 (2020); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Second Report and Order, 35 FCC Rcd 14284, 14296-98, para. 26-29 (2020) (*Supply Chain Second Report and Order*); *Protecting Against National Security Threats to the Communications Supply Chain through the Equipment Authorization Program*; *Protecting Against National Security Threats to the Communications Supply Chain through the Competitive Bidding Program*; ET Docket No. 21-232, EA Docket No. 21-233, Report and Order, Order, and Further Notice of Proposed Rulemaking, FCC 22-84 at 19-21, paras. 39-43 (rel. Nov. 25, 2022) (*Supply Chain Equipment Authorization Report and Order*); 47 U.S.C. § 254; Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 133 Stat. 158 (2020) (codified as amended at 47 U.S.C. §§ 1601-1609); Secure Equipment Act of 2021, Pub. L. No. 117-55, 135 Stat. 423 (2021) (codified at 47 U.S.C. § 1601 (Statutory Notes and Related Subsidiaries)).

<sup>106</sup> *Supply Chain First Report and Order*, 34 FCC Rcd at 11433, para. 26 (stating that this includes prohibitions on using USF support to maintain, improve, modify, operate, manage, or otherwise support any equipment or services produced or provided by these companies), *aff’d Huawei Technologies USA v. FCC*, 2 F.4th 421 (5th Cir. 2021); 47 CFR § 54.9.

<sup>107</sup> See *Supply Chain Second Report and Order*, 35 FCC Rcd at 14326; *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Third Report and Order, 36 FCC Rcd 11958, 11989, para. 75 (2021) (*Supply Chain Third Report and Order*); 47 CFR §§ 1.50001 (defining “advanced communications service” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology with connection speeds of at least 200 kbps in either direction”); 1.50004; 54.10-54.11. The Commission stated that the definition of “provider of advanced communication services” for purposes of the Reimbursement Program did not limit program eligibility to providers who offer service to end users, and included intermediate providers that carry traffic for other carriers only and do not originate or terminate traffic. *Supply Chain Third Report and Order*, 36 FCC Rcd at 11991, paras. 82-83.

<sup>108</sup> See *Supply Chain Second Report and Order*, 35 FCC Rcd at 14311-25, paras. 57-92; 47 CFR §§ 1.50002, 1.50003.

<sup>109</sup> See *Supply Chain Second Report and Order*, 35 FCC Rcd at 14331, para. 108; 47 CFR § 1.50004.

<sup>110</sup> See *Supply Chain Equipment Authorization Report and Order*, FCC 22-84; 47 CFR §§ 2.901-2.910.

more robust authority to require more entities to remove and replace covered Huawei and ZTE communications equipment and services? Could the Commission prohibit the use of covered equipment or services in any network infrastructure that is used to route or transmit communications, including data centers and Internet exchange facilities? Could we use the additional authority under Title II to prohibit carriers from interconnecting with other carriers who have a PoP within the U.S. and its territories that use such equipment and services?<sup>111</sup> Are there other ways Title II authority could be used to address national security threats arising from equipment and services outside the scope of our prior actions? How does the Commission's role fit with that of other agencies that help to address potential security threats from foreign actors to the nation's communications network and equipment, and how would enhancements to the Commission's regulatory authority as a result of reclassification bolster that role?

30. *Cybersecurity.* We believe that returning BIAS to its telecommunications service classification would reinforce the Commission's authority to support its efforts to enhance cybersecurity in the communications sector, and we seek comment on this tentative conclusion. Among such efforts are those pursuant to Presidential Policy Directive 21, which tasks the Commission with "identifying communications sector vulnerabilities and working with industry and other stakeholders to address those vulnerabilities . . . [and] to increase the security and resilience of critical infrastructure within the communications sector. . . ." <sup>112</sup> The Commission is actively involved in federal interagency cybersecurity planning, coordination, and response activities. However, the current classification of BIAS limits the regulatory and operational actions that the Commission can take to address cyber incidents impacting the communications sector, as well as other critical infrastructure sectors. For example, the Commission has limited authority to require providers of non-Title II services (e.g., ISPs) to adopt cybersecurity standards or performance goals, which inhibits the Commission's ability to protect U.S. communications services and infrastructure from cyber-attacks and to ensure that communications devices and equipment do not pose security risks to other critical infrastructure sectors. While the Commission will continue to work closely with ISPs to secure their networks, reclassification of BIAS as telecommunications service would provide the Commission with the authority to act in the absence of voluntary action by ISPs or in cases of emergency or significant risk. We tentatively conclude that the proposed reclassification could address this issue by enhancing the Commission's cybersecurity authority, and we seek comment on this tentative conclusion.

31. Another initiative is the Commission's inquiry into vulnerabilities threatening the security and integrity of the Border Gateway Protocol (BGP), which impacts "the transmission of data from email, e-commerce, and bank transactions to interconnected Voice-over Internet Protocol (VoIP) and 9-1-1 calls."<sup>113</sup> The Commission noted that "BGP's initial design, which remains widely deployed today, does not include security features to ensure trust in the information that it is used to exchange," which allows a bad network actor to "deliberately falsify BGP reachability information to redirect traffic to itself or through a specific third-party network, and prevent that traffic from reaching its intended recipient."<sup>114</sup> Would reclassification provide the Commission with additional authority to address BGP vulnerabilities, including, for example, by requiring providers to deploy solutions to address BGP vulnerabilities in the absence of voluntary action?

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<sup>111</sup> Cf. CSRIC, Report on Recommended Best Practices to Improve Communications Supply Chain Security (Sept. 2022).

<sup>112</sup> The White House, Presidential Policy Directive 21: Critical Infrastructure Security and Resilience (PPD-21) (Feb. 12, 2013).

<sup>113</sup> *Secure Internet Routing*, PS Docket No. 22-90, Notice of Inquiry, 37 FCC Rcd 3471, 3471, paras. 1-2 (2022) (*Secure Internet Routing NOI*). See also Press Release, Dep't of Just. and Dep't of Def., Department of Justice and Department of Defense Support Federal Communications Commission Inquiry into Internet Security (Sept. 14, 2022), <https://www.justice.gov/opa/pr/department-justice-and-department-defense-support-federal-communications-commission-inquiry>.

<sup>114</sup> *Secure Internet Routing NOI*, 37 FCC Rcd at 3471, paras. 1-2.

32. In what other ways could reclassification bolster the Commission’s authority to address cybersecurity in the communications sector? For instance, would it strengthen the Commission’s ability to establish rules mandating that service providers implement cybersecurity practices and risk management plans? Similarly, would reclassification permit the Commission to consider cybersecurity in its annual inquiry under section 706 of the Telecommunications Act 1996?<sup>115</sup> For example, could the Commission determine that only broadband services that meet certain cybersecurity standards constitute “advanced telecommunications capability”?<sup>116</sup> To what extent would reclassification allow us to address threats related to the DNS, which enables domain names to resolve to the correct IP addresses, and other naming protocols? Could the Commission use Title II authority to require ISPs to block IP addresses that originate malicious software and ransomware? Would reclassification allow the Commission to mandate the adoption of Communications Security, Reliability, and Interoperability Council (CSRIC) best practices directed to ISPs and audit or enforce the implementation?<sup>117</sup> Would it likewise enable the Commission to use Title II authority to require ISPs to implement or certify to their implementation of network security practices, such as those recommended in Executive Order 14028, the National Cybersecurity Strategy, or related cybersecurity measures recommended by the Deputy National Security Advisor, the Office of National Cyber Director, and other government agencies or intergovernmental agencies, such as the Federal Acquisition Security Council (FASC)?<sup>118</sup> Would reclassification give the Commission sufficient authority to establish cybersecurity requirements for other components that facilitate communications between end points, such as Internet exchange facilities and data centers that route communications and deliver applications? Could the Commission rely on authority in section 218 to require more comprehensive cyber incident reporting?<sup>119</sup> Would reclassification permit the Commission to rely on a broader range of regulatory tools to ensure network and service reliability and better support an effective 911 and emergency preparedness efforts?

33. *Public Safety.* We next tentatively conclude that reclassifying BIAS as a telecommunications service would enable the Commission to advance several public safety initiatives, and we seek comment on this tentative conclusion. As the Commission recognized in the *RIF Remand Order*, “[a]dvancing public safety is one of our fundamental obligations.”<sup>120</sup> Indeed, the Commission is “required to consider public safety by . . . its enabling act.”<sup>121</sup> The *Mozilla* court explained that when

<sup>115</sup> 47 U.S.C. § 1302(b) (requiring the Commission, on an annual basis, to initiate notices of inquiry to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion”).

<sup>116</sup> 47 U.S.C. § 1302(d)(1) (“The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”).

<sup>117</sup> See, e.g., CSRIC, Recommendations to Mitigate Security Risks for Diameter Networks (March 2018); CSRIC, Legacy Systems Risk Reductions (March 2017).

<sup>118</sup> Exec. Order No. 14028, Executive Order on Improving the Nation’s Cybersecurity (May 21, 2021); The White House, Nat’l Cybersecurity Strategy (March 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf>; Letter from Anne Neuberger, Deputy Assistant to the President and Deputy Nat’l Sec. Advisor for Cyber and Emerging Tech., to Corp. Execs. and Bus. Leaders, The White House (June 2, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Memo-What-We-Urge-You-To-Do-To-Protect-Against-The-Threat-of-Ransomware.pdf>.

<sup>119</sup> 47 U.S.C. § 218.

<sup>120</sup> *RIF Remand Order*, 35 FCC Red at 12336, para. 21.

<sup>121</sup> *Mozilla*, 940 F.3d at 59-60 (quoting *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)). See also 47 U.S.C. § 151 (explaining that, among other things, Congress created the Commission “for the purpose of promoting safety of life and property through the use of wire and radio communications”); 47 U.S.C. § 154(n) (directing the

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“Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,’ then the agency’s decisions ‘must take into account its duty to protect the public.’”<sup>122</sup> We believe that the Commission’s responsibility to address public safety is becoming increasingly important as the severity and frequency of natural disasters are on the rise.<sup>123</sup> We tentatively conclude that reclassification would enhance the Commission’s jurisdiction over ISPs, which it could use in combination with other statutory authority to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes. We seek comment on this tentative conclusion and analysis below. We note that the *RIF Order* concluded that Title I classification advances, and does not harm, public safety, primarily based on its overarching policy rationales for reversing Title II classification.<sup>124</sup> We seek comment on the *RIF Order*’s policy rationales and framework for protecting against harms elsewhere in this *Notice*,<sup>125</sup> and we invite commenters to address whether those rationales sufficiently advance public safety. In particular, we invite comment on whether the Commission’s ability to adopt *ex ante* regulations would provide better public safety protections than an *ex post* enforcement framework.

34. We seek comment on how our proposed reclassification would enable the Commission to support public safety officials’ use of BIAS for public safety purposes. As a general matter, broadband services play an important role in how public safety officials communicate with each other and how they deliver and receive information from the public. Although much of the communications between public safety entities and first responders take advantage of enterprise-level dedicated public safety broadband services, they often rely on commercial broadband services to communicate during emergency situations.<sup>126</sup> Increasingly, public safety entities rely on retail BIAS to access various databases, share data with emergency responders, and stream video into 911 and emergency operations centers.<sup>127</sup> We also are aware that public safety officials often use services accessible over-the-top (OTT) of broadband connections, such as social media, to communicate important and timely information to the public and to gain valuable information from the public and build on-the-ground situational awareness.<sup>128</sup> We seek comment on the extent to which public safety officials rely on BIAS for public safety purposes and on our tentative conclusion that reclassification would give us additional jurisdiction to advance the existing uses of BIAS by these officials.<sup>129</sup>

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Commission to take steps to promote the “maximum effectiveness from the use of radio and wire communications in connection with safety of life and property”).

<sup>122</sup> *Mozilla*, 940 F.3d at 60.

<sup>123</sup> See, e.g., Adam B. Smith, *2022 U.S. billion-dollar weather and climate disasters in historical context*, Climate.gov (Jan. 10, 2023), <https://www.climate.gov/news-features/blogs/beyond-data/2022-us-billion-dollar-weather-and-climate-disasters-historical>; Reuters, *Fact Check: Drop in climate-related disaster deaths not evidence against climate ‘emergency’* (September 19, 2023), <https://www.reuters.com/fact-check/drop-climate-related-disaster-deaths-not-evidence-against-climate-emergency-2023-09-19/> (“Weather-related disasters have become more frequent, intense, and costly in recent decades as documented by many different sources and analyses.”).

<sup>124</sup> *RIF Remand Order*, 35 FCC Rcd at 12336, 12344-68, paras. 20, 32-66.

<sup>125</sup> See *infra* sections 6 and V.A.6.

<sup>126</sup> *RIF Remand Order*, 35 FCC Rcd at 12341, para. 27.

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., Congressional Research Service, *Social Media for Emergencies and Disasters: Overview and Policy Considerations*, 1-2 (June 15, 2016); Ready.gov, *Social Media Preparedness Toolkits*, <https://www.ready.gov/toolkits> (last updated Sept. 13, 2022); NIST, *Spotlight: Gathering Intel From Social Media for Emergency Response* (June 30, 2022), <https://www.nist.gov/news-events/news/2022/06/spotlight-gathering-intel-social-media-emergency-response>; *RIF Remand Order*, 35 FCC Rcd at 12342-43, para. 29.

<sup>129</sup> See *infra* section V.A.2.

35. We also seek comment on how reclassification could further other public safety initiatives. For instance, while the Commission has taken important steps to improve the effectiveness of Wireless Emergency Alerts (WEAs),<sup>130</sup> would classification of BIAS as a telecommunications service enable the Commission to make the nation's alert and warning capabilities more effective and resilient by, for instance, requiring ISPs to transmit emergency alerts to their subscribers? More recently, the Commission modernized its priority services rules to authorize service providers to offer, on a voluntary basis, priority treatment of data, video, and IP-based voice services for public safety personnel and first responders, including by removing outdated requirements that may impede the use of IP-based technologies.<sup>131</sup> Would reclassification allow the Commission to go a step further by requiring service providers to offer prioritized routing for all IP-based services and prioritized restoration for all network infrastructure? Could the Commission require ISPs to participate in Telecommunications Service Priority (TSP), Government Emergency Telecommunications Service (GETS), and Wireless Priority Service (WPS)? How, if at all, would reclassification allow the Commission to expand the applicability, and therefore the public safety benefits, of the Communications Assistance for Law Enforcement Act (CALEA) requirements?<sup>132</sup>

36. We tentatively conclude that BIAS also plays an increasingly important role in allowing the public to communicate with first responders during emergency situations and seek comment on this tentative conclusion.<sup>133</sup> In the *RIF Remand Order*, the Commission noted that retail broadband services are used to translate communications with 911 callers and patients in the field and to deliver critical information about 911 callers that is not delivered through the traditional 911 network.<sup>134</sup> Are there other ways in which BIAS can or does supplement traditional 911 communications? The Commission has undertaken various efforts in recent years to improve how the public reaches and shares information with emergency service providers.<sup>135</sup> What effect, if any, would Title II classification of BIAS have on these

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<sup>130</sup> *Wireless Emergency Alerts; Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System*, PS Docket Nos. 15-91 and 15-94, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 11112 (2016); *Wireless Emergency Alerts; Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System*, PS Docket Nos. 15-91 and 15-94, Second Report and Order and Second Order on Reconsideration, 33 FCC Rcd 1320 (2018); *Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System; Wireless Emergency Alerts*, PS Docket Nos. 15-94 and 15-91, Report and Order and Further Notice of Proposed Rulemaking, 36 FCC Rcd 10694 (2021); *Wireless Emergency Alerts; Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System*, PS Docket Nos. 15-91 and 15-94, Further Notice of Proposed Rulemaking, 37 FCC Rcd 5408 (2022); *Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System; Wireless Emergency Alerts; 2022 Cybersecurity NPRM; Wireless Emergency Alerts; Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System*, PS Docket Nos. 15-91 and 15-94, Further Notice of Proposed Rulemaking, FCC 23-30 (rel. Apr. 21, 2023).

<sup>131</sup> *See Review of Rules and Requirements For Priority Services; National Security Emergency Preparedness Telecommunications Service Priority System; NTIA Petition for Rulemaking to Revise the Rules for Wireless Priority Services; NTIA Petition for Rulemaking to Revise the Rules for the Telecommunications Service Priority System*, PS Docket No. 20-187, Report and Order, 37 FCC Rcd 6798 (2022).

<sup>132</sup> *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

<sup>133</sup> *RIF Remand Order*, 35 FCC Rcd at 12342, para. 29.

<sup>134</sup> *Id.* at 12341, para. 27.

<sup>135</sup> *Implementing Kari's Law and Section 506 of RAY BAUM's Act et al.*, PS Docket Nos. 18-261 and 17-239, GN Docket No. 11-117, Report and Order, 34 FCC Rcd 6607, 6612-13, 6655-91, paras. 14-16, 137-220 (2019); *see also Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Fifth Report and Order and First Further Notice of Proposed Rulemaking, 34 FCC Rcd 11592 (2019); *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Sixth Report and Order and Order on Reconsideration, 35 FCC Rcd 7752 (2020); *Location-Based Routing for Wireless 911 Calls*, PS Docket No. 18-64, Notice of Proposed Rulemaking, FCC 22-96 (rel. Dec. 22, 2022); *Implementation of the National Suicide Hotline Improvement Act of 2018*, WC Docket No. 18-336,

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and future efforts? Would reclassification enhance the Commission’s jurisdiction to improve the flow of voice communications, photos, videos, text messages, real-time text (RTT), or any other type of communication from the public to emergency service providers through Next Generation 911<sup>136</sup> or over the use of Wi-Fi calling<sup>137</sup> to reach emergency service providers? If so, how? We also believe BIAS is critical when used by individuals with disabilities to communicate with public safety services,<sup>138</sup> and the Commission has taken several steps to improve access to IP-enabled 911 communications for people with disabilities.<sup>139</sup> How will reclassification fortify our existing jurisdiction to ensure these communications are not interrupted or degraded? To what extent does or will BIAS support alternatives to 911 communications, and will reclassification help to ensure that BIAS-based emergency communications meet certain reliability and security standards? Would reclassification of BIAS enhance the access to, availability of, and service quality for IP-based communication services used by people with disabilities in emergencies, including the IP-based forms of telecommunications relay services (TRS)?

37. BIAS is also critical for allowing the public to easily and efficiently access public safety resources and information.<sup>140</sup> In particular, members of the public often rely on BIAS during emergencies to enable them to find and receive potentially life-saving information.<sup>141</sup> As the Commission stated in the *RIF Remand Order*, “consumers regularly use their mobile devices and broadband connections ‘to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matters essential to public safety.’”<sup>142</sup> The COVID-19 pandemic, severe

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Report and Order, 35 FCC Rcd 7373, 7375-76, para. 4 (2020); *Implementation of the National Suicide Hotline Improvement Act of 2018*, WC Docket No. 18-336, Second Report and Order, 36 FCC Rcd 16901 (2021).

<sup>136</sup> See *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment*, PS Docket Nos. 11-153 and 10-255, Second Report and Order and Third Further Notice of Proposed Rulemaking, 29 FCC Rcd 9846, 9879-80, paras. 76-78 (2014) (*Text-to-911 Second Report and Order*); 911.gov, *Next Generation 911*, <https://www.911.gov/issues/ng911/> (last updated June 9, 2023).

<sup>137</sup> FCC, *Study on Emergency 911 Access to Wi-Fi Access Points and Spectrum for Unlicensed Devices when Mobile Service is Unavailable* (2021), <https://www.fcc.gov/document/report-congress-911-over-wi-fi>.

<sup>138</sup> For example, the Department of Health and Human Services recently announced that the 988 Suicide & Crisis Lifeline will provide direct video calling ASL services for people who are deaf and hard of hearing, as part of ongoing efforts to expand accessibility to behavioral health care for underserved communities. This will allow an ASL user in crisis to communicate directly with a counselor in ASL. See *988 Suicide & Crisis Lifeline Adds American Sign Language Services for Deaf and Hard of Hearing Callers* (Sept. 8, 2023), <https://www.samhsa.gov/newsroom/press-announcements/20230908/988-suicide-crisis-lifeline-adds-american-sign-language-services-deaf-hard-of-hearing-callers>.

<sup>139</sup> *Transition from TTY to Real-Time Text Technology; Petition for Petition for Rulemaking to Update the Commission’s Rules for Access to Support the Transition from TTY to Real-Time Text Technology, and Petition for Waiver of Rules Requiring Support of TTY Technology*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 13568 (2016); *Text-to-911 Second Report and Order*, 29 FCC Rcd at 9852-55, paras. 13-17; see also *New and Emerging Technologies 911 Improvement Act of 2008*, Pub. L. No. 110-283, Preamble, § 102, 122 Stat. 2620 (2008) (stating the congressional goal to “promote and enhance public safety by facilitating the rapid deployment of IP-enabled 911 and E-911 services, encourage the Nation’s transition to a national IP-enabled emergency network, and improve the 911 and E-911 access to those with disabilities”); *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751 § 106(g) (2010) (codified at 47 U.S.C. § 615c(g)) (granting the Commission authority to promulgate “regulations, technical standards, protocols, and procedures . . . necessary to achieve reliable, interoperable communication that ensures access by individuals with disabilities to an Internet protocol-enabled emergency network, where achievable and technically feasible”).

<sup>140</sup> *RIF Remand Order*, 35 FCC Rcd at 12342, para. 29.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting CTIA Comments at 21).

natural disasters, and other incidents have demonstrated the importance of the public being able to access public safety information using their BIAS connections. We seek comment on how reclassification would allow the Commission to ensure that the public can access life-saving public safety resources and information using BIAS.

38. Furthermore, BIAS is important for public safety communications that occur outside of emergencies. As the Commission observed in the *RIF Remand Order*:

[A]s the COVID-19 pandemic has demonstrated, [] many Americans rely[] on telemedicine over mass-market broadband services for “routine health care, triage, and basic health advice.” . . . 5G networks’ ability to transmit massive amounts of data in real time will also help enable new applications that will allow more advanced communications between the public and health care officials, such as allowing health care professionals, through ubiquitous wireless sensors, to remotely monitor patients’ health and transmit data to their doctors before problems become emergencies, and to develop connected ambulance services for faster patient transport.<sup>143</sup>

BIAS connections are also playing a more important role in home safety and security as consumers increasingly purchase home security and monitoring systems that use connected devices to monitor, deter, and address theft, breaking and entering, and other home threats<sup>144</sup> and BIAS connections are increasingly important for in-home monitoring of individuals who are elderly or disabled.<sup>145</sup> We seek comment on the impact that reclassification may have on these and other public safety applications that rely on BIAS.

39. *Network Resiliency and Reliability.* We tentatively conclude that reclassifying BIAS as a telecommunications service would enhance the Commission’s ability to ensure the nation’s communications networks are resilient and reliable, and we seek comment on this tentative conclusion. For instance, under the Commission’s Network Outage Reporting System (NORS), qualifying communications providers are required to report to the Commission network outages that satisfy certain criteria,<sup>146</sup> and the Commission uses this information to advance network resiliency and reliability. Because this reporting requirement has generally been limited to outages affecting voice services,<sup>147</sup> the Commission has historically lacked reliable outage information for today’s modern, essential broadband networks, which inhibits the Commission from fully ensuring the resiliency and reliability of those networks. Would reclassification support the Commission’s ability to expand the scope of NORS to require ISPs to submit outage reports in response to service incidents that cause outages or the degradation of communications services, such as cybersecurity breaches, wire cuts, infrastructure damages from natural disaster, and operator errors<sup>148</sup> or misconfigurations?<sup>149</sup> Under rules implemented

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<sup>143</sup> *Id.* at 12343, para. 30.

<sup>144</sup> *The Worldwide Smart Home Security Industry is Projected to Reach \$4.6 Billion by 2027* – *ResearchAndMarkets.com*, BusinessWire (June 20, 2022), <https://www.businesswire.com/news/home/20220620005381/en/The-Worldwide-Smart-Home-Security-Industry-is-Projected-to-Rreach-4.6-Billion-by-2027---ResearchAndMarkets.com> (“The Global Smart Home Security Market is estimated to be USD 1.84 Bn in 2022 and is projected to reach USD 4.61 Bn by 2027, growing at a CAGR of 20.14%.”).

<sup>145</sup> Christina Ianzito, *Remote Monitoring Systems Can Give Caregivers Peace of Mind*, AARP (Jan. 10, 2020), <https://www.aarp.org/caregiving/home-care/info-2020/ces-caregiving-products.html>; Rachel Cericola, *These Smart Home Devices Can Enhance Independence for People With Disabilities and Mobility Needs*, Wirecutter (April 29, 2022), <https://www.nytimes.com/wirecutter/reviews/best-assistive-smart-home-technology-for-disabled/>.

<sup>146</sup> See 47 CFR § 4.9.

<sup>147</sup> See *id.*

<sup>148</sup> Operator errors could include, for example, incidents that reflect or resemble internet routing hijacks using the Border Gateway Protocol. See, e.g., OECD, *Routing Security: BGP Incidents, Mitigation Techniques and Policy*

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in 2022, Federal, State, Tribal and Territorial public safety agencies are eligible to obtain direct read-only access to outage information filed in NORS and the Disaster Information Reporting System (DIRS) for their jurisdictions.<sup>150</sup> Would reclassification and enhanced NORS reporting afford public safety officials greater transparency during outages and disasters to assess the operational status of networks for dissemination of emergency information or to assess where support is needed? Would it support reliability efforts for calls and texts to 911 and the 988 Suicide and Crisis Lifeline?<sup>151</sup> How, if at all, would reclassification allow us to further our goal to improve the reliability of wireless networks?<sup>152</sup> Would broadband reclassification give the Commission additional authority to facilitate the use of Wi-Fi calling during emergencies or network outages,<sup>153</sup> and if so, to what extent could the Commission apply reliability standards for Wi-Fi calling? Are there other ways that reclassification of BIAS would help us improve network resiliency and reliability, such as requirements for network upgrades and changes, rules relating to recovery from network outages, and improving our incident investigation and enforcement authority? What impact would any such actions have on ISPs, particularly small ISPs?

### 3. Protecting Consumers' Privacy and Data Security

40. Since before the adoption of the 1996 Act, the Commission has consistently protected consumers from activities that undermine their ability to use communications services freely, fairly, and free from abuse by bad actors. As the communications industry has changed and the tactics used by bad actors have evolved, so too have the Commission's efforts. The current information service classification of BIAS, however, appears to inhibit the Commission's ability to fully ensure that consumers are protected from harmful conduct when they use communications services today and able to utilize these services in a fair and secure manner. We believe that classification of BIAS as a telecommunications service could support the Commission's efforts to protect consumers' privacy and data security and relieve them from unlawful robocalls and robotexts. We seek comment on this view.

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Actions at 12-13 (2022), [https://www.oecd-ilibrary.org/science-and-technology/routing-security\\_40be69c8-en;jsessionid=CtmViajgbUFWAaAC8wqNIZWSQuFGFXlhZKMQ-eGU.ip-10-240-5-167](https://www.oecd-ilibrary.org/science-and-technology/routing-security_40be69c8-en;jsessionid=CtmViajgbUFWAaAC8wqNIZWSQuFGFXlhZKMQ-eGU.ip-10-240-5-167).

<sup>149</sup> *Resilient Networks; Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, PS Docket Nos. 21-346 and 15-80, ET Docket No. 04-35, Notice of Proposed Rulemaking, 36 FCC Rcd 14802, 148014, para. 30 (2021).

<sup>150</sup> *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications*, PS Docket No. 15-80, Second Report and Order, 36 FCC Rcd 6136 (2022).

<sup>151</sup> *See Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 13-75 and 11-60, Report and Order, 28 FCC Rcd 17476, 17488-91, paras. 36-43 (2013); *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications Improving 911 Reliability New Part 4 of Commission's Rules Concerning Disruptions to Communications*, PS Docket Nos. 15-80 and 13-75, ET Docket No. 04-35, Second Report and Order, FCC 22-88 (rel. Nov. 18, 2022) (adopting rules regarding network outage notifications for 911 special facilities); *Ensuring the Reliability and Resiliency of the 988 Suicide & Crisis Lifeline; Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; Implementation of the National Suicide Hotline Improvement Act of 2018*, PS Docket Nos. 23-5 and 15-80, WC Docket No. 18-336, Notice of Proposed Rulemaking, FCC 23-7 (rel. Jan. 27, 2023) (proposing reliability rules for the 988 Suicide and Crisis Lifeline); *Shenandoah Telecommunications Company*, File No.: EB-SED-22-00034239, Order, DA 23-337 (EB Apr. 24, 2023) (settling an investigation related to a 911 outage).

<sup>152</sup> *See Resilient Networks; Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, PS Docket Nos. 21-346 and 15-80; ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-50 (rel. July 6, 2022) (discussing measures to improve the reliability and resiliency of mobile wireless networks).

<sup>153</sup> *See CSRIC, Report on 911 Service Over Wi-Fi* (March 2023).

41. *Privacy and Data Protection.* We tentatively conclude that reclassification of BIAS as a telecommunications service would support the Commission's efforts to safeguard consumers' privacy and data security, and we seek comment on this tentative conclusion. Highlighting the Commission's important role in this area, earlier this year, Chairwoman Rosenworcel established the FCC Privacy and Data Protection Task Force to coordinate the agency's efforts to protect against and respond to consumer privacy infringements and data breaches by communications providers.<sup>154</sup> The Commission's efforts will rely on, among other things, its authority under section 222 of the Act. That provision governs telecommunications carriers' protection and use of information obtained from their customers or other carriers, and calibrates the protection of such information based on its sensitivity. Congress imposed a duty on every telecommunications carrier to protect the confidentiality of its customers' proprietary information,<sup>155</sup> according the category of customer proprietary network information (CPNI) the greatest level of protection.<sup>156</sup>

42. When the Commission classified BIAS as a telecommunications service in the *2015 Open Internet Order*, it declined to forbear from applying section 222 of the Act, citing the need to protect consumers' privacy regardless of whether they communicate via broadband or telephone services.<sup>157</sup> The *RIF Order* eliminated these statutory protections for broadband customers and surrendered the Commission's authority over ISPs' privacy and data protection practices.<sup>158</sup> We believe that ISPs are situated to collect vast swaths of information about their customers, including personal information, financial information, and information regarding subscriber online activity. We further believe that consumers currently may not fully comprehend—and therefore may not be able to meaningfully consent to—ISPs' collection, processing, and disclosure of customer information, including potentially through the use of artificial intelligence models. We are also concerned that, absent statutory and regulatory requirements to do so, ISPs may not adopt adequate administrative, technical, physical, and procedural safeguards to protect their customers' data. Indeed, ISPs appear to continue to be attractive targets to hackers and other bad actors, putting BIAS customer data at significant risk of compromise. We seek comment on these views.

43. Based on the foregoing, we once again propose herein not to forbear from section 222.<sup>159</sup> Returning BIAS to its telecommunications service classification would bring ISPs back under the section 222 privacy and data security framework, and therefore restore those protections for consumers. Additionally, classifying BIAS as a telecommunications service could support a consistent privacy and data security framework for voice and data services, which we believe consumers often subscribe to from one provider in a bundle and perceive to be part of the same service, particularly for mobile services. We seek comment on this proposed analysis.

44. We further believe that, in addition to protecting consumers, reclassifying BIAS as a telecommunications service and declining to forbear from section 222 would protect information concerning entities that interact with ISPs. Section 222 places an obligation on telecommunications carriers to protect the confidentiality of the proprietary information of and relating to other telecommunication carriers (including resellers), equipment manufacturers, and business customers.<sup>160</sup>

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<sup>154</sup> Press Release, FCC, Chairwoman Rosenworcel Launches New 'Privacy and Data Protection Task Force' (June 14, 2023), <https://docs.fcc.gov/public/attachments/DOC-394384A1.pdf>; see also FCC, Privacy and Data Protection Task Force, <https://www.fcc.gov/privacy-and-data-protection-task-force> (last updated July 11, 2023).

<sup>155</sup> 47 U.S.C. § 222(a).

<sup>156</sup> 47 U.S.C. § 222(e).

<sup>157</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5820-24, paras. 462-67.

<sup>158</sup> *RIF Order*, 33 FCC Rcd at 419-23, paras. 181-84.

<sup>159</sup> See *infra* section IV.B.

<sup>160</sup> 47 U.S.C. § 222(a).

We seek comment on how reclassification of BIAS will affect telecommunications carriers and equipment manufacturers who interact with ISPs, as well as the customers those entities serve, such as content creators and edge providers. Would these protections also have national security benefits by, for example, deterring ISPs from contracting with foreign companies that may pose a national security threat or are owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries? Would these section 222 requirements create a meaningful burden on ISPs, especially small ISPs?

45. *Robocalls and Robotexts.* We seek comment on whether reclassification can serve to enhance the Commission's authority to support consumer privacy by combating illegal robocalls and robotexts. In recent years, the Commission has undertaken extensive efforts to address these invasive communications, including by establishing rules for call authentication, robocall mitigation, and call blocking; expanding requirements and restrictions to robotexts; and taking enforcement action against providers who originate and transport these communications.<sup>161</sup> Yet bad actors continue to evolve their techniques to find new ways to interrupt consumers and perpetuate fraud. We note that many illegal robocalls are transmitted via VoIP networks and many illegal robotexts are transmitted by OTT messaging services (e.g., iMessage, WhatsApp, and Signal). We seek comment on the extent to which Title II classification would help the Commission in its efforts to combat these practices. Would Title II classification grant the Commission oversight to reach a larger class of entities, particularly for messages and calls delivered via broadband networks? For example, to the extent robotext scams include links to spoofed websites designed to defraud consumers, would reclassification allow us to require that ISPs block traffic to IP addresses associated with those websites? Would reclassification allow the Commission to apply new requirements and restrictions beyond what it can achieve under the sources of authority the Commission has relied on to date for its robocall and robotext actions? If so, how? Are there other ways in which reclassification would help the Commission combat illegal robocalls and robotexts? How would this affect ISPs, especially small ISPs?

#### 4. Supporting Access to Broadband Internet Access Service

46. From the Commission's inception, it has played a critical role in facilitating the proliferation of communications networks and ensuring that consumers have access to the services these networks provide. While these efforts are crucial to the Commission's mission, we believe that the information service classification of BIAS has limited the Commission's efforts to achieve these goals for the communications service that has become fundamental to consumers' everyday lives. Classifying BIAS as a telecommunications service will enable the Commission to better support the deployment of wireline and wireless infrastructure, advance universal service, and increase the accessibility of communications networks. We seek comment on this tentative conclusion. We also seek comment on whether, and how, we could leverage our proposed reclassification in other proceedings to further encourage access to BIAS by all consumers.

47. *Wireline and Wireless Infrastructure.* We seek comment on the public policy impact of our proposed reclassification of BIAS on the Commission's goals to support investment in and deployment of wireline and wireless infrastructure. For example, section 224(b) of the Act grants the Commission clear authority to regulate the rates, terms, and conditions of pole attachments by a cable

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<sup>161</sup> See FCC, *Robocall Response Team: Combating Scam Robocalls & Robotexts*, <https://www.fcc.gov/spoofed-robocalls> (last updated Aug. 18, 2022); *Call Authentication Trust Anchor*, WC Docket No. 17-97, Sixth Report and Order and Further Notice of Proposed Rulemaking, FCC 23-18, (rel. Mar. 17, 2023); *Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 21-402 and 02-278, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-21 (rel. Mar. 17, 2023); *Advanced Methods to Target and Eliminate Unlawful Robocalls; Call Authentication Trust Anchor*, CG Docket No. 17-59, WC Docket No. 17-97, Seventh Report and Order in CG Docket No. 17-59 and WC Docket No. 17-97, Eighth Further Notice Of Proposed Rulemaking in CG Docket No. 17-59, and Third Notice of Inquiry in CG Docket 17-5, FCC 23-37 (May 19, 2023).

television system or provider of telecommunications service.<sup>162</sup> Since 2011, the Commission has undertaken a series of reforms with the goal of improving access to poles to, among other things, help speed the deployment of broadband infrastructure.<sup>163</sup> However, in the *RIF Order*, the Commission effectively eliminated section 224 pole attachment rights of broadband-only providers as a result of its classifying broadband as an information service.<sup>164</sup> In 2020, following the *Mozilla* court's direction that the Commission "grapple with the lapse in legal safeguards" for broadband-only providers that resulted from the *RIF Order*,<sup>165</sup> the Commission concluded that while there were potentially adverse effects to this class of providers resulting from the loss of pole attachment rights, the benefits of returning BIAS to an information service classification outweighed any drawbacks.<sup>166</sup> We tentatively conclude that the Commission erred in its 2020 analysis and believe that reclassifying BIAS as a telecommunications service will help support the Commission's goals to facilitate broadband deployment, and we seek comment on this tentative conclusion. How has the market for broadband-only ISPs changed since 2015, in particular for new entrants and those ISPs seeking infrastructure access via pole attachments? What effect has the Commission's elimination of pole attachment rights for broadband-only ISPs had on the deployment of broadband, particularly to unserved or underserved areas? How would reinstatement of pole attachment rights benefit or burden ISPs, particularly small ISPs? As the Commission has recognized, Congress recently has made available unprecedented levels of federal funding for broadband buildout, including a variety of programs administered by the National Telecommunications and Information Administration (NTIA), including the Broadband, Equity, Access, and Deployment Program (BEAD), the State Digital Equity Capacity Grant Program and its federal counterpart, the Middle Mile Infrastructure Grant Program, and the Tribal Broadband Connectivity Program.<sup>167</sup> We believe that ensuring the protections of section 224 are restored to all ISPs, including broadband-only providers, will pave the way for quicker and less expensive broadband deployment, thereby enabling that funding to go as far as possible. We seek comment on that view.

48. We also seek comment on how reclassifying BIAS as a telecommunications service and classifying mobile BIAS as a commercial mobile service will impact the Commission's authority over wireless infrastructure.<sup>168</sup> Although section 332(e)(7) of the Act, and Commission interpretation thereof,

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<sup>162</sup> 47 U.S.C. § 224(b).

<sup>163</sup> See generally *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, 37 FCC Rcd 4144 (2022).

<sup>164</sup> See *RIF Remand Order*, 35 FCC Rcd at 12370-71, paras. 71-72.

<sup>165</sup> *Mozilla*, 940 F.3d at 108-109. "Broadband-only" providers refer to those ISPs that lack a commingled telecommunications service or cable television system. See *RIF Order on Remand*, 33 FCC Rcd at 12370, para. 71.

<sup>166</sup> *RIF Order on Remand*, 33 FCC Rcd at 12370-77, paras. 71-81.

<sup>167</sup> *2022 Communications Marketplace Report* at para. 497; *Report on the Future of the Universal Service Fund*, WC Docket No. 21-476, Notice of Inquiry, 36 FCC Rcd 18006, 18015, para. 22 (2021).

<sup>168</sup> See generally 47 U.S.C. § 337(c)(7); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (*City of Arlington*), *aff'd*, 569 U.S. 290 (2013); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79 et al., Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) (*2018 Wireless Infrastructure Order*). Section 337(c)(7)(C) defines "personal wireless services" to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012,

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regulate state and local authority over the placement, construction, and modification of personal wireless service facilities, are there ways in which classifying broadband as a telecommunications service can further advance the Commission's goals to "improve service quality and lower prices for consumers" for broadband access?<sup>169</sup> Finally, we also seek comment on how reclassification of BIAS as a telecommunications service may affect the Commission's application of the Act's preemption frameworks in sections 253(d) and 332(c)(3) regarding infrastructure used to provide broadband-only services.<sup>170</sup>

49. *Universal Service.* We tentatively conclude that classifying BIAS as a telecommunications service will strengthen our policy initiatives to support the availability and affordability of BIAS through USF programs, and we seek comment on this tentative conclusion. The Communications Act defines universal service as an "evolving level of telecommunications services," and charges the Commission with periodically establishing such services.<sup>171</sup> BIAS is now clearly an essential service upon which consumers rely, and we believe that placing BIAS outside of the Commission's Title II authority weakens the Commission's ability to deliver universal service support for that essential service, especially in rural areas. We seek comment on this view. In *Mozilla*, the court found that the Commission failed to explain how its universal service authority over telecommunications carriers in section 254(e) of the Act could extend to ISPs without BIAS classified as a telecommunications service for purposes of the Lifeline program, and it remanded the issue back to the Commission.<sup>172</sup> Although the Commission conceded in the *RIF Remand Order* that under a Title I regime, BIAS could not be a section 254(c) supported service because section 254(c) defines universal service as an "evolving level of telecommunications services," it nevertheless asserted a theory under section 254(e) to enable Lifeline support for BIAS offered by eligible telecommunications carriers (ETCs), similar to the theory under which the Commission has funded broadband-capable networks through the High-Cost Program.<sup>173</sup>

50. We tentatively conclude that reclassifying BIAS as a telecommunications service will bolster the Commission's ability to provide High-Cost and low-income support, and seek comment on

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Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law." Middle Class Tax Relief and Job Creation Act of 2021, Pub L. No. 112-96, 126 Stat. 156 (2012) (codified at 47 U.S.C. § 6409(a)(1)).

<sup>169</sup> See *2018 Wireless Infrastructure Order*, 33 FCC Rcd at 9093, para. 18 (quoting 47 U.S.C. § 337(c)(7)(B)(v)).

<sup>170</sup> *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7806, para. 167; *2018 Wireless Infrastructure Order*, 33 FCC Rcd at 9108, para. 36.

<sup>171</sup> 47 U.S.C. § 254(c)(1).

<sup>172</sup> *Mozilla*, 940 F.3d at 68-70.

<sup>173</sup> See 47 U.S.C. § 254(c)(1) (defining generally universal service as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services" and considering in the definition of services supported by universal service support mechanisms the extent to which such services "(A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by consumers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity"); *id.* § 254(e) (stating that ETCs "shall be eligible to receive specific Federal universal service support" and that an ETC receiving universal service support "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"); *RIF Remand Order*, 35 FCC Rcd at 12380-86, paras. 87-98; see also *Connect America Fund et al.*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17685-86, para. 64 (2011).

this tentative conclusion. Among other things, we believe that reclassifying BIAS as a telecommunications service could eventually allow broadband-only providers to once again participate in the Lifeline program,<sup>174</sup> and would give the Commission the ability to adjust certain service obligations for ETCs. We further believe that reclassifying BIAS as a telecommunications service would enhance our ability to connect low-income households in rural areas, including through the Link Up program, which provides support to reduce connection charges for eligible residents of Tribal lands who subscribe to telecommunications service from a telecommunications carrier receiving high-cost support.<sup>175</sup> We seek comment on these views, including how this may impact ISPs, especially smaller ISPs and ISPs serving rural areas.

51. We also tentatively conclude that classification of BIAS as a telecommunications service protects public investments in BIAS access and affordability. Since the inception of BIAS, the Commission, along with other federal and state entities, have made significant investments to ensure that BIAS networks reach all consumers and are affordable, particularly through the Affordable Connectivity Program. These efforts increased dramatically since the beginning of the COVID-19 pandemic as Congress directed a large influx of funding in broadband deployment and consumer access.<sup>176</sup> We believe our proposed reclassification will enable the Commission to protect these investments on an ongoing basis by enabling the Commission to ensure the connections supported by these funds align with the other policy goals we detail here: advancing national security and public safety and protecting consumers. In doing so, we believe we can ensure these connections continue to achieve their primary purpose of benefiting consumers. We seek comment on these views.

52. *Multiple-Tenant Environments (MTEs)*. We seek comment on how reclassification may impact the Commission's authority to take action to promote tenant choice and competition in the provision of broadband services to the benefit of those who live and work in MTEs. The Commission has long prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE.<sup>177</sup> In 2019, the Commission

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<sup>174</sup> See *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, Order, DA 17-87 (WCB 2017); *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, Order, DA 16-1325, 31 FCC Rcd 12736 (WCB 2016) (designating several broadband providers as Lifeline Broadband Providers).

<sup>175</sup> See 47 CFR §§ 54.413 and 54.414 (establishing Link Up support and the reimbursement process for Link Up).

<sup>176</sup> See *supra* note 59.

<sup>177</sup> In two orders adopted in 2000 and 2008, respectively, the Commission prohibited telecommunications carriers from entering into or enforcing exclusivity contracts with MTE owners in both commercial and residential MTEs. *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22985, para. 1 (2000); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, 5386, para. 5 (2008); see also 47 CFR § 64.2500. And in 2007, the Commission prohibited certain MVPDs from entering into or enforcing exclusivity contracts with residential MTE owners. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20236, para. 1 (2007) (*2007 Exclusive Service Contracts Order*), affirmed, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (applying the prohibition to cable operators and other MVPDs that are subject to section 628 of the Act, 47 U.S.C. § 548). The Commission defined the scope of this rule to include "a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment)." 47 CFR § 76.2000(b); see also *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20238, para. 7. The Fourth Circuit Court of Appeals has applied this prohibition on exclusive access to a homeowners' association. *Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).

released a Notice of Proposed Rulemaking that sought comment about these practices and others that could have the effect of dampening competition or deployment,<sup>178</sup> and on the Commission’s authority to target different kinds of entities, including telecommunications providers, MVPDs, and broadband-only providers.<sup>179</sup> In 2022, relying on sections 201 and 628 of the Act,<sup>180</sup> the Commission adopted rules to prohibit telecommunications carriers and MVPDs from entering into exclusive and graduated revenue sharing agreements, and to require that telecommunications carriers and MVPDs include disclaimers on marketing materials distributed to MTE tenants that inform tenants of the existence of an exclusive marketing arrangement, among other things.<sup>181</sup> The Commission determined that it was appropriate to “proceed incrementally,” but cautioned that it would “continue to monitor competition in MTEs to determine whether we should alter the scope of our rules to cover other providers,” including broadband-only providers. We seek comment whether reclassification of BIAS would provide additional authority for the Commission to further promote competition and consumer choice in communications services in MTEs.

53. *Free Expression.* We believe BIAS connections promote diversity of viewpoints by allowing traditionally disadvantaged communities to express themselves outside of traditional media.<sup>182</sup> Social media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism.<sup>183</sup> Indeed, Congress has recognized that “the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>184</sup> Accordingly, we invite comment on any free expression-related considerations associated with classifying BIAS as a telecommunications service and any benefits or drawbacks of such classification for relevant communications.

54. *Digital Equity.* The Commission, as part of its continuing effort to advance digital equity for all,<sup>185</sup> including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality, invites comments on any equity-related considerations<sup>186</sup> and benefits (if any) that

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<sup>178</sup> *Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, GN Docket No. 17-142 et al., Notice of Proposed Rulemaking, 34 FCC Rcd 5702, 5711-20, paras. 16-31 (2019).

<sup>179</sup> *Id.* at 5720-21, paras. 32-35.

<sup>180</sup> 47 U.S.C. §§ 201(b), 548(b).

<sup>181</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN 17-142, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448 (2022).

<sup>182</sup> See Comments of Voices for Internet Freedom Coalition, et al., WC Docket No. 17-108, 2-3 (July 19, 2017).

<sup>183</sup> See Dominique Skye McDaniel, *As digital activists, teens of color turn to social media to fight for a more just world*, The Conversation (Apr. 20, 2023), <https://theconversation.com/as-digital-activists-teens-of-color-turn-to-social-media-to-fight-for-a-more-just-world-201841>; Brooke Auxier, *Social media continue to be important political outlets for Black Americans*, Pew Research Center (Dec. 11, 2020), <https://www.pewresearch.org/short-reads/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/>. See also Carr Center for Human Rights Policy, *Reimagining Rights & Responsibilities in the United States: Freedom of Speech and Media* (2021), [https://carrcenter.hks.harvard.edu/files/cchr/files/free\\_speech.pdf](https://carrcenter.hks.harvard.edu/files/cchr/files/free_speech.pdf) (“[S]ocial media’s democratization of speech has created an unprecedented capacity for grassroots mobilization and has lifted voices who lack access to traditional forms of communication and power.”).

<sup>184</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5663, para. 143 (citing 47 U.S.C. § 230(a)(3)).

<sup>185</sup> Section 1 of the Communications Act of 1934 as amended provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

<sup>186</sup> We define the term “equity” consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have

(continued....)

may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well as the scope of the Commission’s relevant legal authority.

## 5. Access for Persons with Disabilities

55. We seek comment on how reclassification may impact the Commission’s authority to ensure that individuals with disabilities can communicate using BIAS. People with disabilities “increasingly rely upon Internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language, and through video relay service.”<sup>187</sup> Section 716 of the Act requires that interoperable video conferencing services be accessible, regardless of how those services are transmitted—by broadband or otherwise—and also requires that text messaging, email, other electronic messaging services, and interconnected and non-interconnected VoIP services, be accessible.<sup>188</sup> In addition, section 718 of the Act requires that Internet browsers installed on mobile phones must be accessible to people who are blind or visually impaired to ensure the accessibility of mobile broadband.<sup>189</sup> How would reclassification affect the Commission’s ability to implement and enforce these provisions? We seek comment on the impact, if any, that reclassification may have on the Commission’s goals to ensure that BIAS remains accessible to individuals with disabilities. For instance, if the Commission declines to forbear from section 255 of the Act, as we propose below, would that provide additional authority for the Commission to require that ISPs’ telecommunications services and equipment be accessible to and usable by people with disabilities?<sup>190</sup>

## 6. The *RIF Order*’s Policy Rationales Did Not Justify Reversing the Classification of Broadband Service

56. In the *RIF Order*, the Commission’s primary policy justifications for reclassifying BIAS as a Title I service were its conclusions regarding the alleged harm to investment by Title II classification and the benefits to investment by Title I classification.<sup>191</sup> However, the *RIF Order* gave little weight to the *2015 Open Internet Order*’s showing that investment continued for broadband services that were

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been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021).

<sup>187</sup> California Public Utilities Commission Comments, WC Docket Nos. 17-108, 17-287, and 11-42, at 10 (Apr. 20, 2020). Video relay service is a form of TRS that allows people who are deaf, hard of hearing, deafblind, and who have speech disabilities who use sign language to communicate with voice telephone users through a communications assistant using video transmissions over the Internet. *See* 47 CFR § 64.601(a)(51). *See also* *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 6012, 6014, para. 3 (2010).

<sup>188</sup> 47 U.S.C. § 617; *Access to Video Conferencing; Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket Nos. 23-161, 10-213, and 03-123, Report and Order, Notice of Proposed Rulemaking, and Order, FCC 23-50 para. 29 (rel. June 12, 2023) (stating that section 716’s coverage “does not depend on the options offered to users for connecting to a video conference (e.g., through a dial-up telephone connection or by broadband, through a downloadable app or a web browser)”).

<sup>189</sup> 47 U.S.C. § 619.

<sup>190</sup> 47 U.S.C. § 255.

<sup>191</sup> *RIF Order*, 33 FCC Rcd at 362-63, para. 86-87.



regulated as Title II common carrier services, including digital subscriber line (DSL), which was regulated as such until 2005.<sup>192</sup>

57. We tentatively conclude that the Commission’s conclusions in the *RIF Order* that ISP investment is closely tied to the classification of BIAS were unsubstantiated. Instead, we agree with the *RIF Order*’s statement that “owners of network infrastructure make long-term, irreversible investments,”<sup>193</sup> which we believe makes it unlikely that changes in investment shortly following the adoption of each *Order* were actually related to the effects of each *Order*. We seek comment on this belief. We note that the Commission received conflicting viewpoints regarding the actual effect of Title II classification on investment.<sup>194</sup> Instead of concluding, as the *2015 Open Internet Order* did, that conflicting viewpoints concerning the effect of classification on investment prevented the Commission from being certain which viewpoint was more accurate,<sup>195</sup> the Commission chose to rely on certain studies purporting to show that Title II classification in the *2015 Open Internet Order* hurt investment to reach its conclusion about the effect of Title II classification on investment,<sup>196</sup> even as the Commission seemed to recognize the weaknesses of those studies.<sup>197</sup> Additionally, similar to the *2015 Open Internet Order* record,<sup>198</sup> the *RIF Order*’s record showed opposing views on the likely long-term effects of the Commission’s regulatory decisions on investment.<sup>199</sup> We believe, as the Commission did in 2015, that “no party [could] quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment.”<sup>200</sup> As such, we tentatively conclude that changes in ISP investment following the adoption of each *Order* were more likely the result of other factors unrelated to the classification of BIAS, such as broader economic conditions at the time, technology changes such as the transition from 3G to 4G LTE networks, and ISPs’ general business development decisions.<sup>201</sup> We seek comment on this tentative conclusion. Is there any evidence that ISP investment is closely tied to the regulatory classification of BIAS? Can any declines or increases in investment following adoption of either the *2015 Open Internet Order* or the *RIF Order* be directly attributed to the classification of BIAS

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<sup>192</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5612-13, para. 39 (“History demonstrates that this careful approach to the use of Title II will not impede investment. First, mobile voice services have been regulated under a similar light-touch Title II approach since 1994 — and investment and usage boomed. . . . And, of course, wireline DSL was regulated as a common-carrier service until 2005—including a period in the late ‘90s and the first five years of this century that saw the highest levels of wireline broadband infrastructure investment to date.”); see also *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33 et al., WC Docket Nos. 04-242 and 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14858, para. 5 (2005) (*Wireline Broadband Classification Order*).

<sup>193</sup> *RIF Order*, 33 FCC Rcd at 364, para. 89.

<sup>194</sup> See *id.* at 365, para. 91 (discussing the *RIF Order* record on this issue).

<sup>195</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

<sup>196</sup> *RIF Order*, 33 FCC Rcd at 365-66, paras. 91-93.

<sup>197</sup> See, e.g., *RIF Order*, 33 FCC Rcd at 365, para. 92 (noting that a comparison it cited is among those that “can only be regarded as suggestive, since they fail to control for other factors that may affect investment”); *id.* at 365, para. 91 (noting that counterfactual studies that “attempt[ed] to assess the predicted causal effects of Title II regulation on ISP investment and/or output” are not dispositive). See also *Mozilla*, 940 F.3d at 51 (noting that “the Commission was cleareyed in assigning quite modest probative value to studies attempting to draw links between the [*2015 Open Internet Order*] and broadband investment”); *id.* at 55 (highlighting “the Commission’s recognition that the [*2015 Open Internet Order*]’s effect on investment was subject to honest dispute, focusing . . . on what is ‘likely’ to happen, repeatedly flagging shortcomings in studies it cites, and qualifying their probative force”).

<sup>198</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

<sup>199</sup> See *RIF Order*, 33 FCC Rcd at 370-71, para. 102 (discussing the *RIF Order* record on this issue).

<sup>200</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

<sup>201</sup> See *id.* (noting that “regulation is just one of many factors affecting investment decisions”).

in those *Orders*? What other factors besides the regulatory classification of broadband impact investment decisions? We invite parties to comment on the strength of any evidence submitted on these issues.

58. Notwithstanding these tentative conclusions, we seek comment generally on how, and the extent to which, our proposed classification of BIAS as a telecommunications service will affect ISPs' investment incentives today. How will it affect small ISPs? Is it possible to evaluate ISPs' investment incentives independent of any incentives and investment activity that may result from the billions of dollars in federal and state funding that has been and will be provided to ISPs to support infrastructure deployment and broadband connectivity?<sup>202</sup>

### C. Scope of Reclassification

59. *Broadband Internet Access Service.* We propose to continue using the definition of “broadband Internet access service” as a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service,” as well as “any service that the Commission finds to be providing a functional equivalent of the service described [in the definition] or that is used to evade the protections set forth” in part 8 of the Commission’s rules.<sup>203</sup> The Commission has chiefly retained this definition since it first defined broadband Internet access service in the *2010 Open Internet Order*.<sup>204</sup> We seek comment on whether there is any reason to depart from this definition of broadband Internet access service.

60. Similarly, we propose to continue to define “mass market” as the Commission did in the *2015 Open Internet Order* and *RIF Order*—“a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as school and libraries.”<sup>205</sup> In addition to including broadband Internet access service purchased with support from the E-Rate, Lifeline, and Rural Health Care programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund or the Rural Digital Opportunity Fund, we propose that such “mass market” services would also include any broadband Internet access service purchased with support from the Affordable Connectivity Program and the Connected Care Pilot Program.<sup>206</sup> Consistent with the *2015 Open Internet Order* and *RIF Order*, the proposed definition excludes enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, and special access services.<sup>207</sup> We seek comment on our proposal. Should we apply the modified definition of broadband Internet access service used for the broadband label requirement in this context to make clear that enterprise services are excluded even when they are supported by the Commission’s broadband access and affordability programs?<sup>208</sup>

61. We also propose to remain consistent with the Commission’s conclusions in prior *Orders* to include in the term “broadband Internet access service” those services provided over any technology

<sup>202</sup> See NTIA, BroadbandUSA, *Federal Funding*, <https://broadbandusa.ntia.doc.gov/resources/federal/federal-funding> (last visited Sept. 20, 2023).

<sup>203</sup> 47 CFR § 8.1(b); *see also id.* Part 8.

<sup>204</sup> See *2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 44; *see also 2015 Open Internet Order*, 30 FCC Rcd at 5745-50, 5883, paras. 336-40, Appx. A, Final Rules; *RIF Order*, 33 FCC Rcd at 318-20, paras. 21-25.

<sup>205</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5683-84, para. 189; *RIF Order*, 33 FCC Rcd at 318, para. 21 n.58.

<sup>206</sup> These programs statutorily support BIAS regardless of its classification status.

<sup>207</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5683-84, para. 189; *RIF Order*, 33 FCC Rcd at 318, para. 21 n.58.

<sup>208</sup> See *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Order on Reconsideration, FCC 23-68, at 6-8, paras. 24-26, Appendix A (rel. Aug. 29, 2023) (*Broadband Label Reconsideration Order*).

platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.<sup>209</sup> We seek comment on this proposal. We continue to intend broadband Internet access service “to cover the entire universe of Internet access services at issue in the Commission’s prior broadband classification decisions, as well as all other broadband Internet access services offered over other technology platforms that were not addressed by prior classification orders.”<sup>210</sup> As in prior orders, we propose that “fixed” broadband Internet access service refers to a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user’s home router, computer, or other Internet access device to the Internet, and encompasses the delivery of fixed broadband service over any medium, including various forms of wired broadband service (e.g., cable, DSL, fiber), fixed wireless broadband service (including fixed services using unlicensed spectrum), and fixed satellite broadband service.<sup>211</sup> Likewise, we propose that “mobile” broadband Internet access service refers to a broadband Internet access service that serves end users primarily using mobile stations, and includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet, as well as mobile satellite broadband service.<sup>212</sup> Consistent with the existing definition, we propose to include within the definition of broadband Internet access service any such service, regardless of whether the ISP leases or owns the facilities used to provide the service.<sup>213</sup> We seek comment on our proposals.

62. We also propose that to the extent coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband Internet access service from an ISP to enable patrons to access the Internet from their respective establishments, provision of such service by the premise operator would not itself be considered BIAS unless it was offered to patrons as a retail mass-market service.<sup>214</sup> Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, we believe he or she is not offering a broadband Internet access service under our proposed definition, because the user is not marketing and selling such service to residential customers, small businesses, and other end-user customers.<sup>215</sup> Such proposed findings are consistent with the manner in which the Commission has historically defined broadband Internet access service,<sup>216</sup> and we seek comment on any changed circumstances that would justify a different outcome.

63. We seek comment on whether there are other types of services we should address in defining the scope of broadband Internet access service. For example, with respect to 5G deployments, new network architectures and uses of the technology are emerging, including some that offer both private and public 5G connectivity, like 5G Internet of Things (IoT).<sup>217</sup> We seek comment on how we

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<sup>209</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337; *RIF Order*, 33 FCC Rcd at 319, para. 22.

<sup>210</sup> *RIF Order*, 33 FCC Rcd at 319, para. 22; see also *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337 (expressing the same findings regarding the scope of BIAS within the categories of “fixed” and “mobile” broadband Internet access service).

<sup>211</sup> *RIF Order*, 33 FCC Rcd at 319, para. 22 (footnotes omitted); see also *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337 (footnotes omitted).

<sup>212</sup> *RIF Order*, 33 FCC Rcd at 319, para. 22; see also *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337.

<sup>213</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337; *RIF Order*, 33 FCC Rcd at 319, para. 22.

<sup>214</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, para. 24.

<sup>215</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, para. 25.

<sup>216</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, para. 25.

<sup>217</sup> See, e.g., Enterprise IoT Insights, “NTT Rolls Out 5G IoT Service in the U.S. via its Transtel Subsidiary,” May 17, 2022, <https://enterpriseiotsights.com/20220517/internet-of-things/ntt-rolls-out-5g-iot-service-us-via-transtel-subsidiary>.

should view these services for purposes of defining broadband Internet access service—are these types of services best viewed as enterprise services excluded from the definition of broadband Internet access service or should they be treated as non-BIAS data services?

64. *Non-BIAS Data Services.* We also seek comment on whether to continue excluding non-BIAS data services (formerly “specialized services”) from the scope of broadband Internet access service. In the *2015 Open Internet Order*, the Commission explained that certain services offered by ISPs that share capacity with broadband Internet access service over ISPs’ last-mile facilities were not broadband Internet access service and provided examples and characteristics of services that, at that time, likely fit within this category of non-BIAS data services.<sup>218</sup> The Commission defined characteristics of these services, explaining that they (1) are not used to reach large parts of the Internet; (2) are not a generic platform, but rather a specific “application level” service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband Internet access service.<sup>219</sup> We seek comment on whether these characteristics still appropriately describe non-BIAS data services. Are there any other characteristics of such services on which we should rely? Are these still appropriate examples of data services that are outside the scope of broadband Internet access service? Have the distinctions between mass-market retail and non-BIAS data services changed, particularly from a consumer, technical, or other perspective, to warrant reconsideration of this exclusion?

65. We also tentatively conclude that we should maintain the *2015 Open Internet Order*’s approach to continue closely monitoring the development of non-BIAS data services.<sup>220</sup> We are especially concerned about activities that may undermine national security and public safety, consumers’ use of broadband Internet access service, and the ability of consumers to access broadband Internet access service. We also share the Commission’s concern in the *2015 Open Internet Order* “that over-the-top services offered over the Internet are not impeded in their ability to compete with other data services.”<sup>221</sup> We seek comment on our proposed approach.

66. *Internet Traffic Exchange.* We next tentatively conclude that broadband Internet access service, as we propose to define it, includes arrangements for the exchange of Internet traffic by an edge provider or an intermediary with the ISP’s network, referred to as Internet peering, traffic exchange or interconnection, to the extent they provide the “capability to transmit data to and receive data from all or substantially all internet endpoints . . . [and] enable the operation of the communications service.”<sup>222</sup> We seek comment on this position. As the Commission explained in 2015, “[t]he representation to retail

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<sup>218</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5696, paras. 207-208. The Commission identified some ISPs’ existing facilities-based VoIP and Internet Protocol-video offerings, connectivity bundled with e-readers, heart monitors, energy consumption sensors, limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content as examples of non-BIAS data services. *See id.* at 5696-97, para. 208; *RIF Order*, 33 FCC Rcd at 319-20, para. 23.

<sup>219</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5697, para. 209.

<sup>220</sup> In the *2015 Open Internet Order*, the Commission emphasized that non-BIAS data services might still be subject to enforcement action if the Commission determined that: (1) a particular service is providing the functional equivalent of BIAS; (2) an ISP claimed or attempted to claim that a service that is the equivalent of BIAS is a non-BIAS data service not subject to any rules that would otherwise apply; or (3) a non-BIAS data service offering is undermining investment, innovation, competition, and end-user benefits. *2015 Open Internet Order*, 30 FCC Rcd at 5697, para. 210.

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* at 5686, para. 194 n.482 (“As a general matter, Internet traffic exchange involves the exchange of IP traffic between networks. An Internet traffic exchange arrangement determines which networks exchange traffic and the destinations to which those networks will deliver that traffic. In aggregate, Internet traffic exchange arrangements allow an end user of the Internet to interact with other end users on other Internet networks, including content or services that make themselves available by having a public IP address, similar to how the global public switched telephone networks consists of networks that route calls based on telephone numbers.”).

customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes the promise to make the interconnection arrangements necessary to allow that access<sup>223</sup> and “the promise to transmit traffic to and from those Internet end points back to the user.”<sup>224</sup> We tentatively conclude that the Commission’s findings and rationale regarding Internet traffic exchange in the *2015 Open Internet Order*—that such “edge service” is derivative of broadband Internet access service and constitutes the same traffic—remain valid,<sup>225</sup> and we seek comment on our tentative conclusion. We observe that the *RIF Order* does not appear to dispute the Commission’s previous conclusion that broadband Internet access service includes this “edge service,” and instead determined that Internet traffic exchange arrangements were appropriately regulated as an information service by virtue of its conclusion that broadband Internet access service is an information service. We seek comment on whether there are circumstances under which “edge service” would not be best characterized as a part of broadband Internet access service, and how commenters would characterize that service, given the *Verizon* court’s conclusion that, in addition to the retail service provided to consumers, “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers.’”<sup>226</sup> We seek comment on the *Verizon* court’s characterization of broadband Internet access service in relation to service provided to both consumers and edge providers. How, if at all, has edge service changed in relation to broadband Internet access service? Are there any grounds to depart from the Commission’s prior treatment of edge service and edge providers as a “derivative” service of broadband Internet access service?

67. We also seek comment on whether we should exclude any particular services or functions from the definition of broadband Internet access service. For example, should we exclude virtual private network (VPN) services, web hosting services, and/or data storage services<sup>227</sup> from the scope of broadband Internet access service?<sup>228</sup> While the Commission has previously excluded content delivery networks (CDNs) and Internet backbone services, including transit arrangements, we seek comment whether a different approach may be warranted because these services are integral to transmitting data and delivering communications to Internet endpoints, thus falling within the proposed definition of “broadband internet access service.” We observe that these services directly or indirectly provide data on behalf of their clients. For example, while VPN servers reflect one end-point of an underlying communication stream, they act as a launching pad to forward traffic to the destination identified by the user. We seek comment on this proposed analysis. Do these services fall within the scope of broadband Internet access service, as we propose to define it?

#### **D. Classifying Broadband Internet Access Service as a Telecommunications Service**

68. The 1996 Act enacted the “telecommunications service” and “information service” definitional frameworks, and since that time, the Commission and courts have grappled with the classification of Internet access services as technology and the communications marketplace have evolved and the Internet has become essential to our daily lives. Courts have long recognized the Commission’s

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<sup>223</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5610, 5693-94, paras. 28, 204.

<sup>224</sup> *Id.* at 5748, para. 339; see also *USTA*, 825 F.3d at 713 (explaining that the issue in *Verizon* was the Commission’s failure to classify BIAS as a Title II service, but that the Commission overcame this by reclassifying broadband “and the interconnection arrangements necessary to provide it” as a telecommunications service).

<sup>225</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5748, para. 339 (referring to a broadband provider’s promise to transmit traffic to and from Internet end points back to the user as the “edge service”).

<sup>226</sup> *Verizon*, 740 F.3d at 653.

<sup>227</sup> For purposes of this NPRM, “data storage services” refers to the provision of access to data storage platforms. The term is distinct from “caching,” which involves the temporary storage of data for purposes of delivering content to specific endpoints.

<sup>228</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, paras. 24-25.

authority to interpret and implement the Communications Act of 1934.<sup>229</sup> Both the *2015 Open Internet Order* and the *RIF Order* recognized this authority.<sup>230</sup> And on review of each of those decisions, the D.C. Circuit accepted the Commission’s authority to make classification decisions, even when this involved a change in course.<sup>231</sup> In addressing a prior Commission decision classifying BIAS, in *Brand X*, the Supreme Court confirmed not only that an administrative agency *can* change its interpretation of an ambiguous statute, but that it “*must* consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to . . . a change in administrations.”<sup>232</sup> In light of this precedent, we believe that we not only have the authority to classify BIAS, but that we must reevaluate the 2018 information service classification in consideration of the policy rationales and marketplace developments we have described above as warranting a return to the telecommunications service classification. We seek comment on this view.

69. In evaluating the classification of BIAS, three definitional terms are relevant. First, the Act defines “telecommunications” 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.”<sup>233</sup> Second, the Act defines “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.”<sup>234</sup> Finally, the Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , 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.”<sup>235</sup> When Congress enacted the definitions of “telecommunications service” and “information service” in the 1996 Act,<sup>236</sup> it substantially incorporated

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<sup>229</sup> See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943) (“In the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers.”); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (noting “the power of the Commission” to exercise “the rulemaking authority necessary for the orderly conduct of its business,” and explaining that sections 4(i) and 303(r) of the Act “grant general rulemaking power not inconsistent with the Act or law”); *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (stating that “[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act’”); *Nat’l Cable & Telecomms. Ass’n v. Brand X*, 545 U.S. 967, 980-82 (2005) (*Brand X*) (finding that the FCC has authority to classify services—and BIAS, in particular—and to change course in its classification of BIAS if it acknowledges that it is doing so and justifies its decision); *Phila. Television Broad. Co. v. FCC*, 359 F.2d 282, 283 (D.C. Cir. 1966) (recognizing the Commission’s authority to determine whether community antenna television (CATV) “systems are common carriers within the meaning of the Communications Act”); *Nat’l Ass’n of Regul. Util. Comm’rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (affirming the FCC’s classification of Specialized Mobile Radio Systems (SMRS) as non-common carriers and observing that a different classification could be warranted in the future “should the actual operations of SMRS appear to bring them within the common carrier definition”).

<sup>230</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5742, 5743-44, paras. 328, 331-35; *RIF Order*, 33 FCC Rcd at 403-405, paras. 155-56.

<sup>231</sup> See, e.g., *Mozilla*, 940 F.3d at 23-24, 43, 50, 53-56, 63-64; *USTA*, 825 F.3d at 701-702, 704, 708-10, 723-24.

<sup>232</sup> *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64) (emphasis added; internal quotation marks omitted).

<sup>233</sup> 47 U.S.C. § 153(50).

<sup>234</sup> 47 U.S.C. § 153(53).

<sup>235</sup> 47 U.S.C. § 153(24).

<sup>236</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(a)(2), 110 Stat. 56, 58-60 (1996), *codified at* 47 U.S.C. §§ 153(24), 153(50), 153(53).

the “basic” and “enhanced” service classifications from the *Computer Inquiries* line of decisions.<sup>237</sup> Under the *Computer Inquiries*, facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings—including broadband Internet access service offered via DSL—to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II.<sup>238</sup> Thus, there is no disputing that until 2005, Title II applied to the transmission component of DSL service.<sup>239</sup> Further, because the statutory definitions substantially incorporated the Commission’s terminology under the *Computer Inquiries*, Commission decisions regarding the distinction between basic and enhanced services—in particular, decisions regarding features that are “adjunct to basic” services—are relevant to our analysis, as discussed further below, because the Commission’s definition of “adjunct to basic” services has been instrumental in determining which functions fall within the “telecommunications systems management” exception to the “information service” definition.

70. We tentatively conclude that both a reasonable and the best reading of these definitional provisions supports classifying BIAS as a telecommunications service. As explained in the *2015 Open Internet Order*, “the critical distinction between a telecommunications and an information service turns on what the provider is ‘offering.’”<sup>240</sup> If the provider is offering “telecommunications” to the public for a fee, then the service is necessarily a telecommunications service.<sup>241</sup> Thus, in 2015, the Commission

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<sup>237</sup> In 1966, the Commission initiated its *Computer Inquiries* “to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users.” *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11, 11-12, para. 2 (1966) (*Computer I Notice of Inquiry*) (subsequent history omitted). In the *Computer II* and *Computer III* decisions, the Commission required telephone companies that provided “enhanced services” over their own transmission facilities to separate out and offer on a common carrier basis the transmission component underlying their enhanced services. *Amendment of Section 64.702 of the Comm’n’s Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, 417-35, 461-75, paras. 86-132, 201-31 (1980) (*Computer II Final Decision*), *aff’d sub nom. Computer & Comm’n’s Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm’n’s Rules & Regs. (Third Computer Inquiry)*, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958, para. 4 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*).

<sup>238</sup> See *Computer II Final Decision*, 77 FCC 2d at 475, para. 231; see also *Wireline Broadband Classification Order*, 20 FCC Rcd at 14866-68, para. 24. We note that a large number of rural local exchange carriers (LECs) have also chosen to offer broadband transmission service as a telecommunications service subject to the provisions of Title II.

<sup>239</sup> See, e.g., *Wireline Broadband Classification Order*, 20 FCC Rcd at 14858, para. 5.

<sup>240</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5757, para. 355.

<sup>241</sup> *Id.*

interpreted these terms to classify BIAS as a telecommunications service, finding that BIAS, as then offered, is sufficiently independent from the information services that ISPs may also offer.<sup>242</sup> Consistent with the Commission’s finding in 2015, we believe that BIAS is best understood as making available high-speed access to the Internet (that may be bundled with other applications and functions)—and therefore that it provides telecommunications<sup>243</sup>—and that ISPs offer BIAS to the public for a fee. Accordingly, we tentatively conclude the best reading of the Act is that BIAS, as offered to and understood by consumers today, is a telecommunications service rather than an information service. We seek comment on this tentative conclusion.

71. *Broadband Internet Access Service Provides Telecommunications.* We tentatively conclude that BIAS provides “telecommunications” as it is defined under the Act, and seek comment on this conclusion. As discussed above, the Act defines “telecommunications” 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.”<sup>244</sup> As discussed above,<sup>245</sup> we believe that users rely on BIAS to transmit “information of the user’s choosing,” “between or among points specified by the user.”<sup>246</sup> We further believe, as the Commission has previously found, that the term “points specified by the user” is ambiguous, and that “uncertainty concerning the geographic location of an endpoint of communication is irrelevant for the purpose of determining whether a broadband Internet access service is providing ‘telecommunications.’”<sup>247</sup> We also contend that these points are not constrained to be defined in one particular format. They may be in the form of an IP address or perhaps more commonly associated with fully qualified domain names resolved by the DNS, such as *www.example.com*. This is consistent with the Commission’s prior deduction that while consumers often do not know the precise physical or virtual location of the edge provider or other user they want to access, “there is no question that users specify the end points of their Internet communications” and “would be quite upset if their Internet communications did not make it to their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages.”<sup>248</sup> As the Commission explained, “numerous forms of telephone service qualify as telecommunications even though the consumer typically does not know the geographic location of the called party,” including cell phone service, toll free 800 service, and call bridging service.<sup>249</sup> Likewise, the fact that DNS may resolve the same domain name to one or more virtual locations (e.g., due to load balancing), just as in the toll free arena a single telephone number may route to multiple locations, “does not transform that service to something other than telecommunications.”<sup>250</sup> In the *RIF Order*, the Commission conceded that at least some telecommunications are used as an input into BIAS and “an ISP *makes* use of telecommunications” in the provision of BIAS, but found that it “need not further address the scope of the ‘telecommunications’ definition in order to justify [its] classification of broadband Internet access service,” and did not further address the Commission’s interpretation and application of the “telecommunications” definition in the

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<sup>242</sup> *Id.* at 5757-58, para. 356.

<sup>243</sup> *Id.*; see also *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting) (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799, para. 1 (2002)).

<sup>244</sup> 47 U.S.C. § 153(50).

<sup>245</sup> See *supra* section A; see also *2015 Open Internet Order*, 30 FCC Rcd at 5761, para. 361.

<sup>246</sup> 47 U.S.C. § 153(50).

<sup>247</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5761-62, para. 361.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*



*2015 Open Internet Order*.<sup>251</sup> We seek comment on the analysis that BIAS provides “telecommunications,” including whether there is any reason to depart from it.

72. We further tentatively conclude that there is no change or modification to the form or content of information during transmission, and seek comment on this analysis. In 2015, the Commission explained that “the packet payload (i.e., the content requested or sent by the user) is not altered by the variety of headers that a provider may use to route a given packet” and therefore, the “form and content of the information” is the same when an IP packet is sent by the sender as when the same packet is received by the recipient.<sup>252</sup> We seek comment on whether this analysis of packet transmission remains accurate and relevant today. Have there been any developments or changes in how BIAS is provisioned that would cause us to reconsider this analysis? How do ISPs transmit data information from one point on the network to another? How does it differ from how PSTN calls are transmitted today?

73. *Broadband Internet Access Service is a Telecommunications Service*. Here, we propose to build off our tentative conclusion that BIAS provides telecommunications and our belief that current factual circumstances show that consumers perceive BIAS as a standalone offering used to access third-party services and, as such, ISPs routinely market BIAS widely to the general public.<sup>253</sup> Viewed together, ISPs would necessarily offer BIAS “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,”<sup>254</sup> and therefore we tentatively conclude that BIAS is a telecommunications service as defined in the Act. We seek comment on our tentative conclusion and assessment. We further propose to find that the implied promise to make arrangements for exchange of Internet traffic as part of the BIAS offering does not constitute a private carriage arrangement, and that the rationale adopted in the *2015 Open Internet Order* remains persuasive.<sup>255</sup> We seek comment on this approach. How do Internet traffic arrangements with negotiated terms differ from mass-market services offered to the public? Have there been any significant developments in the Internet traffic exchange market since 2015 that would cause us to reconsider these proposals? We observe that in 2015, the Commission concluded that “some individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service,”<sup>256</sup> and the *RIF Order* does not appear to disturb this finding. We seek comment on this analysis.

74. *Broadband Internet Access Service Is Not Best Classified an Information Service*. We tentatively conclude that, as offered today, BIAS is not an information service under the best reading of the Act. 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.”<sup>257</sup> We believe that the Commission’s reasoning in the *RIF Order*—that because BIAS has the “capability” to be used to engage in the activities within the information service definition, it is best interpreted as an information service<sup>258</sup>—is flawed. Concluding that BIAS “is an information service irrespective of whether it provides the *entirety* of any end user functionality or whether it provides

<sup>251</sup> *RIF Order*, 33 FCC Rcd at 341-43, para. 52.

<sup>252</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5762-63, para. 362.

<sup>253</sup> See *supra* section A.

<sup>254</sup> 47 U.S.C. § 153(53) (defining “telecommunications service”).

<sup>255</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5764-65, para. 364 (explaining that ISPs have “voluntarily undertaken an obligation to arrange to transfer that traffic on and off its network,” thus holding themselves out to carry all edge provider traffic to customers regardless of source and regardless of whether the edge provider has a specific arrangement with the broadband provider, and that “[m]erely asserting that the traffic exchange component of the service may have some individualized negotiation does not alter the nature of the underlying service”).

<sup>256</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5763-64, para. 363.

<sup>257</sup> 47 U.S.C. § 153(24).

<sup>258</sup> *RIF Order*, 33 FCC Rcd at 322-25, paras. 30-32.

end user functionality in tandem with edge providers,”<sup>259</sup> as the Commission did in the *RIF Order*, fails to recognize the relationship of BIAS transmission services to other functions, which may be offered by either the ISP or a third party of the end user’s choice.<sup>260</sup> Logically, under the framework set out in the *RIF Order*, even traditional switched telephone service would be classified as an information service, as it provides customers with the ability to make information available to others (e.g., public service announcements), retrieve information from others, and process and utilize stored information from others (e.g., by interacting with a call menu). We tentatively conclude that the best and more reasonable interpretation of the statutory language is that BIAS is a telecommunications service, while the applications that run over BIAS either constitute distinct information services or fall within the exception to the information service definition for capabilities used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>261</sup> We seek comment on this proposed analysis.

75. We tentatively conclude that companion services, such as DNS and caching, when provided with BIAS, fit within the telecommunications systems management exception to the definition of “information service,” and therefore when these services are provided with BIAS, they do not convert BIAS into an information service. We seek comment on this tentative conclusion. The Act’s telecommunications systems management exception excludes from the definition of “information service” “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>262</sup> In the *2015 Open Internet Order*, the Commission concluded that when DNS and caching are offered with BIAS, they “either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both.”<sup>263</sup> In the *RIF Order*, the Commission took a contrary view, concluding that “DNS and caching functionalities . . . offered by ISPs[] are integrated information processing capabilities offered as part of broadband Internet access service to consumers today.”<sup>264</sup> On review of the *RIF Order*, Judge Millett explained in her concurrence that “the question is whether the combination of transmission with DNS and caching *alone* can justify the information service classification. If we were writing on a clean slate, that question would seem to have only one answer given the current state of technology: No.”<sup>265</sup> She added that “new factual developments call[ed] for serious technological reconsideration and engagement through expert judgment. Instead, the Commission’s exclusive reliance on DNS and caching blinkered itself off from modern broadband reality, and untethered the service ‘offer[ed]’ from both the real-world marketplace and the most ordinary of linguistic conventions.”<sup>266</sup> We intend to guide our decisionmaking about the role of DNS and caching based on today’s broadband reality, and we seek information on the present circumstances.

76. We tentatively conclude that the Commission’s 2015 analysis provides the more reasonable application of the relevant statutory terms and Commission precedent to DNS functionality

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<sup>259</sup> *Id.* at 323-24, para. 31.

<sup>260</sup> *See id.* at 339, para. 50.

<sup>261</sup> 47 U.S.C. § 153(24).

<sup>262</sup> *Id.*

<sup>263</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5765, para. 365.

<sup>264</sup> *RIF Order*, 33 FCC Rcd at 325, para. 33.

<sup>265</sup> *Mozilla*, 940 F.3d at 90 (Millett, J., concurring); *see also id.* at 94-95 (Wilkins, J., concurring) (“As Judge Millett’s concurring opinion persuasively explains, we are bound by the Supreme Court’s decision in [*Brand X*], even though critical aspects of broadband Internet technology and marketing underpinning the Court’s decision have drastically changed since 2005.”).

<sup>266</sup> *Mozilla*, 940 F.3d at 91 (Millett, J., concurring).

with respect to BIAS,<sup>267</sup> and we seek comment on this tentative conclusion. In the *2015 Open Internet Order*, the Commission analogized DNS to adjunct-to-basic services,<sup>268</sup> such as speed dialing, call forwarding, and computer-provided directory assistance, and concluded that because it is effectively equivalent to routing information and does not alter the fundamental character of the telecommunications service, it falls within the telecommunications systems management exception to the definition of “information service.”<sup>269</sup> The *RIF Order* rejected the adjunct-to-basic comparison largely based on its contention that adjunct-to-basic services and the telecommunications systems management exception must be viewed narrowly, effectively to only include functions that solely facilitate transmission.<sup>270</sup> Because it concluded that DNS, as then used, is a core function of BIAS that provides more than a functionally integrated address-translation capability, it determined that DNS did not fall within the exception.<sup>271</sup> We tentatively disagree with the *RIF Order*’s narrow characterization of adjunct-to-basic services and the telecommunications systems management exception as not mandated by the statutory language; however, even under that unnecessarily narrow characterization, we believe DNS would fall under the telecommunications management exception, as its fundamental purpose is to route information—i.e., to facilitate transmission.

77. We further believe that even if DNS did not fall within the telecommunications systems management exception to the Act’s definition of “information services,” it is not so inextricably intertwined so as to convert the entire BIAS offering into an information service, consistent with the Commission’s finding in 2015.<sup>272</sup> In support of the *2015 Open Internet Order*’s conclusion, the Commission explained that IP packet transfer can work without DNS and that DNS lookup is available through third parties.<sup>273</sup> In the *RIF Order*, the Commission argued that even though DNS can also be provided by third parties, the focus should remain on the capabilities that ISPs offer, which it concluded is a single, inextricably intertwined information service.<sup>274</sup> However, in her *Mozilla* concurrence, Judge Millet noted that “DNS, much like email, is now free and widely available to consumers in the Internet marketplace.”<sup>275</sup> We tentatively conclude that the *2015 Open Internet Order*’s showing that DNS is not a necessary component of BIAS, which the *RIF Order* did not dispute, provides the better rationale for evaluating whether DNS transforms the entire BIAS offering into an information service, and tentatively

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<sup>267</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5765-69, paras. 366-69.

<sup>268</sup> “Adjunct-to-basic” functions were those features and services that met the literal definition of “enhanced service” but did not alter the fundamental character of the associated basic transmission service and thus were treated as basic (i.e., telecommunications) services even though they went beyond mere transmission. See *Computer II Final Decision*, 77 FCC 2d at 421, para. 98; *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133 and 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831, para. 16 (2005), *aff’d*, *AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006); *Non-Accounting Safeguards Order*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, para. 107 n.245 (1997); *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, 360, para. 26 (1985). The Commission has held that such functions: (1) must be “incidental” to an underlying telecommunications service—i.e., “‘basic’ in purpose and use” in the sense that they facilitate use of the network; and (2) must “not alter the fundamental character of [the telecommunications service].” See *id.* at 359-61, paras. 24, 27, 28.

<sup>269</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5765-69, paras. 366-69.

<sup>270</sup> *RIF Order*, 33 FCC Rcd at 331, para. 39.

<sup>271</sup> *Id.* at 326-27, para. 34.

<sup>272</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5769-70, para. 370.

<sup>273</sup> See *id.*

<sup>274</sup> *RIF Order*, 33 FCC Rcd at 338-39, paras. 49-50.

<sup>275</sup> *Mozilla*, 940 F.3d at 90 (Millet, J., concurring).

conclude that it does not. We seek comment on this tentative conclusion. Does the Commission's 2015 analysis of DNS as it relates to BIAS remain relevant, accurate, and persuasive? Why or why not? Are there any technical or commercial developments that should cause us to reconsider this analysis?

78. For the same reasons the Commission found in 2015, we believe that caching,<sup>276</sup> when provided in connection with BIAS, is “used to facilitate the transmission of information so that users can access other services, in this case by enabling the user to obtain ‘more rapid retrieval of information’ through the network,” and thus falls within the telecommunications systems management exception. We seek comment on this analysis. The Commission concluded otherwise in the *RIF Order*, finding that “ISP-provided caching does not merely ‘manage’ an ISP’s broadband Internet access service and underlying network, it enables and enhances consumers’ access to and use of information online” and that because it is “useful to the consumer,” caching does not fall within the telecommunications systems management exception.<sup>277</sup> However, we do not believe consumers consider caching capabilities when purchasing BIAS. We seek comment regarding the technical and commercial aspects of caching, how caching functionality is both provisioned by ISPs and offered to customers, as well as the relevance (if any) of Commission precedent as applied to caching today.

79. In particular, given that web pages today change constantly and are often customized on a per-user basis, we question whether ISPs cache popular content requested by multiple users to supply the same web page when requested later, rather than fetching the page anew. Further, as Judge Millett observed in *Mozilla*, caching “does not work when users employ encryption,” which as of 2017 constituted a majority of Internet traffic, which suggests “that caching no longer enjoys the pride of place ascribed to it” by the *RIF Order*.<sup>278</sup> We seek comment on whether ISPs use this practice and, to the extent that commenters contend they do, why (given the ever-changing nature and high customization of contemporary web pages). In addition, should the Commission distinguish between caching by ISPs and the kind of caching that third-party content providers use to keep copies of content (such as videos and images, but possibly also web pages) closer to users? We preliminarily conclude that caching of this kind is not provided by ISPs and thus is not a part of BIAS, and as such does not transform BIAS into an information service.

80. We also seek comment on whether there are other functionalities provided or offered with BIAS, besides DNS and caching, that might fall into the telecommunications systems management exception, as well as on other add-on information services offered in conjunction with BIAS and how they might affect our analysis with respect to the classification of BIAS. The *2015 Open Internet Order* identified examples of processing-related capabilities that fall within the telecommunications systems management functions, such as security virus protection and blocking denial of service attacks,<sup>279</sup> as well as add-on information services such as cloud-based storage services, email, and spam protection that were often offered in conjunction with BIAS but were not inextricably intertwined with it.<sup>280</sup> Consistent with the Commission's finding in 2015, we propose that “such services are not inextricably intertwined with [BIAS], but rather are a product of the provider’s marketing decision not to offer the two separately,”<sup>281</sup> and seek comment on this proposal. We believe that, to the extent BIAS is offered along with other capabilities that would otherwise fall into the “information service” definition, such an offering does not turn BIAS into a functionally integrated information service. Are there examples of other information

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<sup>276</sup> Caching is the storing of copies of content at locations in the network closer to subscribers than their original sources.

<sup>277</sup> *RIF Order*, 33 FCC Rcd at 332-33, para. 42.

<sup>278</sup> *Mozilla*, 940 F.3d at 91 (Millett, J., concurring).

<sup>279</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5771-72, para. 373.

<sup>280</sup> *Id.* at 5773, paras. 376-77.

<sup>281</sup> *Id.* at 5773, para. 376 (internal quotations omitted); see *Brand X*, 545 U.S. at 1009 & n.4 (Scalia, J., dissenting).

services or capabilities that are often offered by ISPs in conjunction with BIAS? How do consumers view and use these products in relation to their BIAS subscription? How has the market for third-party information services offered in tandem with BIAS developed since the *RIF Order* was adopted? We also seek comment on any devices or applications, such as Wi-Fi hotspots, wearables, appliances, and other IoT devices that an ISP may include with its BIAS offering and how they may function both in conjunction with and apart from the underlying BIAS. How does a secondary market for such devices and applications impact our interpretation that they are separable information services?

81. *Major Questions Doctrine Applicability.* We seek comment on whether, and if so how, the major questions doctrine—the notion that Congress is expected to speak clearly when delegating authority in certain extraordinary cases<sup>282</sup>—should inform the conclusions we reach based on the text and structure of the Act. In the *USTA* decision, the D.C. Circuit reasoned that *Brand X* conclusively held that the Commission has the authority to determine the proper statutory classification of BIAS and that its determinations are entitled to deference, and so there is no need to consult the major questions doctrine here.<sup>283</sup> In opinions respecting the denial of rehearing *en banc*, several judges debated how (if at all) the major questions doctrine would otherwise apply to the issue.<sup>284</sup> The *RIF Order* did not directly dispute this conclusion, but stated that the doctrine supported its decision to classify BIAS as an information service in order to steer clear of any major questions doctrine issues.<sup>285</sup>

82. What factors are relevant to the Commission’s consideration of whether the major questions doctrine applies to the classification of BIAS, taking account of evolving Supreme Court precedent? Among other factors, we ask that commenters consider the extent to which this matter falls within the Commission’s recognized expertise and authority as the federal regulator responsible for “regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, . . . wire and radio communications service with adequate communications facilities at reasonable charges.”<sup>286</sup> In light of relevant Commission precedent, both before and shortly after Congress adopted the 1996 Act, classifying analogous transmission services—including the transmission component of broadband Internet access service offered via digital subscriber line (DSL)—as common carrier services,<sup>287</sup> what basis is there, if any, for concluding that the Commission’s proposed classification action here is an exercise of “newfound power” not previously recognized?<sup>288</sup> Has Congress acted or failed to act on proposals to clarify the proper classification of broadband in subsequent years, and to what extent does such action or inaction inform the Commission’s exercise of its claimed classification authority or the application of the major questions doctrine?<sup>289</sup>

83. We also seek comment on how and to what extent each relevant factor should affect the Commission’s analysis of whether the classification of BIAS implicates the major questions doctrine.

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<sup>282</sup> See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2372-75 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587, 2606-14 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

<sup>283</sup> *USTA*, 825 F.3d at 704; see also *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 383-88 (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing *en banc*).

<sup>284</sup> Compare *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 383 (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing *en banc*) (“The question posed by the doctrine is whether the FCC has clear congressional authorization to issue the rule. The answer is yes.”), with *id.* at 402-08 (Brown, J., dissenting from the denial of rehearing *en banc*) and *id.* at 417-26 (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

<sup>285</sup> *RIF Order*, 33 FCC Rcd at 407-408, para. 161

<sup>286</sup> 47 U.S.C. § 151; see *West Virginia v. EPA*, 142 S. Ct. at 2612-13 (considering whether an agency has “‘comparative expertise’ in making [the] policy judgments” at issue).

<sup>287</sup> See *supra* para. 69.

<sup>288</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2610-12.

<sup>289</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2614.

Commenters should consider how the relevant factors apply to the specific proposals here. For example, should the Commission evaluate the applicability of the major questions doctrine for BIAS as a whole, or should it distinguish between or among particular categories of BIAS offerings? How would the major questions doctrine apply in the case of particular rules we might adopt if we determine BIAS meets a given statutory classification?

84. Separately, even assuming *arguendo* that the major questions doctrine were applied to our classification of BIAS, we seek comment on whether Congress has spoken sufficiently clearly in the Act—in definitional provisions or more generally—to satisfy that standard.<sup>290</sup>

#### **E. Classifying Mobile Broadband Internet Access Service as a Commercial Mobile Service**

85. In addition to our proposed return to the *2015 Open Internet Order*'s classification of BIAS as a telecommunications service, we propose to return to that *Order*'s classification of mobile BIAS as a commercial mobile service.<sup>291</sup> In the alternative, even if mobile BIAS does not meet the definition of “commercial mobile service,” we propose to find that it is the functional equivalent of a commercial mobile service and, therefore, not private mobile service.

86. Section 332(d)(1) of the Act defines “commercial mobile service” as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.”<sup>292</sup> As an initial matter, we tentatively conclude that mobile BIAS is a “mobile service” because subscribers access the service through their mobile devices. Next, we tentatively conclude that mobile BIAS is provided “for profit” because ISPs offer it to subscribers with the intent of receiving compensation. We also tentatively conclude that mobile BIAS is widely available to the public, without restriction on who may receive it.

87. We also propose to return to the *2015 Open Internet Order*'s determination that mobile BIAS is an interconnected service.<sup>293</sup> Section 332(d)(2) states that the term “interconnected service” means “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission). . . .”<sup>294</sup> In the *2015 Open Internet Order*, the Commission reached the conclusion that mobile BIAS was an interconnected service through the application of an updated definition of “public switched network” that included networks that use public IP addresses.<sup>295</sup> In doing so, the Commission highlighted the Commission’s longstanding determination from the *Second CMRS Report and Order* that the term “public switched network” “should not be defined in a static way” as “the

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<sup>290</sup> See *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 383 (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing en banc) (“Assuming . . . that the rule in this case qualifies as a major one so as to bring the doctrine into play, the question posed by the doctrine is whether the FCC has clear congressional authorization to issue the rule. The answer is yes.”). The 1996 Act incorporated the relevant statutory definitions in the Act, which the Commission has broad authority to implement. See, e.g., 47 U.S.C. §§ 154(i), 201(b), 303(r); see also *City of Arlington*, 569 US at 293, 307 (2013). The 1996 Act also required the Commission to adopt rules or orders that turned on the interpretation of those statutory definitions. See, e.g., 47 U.S.C. §§ 160, 224, 251, 253, 254.

<sup>291</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5778-90, paras. 388-408.

<sup>292</sup> 47 U.S.C. § 332(d)(1).

<sup>293</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5779-5788, paras. 390-402.

<sup>294</sup> 47 U.S.C. § 332(d)(2). By stating that the terms “interconnected service” and “public switched network” shall be defined by regulation by the Commission, the statute expressly delegates to the Commission the authority to define these terms.

<sup>295</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5779-86, paras. 391-99.

network is continuously growing and changing because of new technology and increasing demand.”<sup>296</sup> The Commission reversed course in the *RIF Order*, reinstating the prior definition of “public switched network.”<sup>297</sup> We believe the Commission’s decision in the *RIF Order* fails to align with the technological reality and widespread use of mobile BIAS. The ubiquity of mobile BIAS that the Commission recognized in 2015 is even more pronounced today, as mobile broadband networks have continued to develop and grow in the intervening years, with more users and increased mobile data traffic. In 2022, there was more than 73 trillion megabytes of mobile data traffic exchanged in the United States, representing a 38 percent increase from the previous year.<sup>298</sup> Continued growth of mobile BIAS is expected, with one forecast predicting that there will be 410 million 5G mobile subscriptions in North America by 2028.<sup>299</sup> In light of these factors, we propose to return to the *2015 Open Internet Order*’s modernized definition of “public switched network” in section 20.3 of the Commission’s rules,<sup>300</sup> specifically defining the term to mean “the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.”<sup>301</sup> We believe this definition, which includes IP addresses, embodies the current technological landscape and the widespread use of mobile broadband networks, and is therefore more consistent with the Commission’s recognition that the public switched network will grow and change over time. We seek comment on this analysis and our proposed approach.

88. We further propose to reach the same conclusion the Commission did in the *2015 Open Internet Order* that mobile BIAS is interconnected with the “public switched network,” as we propose to define it today.<sup>302</sup> The *2015 Open Internet Order* found that mobile BIAS should be considered interconnected because it was a broadly available mobile service that provided users with the ability to send and receive communications to all other users of the Internet.<sup>303</sup> Given the “universal access” and expected future growth of mobile BIAS, the *2015 Open Internet Order* determined that finding mobile BIAS to be interconnected and a commercial mobile service was consistent with Congress’ objective in section 332 of the Act in creating a symmetrical regulatory framework among similar mobile services that were available to the public.<sup>304</sup> Mobile BIAS remains a broadly available mobile service that provides its users with the ability to send and receive communications and is an essential component of today’s technology landscape. As discussed above, there has been a marked increase in the amount of mobile data traffic in recent years, and continued growth is predicted. Given the continued widespread use and availability of mobile BIAS, we propose to find that mobile BIAS is an interconnected service, and

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<sup>296</sup> *Id.* at 5779, para. 391 (citing *Second Report and Order Implementing Sections 3(n) and 332 of the Communications Act, as Amended by Section 6002(b) of the Omnibus Reconciliation Act of 1993*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1436, para. 59 (1994) (*Second CMRS Report and Order*)). For example, services that use 4G and 5G technology are now IP-based and leverage broadband architecture.

<sup>297</sup> *RIF Order*, 33 FCC Rcd at 355, para. 75.

<sup>298</sup> CTIA, *2023 Annual Survey Highlights* (July 25, 2023), <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>299</sup> Ericsson, *Wireless Mobility Report* (June 2023), <https://www.ericsson.com/en/reports-and-papers/mobility-report/reports/june-2023>.

<sup>300</sup> 47 CFR § 20.3 (definition of “public switched network”).

<sup>301</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5779, para. 391.

<sup>302</sup> *Id.* at 5785-86, para. 398.

<sup>303</sup> *Id.* at 5785-86, paras. 398-99.

<sup>304</sup> *Id.*

propose to support this finding by applying the Commission’s analysis from the *2015 Open Internet Order*<sup>305</sup> to today’s marketplace. We seek comment on our proposed approach.

89. We also propose to rely on the Commission’s analysis from the *2015 Open Internet Order* that mobile BIAS is an interconnected service for the additional reason that it provides users with the capability to communicate with other users of the Internet and with people using telephone numbers through VoIP applications.<sup>306</sup> The *2015 Open Internet Order* found that “users on mobile networks can communicate with users on traditional copper based networks and IP based networks, making more and more networks using different technologies interconnected.”<sup>307</sup> It further identified mobile VoIP, as well as over-the-top mobile messaging, as “among the increasing number of ways in which users communicate indiscriminately between [North American Numbering Plan (NANP)] and IP endpoints on the public switched network.”<sup>308</sup> Since 2015, mobile BIAS users continue to communicate using these tools, with 85 percent of Americans owning a smartphone that offers access to VoIP and over-the-top communications apps.<sup>309</sup> We seek comment on whether there have been any material changes in technology, the marketplace, or other facts that would warrant refinement or revision of the analysis regarding the interconnected nature of mobile BIAS from the *2015 Open Internet Order*.

90. In connection with this approach, we seek comment on whether we should readopt the *2015 Open Internet Order*’s revised definition of “interconnected service” in section 20.3 of the Commission’s rules.<sup>310</sup> That *Order* defined “interconnected service” to mean a service that gives subscribers the ability to “communicate to or receive communications from other users of the public switched network,” removing the requirement that such service provide the ability to communicate with *all* other users of the public switched network.<sup>311</sup> It did so to ensure that services that provide the *capability* to access all other users, including through the use of OTT services, but limit that access in certain limited ways, are not excluded from the definition of “interconnected service.”<sup>312</sup> The *RIF Order* reverted to the prior definition, concluding that “the best reading of ‘interconnected service’ is one that enables communication between its users and all other users of the public switched network” and that the service “must itself provide interconnection to the public switched network using the NANP.”<sup>313</sup> We seek comment on whether it is necessary to return to the definition of “interconnected service” in the *2015 Open Internet Order* to ensure that all appropriate services are covered by the definition.

91. Because we also propose to reclassify mobile BIAS as a telecommunications service, we believe that classifying it as a commercial mobile service would avoid the inconsistency that would result if the service were both a telecommunications service and a private service. The Commission explained this reasoning in the *2015 Open Internet Order*, and we propose to adopt a consistent rationale here.<sup>314</sup> The Commission stated that, because it determined mobile BIAS to be a telecommunications service, “designating it also as commercial mobile service subject to Title II is most consistent with Congressional

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<sup>305</sup> *Id.* at 5779-88, paras. 390-402.

<sup>306</sup> *Id.* at 5786-87, paras. 400-401.

<sup>307</sup> *Id.* at 5787, para. 401.

<sup>308</sup> *Id.*

<sup>309</sup> Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>310</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5778-88, para. 402 n.1175; 47 CFR § 20.3.

<sup>311</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5778-88, para. 402 n.1175.

<sup>312</sup> *See id.* at 5787-88, para. 402.

<sup>313</sup> *See RIF Order*, 33 FCC Rcd at 356-57, 358, paras. 77, 80.

<sup>314</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5788, para. 403.



intent to apply common carrier treatment to telecommunications services.”<sup>315</sup> The Commission found that classifying mobile BIAS as a commercial mobile service was necessary “to avoid a statutory contradiction that would result if the Commission were to conclude both that mobile broadband Internet access was a telecommunications service and also that it was not a commercial mobile service. A statutory contradiction would result from such a finding because, while the Act requires that providers of telecommunications services be treated as common carriers, it prohibits common carrier treatment of mobile services that do not meet the definition of commercial mobile service. Finding mobile broadband Internet access service to be commercial mobile service avoids this statutory contradiction and is most consistent with the Act’s intent to apply common carrier treatment to providers of telecommunication services.”<sup>316</sup> We seek comment on this proposal.

92. In the alternative, to the extent that mobile BIAS falls outside the definition of “commercial mobile service,” we propose to find that it is the functional equivalent of a commercial mobile service and, thus, not private mobile service. The Commission found that mobile BIAS service was functionally equivalent to commercial mobile service because, “like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public. Although the services use different addressing identifiers, from an end user’s perspective, both are commercial services that allow users to communicate with the vast majority of the public.”<sup>317</sup> The *RIF Order* found that the *2015 Open Internet Order*’s focus on the public’s “ubiquitous access” to mobile BIAS alone was “insufficient” to establish functional equivalency and that the test established in the *Second CMRS Report and Order* provided a more thorough consideration of factors of whether a service is closely substitutable for a commercial mobile service.<sup>318</sup> We seek comment on both of these analyses. As the *RIF Order* acknowledged, however, the Commission has discretion to determine whether services are functionally equivalent.<sup>319</sup> Congress expressly delegated authority to the Commission to determine whether a particular mobile service may be the functional equivalent of a commercial mobile service, defining “private mobile service” as “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.”<sup>320</sup> For the reasons outlined in the *2015 Open Internet Order* and in light of the continued increased use and distribution of mobile broadband services and devices, we propose to find that mobile BIAS is the functional equivalent of commercial mobile service.<sup>321</sup> We seek comment on this proposal and on any other or different definition of “functional equivalent” that the Commission should adopt.

93. We anticipate that returning mobile BIAS to its classification as a commercial mobile service and reinstating openness requirements on a larger set of mobile ISPs will allow mobile providers that would become subject to such rules to continue to be able to compete successfully in the marketplace and continue to have incentives to develop new products and services. For example, the Commission has applied open access rules to upper 700 MHz C Block licensees, including Verizon Wireless, for more than a decade, and the mobile operators subject to these requirements have continued to compete

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 5789, para. 404.

<sup>318</sup> *RIF Order*, 33 FCC Rcd at 361, para. 84 (citing *Second CMRS Report and Order*, 9 FCC Rcd at 1447, paras. 78, 79).

<sup>319</sup> *Id.*

<sup>320</sup> 47 U.S.C. § 332(d)(3).

<sup>321</sup> *RIF Order*, 33 FCC Rcd at 361, para. 84.

successfully in the marketplace.<sup>322</sup> We seek comment on this view and on any policy consequences that commenters believe may result from the proposed reclassification of mobile BIAS.

#### F. Preemption of State and Local Regulation of Broadband Service

94. We seek comment on how best to exercise our preemption authority to ensure that BIAS is governed primarily by a national framework, including a uniform floor of ISP conduct rules. The *RIF Order* adopted an expansive preemption decision, but the D.C. Circuit in *Mozilla* concluded that the *RIF Order* “fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority,” and vacated that preemption action.<sup>323</sup> The D.C. Circuit concluded that “in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.”<sup>324</sup> A number of states quickly stepped in to fill that void, adopting their own unique regulatory approaches for BIAS, including their own versions of open Internet requirements, and even measures like regulation of retail rates that the *2015 Open Internet Order* found unnecessary.<sup>325</sup> We anticipate that our proposed regulatory approach to BIAS will remedy the infirmities the D.C. Circuit identified in the *RIF Order*’s approach, and we seek comment on the best way to use our preemption authority.

95. We seek comment on the best sources of preemption authority for us, if needed. For one, we anticipate that the regulatory approach proposed here would give us authority to oversee BIAS under Title II with forbearance, under Title III in the case of mobile ISPs, as well as under section 706 of the 1996 Act. These sources of authority could enable us to adopt regulations that preempt contrary state requirements.<sup>326</sup> We also expect that our proposed regulatory approach could make it more

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<sup>322</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; 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*, WT Docket Nos. 07-166, 06-169, 06-150, 03-264, and 96-86, PS Docket No. 06-229, CC Docket No. 94-102, Second Report and Order, 22 FCC Rcd at 15289, 15364, paras. 203-204; 47 CFR § 27.16.

<sup>323</sup> *Mozilla*, 940 F.3d at 74. See also *ACA Connects v. Bonta*, 24 F.4th 1233,1241-48 (9th Cir. 2022). But see *N.Y. State Telecomms. Ass’n v. James*, 544 F. Supp. 3d 269, 283 & n.10 (E.D.N.Y. 2021) (granting a preliminary injunction of enforcement of a New York law restricting the price of BIAS for low income consumers, concluding among other things that the petitioners were likely to succeed on the merits of their preemption claim, distinguishing *Mozilla* on the theory that it only rejected the FCC’s attempted express preemption there but did not foreclose case-by-case preemption decisions, and distinguishing the district court decision in *ACA Connects* based on the understanding that the California law did not restrict BIAS prices), *appeal pending*, No. 21-1975 (2d Cir. argued Jan. 12, 2023).

<sup>324</sup> *Mozilla*, 940 F.3d at 75.

<sup>325</sup> See *supra* note 45.

<sup>326</sup> See, e.g., *Updating the Commission’s Rules for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, 36 FCC Rcd 537, 549-50, para. 25 (2021) (explaining that “[t]he Commission has used its Section 303 authority to limit State and local regulation of the placement of antennas”); *Rates For Interstate Inmate Calling Services*, WC Docket No. 12-375, Third Report and Order, Order On Reconsideration, and Fifth Further Notice of Proposed Rulemaking, 36 FCC Rcd 9519, 9617, para. 217 (2021) (discussing the Commission’s preemption authority “where the Commission has jurisdiction under section 201(b) of the Act to regulate rates, charges, and practices of interstate communications services”); *Promoting Technological Solutions To Combat Contraband Wireless Device Use In Correctional Facilities*, GN Docket No. 13-111, Second Report and Order and Second Further Notice of Proposed Rulemaking, 36 FCC Rcd 11813 (2021) (adopting rules requiring disabling of contraband wireless phones and “[i]n light of this mandate that wireless providers must act upon, and pursuant to the

(continued....)

straightforward to rely on various express preemption provisions in the Act, such as the preemption that accompanies forbearance under section 10(e),<sup>327</sup> the preemption that arises when state requirements hinder provision of services covered under sections 253 or 332(c)(7) of the Act,<sup>328</sup> the preemption of state requirements contrary to federal universal service policies under section 254(f),<sup>329</sup> and other possible preemption provisions. We expect that Commission decisions finding BIAS to be interstate for regulatory purposes largely resolve possible arguments premised on the limitation on FCC authority over state communications services under section 2(b) of the Act that otherwise could arise here.<sup>330</sup> We seek comment on these views and on any additional sources of statutory authority for preemption, if needed.

96. We seek comment on how far to go in this proceeding in exercising our preemption authority to ensure that BIAS principally is governed by a federal framework. Should we adopt a broad preemption decision like the Commission attempted to do in the *RIF Order*? Or should the Commission proceed more incrementally, such as by only addressing in this proceeding those state or local legal requirements squarely raised in the record, and otherwise deferring to future case-by-case adjudications of preemption?<sup>331</sup> Under an incremental approach, should we identify in this proceeding issues where the Commission will decline to preempt state requirements and thereby share regulatory responsibility with the states, such as state privacy and consumer protection laws? For what issues, if any, is the Commission required to share regulatory responsibility with the states? What are the benefits and drawbacks of permitting state regulation in specific issue areas? What issues may benefit most from shared regulatory responsibility with states?

97. We also seek comment on how best to define the scope of preemption to ensure that BIAS is principally governed by a federal framework. For example, should open Internet conduct rules of the sort proposed below<sup>332</sup> be seen not only as an appropriate nationwide floor providing those protections to everyone, but also as an appropriate ceiling to reflect the balancing of relevant policy considerations? The *2015 Open Internet Order* stated that “should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of BIAS through tariffs or

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Commission’s well-established authority, we preempt any state liability for wireless provider disabling actions that comply with our rules”); *Implementation of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, para. 18 (1999) (providing guidance that “[s]tate rules that likely would be vulnerable to preemption would include those permitting greater carrier use of CPNI than section 222 and our implementing regulations announced herein, as well as those state regulations that sought to impose more limitations on carriers’ use”); see also *Louisiana PSC v. FCC*, 476 U.S. 355, 369 (1986) (“Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”).

<sup>327</sup> 47 U.S.C. § 160(e).

<sup>328</sup> 47 U.S.C. §§ 253, 332(c)(7).

<sup>329</sup> 47 U.S.C. § 254(f).

<sup>330</sup> 47 U.S.C. § 152(b) (stating in pertinent part that “[e]xcept as provided in sections 223 through 227 of this title, inclusive, section 276 of this title, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . .”); see also *Pub. Serv. Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (the Commission can preempt even in the area of matters left to the states under section 2(b) of the Act “when (1) the matter to be regulated has both interstate and intrastate aspects, (2) FCC preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would ‘negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be ‘unbundled’ from regulation of the intrastate aspects” (citations omitted)).

<sup>331</sup> See, e.g., *2010 Open Internet Order*, 25 FCC Rcd at 17970, para. 121 n.374 (adopting an incremental approach); *2015 Open Internet Order*, 30 FCC Rcd at 5804, para. 433 (similar).

<sup>332</sup> See *infra* section V.

otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.”<sup>333</sup> Should the Commission affirmatively preempt in those scenarios here rather than leaving those scenarios for future case-by-case evaluation as it did in 2015? In addition, how should the Commission define what state or local actions are within the scope of any affirmative preemption it might adopt here? To what extent should these decisions be informed by traditional preemption frameworks, such as express preemption,<sup>334</sup> field preemption,<sup>335</sup> or conflict preemption?<sup>336</sup>

#### IV. PROPOSED FORBEARANCE

98. We propose to forbear from applying some Title II provisions to BIAS in the event that we reclassify the service, and we seek comment on what the parameters of such forbearance should be, taking into account as a primary matter that we believe we must enable the Commission to fulfill its responsibility under the Act to protect national security and public safety when executing its other statutory obligations. In the *2015 Open Internet Order*, the Commission accompanied Title II classification with “substantial” forbearance for BIAS in a way that was designed to “strike the right balance at this time of minimizing the burdens on ISPs while still adequately protecting the public, particularly given the objectives of section 706 of the 1996 Act.”<sup>337</sup> We propose to return to largely the same forbearance that was adopted in the *2015 Open Internet Order*, tailored as appropriate in light of any updated conclusions the Commission reaches in this proceeding regarding the need for particular rules, requirements, or sources of authority covering BIAS. Notably, we propose to forbear from Title II provisions insofar as they would support the adoption of *ex ante* rate regulations for broadband Internet access service.<sup>338</sup>

99. However, subsequent developments have highlighted the importance of retaining statutory authority to enable the Commission to address national security and public safety concerns that could arise with respect to BIAS. Those considerations provide a leading basis for revisiting the statutory classification of BIAS, and therefore we propose to depart from the forbearance approach reflected in the

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<sup>333</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5804, para. 433.

<sup>334</sup> See, e.g., *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (Congress may preempt state law “through express language in a statute.”).

<sup>335</sup> *Arizona v. United States*, 567 U.S. 384, 401 (2012) (field preemption “foreclose[s] any state regulation in the area, even if it is parallel to federal standards” or “complementary” to federal regulation). We note, however, that the Commission has recognized in the past certain roles that states might have with respect to BIAS. See, e.g., *RIF Order*, 33 FCC Rcd at 395-97, para. 142 & n.517 (citing state consumer protection laws); *id.* at 428-29, para. 196 (acknowledging “the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings”); *2015 Open Internet Order*, 30 FCC Rcd at 5803, para. 431 n.1276 (observing that “[n]otwithstanding the interstate nature of BIAS, states of course have a role with respect to broadband”); *2010 Open Internet Order*, 25 FCC Rcd at 17970, para. 121 n.374 (recognizing, “for example, that states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints”).

<sup>336</sup> See, e.g., *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (upholding the Commission’s preemption of state structural-separation requirements that “would negate the FCC’s goal of allowing [carriers] to develop efficiently a mass market for enhanced services for small customers” and “defeat the FCC’s more permissive policy of integration,” reasoning that as a matter of conflict preemption, that any state requirement that conflicts with a validly enacted federal substantive policy are preempted under the Supremacy Clause); *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (upholding the Commission’s broad preemption of state efforts to regulate a form of VoIP service because state regulation would interfere with federal policies, including the FCC’s “market-oriented policy allowing providers of information services to burgeon and flourish . . . without the need for and possible burden of rules, regulations and licensing requirements”).

<sup>337</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5804, para. 433; see generally *id.* at 5616-18, 5804-67, paras. 51-59, 434-542 (discussing the forbearance in the *2015 Open Internet Order*).

<sup>338</sup> See *id.* at 5814, paras. 451-52.

*2015 Open Internet Order* by declining to forbear from applying section 214 of the Act, and expressly clarifying that our proposed forbearance would not encompass Title III licensing and authorization authorities,<sup>339</sup> given that those statutory provisions could provide important additional tools to advance the Act’s national security and public safety objectives. We seek comment on that proposal and on any issues related to forbearance with respect to BIAS if classified as a Title II service, including the best understanding of the current status of the forbearance granted in the *2015 Open Internet Order*, the appropriate analytical approach to evaluating forbearance, and the substantive scope of forbearance that should be granted. We also seek comment on the impact of our proposed forbearance approach on ISPs, particularly small ISPs.

#### A. Forbearance Framework

100. As a threshold matter, we seek comment on the best way to interpret the effect of the *RIF Order* on the forbearance previously granted in the *2015 Open Internet Order*. The *RIF Order* stated that, due to the reclassification decision there, “the forbearance granted in the [*2015 Open Internet Order*] is now moot,” and that “carriers are no longer permitted to use the [*2015 Open Internet Order*] forbearance framework (i.e., no carrier will be permitted to maintain, or newly elect, the [*2015 Open Internet Order*] forbearance framework).”<sup>340</sup> We seek comment on how to interpret those statements in the *RIF Order*.

101. Next, we seek comment on the appropriate analytical approach to use when evaluating the statutory forbearance criteria. In the *2015 Open Internet Order*, the Commission stated that “[b]ecause the Commission is not responding to a petition under section 10(c), we conduct our forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act [(APA)], without the burden of proof requirements that section 10(c) petitioners face.”<sup>341</sup> The Commission explained how its approach to forbearance in the *2015 Open Internet Order* satisfied the statutory forbearance criteria, other relevant statutory objectives such as section 706 of the 1996 Act, and applicable procedural requirements under the Act and the APA,<sup>342</sup> and the D.C. Circuit rejected challenges to that forbearance approach in its *USTA* decision.<sup>343</sup> We propose to follow the same analytical approach here and seek comment on that proposal. We also seek comment on alternative analytical approaches or other ways to effectuate the forbearance analysis.<sup>344</sup>

102. We seek comment on the interplay between our approach to forbearance and the argument in the *RIF Order* that the scope of forbearance granted in the *2015 Open Internet Order* suggests that classification of BIAS as a Title II service is contrary to the statutory scheme.<sup>345</sup> In

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<sup>339</sup> As discussed *infra*. at para. 112, we propose to forbear from applying common carrier roaming requirements, conditioned on compliance with our data roaming rules.

<sup>340</sup> *RIF Order*, 33 FCC Rcd at 416-17, para. 174.

<sup>341</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5806-5807, para. 438.

<sup>342</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5805-5808, 5838-41, 5864-67, paras. 435-39, 493-96, 537-42.

<sup>343</sup> *USTA*, 825 F.3d at 726-33.

<sup>344</sup> For example, Judge Williams’s partial dissent in *USTA* questioned aspects of the Commission’s forbearance approach, particularly what he viewed as a disconnect between the granting of forbearance and the nature and scope of competitive assessments and other economic analysis in the *2015 Open Internet Order* as a whole. *USTA*, 825 F.3d at 773-78 (Williams, S.J., concurring in part and dissenting in part). In addition, in a dissent from the D.C. Circuit’s denial of requests to rehear the *USTA* case *en banc*, Judge Brown expressed nondelegation concerns about forbearance, premised particularly on the view that the forbearance decision did not adequately address the required statutory criteria. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 407-408 (D.C. Cir. 2017) (Brown, J., dissenting from the denial of rehearing *en banc*).

<sup>345</sup> *RIF Order*, 33 FCC Rcd at 351-52, para. 64; see also *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 408-409 (D.C. Cir. 2017) (Brown, J., dissenting from the denial of rehearing *en banc*) (making a similar argument).

particular, does such an argument fail to account for important aspects of the approach to forbearance in the *2015 Open Internet Order*? For example, we note that in many cases the *2015 Open Internet Order* evaluated forbearance assuming *arguendo* that particular provisions of the Act or Commission rules apply to BIAS, rather than “first exhaustively determining provision-by-provision and regulation-by-regulation whether and how particular provisions and rules apply to this service.”<sup>346</sup> Do objections to Title II classification premised on the scope of forbearance adequately account for that fact, or do they draw unduly broad conclusions based on simple counts of rules or statutory provisions subject to the forbearance decision?

103. Separately, we propose to leave ISPs’ broadband transmission services—as distinguished from BIAS that relies on that transmission as an input—subject by default to the framework of the *Wireline Broadband Classification Order* as the Commission has done previously. The *RIF Order* observed that such services “have never been subject to the [2015 *Open Internet Order*] forbearance framework,” and stated that “carriers that choose to offer transmission service on a common carriage basis are, as under the *Wireline Broadband Classification Order*, subject to the full set of Title II obligations, to the extent they applied before the” *2015 Open Internet Order*.<sup>347</sup> The *2015 Open Internet Order* did, however, allow a provider previously offering broadband transmission on a common carrier basis “to change to offer Internet access services pursuant to the construct adopted in” that *Order* subject to filing with and review by the Wireline Competition Bureau of the provider’s proposal for the steps it would take to convert to such an approach.<sup>348</sup> We propose to follow the same approach here, and seek comment on that proposal.

## B. Proposed Forbearance

104. We seek comment on the particular statutory provisions and rules that should or should not be subject to forbearance. In this regard, we propose to use the forbearance granted in the *2015 Open Internet Order* as the starting point for our consideration of the appropriate scope of forbearance.<sup>349</sup> There, although the Commission granted broad forbearance, the Commission did not forbear from a number of specific protections or authorities:

- The open Internet rules and section 706 of the 1996 Act;<sup>350</sup>
- “[S]ections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide”;<sup>351</sup>
- Section 222 of the Act, “which establishes core customer privacy protections”;<sup>352</sup>
- Section 224 of the Act and the Commission’s implementing rules, “which grant certain

<sup>346</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5867, para. 542 (discussing the general approach).

<sup>347</sup> *RIF Order*, 33 FCC Rcd at 418-19, paras. 177, 179.

<sup>348</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5819, para. 460 n.1378.

<sup>349</sup> *Id.* at 5616-18, 5804-64, paras. 51-59, 434-536.

<sup>350</sup> *Id.* at 5818, para. 457.

<sup>351</sup> *Id.* at 5817-18, para. 456.

<sup>352</sup> *Id.*; see also *id.* at 5820-24, paras. 462-67. While initially proceeding under the statutory privacy protections alone, *id.* at 5823-24, para. 467, in 2016 the Commission adopted rules implementing section 222 with respect to ISPs’ provision of BIAS. *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911 (2016). The 2016 rules were subject to a resolution of disapproval under the Congressional Review Act in 2017, leaving the statutory protections themselves in place at that time. Joint Resolution, Pub. L. No. 155-22 (2017); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, et al.*, Order, 32 FCC Rcd 5442, 5442-43, para. 2 & n.6 (2017).

benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way”;<sup>353</sup>

- Sections 225, 255, and 251(a)(2) of the Act and the Commission’s implementing rules, “which collectively advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband Internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time”;<sup>354</sup>
- Section 254 of the Act and “the interrelated requirements of section 214(e), and the Commission’s implementing regulations to strengthen the Commission’s ability to support broadband, supporting the Commission’s ongoing efforts to support broadband deployment and adoption”;<sup>355</sup> and
- Requirements governing the wireless licensing process in section 309(b) and (d)(1) of the Act and sections 1.931, 1.933, 1.939, 22.1110, and 27.10 of the Commission’s rules.<sup>356</sup>

105. We propose to forbear from all provisions of Title II that would permit Commission regulation of BIAS rates. We believe that Commission rate regulation is unnecessary because the tailored approach we adopt here will enable the Commission to promote broadband deployment and competition, and because we will be able to rely on sections 201 and 202 to address non-rate related issues.<sup>357</sup> Therefore, while we do not propose to forbear from sections 201 and 202 of the Act as a general matter, we “do not and cannot envision adopting new *ex ante* rate regulation” or *ex post* rate regulation of BIAS,<sup>358</sup> and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of rate regulations for BIAS. We seek comment on this proposal. With respect to section 254, we propose to forbear in part from the first sentence in section 254(d) and our associated rules “insofar as they would immediately require new universal service contributions associated with” BIAS, as the Commission did in 2015, and seek comment on this proposal.<sup>359</sup>

106. In addition to declining to forbear from applying those specifically enumerated provisions of the Act and Commission rules, the Commission also more generally limited its forbearance to the scope of its section 10 forbearance authority, and thus did not forbear from applying statutory provisions or rules that “are not applied to telecommunications carriers or telecommunications services.”<sup>360</sup> The Commission also did not forbear from applying provisions of the Act or Commission rules that already applied to BIAS irrespective of the Title II classification of that service.<sup>361</sup> The Commission cited illustrative examples falling within one or both of those categories, including provisions imposing obligations on the Commission, like section 257 of the Act,<sup>362</sup> provisions that simply

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<sup>353</sup> 2015 *Open Internet Order*, 30 FCC Rcd at 5817-17, para. 456; *see also id.* at 5831-33, paras. 478-85.

<sup>354</sup> *Id.* at 5817-18, para. 456; *see also id.* at 5824-30, paras. 468-77.

<sup>355</sup> *Id.* at 5817-18, para. 456; *see also id.* at 5834-38, paras. 486-92.

<sup>356</sup> *Id.* at 5863-64, paras. 534-36.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 5814, para. 451.

<sup>359</sup> *Id.* at 5835, para. 488.

<sup>360</sup> *Id.* at 5860-61, para. 529; *see also id.* at 5861-63, paras. 531-33.

<sup>361</sup> *Id.* at 5861, para. 530; *see also id.* at 5861-63, paras. 531-33.

<sup>362</sup> *Id.* at 5861-63, para. 531. The Act subsequently was amended and the requirements previously in section 257 were, in pertinent part, incorporated in section 13 of the Act, 47 U.S.C. § 163.

reserve state authority,<sup>363</sup> and the CALEA requirements in section 229.<sup>364</sup> In addition, the Commission did not forbear from provisions that would benefit ISPs.<sup>365</sup> This would include, for example, preemption provisions such as those in sections 253 and 332(c) of the Act,<sup>366</sup> as well as liability limitation provisions in sections 223, 230, and 231 of the Act.<sup>367</sup> To the extent that forbearance was considered and rejected in the *2015 Open Internet Order* for particular statutory provisions, we propose to once again decline to grant forbearance here, and we seek comment on that proposal. As part of that analysis, we seek updated information and analyses regarding the application of the statutory forbearance criteria regarding these provisions and rules that were not subject to forbearance in the *2015 Open Internet Order*. We also seek comment on any relevant analyses or conclusions in the *RIF Order*.<sup>368</sup>

107. Other than in the specific areas described above, the *2015 Open Internet Order* broadly granted forbearance from applying provisions of the Act and Commission rules that newly applied by virtue of the Title II classification of BIAS.<sup>369</sup> We generally propose to again adopt broad forbearance consistent with that outcome, with the exception of statutory authorities that could enable the Commission to advance the Act's goals of national security and public safety. For example, section 1 of the Act makes clear that the Commission was established, among other reasons, "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications."<sup>370</sup> Section 4(n) of the Act directs the Commission to take steps to promote the "maximum effectiveness from the use of radio and wire communications in connection with safety of life and property."<sup>371</sup> In addition, the D.C. Circuit in *Mozilla* emphasized the need to consider the potential benefits of Title II classification of BIAS for the Commission's authority to protect public safety.<sup>372</sup> Although public safety considerations were an important element of the Commission's overall decision in the *2015 Open Internet Order*, preserving the Commission's public safety authority above and beyond that granted in sections 201 and 202 of the Act was not as explicit a focus in much of the Commission's tailoring of forbearance there. We thus seek comment on what specific provisions should be excluded from the scope of forbearance here in light of those national security and public safety interests, as discussed in greater detail above.<sup>373</sup>

108. Given the role section 214 of the Act has played in the Commission's efforts to address national security and law enforcement concerns related to U.S. telecommunications networks, we

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<sup>363</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5861-63, para. 531 (citing comments that reference sections 214(e)(2), 224(c), 253, and 261 of the Act).

<sup>364</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5861-63, para. 533.

<sup>365</sup> *Id.* at 5862, para. 532.

<sup>366</sup> 47 U.S.C. §§ 253, 332(c).

<sup>367</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5862, para. 532.

<sup>368</sup> *See, e.g., RIF Order*, 33 FCC Rcd at 419-23, paras. 181-84 (discussing reliance on the FTC to address privacy); *id.* at 423-25, paras. 185-91 (discussing the potential continued availability of statutory protections under the Act to support the deployment of wireline and wireless infrastructure for commingled services, and under state regulation of pole attachments); *id.* at 425-26, paras. 192-93 (discussing the extent to which the Commission would remain able to provide universal service support for broadband-capable networks and services); *id.* at 432-33, para. 205 (discussing the protections for persons with disabilities that would continue to apply); *id.* at 434, para. 206 (discussing the continued application of Title III licensing provisions).

<sup>369</sup> *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5838-60, paras. 493-528.

<sup>370</sup> 47 U.S.C. § 151.

<sup>371</sup> 47 U.S.C. § 154(n).

<sup>372</sup> *Mozilla*, 940 F.3d at 59-63.

<sup>373</sup> *See supra* sections III.B.3.



tentatively conclude that we should exclude that provision from any forbearance granted here.<sup>374</sup> How should the Commission apply its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies, to BIAS providers?<sup>375</sup> We seek comment on any implementation issues arising from our tentative conclusion and how we could best address them. For example, would implementation challenges arise if the Commission immediately applied to BIAS providers its existing procedures for international section 214 authorizations, which include coordination of applications that have reportable foreign ownership with the relevant Executive Branch agencies?<sup>376</sup> We note that the *2015 Open Internet Order* recognized that certain implementation issues could arise from the application of section 222 and the Commission's implementing rules to BIAS, and sought to mitigate those effects pending a rulemaking specifically focused on implementing section 222 for BIAS.<sup>377</sup> Should we proceed in a similar manner with respect to some or all aspects of international section 214 authorizations, whether by adopting temporary forbearance, temporary grants of blanket international section 214 authority,<sup>378</sup> or in some other manner? We also seek comment on any implementation issues concerning our domestic section 214 requirements.

109. We also make clear that our proposed forbearance would not encompass Title III licensing authorities, including sections 301-303, 307-309, 312, and 316 of the Act, which we believe likewise grant us important authority that can be used to advance national security and public safety with respect to the services and equipment subject to licensing.<sup>379</sup> We also seek comment on whether we should exclude from the scope of our forbearance provisions sections 218 and 220 of the Act, which authorize the Commission to obtain information from common carriers, which could provide important tools to investigate public safety and security-related issues that arise. We seek comment on those proposals and on any other provisions of the Act or Commission rules that likewise should be expressly excluded from the scope of forbearance based on national security and/or public safety considerations, including, for example, sections 305, 310, and 332 of the Act.<sup>380</sup>

110. The D.C. Circuit's *Mozilla* decision also highlighted the potential benefits of Title II classification of BIAS for the Commission's authority to encourage deployment through regulation of

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<sup>374</sup> See *supra* para. 27.

<sup>375</sup> See generally *Executive Branch Process Reform Order; Review of International Section 214 Authorizations to Assess Evolving National Security, Law Enforcement, Foreign Policy, and Trade Policy Risks; Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission's Rules*, IB Docket No. 23-119 and MD Docket No. 23-134, Order and Notice of Proposed Rulemaking, FCC 23-28 (Apr. 25, 2023).

<sup>376</sup> See generally *id.*

<sup>377</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5822-24, paras. 466-67.

<sup>378</sup> The Commission previously has granted blanket domestic section 214 entry authority. 47 CFR § 63.01.

<sup>379</sup> 47 U.S.C. §§ 301-303, 307-309, 312, 316. As the *RIF Order* explained, the application of those provisions do not depend on the classification of BIAS. *RIF Order*, 33 FCC Rcd at 434, para. 206. Consequently, although not all of those statutory provisions were expressly enumerated as excluded from forbearance in the *2015 Open Internet Order*, they were not subject to forbearance there because they did not newly apply by virtue of the classification of BIAS as a telecommunications service, or the classification of mobile BIAS as CMRS, and we clarify that they likewise would not be encompassed by our proposed forbearance here. See *2015 Open Internet Order*, 30 FCC Rcd at 5861, para. 530 (declining to forbear from provisions if they do not newly apply by virtue of the classification decisions in that *Order*).

<sup>380</sup> 47 U.S.C. § 305 (requiring Government radio stations using frequencies assigned by the President to conform to FCC rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe); 47 U.S.C. § 310 (establishing limitations on foreign ownership requirement for common carriers); 47 U.S.C. § 332 (addressing regulatory treatment of mobile services and preemption of state and local requirements pertaining to wireless siting).

pole attachments and to provide universal service support for low income households.<sup>381</sup> In consideration of those interests, the Commission previously excluded sections 224 and 254 of the Act from the scope of its forbearance in the *2015 Open Internet Order*.<sup>382</sup> We seek comment on whether there are additional or different ways those interests should be reflected in the tailoring of forbearance here.

111. We believe that the *RIF Remand Order* was too quick to dismiss concerns regarding public safety, pole attachments, and low income universal service support as speculative or unproven, and we seek comment on that view. Do commenters agree that the *RIF Remand Order* gave insufficient weight to the potential additional benefits that could be achieved through additional authority retained by virtue of Title II classification of BIAS?

112. We also seek comment on any additional or different ways that forbearance could be tailored here. For example, the *2015 Open Internet Order* adopted conditional forbearance from common carrier roaming regulations, subject to mobile ISPs complying with the data roaming requirements.<sup>383</sup> Conditioned in that manner, the Commission was able to find the statutory forbearance criteria satisfied.<sup>384</sup> We propose to follow the same approach with respect to our roaming rules here, and also seek comment on whether there are other provisions of the Act or Commission rules where conditional forbearance would satisfy the statutory forbearance criteria, even if unconditional forbearance would not. More generally, we also seek comment on alternative frameworks we might draw upon in deciding on how to tailor forbearance here. For example, in the *2015 Open Internet Order*, the Commission elected to grant broader forbearance despite some calls to limit forbearance just to the scope of relief previously granted to CMRS providers.<sup>385</sup> We seek renewed comment on that approach, as well as any alternative options for tailoring forbearance here based on the regulatory experience in other contexts.

113. We also seek comment on whether forbearance should be differently tailored in the specific context of the Internet traffic exchange portion of BIAS. In the *2015 Open Internet Order*, the Commission's "definition for broadband Internet access service include[d] the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network."<sup>386</sup> Consequently, under the *2015 Open Internet Order*, Internet traffic exchange was subject to the same forbearance as BIAS more generally.<sup>387</sup> We propose to continue that uniform approach here, but also seek comment on whether and to what extent the Internet traffic exchange component of BIAS should be subject to different tailoring of forbearance.

114. Finally, we also seek comment on any relevant new rules or statutory requirements enacted subsequent to the forbearance analysis in the *2015 Open Internet Order*.

## V. PROPOSED OPEN INTERNET RULES

115. Today we propose to return to the basic framework the Commission adopted in 2015 to protect the openness of the Internet. In 2015, consistent with its longstanding policy approach to protect Internet openness through basic conduct "rules of the road," the Commission adopted a set of carefully tailored conduct rules to prevent specific practices harmful to an open Internet—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent deployment of new

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<sup>381</sup> *Mozilla*, 940 F.3d at 1, 65-70.

<sup>382</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5817-18, 5831-33, 5834-38, paras. 456, 478-85, 486-92.

<sup>383</sup> *Id.* at 5857-58, paras. 523-26.

<sup>384</sup> *Id.*

<sup>385</sup> *See, e.g., id.* at 5848, 5864, paras. 510 n.1559, 537.

<sup>386</sup> *Id.* at 5686-87, para. 195.

<sup>387</sup> *See, e.g., id.* at 5686-87, para. 195 & n.485 (discussing the legal authority available for oversight of Internet traffic exchange, and cross-referencing the *2015 Open Internet Order*'s forbearance discussion).

practices that would harm Internet openness, and enhancements to the existing transparency rule.<sup>388</sup> In the *RIF Order*, the Commission broke with this longstanding approach by altogether eliminating the open Internet conduct rules,<sup>389</sup> which we believe left consumers exposed to behavior that can hinder their ability to access the open Internet. Below, we propose to reinstate straightforward, clear rules that are designed to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS.

116. We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. The rules we propose today are consistent with numerous other steps the Commission has taken to ensure that this country has access to affordable, competitive, secure, and reliable broadband.<sup>390</sup> The proposed rules would establish clear standards for ISPs to maintain Internet openness and would give the Commission a solid basis on which to take enforcement action against conduct that prevents people from fully accessing all of the critical services available through the Internet.

#### **A. Need for Rules**

117. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs. Above, we express our belief that consumers perceive and use BIAS as an essential service, critical to accessing healthcare, education, work, commerce, and civic engagement.<sup>391</sup> Because of its importance, we further believe it is paramount that consumers be able to use their BIAS connections without degradation due to blocking, throttling, paid prioritization, or other harmful conduct. The rules we propose today are designed to ensure these protections. Below, we seek comment on particular issues that inspire the need for these rules, including protecting public safety, ISPs' incentives and abilities to harm Internet openness, the effects of harmful conduct on consumer demand and edge innovation, reliance on the Commission's communications sector expertise to address harmful conduct, and how the *RIF Order's* oversight framework addresses harmful conduct. We invite commenters to submit economic analyses that weigh the costs and benefits of the Commission potentially adopting open Internet rules.

#### **1. Promoting Innovation and Free Expression**

118. In the *2015 Open Internet Order*, the Commission found that Internet openness helps promote innovation, investment, and free expression, among other goals.<sup>392</sup> Among other things, the Commission found that the record there “overwhelmingly support[ed] the proposition that the Internet’s openness is critical to its ability to serve as a platform for speech and civic engagement,” facilitate “the development of diverse content, applications, and services,” and enable “a virtuous cycle of innovation.”<sup>393</sup> We continue to place high importance on innovation, investment, and free expression, and we believe that conduct rules designed to ensure Internet openness will better advance those goals, consistent with the reasoning in the *2015 Open Internet Order*. We seek comment on that view.

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<sup>388</sup> *Id.* at 5603, para. 4.

<sup>389</sup> *See RIF Order*, 33 FCC Rcd at 450, para. 239.

<sup>390</sup> *See supra* notes 1 and 105.

<sup>391</sup> *See supra* section III.A.

<sup>392</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5625-26, para. 76.

<sup>393</sup> *Id.* at 5627, para. 77.

119. We are skeptical of the *RIF Order*'s rejection of free expression as a likely benefit of Internet conduct rules designed to advance Internet openness. The *RIF Order* theorized that competition "will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression."<sup>394</sup> We question, however, whether the *RIF Order* was correct to place such confidence in the marketplace as sufficient to advance free expression on the Internet. Do consumers and the public have information about how ISP actions affect free expression on a sufficiently granular and detailed basis to act on that information? Separately, the *RIF Order* acknowledged that "[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value."<sup>395</sup> We doubt that consumers are likely to act uniformly as a single, undifferentiated group, particularly where issues like free expression are concerned. We thus question how well the *RIF Order*'s analysis accounts for the interests of consumers who place different values on free expression. More generally, we seek updated information and analysis about the anticipated effects of Internet conduct rules on free expression.

## 2. Protecting Public Safety

120. We believe that blocking, throttling, paid prioritization, and other potential conduct have the potential to impair public safety communications in a variety of circumstances and therefore harm the public. As discussed above, one of the Commission's fundamental obligations under the Act is to advance public safety.<sup>396</sup> The *Mozilla* court highlighted this charge and recognized the significance of it, emphasizing that "whenever public safety is involved, lives are at stake."<sup>397</sup> It went on to note that "[a]ny blocking or throttling of [safety officials'] Internet communications during a public safety crisis could have dire, irreversible results."<sup>398</sup> Similarly, in the *2015 Open Internet Order*, the Commission recognized that paid prioritization and peering disagreements can negatively affect public safety communications traveling over the same networks.<sup>399</sup> Above, we detail and seek comment on the wide range of public safety communications and applications that rely on broadband networks and on the related national security concerns implicating broadband service providers.<sup>400</sup> We now seek comment on our belief that maintaining the *RIF Order*'s *ex post* enforcement framework will provide insufficient protection against conduct harms, which includes harms to public safety or national security.<sup>401</sup> We believe that the conduct rules we propose are necessary to prevent and mitigate harms to those public safety uses that would result from blocking, throttling, and other conduct, and we seek comment on our

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<sup>394</sup> *RIF Order*, 33 FCC Rcd at 402-403, para. 153.

<sup>395</sup> *Id.* at 402-03, para. 153 n.558.

<sup>396</sup> *See supra* para. 33; 47 U.S.C. § 151.

<sup>397</sup> *Mozilla*, 940 F.3d at 59-60, 62.

<sup>398</sup> *Id.* at 61; *see also id.* at 60 (pointing out that "public safety officials explained at some length how allowing ISPs to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis").

<sup>399</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5654-55, 5689-90, paras. 126, 199.

<sup>400</sup> *See supra* section III.B.2.

<sup>401</sup> *See infra* section 6. We note that the *Mozilla* court expressed specific skepticism about the Commission's contention in the *RIF Order* that post-activity enforcement is a suitable method to address harmful conduct in the public safety context, emphasizing that "even if discriminatory practices might later be addressed on a post-hoc basis by entities like the Federal Trade Commission, the harm to the public cannot be undone." *Mozilla*, 940 F.3d at 61 (internal quotation omitted).

tentative conclusion.<sup>402</sup> We seek comment on consumer experiences where they have been harmed.

121. We further believe our proposed conduct rules would have particular benefits for the safety of individuals with disabilities. Above, we highlighted that these individuals increasingly rely on Internet-based communications,<sup>403</sup> and that “[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.”<sup>404</sup> We believe the use of broadband to facilitate Internet-based communications by persons with disabilities for public safety purposes, such as to contact emergency service providers, has a higher likelihood of being degraded by prioritization of latency-sensitive applications on the same facilities than less data-intensive uses, such as email, software updates, or cached video. We accordingly believe that our proposed rules would prevent such degradation and seek comment on this proposed analysis.

122. We seek comment on any other public safety harms or unaddressed concerns that the proposed rules would help to alleviate. For example, would the proposed rules help to improve public safety officials’ ability to communicate via alerting systems to help improve emergency preparedness? Would they help to provide additional necessary bandwidth for IP-based communications to Public Safety Answering Points via 9-1-1? Would such rules help the authorities responding to such calls to have better or more complete information about an emergency to ensure a more comprehensive or timely response? Would such rules help public safety and law enforcement authorities to better communicate with one another during their responses to emergencies? What public safety issues have arisen since the Commission’s prior 2015 and 2018 orders that the proposed rules would help to address?

### 3. ISPs’ Incentive and Ability to Harm Internet Openness

123. In both the *2010 Open Internet Order* and *2015 Open Internet Order*, the Commission concluded that open Internet rules were needed because ISPs have the incentive and ability to engage in practices that pose a threat to Internet openness.<sup>405</sup> In particular, the Commission found that because ISP networks serve as platforms for Internet ecosystem participants to communicate, ISPs “are in a position to act as a ‘gatekeeper’ between end users’ access to edge providers’ applications, services, and devices and reciprocally for edge providers’ access to end users.”<sup>406</sup> The *2015 Open Internet Order* highlighted several economic incentives ISPs have to exploit this gatekeeper role, “such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users.”<sup>407</sup> This behavior, the Commission found, “has the potential to cause a variety of other negative externalities that hurt the open nature of the Internet,” which ISPs do not internalize.<sup>408</sup> The Commission also concluded that ISPs “have the technical ability to act on incentives to harm the open Internet.”<sup>409</sup>

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<sup>402</sup> Our proposed conduct rules may also support consumer use of telehealth service and remote healthcare monitoring, such as through connected devices, by ensuring consumers can continue to access these services without the threat of blocking, throttling, or other degradation.

<sup>403</sup> See *supra* section III.B.5.

<sup>404</sup> California Public Utilities Commission Comments, WC Docket Nos. 17-108, 17-287, and 11-42, at 10 (Apr. 20, 2020).

<sup>405</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17915, para. 21; *2015 Open Internet Order*, 30 FCC Rcd at 5625, para. 75.

<sup>406</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5629, para. 80.

<sup>407</sup> *Id.*; see also *id.* at 5632-33, para. 82 (explaining how ISPs may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources).

<sup>408</sup> See *id.* at 5633, para. 83 (describing how ISPs have incentives to engage in practices that will provide short term gains but will not adequately take into account the effects on the virtuous cycle).

<sup>409</sup> See *id.* 5634, para. 85 (describing the tools ISPs have at their disposal to monitor and regulate the flow of traffic over their networks).

124. The *RIF Order* offered several reasons for rejecting the prior rationales, including ISPs' economic incentives and supposed material competitive restraints.<sup>410</sup> We believe these conclusions presumed that there were other ISPs to which consumers can switch if they were suffering open Internet harms, and that the switching costs would not deter such switching. In addition, we tentatively agree with the *Mozilla* court, which found that, “[t]aken together, the Commission fail[ed] to provide a fully satisfying analysis of the competitive constraints faced by broadband providers.”<sup>411</sup> The Commission also claimed that “from the perspective of many edge providers, end users do not single home, but subscribe to more than one platform (e.g., one fixed and one mobile) capable of granting the end user effective access to the edge provider’s content (i.e., they multi-home),” and “to the extent multihoming occurs in the use of an application, there is no terminating monopoly.”<sup>412</sup> However, consumers may lack access to both fixed and mobile connections,<sup>413</sup> and even when they do have access to both, the Commission did not show that these connections allow consumers to access all edge provider services unhindered, and therefore are truly competitive alternatives. Indeed, the Commission has since concluded that “fixed broadband and mobile wireless broadband are not substitutes in all cases,” finding that each type of service “enables different situational uses.”<sup>414</sup> We seek comment on this analysis.

125. The *RIF Order* also found the Commission’s action in the *2015 Open Internet Order* was unjustified because it lacked evidence of harms to Internet openness.<sup>415</sup> Setting aside the several examples of harmful conduct discussed in the *2015 Open Internet Order* and detailed in the record for the *RIF Order*, we believe the *RIF Order*’s conclusion gave inadequate consideration to the effects of the Commission’s consistent efforts to apply and enforce the open Internet standards since early 2005, which we believe deterred harmful ISP conduct. Thus, to the extent there is limited evidence of harmful conduct prior to the *2015 Open Internet Order*, we believe that demonstrates the Commission’s consistent efforts to apply and enforce open Internet standards since 2005 were effective and are needed, not that the *2015 Open Internet Order* and the protections it adopted were unjustified. We seek comment on this analysis.

126. We tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that pose a threat to Internet openness, and seek comment on this tentative conclusion and the above analysis. We also seek to update the record underlying the conclusions in the *2010 Open Internet Order* and *2015 Open Internet Order*.<sup>416</sup> How have changes in the marketplace or technology since 2015 affected ISPs’, including smaller ISPs, incentives and ability to engage in such practices? To what extent do ISPs have economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers? To what extent do vertically integrated providers have particularized incentives to discriminate—on price, quality, or other bases—in favor of affiliated products? For instance, we believe that many major ISPs are affiliated with OTT services or continue to offer competitive vertically integrated OTT services, and frequently provide consumers with promotional offers that bundle OTT

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<sup>410</sup> *RIF Order*, 33 FCC Rcd at 379, 382, paras. 117, 123.

<sup>411</sup> *Mozilla*, 940 F.3d at 57.

<sup>412</sup> *RIF Order*, 33 FCC Rcd at 391, para. 136.

<sup>413</sup> See *2022 Communications Marketplace Report* at Fig. II.A.3a, para. 345 (determining that in rural areas, approximately 75 percent of Americans are covered by both fixed terrestrial 100/20 Mbps services and 5/1 Mbps mobile 4G LTE and that on Tribal lands, approximately 74 percent of Americans have coverage from both services).

<sup>414</sup> *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269, Fourteenth Broadband Deployment Report, 36 FCC Rcd 836, 841, para. 11 (2021) (*Fourteenth Broadband Deployment Report*).

<sup>415</sup> *RIF Order*, 33 FCC Rcd at 378, para. 116.

<sup>416</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17915, at para. 21; *2015 Open Internet Order*, 30 FCC Rcd at 5625, para. 75.

services with BIAS.<sup>417</sup> Do these affiliate relationships and vertically integrated offerings create additional incentive for ISPs to favor those services over others? To what extent should the Commission evaluate the ability and incentives of other intermediaries involved in the exchange of Internet traffic, such as middle mile and backbone providers, to engage in conduct harmful to Internet openness, particularly with respect to their relationships with ISPs? We seek comment on this analysis.

127. We also seek comment on whether ISPs are incentivized to increase revenues by charging edge providers for access or prioritized access to the ISPs' end users. Are there justifications for charging fees to edge providers that were not present in 2015? We seek comment on these and other economic incentives and abilities that ISPs may have to limit openness.

128. We seek comment on the state of competition in the BIAS market. We note that the Commission's *2022 Communications Marketplace Report* found that, as of 2021, approximately 36 percent of households lack a competitive option for fixed broadband at speeds of 100/20 Mbps and that 70 percent of households in rural areas lack such an option.<sup>418</sup> While competition in the mobile BIAS market is somewhat more significant, fixed and mobile services have not proven to be substitutable.<sup>419</sup> To what extent does the state of competition affect ISPs' incentives to limit openness? Are there different incentives for small ISPs? Similarly, to what extent does the state of competition affect ISPs' incentives to innovate and invest in their networks? We seek insight into whether consumers in all areas of the country have adequate choices in the fixed and mobile broadband service market. Also, to what extent do broadband services with substantially different technical characteristics serve as competitive substitutes? How, if at all, do commercial practices differ in places where consumers have only one or two choices, particularly when those choices use different technologies? Although the Commission previously found that its authority is not predicated on a finding of market power, and this finding has twice been upheld, is there a reason we should engage in a market power analysis now with respect to ISPs and, if so, how? We further seek comment on whether there are other economic theories that we should consider to better understand and assess ISP incentives to engage in practices that affect the Internet's openness. We also seek comment on the extent to which the state of competition in the BIAS market should play a role in our decision as to whether or not to reclassify BIAS as a Title II service.<sup>420</sup>

129. We further seek information on ISP conduct since the *RIF Order* was adopted. Are there examples of conduct that has harmed Internet openness? We note that one 2019 study suggested that ISPs regularly throttle video content.<sup>421</sup> Aside from specific examples of harm, could other factors have deterred ISPs from engaging in any behavior that might have violated open Internet principles? For

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<sup>417</sup> See Peter Hoslin, *5 Streaming Deals You Can Get When You Sign Up for a New Internet Plan*, HighSpeedInternet.com (Apr. 13, 2022), <https://www.highspeedinternet.com/resources/best-internet-perks> (highlighting several Internet plan bundles: AT&T with HBO Max, Verizon with Disney+, Hulu, and ESPN+, T-Mobile with Paramount+, and Xfinity with Peacock Premium). See also *supra* note 78.

<sup>418</sup> See *2022 Communications Marketplace Report* at Figs. II.A.28 & II.A.29, paras. 56-58. Preliminary FCC staff calculations using December 2022 Broadband Deployment Collection data yield similar results.

<sup>419</sup> See *2022 Communications Marketplace Report* at para. 157 ("Many households continue to subscribe to both fixed and mobile broadband service, suggesting that these separate services offer benefits that are either complementary or independent of each other.") (footnote omitted). See also *Fourteenth Broadband Deployment Report* at 841, para. 11 (finding that "fixed broadband and mobile wireless broadband are not substitutes in all cases" because each type of service "enables different situational uses").

<sup>420</sup> See *supra* section III.

<sup>421</sup> See Fangfan Li et al., *A Large-Scale Analysis of Deployed Traffic Differentiation Practices*, SIGCOMM '19 (2019); see also Khalida Sarwari, *Northeastern University researcher finds that wireless networks are throttling video streaming 24/7*, Northeastern Global News (Aug. 27, 2019), <https://news.northeastern.edu/2019/08/27/northeastern-university-researcher-finds-that-wireless-networks-are-throttling-video-streaming-24-7>.

instance, while the *RIF Order* was published in the Federal Register in February of 2018, it was not until the *Mozilla* case concluded in October of 2019 that it was clear open Internet rules would no longer be in effect. To what degree might long-term contracts, and the general difficulty of implementing new business models, also have played a role in making it difficult for ISPs to exploit opportunities the *RIF Order* created? Could the threat of regulation have led ISPs to make voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order*, as they did,<sup>422</sup> and if so, would this threat have dimmed with time? Because broadband connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments. Further, following the *RIF Order*, ISPs have been subject to state laws and executive orders addressing Internet conduct.<sup>423</sup> How have state regulations addressing ISP conduct affected ISP conduct nationwide? We also observe that unprecedented consumer demand for BIAS and edge innovation that occurred during the pandemic also led to unprecedented growth for ISPs. How did this growth impact providers' incentives either to comply with open Internet principles or to engage in behavior that might increase their revenues at the expense of Internet openness? Are smaller ISPs' incentives or ability to engage in conduct that might harm Internet openness different from those facing larger ISPs? What are the costs and advantages of waiting to act only after ISPs begin to take actions that might harm Internet openness? Would such conduct be immediately identifiable? How quickly could ISPs comply with new rules and what harms would occur in the meantime? Going forward, is there reason to believe that ISPs will engage in conduct that harms the open Internet, particularly if the Commission chooses not to adopt open Internet rules?

#### 4. Consumer Demand and Edge Innovation

130. We believe that an important byproduct of an open Internet is the edge innovation and consumer demand that promotes ISP investment, and seek comment on this position. In the *2015 Open Internet Order*, the Commission recognized that “innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.”<sup>424</sup> The Commission referred to this as the “virtuous cycle,” and it was the foundation for the action the Commission took in both the *2010 Open Internet Order* and *2015 Open Internet Order*.<sup>425</sup> The validity of the virtuous cycle was upheld by both the *Verizon* court and the *USTA*

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<sup>422</sup> See, e.g., *Xfinity Internet Broadband Disclosures*, Xfinity, <https://www.xfinity.com/policies/internet-broadband-disclosures> [<https://perma.cc/Y7L5-KMXD>] (last visited Sept. 20, 2023) (pledging that Comcast does not block or throttle traffic, subject to reasonable network management practices, or engage in paid prioritization arrangements); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023); *Verizon Broadband Commitment*, Verizon, <https://www.verizon.com/about/our-company/verizon-broadband-commitment> [<https://perma.cc/K29R-W95Q>] (last visited Sept. 20, 2023).

<sup>423</sup> See, e.g., SB-822, 2017-2018 Reg. Sess. (Cal. 2018) (adopting open Internet-type requirements); H.B. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (similar); H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018) (requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government); S.289, No. 169, 2018 Sess. (Vt. 2018) (similar); LD 1364, 129th Leg., Reg. Sess. (Me. 2019) (similar); Colorado S.B. 19-078, 71st Leg., Reg. Sess. (Colo. 2019) (requiring compliance with certain open Internet-type requirements as a condition of state universal service support); NY Gen. Bus. § 399-zzzzz (N.Y. 2021) (restricting BIAS prices for low income consumers); Mont. Exec. Order No. 3-2018 (2018), [https://spb.mt.gov/\\_docs/Laws-Rules-EOs/EOs/EO-03-2018-Net-Freedom.pdf](https://spb.mt.gov/_docs/Laws-Rules-EOs/EOs/EO-03-2018-Net-Freedom.pdf) (amended by Mont. Exec. Order No. 6-2018 (2018), [https://spb.mt.gov/\\_docs/Laws-Rules-EOs/EOs/EO-06-2018-Amended-Net-Freedom.pdf](https://spb.mt.gov/_docs/Laws-Rules-EOs/EOs/EO-06-2018-Amended-Net-Freedom.pdf)) (requiring compliance with certain open Internet-type requirements as a condition of contracting with the state government); N.J. Exec. Order No. 9 (2018), <https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf> (similar); N.Y. Exec. Order No. 175 (2018); R.I. Exec. Order No. 18-02 (2018), <https://governor.ri.gov/executive-orders/executive-order-18-02> (similar).

<sup>424</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5663, para. 142.

<sup>425</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17927, para. 38; *2015 Open Internet Order*, 30 FCC Rcd at 5625-26, paras. 75-76.



court.<sup>426</sup> The *RIF Order*, however, discounted the *2015 Open Internet Order*'s reliance on the virtuous cycle, contending there was a two-sided market in which ISPs acted as platforms and benefited from facilitating interactions between both sides of the market—edge providers and end users—and profits from inducing both sides of the market to use its platform.<sup>427</sup>

131. We tentatively conclude that the *RIF Order*'s explanation of how two-sided markets work does not address a central problem open Internet rules are intended to address. When an ISP's actions harm content creators and edge providers, the impact is distributed across all ISPs, not just the ISP undertaking the action. Yet, each ISP only accounts for the impact on its own operations. Consequently, a profit-making decision from the perspective of the individual ISP creates repercussions across all ISPs that harm the industry and the economy at large. When an ISP makes the profit-maximizing decisions the *RIF Order* describes, it only accounts for the impacts of its decision on its own company. It does not account for the impact of those actions on ISPs that lie outside its geographic market.<sup>428</sup> These constitute the bulk of ISPs. Thus, an ISP, for example, that does not face fully effective competition, might expect to see higher profits if it sets prices for edge providers that recover in expectation a little more than its long-term costs. However, consistent with the reasoning of the *RIF Order*, it will not set prices for edge providers that are so high that the impact on the quality of edge provider service would cause the ISP to lose more because it would be forced to lower prices to its own consumers. We believe that the difficulty with the *RIF Order* analysis is that in setting its profit-maximizing prices for edge providers, the ISP lowers service quality for all ISPs, but that harm does not feature in the ISP's profit-maximizing calculation. While the impact on content quality of a single ISP setting prices for edge providers somewhat above the competitive level will be small and spread out over all ISPs,<sup>429</sup> all similarly situated ISPs face similar incentives. Thus, since ISPs have no means of coordinating their behavior, and doing so could be illegal, each will behave in this way with material negative cumulative effects. The result is a breaking of the virtuous cycle described in the *2010 Open Internet Order*: not only will ISPs collectively be worse off, but so will the broader economy. We seek comment on this analysis and other bases for validating or questioning the *RIF Order*'s analysis.

132. We believe it is necessary to secure the open Internet to preserve the virtuous cycle wherein market signals on both sides of ISPs' platforms encourage consumer demand, content creation, and innovation, with each respectively increasing the other, providing ISPs incentives to invest in their networks. We further believe that if innovative edge services are subject to blocking, throttling, paid prioritization, or other conduct by ISPs that harms Internet openness, that conduct will reduce edge innovation. This will, in turn, reduce the quality and quantity of edge services available to consumers, and, specifically with blocking and throttling, directly inhibit consumers from accessing the edge services they desire. The impacts on edge services and consumers will reduce demand for broadband connections and ultimately suppress the need for ISPs to invest in upgrades to their networks or new deployments to meet that demand. Stalled ISP network improvements ultimately will undermine new edge innovation and consumer demand. We seek comment on this proposed analysis.

133. We believe the conduct rules we propose will protect edge innovation and the ability of consumers to access those new and developing services, thereby promoting both edge and ISP investment. We seek comment on this view. In particular, what is the role of the Internet's openness in facilitating consumer demand and edge innovation that encourages edge and ISP investment? We are

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<sup>426</sup> *Verizon*, 740 F.3d at 644; *USTA*, 825 F.3d at 707.

<sup>427</sup> *RIF Order*, 33 FCC Rcd at 380, para. 119.

<sup>428</sup> This also applies to rivals. While the ISP considers the reaction of any competitor within its footprint to its prices, it is not concerned that its actions may lower the profits of its rivals.

<sup>429</sup> This could be true even if the impact of above competitive prices was isolated to the pricing ISP, since there is no reason to think the impact on content of a price that is slightly above competitive rates would result in an equal or greater offset of profit due to the resulting decline in quality.

also interested in understanding the role the open Internet may play in the promotion of edge competition or in the reduction or elimination of barriers to edge entry and investment.

### 5. The Commission’s Ability to Address Conduct that Undermines an Open Internet

134. We believe that, as the expert agency on communications, the Commission is best positioned to safeguard Internet openness. The *RIF Order* removed the Commission’s authority to enforce open Internet requirements and left to the FTC the responsibility to address harmful ISP conduct.<sup>430</sup> The current Chair of the FTC agrees that the Federal Communications Commission “has the clearest legal authority and expertise to fully oversee internet service providers,” noting specifically that she supports efforts by the Commission “to reassert that authority and once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market.”<sup>431</sup> We seek comment on whether the Commission’s longstanding oversight of the communications industry gives it unique technical, economic, and public interest aptitude in evaluating ISP conduct. To what extent does the Commission’s enforcement apparatus provide it with sufficient authority and capabilities to address harmful conduct by ISPs, including by securing administrative relief? What efficiencies would be achieved as a result of the Commission having authority over BIAS along with other communications services (e.g., voice and cable) that providers offer to customers as part of bundled offerings?

### 6. The *RIF Order*’s Framework

135. When the Commission repealed the open Internet rules in the *RIF Order*, it broke from the Commission’s persistent efforts to preserve an open Internet. The *RIF Order* did not address the longstanding bipartisan agreement that the Commission should prohibit ISPs from engaging in blocking, throttling, and other conduct that undermines an open Internet and—importantly—that it should have the authority to enforce those restrictions.<sup>432</sup> This was echoed by the *Mozilla* court, which was “troubled by the Commission’s failure to grapple with the fact that, for much of the past two decades, ISPs were subject to some degree of open Internet restrictions.”<sup>433</sup> The *Mozilla* court explained, that “[w]hile outside observers may associate ‘light touch’ with a distinct era in regulation and ‘open Internet’ with another era, the successive Commission majorities have consistently vowed fealty to both.”<sup>434</sup> We believe the *RIF Order* failed to ensure the most basic protections for the open Internet—prohibitions on blocking and throttling—let alone other threats to the open Internet identified in the *2015 Open Internet Order*. We seek comment on this analysis.

136. We believe that the *2015 Open Internet Order* was consistent with Commission precedent by applying a light-touch regulatory framework to preserve an open Internet. When the *Verizon* court struck down the *2010 Open Internet Order*, the Commission sought to implement a solution

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<sup>430</sup> See *RIF Order*, 33 FCC Rcd at 393-403, paras. 140-54.

<sup>431</sup> Remarks of FTC Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers, Commission File No. P195402, 2 (Oct. 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597790/20211021\\_isp\\_privacy\\_6b\\_statement\\_of\\_chair\\_khan\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597790/20211021_isp_privacy_6b_statement_of_chair_khan_final.pdf).

<sup>432</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5619-21, 5623, paras. 64-67, 62. See also Maggie Farry, *Net Neutrality Is and Has Always Been a Bipartisan Issue*, Open Technology Institute (Dec. 2, 2021), <https://www.newamerica.org/oti/blog/net-neutrality-is-and-has-always-been-a-bipartisan-issue/> (“The FCC’s first action to enforce net neutrality was in 2005, under a Republican Chairman, Kevin Martin. . . . An avid defender of net neutrality, Chairman Martin sided with Democratic FCC commissioners in 2008, deciding Comcast’s slowing down of BitTorrent traffic was unlawful.”).

<sup>433</sup> *Mozilla*, 940 F.3d at 56.

<sup>434</sup> *Id.* at 65.

to preserve longstanding open Internet standards that supported the unprecedented growth in fixed and mobile subscribership, edge innovation, and network investment that occurred up to that point. The Commission determined that classifying BIAS as a Title II service was not only more consistent with a modern assessment of how the definition of “telecommunications service” applies to current BIAS offerings, but would also enable it to apply and enforce open Internet rules.<sup>435</sup> Thus, in establishing open Internet rules using a light-touch application of Title II, we believe the *2015 Open Internet Order* ensured maintenance of the status quo that had existed for more than ten years prior to that *Order*. As such, we tentatively conclude that the action we propose today restores the status quo that had existed up until the Commission adopted the *RIF Order*, in which clear rules of the road ensure that edge innovation and investment flourish and consumers can access all lawful content they see fit. We seek comment on our proposed assessment.

137. *Transparency.* The Commission’s transparency rule requires ISPs to publicly disclose the network practices, performance characteristics, and commercial terms of the BIAS they offer, including disclosure of any blocking, throttling, and affiliated or paid prioritization practices.<sup>436</sup> We recognize that transparency is a valuable tool to protect the open Internet, but that it is only one element of a comprehensive framework that prevents consumers from experiencing harms that inhibit their access to an open Internet. While the transparency requirements currently in place provide consumers and edge providers the ability to make informed decisions, we believe their effectiveness is limited because they do not restrict ISPs from engaging in activities that have long enjoyed bipartisan opposition—blocking, throttling, and discrimination—let alone other conduct that has the potential to cause harm, such as paid prioritization.<sup>437</sup> We tentatively conclude that these are the types of conduct that require *ex ante* intervention to ensure they do not happen in the first instance, and therefore tentatively conclude that the comprehensive set of conduct rules that we propose today are needed to protect consumers from this conduct. We seek comment on this tentative conclusion.

138. *Consumer Protection and Antitrust Law.* We seek comment on whether, in practice, consumer protection and antitrust laws provide sufficient protections against blocking, throttling, paid prioritization, and other conduct that harms the open Internet, as the *RIF Order* asserted.<sup>438</sup> The *Mozilla* court explained that the *RIF Order* “theorized why antitrust and consumer protection law is preferred to *ex ante* regulations but failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling.”<sup>439</sup> The *RIF Order* also seems to concede that blocking, throttling, and discrimination may be permitted under its chosen oversight and enforcement framework,<sup>440</sup> and that paid prioritization may be found to be permissible in many instances.<sup>441</sup>

139. We seek comment on the application of consumer protection laws by the FTC. Notably, a 2021 Supreme Court ruling restricted the FTC’s ability to seek monetary relief on behalf of consumers, thereby reducing the deterrent effect of the FTC’s actions.<sup>442</sup> Congress has also created other exceptions

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<sup>435</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5733-34, 5745, paras. 307-308, 335.

<sup>436</sup> See *RIF Order*, 33 FCC Rcd at 437-45, paras. 215-31.

<sup>437</sup> Indeed, the *RIF Order* only requires that companies disclose their blocking, throttling, and paid or affiliated prioritization in their transparency disclosures; it does not prohibit companies from engaging in these practices. *Id.* at 450, para. 240.

<sup>438</sup> See *id.* at 393-403, paras. 140-54.

<sup>439</sup> *Mozilla*, 940 F.3d at 59.

<sup>440</sup> *RIF Order*, 33 FCC Rcd at 467, para. 264; *id.* at 396, para. 142; *id.* at 397 n.519.

<sup>441</sup> *Id.* at 465, para. 261.

<sup>442</sup> Press Release, FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring, Federal Trade Commission (Apr. 27, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-asks-congress-pass-legislation->

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to the FTC’s consumer protection authority<sup>443</sup> and assigned consumer protection responsibilities to other agencies that have expertise in both consumer protection and the relevant industry.<sup>444</sup> Finally, we also observe that while the FTC has generally proceeded through *ex post* enforcement actions and public guidance, reclassification would allow the Commission to proceed by establishing *ex ante*, commonly applicable rules. We seek comment on the benefits and burdens of such an approach.

140. We also seek comment on whether the FTC’s and Department of Justice’s (DOJ) antitrust enforcement authority is limited in its ability to protect against open Internet harms.<sup>445</sup> The *RIF Order* claims that antitrust would be effective because harmful conduct would be evaluated under the “rule of reason,” which it claims amounts to a “consumer welfare test.”<sup>446</sup> However, the “rule of reason” analysis includes a subjective determination about whether alleged economic benefits outweigh recognized consumer harms.<sup>447</sup> Because the analysis focuses on economic factors, does it provide sufficient weight to important non-economic factors, which courts have recognized are appropriate to consider under the public interest standard of the Act?<sup>448</sup> Even if strict application of antitrust law does not reveal a violation

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[reviving-agencys-authority-return-money-consumers-harmed-law](#) (discussing an “April 22 ruling by the U.S. Supreme Court that eliminated the FTC’s longstanding authority under Section 13(b) of the FTC Act to recover money for harmed consumers”).

<sup>443</sup> 15 U.S.C. § 45(a)(2) (“The [FTC] is hereby empowered and directed to prevent persons, partnerships, or corporations, *except* banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”) (emphasis added).

<sup>444</sup> *See, e.g.*, Consumer Product Safety Commission, <https://www.cpsc.gov/About-CPSC> (last visited Sept. 20, 2023) (“CPSC works to save lives and keep families safe by reducing the unreasonable risk of injuries and deaths associated with consumer products . . . by: Issuing and enforcing mandatory standards or banning consumer products if no feasible standard would adequately protect the public.”); Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/about-us> (last visited Sept. 20, 2023) (“The Consumer Financial Protection Bureau . . . implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive.”); Department of Transportation, <https://www.transportation.gov/about> (last updated Mar. 28, 2022) (“To deliver the world’s leading transportation system, serving the American people and economy through the safe, efficient, sustainable, and equitable movement of people and goods.”); Food and Drug Administration, <https://www.fda.gov/about-fda/what-we-do> (last updated Mar. 28, 2018) (“The Food and Drug Administration is responsible for protecting the public health by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices; and by ensuring the safety of our nation’s food supply, cosmetics, and products that emit radiation.”); Environmental Protection Agency, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last updated May 23, 2023) (“The mission of EPA is to protect human health and the environment.”).

<sup>445</sup> Both the FTC and DOJ can bring enforcement actions for violation of the Sherman Act. 15 U.S.C. § 1 (barring contract, combinations, or conspiracies in restraint of trade, making anticompetitive arrangements illegal); 15 U.S.C. § 2 (applying if a firm possesses or has a dangerous probability of achieving monopoly power, prohibits exclusionary conduct, which can include refusals to deal and exclusive dealing, tying arrangements, and vertical restraints).

<sup>446</sup> *RIF Order*, 33 FCC Rcd at 397, para. 143.

<sup>447</sup> *See id.* at 398, para. 147 (stating that the rule of reason is “an all-encompassing inquiry, paying close attention to the consumer benefits and downsides of the challenged practice based on the facts at hand”) (quoting Hon. Maureen K. Ohlhausen, *Antitrust Over Net Neutrality*, 15 Colo. Tech. L. J. 119, 122 (2016)).

<sup>448</sup> *See, e.g.*, *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (“[T]he touchstone” of “public interest” in the Act “is as concrete as the complicated factors for judgment in such a field of delegated authority permit; it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy”); *Huawei Technologies USA, Inc. v. FCC*, 2 F.4th 421, 438-39 (5th Cir. 2021) (noting that “the Supreme Court has interpreted the public interest provisions of the Communications Act expansively” and finding

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of section 1 or section 2 of the Sherman Act, could there still be market distortions and power asymmetries, both between ISPs and other market players and between ISPs and consumers, that require *ex ante* intervention in the public interest, at least in instances where the Commission may find that conduct is unjust, unreasonable, or unreasonably discriminatory? For example, would regulatory intervention be necessary in instances when there is a high likelihood of harm to consumers and the likelihood or availability of effective remedies for consumers is speculative?

141. *Consumer Relief.* Even if the *RIF Order*'s oversight and enforcement framework were to provide some protection, we seek comment on whether it gives consumers a meaningful opportunity to secure relief. The *RIF Order* concluded that its framework “ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.”<sup>449</sup> It appears that consumers' primary means for seeking recourse under that framework is to submit complaints to the FTC with the goal of spurring the agency to direct its resources to investigate and address the alleged harms. With antitrust, in particular, it appears that to pursue relief, consumers must submit complaints that describe conduct that inhibits their access to the Internet, attempt to tie that conduct to anticompetitive behavior that harms other entities, and otherwise rely on the FTC or other entities to bring suits alleging anticompetitive conduct that also harms the open Internet. We seek comment on whether consumers can effectively use these mechanisms to obtain relief, and do so in a timely manner, and we seek comment generally regarding consumers' experiences obtaining relief following the *RIF Order*.

142. Aside from the remedies offered by law, we seek comment on the adequacy of other methods the *RIF Order* offers that consumers can use to secure relief. First, the *RIF Order* suggests that consumers may be able to seek service from another ISP if they are experiencing harmful conduct, but as discussed above,<sup>450</sup> it is not clear there is adequate local competition in many areas, especially rural areas, to give consumers a meaningful choice among providers, and we seek comment on this assessment.<sup>451</sup> For instance, 36 percent of households lack a competitive option for broadband at speeds of 100/20 Mbps and 70 percent of households in rural areas lack such an option.<sup>452</sup> At higher speeds, the level of competition becomes non-existent in most areas with approximately 96 percent of households lacking a competitive option for gigabit broadband service.<sup>453</sup> Even when consumers have access to another provider not engaging in behavior that is inconsistent with an open Internet, to what extent is their choice between providers often negated because the alternatives charge significantly higher prices or provide lower performance and quality of service? Second, the *RIF Order* states that if ISPs engage in conduct that harms the open Internet, public attention from consumer backlash would police their behavior, but it seems to assume that the harmful conduct by ISPs would be obvious or widespread—rather than surreptitious or sporadic—such that a sufficient number of consumers would be aware of the conduct and vocal in their objections to have the necessary force to influence ISP conduct. Third, even if ISP conduct was sufficiently egregious to result in a consumer backlash, how would that backlash police ISP behavior? We seek comment on the foregoing.

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that “considering national security under the public interest” is appropriate). We recognize that since the Commission adopted the *RIF Order*, the FTC rescinded its 2015 policy statement concerning how it addresses unfair methods of competition and replaced it with a new policy statement, but we believe the FTC's new approach to competition oversight is still fundamentally geared toward protecting competition rather than consumers. Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Federal Trade Commission (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

<sup>449</sup> *RIF Order*, 33 FCC Rcd at 313, para. 4.

<sup>450</sup> *See supra* para. 128.

<sup>451</sup> *See 2022 Communications Marketplace Report* at Figs. II.A.28 and II.A.29, paras. 56-58.

<sup>452</sup> *See id.*

<sup>453</sup> *Id.* at Fig. II.A.28, para. 56.

143. Further, to the extent the *RIF Order*'s oversight and enforcement framework can address harmful conduct when it occurs, we seek comment on whether the framework will still result in fewer instances where ISPs will be subject to enforcement action for conduct that is clearly harmful to an open Internet. If the *RIF Order*'s framework becomes the settled approach, will consumers suffer a greater amount of harmful conduct than would exist under the open Internet rules we propose, and receive fewer remedies when that harm occurs? Even when remedies are achieved, will they provide sufficient redress to harms resulting from ISPs' conduct? Does the *RIF Order*'s regulatory framework adequately serve the public interest, given how essential broadband is to full participation in today's society and economy?

144. *Edge Provider Protections.* We believe the *RIF Order*'s reliance on antitrust protections undermines the virtuous cycle by failing to protect the small edge services that comprise an important part of the Internet. While antitrust protections would apply where, for example, an ISP favored its own edge provider, or sought to harm a competing edge provider, antitrust protections do not forbid the unjust or unreasonable exercise of market powers. But it is exactly those practices that could unravel the virtuous cycle. As part of its justification for reliance on antitrust law, the *RIF Order* expresses particular concern about the effect of regulations on small ISPs.<sup>454</sup> But we believe that there are far more edge services that are small—typically many times smaller than the smallest ISPs—which the *RIF Order* does not acknowledge or evaluate. We seek comment on this belief and on the extent to which providers of these edge services would have any leverage in negotiations with ISPs of any size, let alone large, vertically integrated ISPs. Should large, or even small, ISPs begin seeking paid prioritization arrangements, for example, would this disproportionately harm small edge providers, for example, because larger edge providers could use their own countervailing power to better manage the situation? Would this increase entry barriers, harming edge provider competition and innovation, for example, by discouraging new entry against larger established edge providers? In all of these cases, what legal case would a harmed edge provider be able to bring under antitrust law and what would the likelihood of success be? The *RIF Order* argues that ISPs have incentives to support nascent competition as more edge provider competition will reduce the countervailing power of large, entrenched ISPs. We seek comment on whether this is accurate, and in particular whether any efforts or investments by an ISP to help nascent edge providers would produce diffuse benefits to all ISPs, and thus whether any single ISP would have appropriate incentives to help develop edge provider competition.

145. Research in innovation economics suggests that edge innovation is heterogeneous.<sup>455</sup> Some types of edge innovation will thrive under general purpose open networks. Such innovations could have significant positive spillover effects that benefit the broader Internet ecosystem. However, other types of edge innovation, especially during the early phases of the innovation process, may be facilitated by quality of service differentiation of the network. This suggests that a forward-looking open Internet policy will be most supportive of innovation if it protects the openness of the access platforms for innovations with high spillover effects while at the same time allowing non-discriminatory forms of network differentiation to support edge innovations that are facilitated by such support. We seek comment on this proposed analysis.

146. *Costs of Oversight Regime.* We seek comment generally on the costs to ISPs resulting from the *RIF Order*'s chosen oversight regime. The *RIF Order* claims that its approach would lower compliance costs for ISPs.<sup>456</sup> We reiterate, however, that because the *RIF Order*'s preemption directive was vacated by the D.C. Circuit in *Mozilla*, ISPs are now subject to a patchwork of state requirements for BIAS, rather than a national regulatory framework.<sup>457</sup> We seek comment on the costs of this patchwork

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<sup>454</sup> *RIF Order*, 33 FCC Rcd at 299-300, para. 149.

<sup>455</sup> See, e.g., Carlyss Y. Baldwin and Kim B. Clark, *Design rules: the power of modularity*. MIT Press, 2000.

<sup>456</sup> See *RIF Order*, 33 FCC Rcd at 450, para. 239.

<sup>457</sup> See *supra* para. 24.

approach.

147. We also seek comment on the costs of the *RIF Order*'s consumer protection and antitrust oversight framework. We observe that whether an act is unfair or deceptive under consumer protection law each depends on its own three-prong subjective test,<sup>458</sup> which can result in unforeseen outcomes, and the antitrust rule of reason relies on a case-by-case evaluation.<sup>459</sup> In light of these factors, we seek comment on whether the *RIF Order*'s removal of bright-line, *ex ante* rules can result in significant compliance cost for ISPs. Relatedly, what are the costs to ISPs for having to evaluate the risks of their planned conduct under this consumer protection and antitrust oversight framework?

## B. Conduct Rules

148. We propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements, and also seek comment on the adoption of a proposed general conduct standard for ISPs. The last several years have demonstrated not only broadband's essential value, but also the consequences to consumers of its absence or degradation, and we therefore believe it important to establish clear, bright-line rules. We seek comment on the proposals and analyses herein.

149. The conduct rules we propose track the language of the rules the Commission adopted in the *2015 Open Internet Order*.<sup>460</sup> In 2015, the Commission found that blocking, throttling, and paid prioritization arrangements were three practices that "in particular demonstrably harm the open Internet."<sup>461</sup> The Commission adopted rules to ban these three practices, finding that they are "inherently unjust and unreasonable, in violation of section 201(b) of the Act, and that these practices threaten the virtuous cycle of innovation and investment that the Commission intends to protect under its obligation and authority to take steps to promote broadband deployment under section 706 of the 1996 Act."<sup>462</sup> Even while eliminating these protections in 2018, the *RIF Order* still recognized the harms of blocking and throttling practices<sup>463</sup> and required disclosure of such practices under its revised transparency rule.<sup>464</sup> Below, we seek comment on how experience since the *RIF Order* would help inform the scope and language of prohibitions on blocking, throttling, and paid prioritization arrangements. At the outset, however, we seek comment at a broader level on whether these three practices are still the key threats to Internet openness.

150. We do not anticipate that the open Internet rules we propose today will have a harmful effect on investment. ISP investment was not inhibited from 2005 through 2016, when the Commission consistently sought to impose and enforce open Internet standards.<sup>465</sup> We also believe that many ISP investment decisions over the next several years will be significantly influenced by the influx of federal

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<sup>458</sup> See *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (last visited Sept. 20, 2023) (explaining that an act or practice is "deceptive" if it (1) involves a material representation, omission, or practice that (2) is likely to mislead a consumer (3) acting reasonably in the circumstances, and that an act or practice is "unfair" if it (1) causes or is likely to cause substantial injury to consumers, (2) which is not reasonably avoidable by consumers themselves, and (3) is not outweighed by countervailing benefits to consumers or to competition).

<sup>459</sup> Ramsi A. Woodcock, *The Hidden Rules of A Modest Antitrust*, 105 Minn. L. Rev. 2095, 2100 (2021) ("The rule of reason, in other words, is a license to engage in case-by-case adjudication.").

<sup>460</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5648, 5651, 5653, paras. 112, 119, 125.

<sup>461</sup> *Id.* at 5647, para. 110.

<sup>462</sup> *Id.*

<sup>463</sup> See *RIF Order*, 33 FCC Rcd at 468, para. 265.

<sup>464</sup> See *id.* at 440, para. 220.

<sup>465</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5612-13, 5619-25, paras. 38-40, 64-74.

and state funding allocated to ISPs to support infrastructure deployment and broadband connectivity.<sup>466</sup> In light of these facts, we do not expect that adopting open Internet rules will change ISP investment decisions. Do commenters agree? Furthermore, we believe that “[w]ithout an open Internet, there would be less broadband investment and deployment” because of the expected harm to the virtuous cycle.<sup>467</sup> As the Commission concluded in the *2015 Open Internet Order*, “to the extent that our decision might in some cases reduce providers’ investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.”<sup>468</sup> We seek comment on these views.

### 1. Preventing Blocking of Lawful Content, Applications, Services, and Non-harmful Devices

151. We propose to adopt a bright-line rule prohibiting ISPs from blocking lawful content, applications, services, or non-harmful devices. In 2015, the Commission found that ISPs function as gatekeepers for both their end-user customers who access the Internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider’s end-user subscribers.<sup>469</sup> The Commission concluded that ISPs have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users.<sup>470</sup> Reversing course in 2018, the Commission determined, in contrast, that “ISPs have strong incentives to preserve Internet openness, and these interests typically outweigh any countervailing incentives an ISP might have.”<sup>471</sup> As discussed above, we tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that threaten Internet openness,<sup>472</sup> and as such, we believe rules are needed to protect a consumer’s right to access lawful content, applications, and services, and to use non-harmful devices. We seek comment on this proposed analysis.

152. As the Commission found in the *2010 Open Internet Order* and the *2015 Open Internet Order*, we believe 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.”<sup>473</sup> To that end, we propose to adopt the following no-blocking rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the prohibition adopted by the *2015 Open Internet Order*:

*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.*

We seek comment on this proposed rule and whether this remains the best formulation of a no-blocking principle for ISPs. As in 2015, we intend that the phrase “content, applications, and services” refers to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may

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<sup>466</sup> See NTIA, BroadbandUSA, *Federal Funding*, <https://broadbandusa.ntia.doc.gov/resources/federal/federal-funding> (last visited Sept. 20, 2023) (providing information on federal funding programs); NTIA, BroadbandUSA, *States*, <https://broadbandusa.ntia.doc.gov/resources/states> (last visited Sept. 20, 2023) (providing information on broadband funding programs by state).

<sup>467</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5606, para. 11; *supra* section A.4.

<sup>468</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

<sup>469</sup> See *id.* at 5628, para. 78.

<sup>470</sup> See *id.* at 5628-43, paras. 78-101.

<sup>471</sup> *RIF Order*, 33 FCC Rcd at 378, para. 117; see also *id.* at 378-93, paras. 116-39.

<sup>472</sup> See *supra* section A.3.

<sup>473</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5647-48, para. 111 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17941-42, para. 62).



not fit clearly into any of these categories.<sup>474</sup> Is this language expansive enough to encompass all types of Internet traffic, or are there additional categories that we should include? We also propose to make clear that the no-blocking rule would prohibit ISPs from charging edge providers a fee to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customers.<sup>475</sup> As in 2015, we also propose that this prohibition will apply to transmission of lawful content only and does not prevent or restrict an ISP from refusing to transmit unlawful material.<sup>476</sup> We seek comment on these proposals. What other consequences of a no-blocking rule should we consider?

153. As far back as the Commission's *Internet Policy Statement* in 2005, major ISPs have broadly accepted a no-blocking principle.<sup>477</sup> Even after the repeal of the no-blocking rule, many ISPs continue to advertise a commitment to open Internet principles on their websites, which include commitments not to block traffic except in certain circumstances.<sup>478</sup> Rather than reflect a lack of potential harm to consumers and the open Internet, we believe that these continued commitments to no-blocking principles emphasize their importance to the Internet as we know it. We believe that codifying this principle in the Commission's rules is necessary to protect consumers and Internet openness against any ISP's decision in the future to move away from this widely accepted principle. Furthermore, because this principle is so widely accepted, including by ISPs, we anticipate compliance costs will be minimal. We seek comment on this analysis. We seek comment on whether the predictive reasoning underlying the Commission's repeal of the no-blocking rule in 2018 proved accurate.<sup>479</sup> We also seek specific comment regarding any instances of an ISP blocking lawful content, applications, services or non-harmful devices in the years since the Commission repealed the no-blocking rule.<sup>480</sup> Finally, we seek comment on the costs and benefits of a no-blocking rule.

## 2. Preventing Throttling of Lawful Content, Applications, Services, and Non-harmful Devices

154. Next, we propose to adopt a rule to prevent ISPs from throttling lawful content, applications, services, and non-harmful devices. As part of the no-blocking rule that the Commission adopted in the *2010 Open Internet Order*, the Commission prohibited ISPs from "impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable (subject to reasonable network management)," because such conduct "can have the same effects as outright blocking."<sup>481</sup> In 2015, the Commission concluded that a standalone prohibition was required to prevent ISPs from impairing or degrading lawful Internet traffic.<sup>482</sup> The Commission used the term

<sup>474</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5648-49, para. 113.

<sup>475</sup> *Id.* at 5649, para. 113.

<sup>476</sup> *Id.*

<sup>477</sup> See *2010 Open Internet Order*, 25 FCC Rcd at 17941-42, para. 62; *2015 Open Internet Order*, 30 FCC Rcd at 5648, para. 112; *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 4.

<sup>478</sup> See, e.g., *Xfinity Internet Broadband Disclosures*, Xfinity, <https://www.xfinity.com/policies/internet-broadband-disclosures> [<https://perma.cc/Y7L5-KMXD>] (last visited Sept. 30, 2023); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023); *Network Management*, Verizon, <https://www.verizon.com/about/our-company/network-management> [<https://perma.cc/K29R-W95Q>] (last visited Sept. 20, 2023).

<sup>479</sup> *RIF Order*, 33 FCC Rcd at 466, para. 263.

<sup>480</sup> See, e.g., *Citing 'censorship' concerns, Idaho internet provider blocks Facebook, Twitter*, WKRC Local 12 (Jan. 13, 2021), <https://local12.com/news/nation-world/citing-censorship-concerns-idaho-internet-provider-blocks-facebook-twitter> (reporting that in January 2021, a small ISP in north Idaho began to implement a plan where its customers would be automatically blocked from accessing Twitter and Facebook because it disagreed with how those platforms enforced their terms of service, ultimately backtracking and instead blocking those services on an opt-out, instead of an opt-in, basis).

<sup>481</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17943, para. 66.

“throttling” to refer to such conduct that is not outright blocking, but that inhibited the delivery of particular content, applications, or services, or particular classes of content, applications, or services.<sup>483</sup>

155. We propose to adopt the following no-throttling rule applicable to both fixed and mobile providers of BIAS, which tracks the language of the Commission’s *2015 Open Internet Order*, and seek comment on our proposal:

*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.*

As in 2015, we intend this rule to prohibit conduct that impairs or degrades lawful traffic to a non-harmful device or class of devices, which includes any conduct by an ISP to impair, degrade, slow down, or render effectively unusable particular content, services, applications, or devices, that is not reasonable network management.<sup>484</sup> We also propose to give the same meaning to “content, applications, and services” as we propose in the context of the no-blocking rule, and we seek comment on this proposal. Have there been any technological changes or advancements in network management since 2015 that we should reflect in the proposed rule? As written, does the proposed rule provide clear guidance to ISPs and customers on what is considered prohibited conduct? As in 2015, we propose that transfers of unlawful content or unlawful transfers of content would not be protected by the no-throttling rule.<sup>485</sup> Further, as with our proposed no-blocking rule, we propose to prohibit ISPs from imposing a fee on edge providers to avoid having the edge providers’ content, service, or application throttled.<sup>486</sup> We seek comment on these proposals. What other aspects and consequences of a no-throttling rule should we consider?

156. As in 2015, we propose that while a no-throttling rule would address instances in which an ISP targets particular content, applications, services, or non-harmful devices, it would not address the practice of slowing down an end user’s connection to the Internet based on a choice clearly made by the end user.<sup>487</sup> For example, an ISP may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier.<sup>488</sup> We seek comment on our proposal to maintain this distinction. We do not intend to leave such data plans without oversight, however, and therefore propose to allow the Commission to review the particulars of a certain data plan, as required by sections 201 and 202 of the Act, which prohibit unjust and unreasonable charges and practices, or our proposed general conduct standard, discussed below.

157. As discussed above, because BIAS connections were so essential during the pandemic, we believe ISPs have been under increased scrutiny by the Commission, the media, and the public since March 2020, and therefore have had a strong incentive to follow their voluntary commitments to maintain service consistent with certain conduct rules established in the *2015 Open Internet Order*.<sup>489</sup> We believe

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<sup>482</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5651, para. 119.

<sup>483</sup> *See id.* at 5651-52, para. 120.

<sup>484</sup> *Id.* at 5651, para. 119.

<sup>485</sup> *Id.* at 5651-52, para. 120.

<sup>486</sup> *See id.*

<sup>487</sup> *Id.* at 5652, para. 122.

<sup>488</sup> *Id.*

<sup>489</sup> *See, e.g., Xfinity Internet Broadband Disclosures*, Xfinity, <https://www.xfinity.com/policies/internet-broadband-disclosures> [<https://perma.cc/Y7L5-KMXD>] (last visited Sept. 20, 2023); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023); *Verizon Broadband Commitment*, Verizon, <https://www.verizon.com/about/our-company/verizon-broadband-commitment> [<https://perma.cc/K29R-W95Q>] (last visited Sept. 20, 2023).

that this, coupled with unprecedented consumer demand for BIAS during the pandemic and state regulations addressing ISP conduct, helped to constrain ISPs from engaging in conduct that could harm Internet openness. These constraints, however, are neither permanent nor uniform, and we believe that incentives for ISPs to degrade competitors' content, applications, or devices remain; as such, we propose that rules are needed to protect consumers' right to access lawful Internet traffic of their choice without impairment or degradation. We seek comment on this proposed analysis, and invite comment on ISPs' incentives to engage in throttling conduct harmful to Internet openness. As the Commission recognized in the *RIF Order*, "[t]he potential consequences of blocking and throttling lawful content on the Internet ecosystem are well-documented in the record and in Commission precedent."<sup>490</sup> Even after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances.<sup>491</sup> As a result, we anticipate that prohibiting throttling of lawful Internet traffic will impose a minimal compliance burden on ISPs. Do commenters agree? We seek comment on specific costs or technical concerns that our proposed rule would impose on ISPs, including small providers. We also seek comment on the reasoning underlying the Commission's repeal of the no-throttling rule in 2018.<sup>492</sup> We seek specific comment regarding any instances of an ISP throttling lawful content, applications, services, or non-harmful devices in the years since the no-throttling rule was repealed.

### 3. No Paid or Affiliated Prioritization

158. We next propose to ban arrangements in which an ISP accepts consideration (monetary or otherwise) from a third party to manage its network in a manner that benefits particular content, applications, services, or devices. Under this proposal, we would also prohibit arrangements in which a provider manages its network in a manner that favors the content, applications, services, or devices of an affiliated<sup>493</sup> entity. In 2015, the Commission adopted a rule banning these type of paid or affiliated prioritization agreements, finding that such practices "harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment."<sup>494</sup> We tentatively conclude that this reasoning remains applicable today. We seek comment on this proposal and the underlying analysis.

159. Tracking the language of the Commission's *2015 Open Internet Order*, we propose to adopt the following definition of "paid prioritization" and rule banning such arrangements:

*A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.*

*"Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.*

In adopting a ban on paid prioritization in 2015, the Commission sought to prevent the bifurcation of the

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<sup>490</sup> *RIF Order*, 33 FCC Rcd at 468, para. 265.

<sup>491</sup> See, e.g., *Xfinity Internet Broadband Disclosures*, Xfinity, <https://www.xfinity.com/policies/internet-broadband-disclosures> [<https://perma.cc/Y7L5-KMXD>] (last visited Sept. 20, 2023); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023); *Network Management*, Verizon, <https://www.verizon.com/about/our-company/network-management> [<https://perma.cc/K29R-W95Q>] (last visited Sept. 20, 2023).

<sup>492</sup> *RIF Order*, 33 FCC Rcd at 466, para. 263.

<sup>493</sup> The Act defines "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. § 153(2).

<sup>494</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5653, para. 125.

Internet into a “fast” lane for those with the means and will to pay and a “slow” lane for everyone else.<sup>495</sup> This development, the Commission reasoned, would introduce artificial barriers to entry, distort the market, harm competition, harm consumers, discourage innovation, undermine public safety and universal service, and harm free expression.<sup>496</sup> The Commission was concerned that preferential treatment arrangements would create a chilling effect, disrupting the Internet’s virtuous cycle of innovation, consumer demand, and investment, and that the widespread use of paid prioritization practices would cause damage to Internet openness that would be difficult to reverse and challenging to track.<sup>497</sup> We tentatively conclude that these concerns remain valid today, and we seek comment on this conclusion. What are some examples of harms or categories of harms that paid prioritization arrangements might cause to the open Internet and to consumers? Does the language of the proposed rule make clear the scope of this proposed prohibition? What other aspects or consequences of a ban on paid prioritization practices should we consider?

160. Previously, the Commission has found it well-established that ISPs have both the incentive and the ability to engage in paid prioritization.<sup>498</sup> In its *Verizon* opinion, the D.C. Circuit noted the powerful incentives ISPs have to accept fees from edge providers in return for excluding their competitors or for granting prioritized access to end users.<sup>499</sup> Some ISPs continue to advertise that they do not engage in paid or affiliated prioritization practices.<sup>500</sup> Even with similar promises from ISPs in 2015, the Commission concluded that the potential harm to the open Internet was too significant to rely on mere promises from ISPs because “the future openness of the Internet should not turn on the decision of a particular company.”<sup>501</sup> We tentatively conclude that this reasoning remains valid today, and we seek comment on this tentative conclusion, and any alternatives we should consider.

161. In choosing to repeal the ban on paid prioritization in 2018, the Commission found that the costs of a ban outweighed the benefits, and that the transparency rule and the enforcement of existing antitrust and consumer protection laws would sufficiently address many of the concerns regarding the dangers of paid prioritization arrangements.<sup>502</sup> We seek comment on that assessment from 2018. In weighing the costs and benefits, the Commission did not identify specific compliance costs, but rather identified the costs in the form of forgone benefits.<sup>503</sup> While we do not dispute that some potential benefits may result from paid prioritization arrangements, we tentatively conclude that the potential harms to consumers and the open Internet outweigh any speculative benefits.<sup>504</sup> Do commenters agree? Why or why not? What compliance costs might ISPs incur as a result of such a ban, including small providers? The Commission also found in 2018 that paid prioritization could be a tool in helping to close the digital

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<sup>495</sup> *See id.* at 5653-55, para. 126.

<sup>496</sup> *Id.*

<sup>497</sup> *Id.* at 5655-56, para. 127.

<sup>498</sup> *Id.* at 5655-56, 5628-43, paras. 127, 78-101.

<sup>499</sup> *Id.* at 5655-56, para. 127 (citing *Verizon*, 740 F.3d at 645-46) (noting that in oral argument for that case, Verizon’s counsel stated that “but for [the 2010 *Open Internet Order*] rules we would be exploring [such] commercial arrangements”).

<sup>500</sup> 2015 *Open Internet Order*, 30 FCC Rcd at 5656, para. 127; *see, e.g., Xfinity Internet Broadband Disclosures*, Xfinity, <https://www.xfinity.com/policies/internet-broadband-disclosures> [<https://perma.cc/Y7L5-KMXD>] (last visited Sept. 20, 2023); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023).

<sup>501</sup> 2015 *Open Internet Order*, 30 FCC Rcd at 5656, para. 127.

<sup>502</sup> *RIF Order*, 33 FCC Rcd at 456-57, para. 253.

<sup>503</sup> *Id.*

<sup>504</sup> *See 2015 Open Internet Order*, 30 FCC Rcd at 5654-55, para. 126.

divide by reducing BIAS subscription prices for consumers.<sup>505</sup> Do commenters agree with this assessment? We tentatively conclude that the Commission's 2018 finding that existing antitrust and consumer protection laws, in conjunction with some form of a transparency rule, offer enough protection against the potential harms caused by paid prioritization arrangements was erroneous. We seek comment on this tentative conclusion.

162. As part of a rule prohibiting paid prioritization arrangements, we also propose to adopt a rule concerning waiver of such a ban that establishes a balancing test. Under our waiver rules, the Commission may waive any rule in whole or in part, "for good cause shown."<sup>506</sup> A general waiver of the Commission's rules is only appropriate if special circumstances warrant a deviation from the general rule and such a deviation will service the public interest.<sup>507</sup> In 2015, the Commission found that it was appropriate to adopt specific rules concerning the factors that it will use to examine a waiver request of the paid prioritization ban.<sup>508</sup> We tentatively conclude that it remains appropriate to accompany a rule prohibiting paid prioritization arrangements with specific guidance on how the Commission would evaluate subsequent waiver requests. We seek comment on this conclusion. Tracking the language of the *2015 Open Internet Order*, we propose to adopt the following rule, and seek comment on this proposal:

*The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.*

163. Following the framework the Commission established in 2015, we propose to require an applicant seeking a waiver of our proposed rule to prohibit paid prioritization arrangements to make two related showings. First, the applicant would need to demonstrate that the practice will have some significant public interest benefit.<sup>509</sup> The applicant could make such a showing by providing evidence that the practice furthers competition, innovation, consumer demand, or investment.<sup>510</sup> Second, the applicant would need to demonstrate that the practice does not harm the nature of the open Internet.<sup>511</sup> This second showing would include, but is not limited to, providing evidence that the practice: (i) does not materially degrade or threaten to materially degrade the BIAS of the general public; (ii) does not hinder consumer choice; (iii) does not impair competition, innovation, consumer demand, or investment; and (iv) does not impede any forms of expression, types of service, or points of view.<sup>512</sup> We seek comment on the continued relevance of these four examples. Should the Commission consider other factors when considering a request to waive our proposed ban on paid prioritization arrangements? Do commenters agree that this language creates a "high bar" for potential applicants to meet, ensuring that the Commission would only grant waiver relief in exceptional cases?<sup>513</sup>

#### 4. General Conduct Rule

164. We propose to adopt a general conduct standard, which would prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers. In 2015, the Commission

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<sup>505</sup> *RIF Order*, 33 FCC Rcd at 464, para. 260.

<sup>506</sup> 47 CFR § 1.3.

<sup>507</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>508</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5658, para. 130.

<sup>509</sup> *Id.* at 5658, para. 131.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

adopted a standard to 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.<sup>514</sup> The Commission reasoned that while the bright-line rules against blocking, throttling, and paid prioritization arrangements would act as “critical cornerstone[s] in protecting and promoting the open Internet,” it also needed a mechanism to respond to “other current or future practices that cause the type of harms our rules are intended to address.”<sup>515</sup> The general conduct standard was necessary, in other words, to ensure that ISPs did not find a technical or economic means to evade these bright line bans to wield their gatekeeper power in a way that would compromise the open Internet.<sup>516</sup> We agree with the Commission’s conclusion in 2015 that it is “critical that access to a robust, open Internet remains a core feature of the communications landscape, but also that there remains leeway for experimentation with innovative offerings.”<sup>517</sup> We believe that this reasoning continues to support the adoption of a general conduct standard to operate as the catch-all backstop to the three bright-line prohibitions, and we seek comment on this analysis.

165. We propose to adopt a general conduct standard that tracks the language of the *2015 Open Internet Order*, and we seek comment on this proposal:

*Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*

In 2015, the Commission found that careful application of this standard would act to not only balance the benefits of innovation against the harms to end users and edge providers, but also act to protect free expression.<sup>518</sup> If adopted, we anticipate that this general conduct standard would accomplish these same goals going forward, and we seek comment on this prediction. Does the proposed language capture the scope of behaviors that the Commission might need to address? Have there been any technical or market developments that should affect our approach? Is there an alternative standard we should adopt to establish a general conduct rule?

166. Consistent with the Commission’s 2015 approach, we propose to enforce this standard with a framework and in a manner that would provide certainty and flexibility to the industry and encourage innovation, while best protecting the open Internet. First, we propose to follow a case-by-case approach that would consider the totality of the circumstances when analyzing whether conduct satisfies the standard.<sup>519</sup> Second, we propose a non-exhaustive list of factors that we would consider to aid in our analysis.<sup>520</sup> These factors would include: (i) whether a practice allows end-user control and enables consumer choice;<sup>521</sup> (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices;<sup>522</sup> (iii) whether a practice affects consumers’ ability to select, access, or use

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<sup>514</sup> *Id.* at 5659-60, para. 135.

<sup>515</sup> *Id.*

<sup>516</sup> *See id.* at 5609, para. 21.

<sup>517</sup> *Id.* at 5659, para. 136.

<sup>518</sup> *See id.* at 5660, para. 137.

<sup>519</sup> *Id.* at 5661, para. 138.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 5661-62, para. 139 (“End-User Control”).

lawful broadband services, applications, or content;<sup>523</sup> (iv) the effect a practice has on innovation, investment, or broadband deployment;<sup>524</sup> (v) whether a practice threatens free expression;<sup>525</sup> (vi) whether a practice is application agnostic;<sup>526</sup> and (v) whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organizations.<sup>527</sup> Do all of these factors remain relevant in today's Internet ecosystem? If not, why not? Are there other factors we should consider including in this non-exhaustive list that would aid with industry compliance or Commission enforcement?

167. We believe that the general conduct standard we propose today, mirroring that adopted in the *2015 Open Internet Order*, provides sufficient guidance to ISPs for purpose of compliance, a conclusion affirmed by the D.C. Circuit.<sup>528</sup> Nonetheless, in 2018, the Commission repealed the general conduct standard because it found that it was “vague and ha[d] created regulatory uncertainty in the marketplace hindering investment and innovation.”<sup>529</sup> We seek comment on whether there are additional steps we should take to ensure that ISPs understand the types of conduct and practices that might be prohibited under our proposal. Are there any specific practices that would or would not violate this proposed rule, and if so, should we provide examples of those practices?<sup>530</sup> For example, are there any zero rating or sponsored data practices that raise particular concerns under the proposed general conduct standard? What would the compliance costs be for ISPs, particularly small providers? How would our proposed general conduct standard affect current and future ISP business practices? What other aspects or consequences of imposing a general conduct standard should we consider? We seek comment on whether the Commission's prediction in 2018 that eliminating the Internet conduct standard will “benefit consumers, increase competition, and eliminate regulatory uncertainty that has a ‘corresponding chilling effect on broadband investment and innovation’”<sup>531</sup> has been borne out. Is it reasonable to attribute any growth and development in broadband markets and services to elimination of the general conduct rule, or is such a potential connection too attenuated? The *RIF Order* also found that “the benefits of the Internet conduct standard provides approximately zero additional benefits” when compared to the antitrust and

<sup>522</sup> *Id.* at 5662, para. 140 (“Competitive Effects”).

<sup>523</sup> *Id.* at 5662, para. 141 (“Consumer Protection”).

<sup>524</sup> *Id.* at 5663, para. 142 (“Effect on Innovation, Investment, or Broadband Deployment”).

<sup>525</sup> *Id.* at 5663, para. 143 (“Free Expression”).

<sup>526</sup> *Id.* at 5663-64, para. 144 (“Application Agnostic”).

<sup>527</sup> *Id.* at 5664, para. 145 (“Standard Practices”).

<sup>528</sup> In its *USTA* opinion, the D.C. Circuit found that the general conduct rule adopted in the *2015 Open Internet Order* provided sufficient notice to affected entities of the conduct it prohibited, rejecting an argument that the standard was unconstitutionally vague. *See USTA*, 825 F.3d at 734-39. In rejecting this challenge, the D.C. Circuit concluded that the general conduct standard satisfied due process because of the Commission's clear articulation of the standard's objectives and the detailed discussion of the non-exhaustive list of factors the Commission would use to guide its analysis. *USTA*, 825 F.3d at 736-37. The D.C. Circuit recognized that a regulation is not impermissibly vague simply because it allows some flexibility, and because of the rapid pace of technological development, requiring too much specificity could risk enabling ISPs to find loopholes to escape regulation. *USTA*, 825 F.3d at 736-37. The D.C. Circuit also found that the advisory opinion procedure the Commission adopted in 2015 to accompany the standard “cure[d] it of any potential lingering constitutional deficiency.” *USTA*, 825 F.3d at 738.

<sup>529</sup> *RIF Order*, 33 FCC Rcd at 452-53, paras. 246-47.

<sup>530</sup> *Compare, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5666-68, paras. 151-53 (discussing the benefits and drawbacks of sponsored data and usage allowance practices, and declining to make a blanket finding about these practices) with *RIF Order*, 33 FCC Rcd at 455, para. 250 (discussing the rescinded Zero-Rating Report issued by the Wireless Telecommunications Bureau, and asserting that it did not provide certainty about whether particular zero-rating programs were legally permissible).

<sup>531</sup> *RIF Order*, 33 FCC Rcd at 454, para. 249.

consumer protection enforcement in place through the FTC, while imposing negative benefits in the form of delayed or never-brought-to-market innovations.<sup>532</sup> We seek comment on whether elimination of the general conduct rule has resulted in new innovations which would not have been permissible under the general conduct rule.

168. In the alternative, we seek comment on whether we should instead rely on the “just and reasonable” standards in sections 201 and 202 of the Act. In 2015, the Commission explained that the general conduct rule was its interpretation of sections 201 and 202 in the broadband context.<sup>533</sup> We seek comment on whether it remains necessary to enunciate a specific rule, like the proposed general conduct standard described above, by interpreting sections 201 and 202 in the context of broadband, or whether it would be sufficient to rely on sections 201 and 202 alone to address potential harmful practices and behaviors.<sup>534</sup> Would the latter alternative approach provide sufficient certainty and clarity to ISPs regarding what practices would violate the Act’s standard? If we choose not to adopt a general conduct rule, are there other ways for us to aid our enforcement efforts related to sections 201 and 202 in the broadband context?

### C. Transparency Rule

169. Policymakers have consistently recognized the importance of transparency regarding the terms and service characteristics of broadband offerings, even as certain details of the Commission’s transparency requirements have changed over time. This includes not only transparency requirements that have been in place since they originally were adopted in the *2010 Open Internet Order*,<sup>535</sup> but also the broadband label the Commission adopted in 2022, which gives consumers a convenient tool to research and compare broadband offerings.<sup>536</sup> We propose to build upon the foundation of our existing transparency rule, informed by our recent experience in adopting broadband label requirements, and we seek comment on possible modifications or additions to update the transparency rule to ensure that end users, edge providers, the broader Internet community, and the Commission have the information they need to assess ISPs’ terms and conditions for BIAS in a timely and effective manner.

#### 1. Policy Benefits of Transparency Requirements

170. We anticipate transparency requirements are likely to continue playing a key role in the broadband marketplace. In the *2010 Open Internet Order*, the Commission adopted its original BIAS transparency rule, explaining that “[e]ffective disclosure of broadband providers’ network management practices and the performance and commercial terms of their services promotes competition—as well as innovation, investment, end-user choice, and broadband adoption.”<sup>537</sup> The Commission echoed this

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<sup>532</sup> *Id.* at 494, paras. 317-18.

<sup>533</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5660, para. 137.

<sup>534</sup> Section 201(b) requires that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign communications service by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.” 47 U.S.C. § 201(b). Section 202(a) states that it “shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a).

<sup>535</sup> 47 CFR § 8.1(a).

<sup>536</sup> See generally *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-86 (rel. Nov. 17, 2022) (*Broadband Label Order* or *Broadband Label Further Notice*); *Broadband Label Reconsideration Order*, FCC 23-68.

<sup>537</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17936-37, para. 53.



policy judgment in the *2015 Open Internet Order*,<sup>538</sup> going on to adopt additional clarifications and enhancements to the transparency rule—along with a broadband label safe harbor—to “better enable end-user consumers to make informed choices about broadband services by providing them with timely information tailored more specifically to their needs,” and to “provide edge providers with the information necessary to develop new content, applications, services, and devices that promote the virtuous cycle of investment and innovation.”<sup>539</sup> In discussing transparency in the *RIF Order*, the Commission noted that “[d]isclosure supports innovation, investment, and competition by ensuring that entrepreneurs and other small businesses have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects.”<sup>540</sup> In that *Order*, however, the Commission elected to “return, with minor adjustments, to the transparency rule adopted in the *2010 Open Internet Order*,” under the theory that such an approach would “provide[] consumers and the Commission with essential information while minimizing the burdens imposed on ISPs.”<sup>541</sup> We seek comment on how the Commission can ensure that its transparency rule most effectively advances these longstanding policy goals.

171. In 2021, Congress enacted and the President signed the Infrastructure Act, which, in relevant part, directs the Commission “to promulgate regulations to require the display of broadband consumer labels,” using as an initial point of reference the broadband label established in connection with the enhanced transparency rule adopted in the *2015 Open Internet Order*.<sup>542</sup> The Infrastructure Act recognizes the benefits of a label “to disclose to consumers information regarding broadband internet access service plans,” further observing that consumers need the ability to “evaluate broadband internet access service plans” through information that is “available, effective, and sufficient” to meet that need. In November 2022, the Commission adopted the broadband consumer label rules and sought further comment in the accompanying *Broadband Label Further Notice*.<sup>543</sup> These broadband label requirements promote “consumer access to clear, easy-to-understand, and accurate information about the cost for broadband services and will empower consumers to choose services that best meet their needs and match their budgets and ensures that they are not surprised by unexpected charges or service quality that falls short of their expectations.”<sup>544</sup> We seek comment on the interplay between the broadband label requirements adopted in the *Broadband Label Order*, the possible amendments raised in the *Broadband Label Further Notice*,<sup>545</sup> and any modifications to the transparency rule that we might adopt here. For example, to the extent that the content of the required disclosures under the two requirements diverge, how can we avoid any undue duplication of effort in making each required disclosure, particularly for small providers? Should the broadband label requirements and the transparency rule as it might be modified here be legally distinct, or legally interrelated, requirements?

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<sup>538</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5669, para. 154.

<sup>539</sup> *Id.* at 5672, para. 162.

<sup>540</sup> *RIF Order*, 33 FCC Rcd at 438, para. 216.

<sup>541</sup> *Id.* at 435, para. 210.

<sup>542</sup> Infrastructure Act, § 60504(a); Executive Order No. 14036, Promoting Competition in the American Economy, 86 FR 36987 (July 9, 2021) (in relevant part, encouraging the Commission to consider “initiating a rulemaking that requires broadband service providers to display a broadband consumer label, such as that described in the [2016 *Public Notice*] so as to give consumers clear, concise, and accurate information regarding provider prices and fees, performance, and network practices”).

<sup>543</sup> *Broadband Label Order*, FCC 22-86 (adopting broadband consumer label rules as required by the Infrastructure Act). See also *Broadband Label Reconsideration Order*, FCC 23-68.

<sup>544</sup> *Broadband Label Reconsideration Order*, FCC 23-68, para. 4.

<sup>545</sup> See generally *Broadband Label Further Notice*, FCC 22-86, paras. 131-53 (seeking comment on possible additions or modifications to the broadband label rules).

## 2. Content of Required Disclosures

172. We seek comment on what, if any, additional disclosures should be required under the transparency rule. As a starting point, we believe that the disclosures required under the current transparency rule are an appropriate baseline, and we propose to retain them in the transparency rule going forward. We seek comment on this proposal. As the Commission recently explained when adopting broadband label requirements, “the transparency rule seeks to enable a deeper dive into details of broadband Internet service offerings, which could be relevant not only for consumers as a whole, but also for consumers with particularized interests or needs, as well as a broader range of participants in the Internet community—notably including the Commission itself.”<sup>546</sup> Are the current requirements of the transparency rule sufficient to enable that deeper dive into details of broadband Internet service offerings?

173. We seek comment on whether enhancements to the content of disclosures required by the transparency rule under the *2015 Open Internet Order* should be incorporated in a revised transparency rule here.<sup>547</sup> With respect to required disclosure of commercial terms, the *2015 Open Internet Order* provided additional specifications regarding ISPs’ disclosures about price and related terms and their relationship with disclosures regarding privacy and redress options.<sup>548</sup> Regarding the disclosure of performance characteristics, the *2015 Open Internet Order* provided additional specifications regarding the disclosure of network performance<sup>549</sup> and network practices.<sup>550</sup> The *RIF Order* eliminated those enhancements under the theory that their burdens to ISPs exceeded their benefits.<sup>551</sup> The *Broadband Label Order*, on the other hand, required ISPs to disclose in the broadband labels their typical upload and download speeds and typical latency metrics associated with their broadband services, noting that speed in particular “remains the network performance metric of greatest interest to the consumer.”<sup>552</sup> The Commission similarly found that low delay or latency is important to any application involving users interacting with each other, a device, or an application.<sup>553</sup> We seek comment on these assessments, including updated evidence regarding the relative costs and benefits of the transparency enhancements based on experience following the *RIF Order*. To the extent that the transparency requirements were intended to provide needed information not only to consumers but also edge providers, the broader Internet community, and the Commission, how should that affect our assessment of the overall benefits of the enhanced transparency requirements? Would the enhancements to the transparency rule adopted in the *2015 Open Internet Order*, or other modifications to the current transparency rule, assist the Commission in monitoring and enforcing compliance with the conduct rules proposed here? Are there any metrics that are particularly important to some subset of consumers that we should consider including

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<sup>546</sup> *Broadband Label Order*, FCC 22-86, para. 107.

<sup>547</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5672-77, paras. 162-70 (discussing enhancements to the content of disclosures required by the transparency rule).

<sup>548</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5672-73, para. 164.

<sup>549</sup> *Id.* at 5673-75, paras. 166-67.

<sup>550</sup> *Id.* at 5676-77, para. 169.

<sup>551</sup> *RIF Order*, 33 FCC Rcd at 437-38, para. 215.

<sup>552</sup> *Broadband Label Order*, FCC 22-86, paras. 37-38 (citing the Eleventh MBA Report in which the Commission stated that “[s]peed (both download and upload) performance continues to be one of the key metrics reported by the MBA.” See *Eleventh Measuring Broadband America, Fixed Broadband Report, Federal Communications Commission, Office of Engineering and Technology* at 8, 10 (Dec. 31, 2021)).

<sup>553</sup> *Broadband Label Order*, FCC 22-86, para. 41. The Commission declined, however, to require providers to include information on packet loss in the label, noting that packet loss is less important than upload and download speeds and latency, and may actually lead to more confusion for most consumers. It also sought additional comment in the *Broadband Label Further Notice* about whether there are other service characteristics, beyond speed and latency, that ISPs should display on the label. See *Broadband Label Order*, FCC 22-86, para. 46.

despite those metrics not being of significant value to the average consumer?

174. In addition, we seek comment on other considerations relevant to possible changes to the content ISPs may be required to disclose under the transparency rule. For one, we seek comment on whether we should revise the transparency rule to incorporate the Commission's clarifications and guidance regarding prior versions of the transparency rule. For example, a 2011 Public Notice (*2011 Advisory Guidance*) provided "examples of approaches to disclosure that would satisfy the transparency rule,"<sup>554</sup> discussing point-of-sale disclosures, service descriptions, the extent of required disclosures, disclosures for the benefit of edge providers, and disclosures regarding security measures.<sup>555</sup> A 2014 Public Notice (*2014 Advisory Guidance*) summarized the applicability and requirements of the transparency rule and the potential enforcement consequences if it were violated, and emphasized the importance of consistency between ISPs' disclosures under the transparency rule and their advertising claims or other public statements.<sup>556</sup> And a 2016 Public Notice (*2016 Advisory Guidance*) provided guidance regarding acceptable methodologies for disclosure of network performance information and point-of-sale disclosures consistent with the *2015 Open Internet Order*.<sup>557</sup> The *RIF Order* subsequently eliminated the enhancements adopted in 2015, and the clarifications in the *2016 Advisory Guidance* along with it.<sup>558</sup> The *RIF Order* endorsed the clarifications in the *2011 Advisory Guidance*,<sup>559</sup> but neither endorsed nor disclaimed the clarifications in the *2014 Advisory Guidance*. We seek comment on whether and to what extent the Commission should reaffirm, reject, or elaborate on any of that prior guidance in connection with any modification of the transparency rule here. Are there other areas where additional clarification or guidance would be beneficial either under the existing transparency rule or a revised transparency rule?

175. We also seek comment on the availability of information that ISPs can or should use to comply with the content of disclosures required under the current or modified transparency rule. For example, the *RIF Order* allowed fixed ISPs participating "in the Measuring Broadband America (MBA) program [to] disclose their results as a sufficient representation of the actual performance their customers can expect to experience."<sup>560</sup> Should we continue that approach here, or make use of the MBA program in some other way? To what extent can or should we allow ISPs to use other specific information sources or measurement approaches to provide transparency disclosures?<sup>561</sup> Should we clarify that certain sources

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<sup>554</sup> *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411 (EB/OGC 2011).

<sup>555</sup> *Id.*, 26 FCC Rcd at 9413-18.

<sup>556</sup> *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8606-8607 (EB 2014).

<sup>557</sup> *Guidance on Open Internet Transparency Requirements*, Public Notice, 31 FCC Rcd 5330 (CTO/OGC/EB 2016).

<sup>558</sup> *See, e.g., RIF Order*, 33 FCC Rcd at 442, para. 225.

<sup>559</sup> *See, e.g., id.* at 440-41, 444-45, paras. 220 n.814, 222 n.818, 229-30.

<sup>560</sup> *RIF Order*, 33 FCC Rcd at 441-42, para. 222 n.818. The *Broadband Label Order* similarly concluded that fixed broadband service providers that choose to participate in the MBA program may disclose their results as a sufficient representation of the actual performance their customers can expect to experience for the relevant speed tier. The Commission also determined that providers that do not participate may use the methodology from the MBA program to measure actual performance, or may disclose actual performance based on internal testing, consumer speed test data, or other data regarding network performance, including reliable, relevant data from third-party sources. *Broadband Label Order*, FCC 22-86, para. 39.

<sup>561</sup> *See Broadband Label Further Notice*, FCC 22-86, para. 138 (seeking comment on whether there are more appropriate ways to measure speed and latency other than "typical" for purposes of the label disclosure such as average or peak speed and latency, and whether it is appropriate to require providers to add another speed metric to the label in addition to typical speed).

of information are permissible to rely on in making the required disclosures? Or should we go further in particular cases and require the use of certain data sources for reasons of uniformity, reliability, or otherwise? Should the Commission require ISPs to include additional information in transparency disclosures regarding their measurement methodologies and practices?

176. Finally, we seek comment on any other considerations relevant to our evaluation of the appropriate content of required disclosures under the transparency rule. Is there additional content that we should require? For example, the *2015 Open Internet Order* considered, but ultimately did not adopt, additional disclosure requirements regarding “the source, location, timing, or duration of network congestion,”<sup>562</sup> packet corruption and jitter,<sup>563</sup> and “disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage.”<sup>564</sup> In light of subsequent experience, should we revisit the decisions not to require such disclosures? Should the Commission consider requiring more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps, and if so, how? We also seek comment on whether different content disclosures should be required for mobile ISPs than for fixed ISPs.

### 3. Means of Disclosure

177. We seek comment on how best to ensure that the content of the required disclosures is made available in a timely and effective manner without undue burdens on ISPs, both as a general matter and in the specific respects discussed below. In the *RIF Order*, the Commission allowed providers to make the required disclosures either “on a publicly available, easily accessible website,” or by “transmit[ting] their disclosures to the Commission,” which would then make them “available on a publicly available, easily accessible website.”<sup>565</sup> We seek comment on practical experiences with that approach, and whether that approach should be retained in its current form, modified, or eliminated in favor of disclosures required specifically on provider websites—as had been the case under prior versions of the transparency rule. When the Commission recently adopted broadband label rules, it required ISPs to display labels on their websites, as well as at other points of sale.<sup>566</sup> While it “aim[ed] to give providers flexibility in how they display labels,” the Commission also sought “to ensure that the labels are prominently displayed on any device on which the consumer accesses and views the labels, including mobile devices”<sup>567</sup> and in a uniform format that will best assist consumers in comparing pricing, fees, performance characteristics, and data allowances across different providers.<sup>568</sup> Are there lessons from the Commission’s recent experience crafting broadband label requirements that should inform our approach to the manner of making disclosures under the transparency rule?

178. We also seek comment on whether any additional requirements are warranted regarding ISPs’ website disclosures under the transparency rule. For ISPs electing to make the required disclosures on a “publicly available, easily accessible website,” the *RIF Order* “reaffirm[ed] the means of disclosure requirement from the [2010] *Open Internet Order* and the clarification found in the *2011 Advisory Guidance*.”<sup>569</sup> Should the approach reflected in the current transparency rule, as informed by the *2010 Open Internet Order* and *2011 Advisory Guidance*, be retained or modified? Should we require the disclosures to be in machine-readable format, akin to the Commission’s recently-adopted approach for

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<sup>562</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5675-76, para. 168.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.* at 5677, para. 170.

<sup>565</sup> *RIF Order*, 33 FCC Rcd at 444, para. 229.

<sup>566</sup> *Broadband Label Order*, FCC 22-86, paras. 90-92.

<sup>567</sup> *Id.* at para. 93.

<sup>568</sup> *Id.* at para. 65.

<sup>569</sup> *RIF Order*, 33 FCC Rcd at 444, para. 229.

broadband consumer labels?<sup>570</sup>

179. We also seek comment on whether disclosures under the transparency rule should be required in additional locations. For instance, are there places on an ISP's website besides a point of sale where disclosures should be made?<sup>571</sup>

180. Ensuring that disclosures under the transparency rule are accessible to individuals with disabilities is a priority.<sup>572</sup> The *RIF Order* explained that ISPs making website disclosures under the transparency rule must make them “in a manner accessible by people with disabilities.”<sup>573</sup> Has this direction been adequate, or are additional requirements warranted to ensure that disclosures under the transparency rule are accessible to individuals with disabilities? For example, should we encourage or require that website disclosures under the transparency rule follow guidance developed by the Web Accessibility Initiative?<sup>574</sup> Most recently, the Commission required ISPs to post broadband label information on their websites in an accessible format, and strongly encouraged them to use the most current version of the Web Content Accessibility Guidelines (WCAG).<sup>575</sup> In the *Broadband Label Further Notice*, it sought comment on whether to adopt specific criteria, based on the WCAG standard.<sup>576</sup> Are there other industry guidelines that providers should be encouraged or required to follow? To the extent that we ultimately require transparency disclosures in locations other than websites and in alternative formats besides websites, is there additional guidance or requirements we should adopt to ensure accessibility to individuals with disabilities?

181. Further, we seek comment on possible “direct notification” requirements, including the costs and benefits of such requirements. The *2015 Open Internet Order* had imposed such an obligation,<sup>577</sup> but the *RIF Order* eliminated that requirement.<sup>578</sup> The Commission also recently declined to adopt a direct notification requirement in the context of its broadband label rules, finding that the broadband labels are specifically intended to inform consumers at the time of purchase.<sup>579</sup> We note, however, the broader purpose of the transparency rule compared to the broadband labels. We therefore seek further comment and updated information on the benefits and burdens of such a requirement in the specific context of the transparency rule, in light of this more recent experience.

182. Finally, we seek comment on any other changes to our transparency rule regarding the

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<sup>570</sup> See, e.g., *Broadband Label Order*, FCC 22-86, paras. 68-77. The OPEN Government Data Act, of 2018, Pub. L. No. 115-435 (2019) §§ 201-202, Title II of the Foundations for Evidence-Based Policymaking Act, requires agencies to use a machine-readable format when making data publicly available. See 44 U.S.C. § 3506(b)(6); *id.* §§ 3502(17), (20), (22) (defining “data asset,” “open Government data asset,” and “public data asset”). The term “machine-readable,” when used with respect to data, means “data in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost.” *Id.* § 3502(18).

<sup>571</sup> See *Broadband Label Order*, FCC 22-86, para. 90 (requiring ISPs to display labels after the consumer enters any required location information and on the provider's primary advertising web page that identifies the plans available to the consumer, which is considered to be the point of sale).

<sup>572</sup> See, e.g., *RIF Order*, 33 FCC Rcd at 444, para. 229; *2015 Open Internet Order*, 30 FCC Rcd at 5680-81, paras. 179-80; *2010 Open Internet Order*, 25 FCC Rcd at 17940, para. 58 n.186.

<sup>573</sup> *RIF Order*, 33 FCC Rcd at 444, para. 229.

<sup>574</sup> See generally WC3 Web Accessibility Initiative, *WCAG 2 Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag> (last updated July 24, 2023).

<sup>575</sup> *Broadband Label Order*, FCC 22-86, paras. 81-82.

<sup>576</sup> *Broadband Label Further Notice*, FCC 22-86, para. 133.

<sup>577</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5677, para. 171.

<sup>578</sup> *RIF Order*, 33 FCC Rcd at 444-45, para. 230.

<sup>579</sup> *Broadband Label Order*, FCC 22-86, paras. 105-106.

means of disclosure. Are there additional requirements regarding the means of disclosure under the transparency rule that the Commission should adopt to ensure that information is available in a timely and effective manner? Conversely, are there existing requirements regarding the means of disclosure that commenters believe impose burdens that outweigh their benefits, and thus should be eliminated?

#### 4. Implementation and Other Issues

183. We seek comment on any implementation issues associated with potential modifications to the transparency rule, and whether we should consider additional time for compliance by small providers.

184. We also seek comment on whether the Commission should adopt new safe harbors for compliance with the transparency rule. Are there particular data sources or methodologies for complying with particular elements of the transparency rule, whether in its current form or as it may be modified, that the Commission should treat as a safe harbor or otherwise presumptively reasonable? Are there safe harbors the Commission should adopt for compliance with the transparency rule as a whole, akin to the broadband label safe harbor adopted in the *2015 Open Internet Order*?<sup>580</sup>

185. Further, we seek comment on whether we should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. Would such a requirement be helpful to our enforcement of the transparency rule by enabling us to evaluate the reasonableness of ISPs' claims? Would such requirements help inform our evaluation of the effectiveness of the rule and the need for changes over time? This requirement could, for example, help to identify and account for particular data sources or methodologies that prove to be especially reliable or unreliable. In the *Broadband Label Order*, the Commission required ISPs to maintain an archive of all labels no longer posted on their websites and at alternate sales channels, along with evidence sufficient to support the accuracy of the labels' content.<sup>581</sup> Given that ISPs must have a basis for the claims made in their disclosures under the transparency rule, are there particular ways of retaining that information that could minimize the burden on ISPs? If we elect to adopt recordkeeping requirements, what period of time would best balance the benefits to the Commission from having the information available against the compliance burden for ISPs?

186. In addition, we seek comment on the overall cost effectiveness of modifications we might adopt to the transparency rule. What are the most cost-effective ways of ensuring that consumers and edge providers receive the information they need in a timely and effective manner? How can we minimize implementation and compliance burdens for ISPs, consistent with those goals?

#### D. Scope of Open Internet Rules

187. *Internet Traffic Exchange*. We propose to decline to apply any open Internet rules to Internet traffic exchange.<sup>582</sup> We tentatively conclude, consistent with the *2015 Open Internet Order* and as discussed further below, that case-by-case review under sections 201 and 202 is "an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and CDNs, that act on behalf of smaller edge providers."<sup>583</sup> We believe that the best approach with respect to Internet traffic exchange is to

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<sup>580</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5679-81, paras. 176-81 (discussing the safe harbor); *see also Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, 31 FCC Rcd 3358 (CGB/WCB/WTB 2016) (approving consumer labels for use as safe harbors).

<sup>581</sup> *Broadband Label Order*, FCC 22-86, paras. 102-103 (requiring ISPs to maintain the archive for two years and to provide any archived label to the Commission, upon request, within 30 days).

<sup>582</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5687, para. 195.

<sup>583</sup> *Id.* at 5686, para. 193.

“watch, learn, and act as required” but to not intervene with prescriptive rules.<sup>584</sup> We seek comment on our proposed approach.

188. *Reasonable Network Management.* We also propose that reasonable network management would not be considered a violation of prohibitions on blocking and throttling, or the general conduct rule, and seek comment on our proposal.<sup>585</sup> In 2015, the Commission concluded that a reasonable network management exception to the conduct rules was necessary for ISPs to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks.<sup>586</sup> We tentatively conclude this analysis remains equally applicable today and seek comment on this tentative conclusion. Is excluding reasonable network management practices still both necessary and advisable? In the *RIF Order*, the Commission defined “reasonable network management” to mean “a practice ‘appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service,’” returning to the definition the Commission adopted in the *2010 Open Internet Order*.<sup>587</sup> In 2015, the Commission had slightly modified that definition, adding that “a network management practice is a practice that has a primarily technical network management justification, but does not include other business practices.”<sup>588</sup> We seek comment on how we should define “reasonable network management” for the purposes of our proposed open Internet rules, and invite commenters to provide examples of how this term is best interpreted with regard to management of today’s broadband networks. Is it necessary for the Commission to provide further guidance on the reasonable network management exception to provide certainty for ISPs? How can we ensure that the reasonable network management exception is not used to circumvent the proposed rules, while also providing regulatory certainty to ISPs and enabling them to appropriately manage their networks?

#### **E. Enforcement of Open Internet Rules**

189. We seek comment on the best framework for enforcing any potential open Internet rules. Our aims are to enable effective and timely conflict resolution and to provide clear guidance on allowed and prohibited practices. We seek comment on what enforcement regime will be most efficient and least burdensome for customers, edge providers, and ISPs, including small entities.

190. In 2010, the Commission adopted a multipart framework to ensure prompt and effective enforcement of the open Internet rules and encouraged informal and private resolution of matters.<sup>589</sup> The first component involved informal complaints filed under section 1.41 of the Commission’s rules. The Commission noted that this vehicle was “already available” and that “no filing fee is required.”<sup>590</sup> “Although individual informal complaints will not typically result in written Commission orders,” the Commission explained that the Enforcement Bureau “will examine trends or patterns in [informal] complaints to identify potential targets for investigation and enforcement action.”<sup>591</sup> Should informal or other means fail to resolve a dispute, the Commission adopted new procedures for filing formal complaints that would “permit anyone—including individual end users and edge providers—to file a claim alleging that another party has violated a statute or rule, and asking the Commission to rule on the

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<sup>584</sup> *Id.* at 5611, para. 31.

<sup>585</sup> *Id.* at 5700, para. 215.

<sup>586</sup> *Id.*

<sup>587</sup> *RIF Order*, 33 FCC Rcd at 441, para. 220; *2010 Open Internet Order*, 25 FCC Rcd at 17952, para. 82.

<sup>588</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5700, para. 215.

<sup>589</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17986, para. 151.

<sup>590</sup> *Id.* at 17986, para. 153.

<sup>591</sup> *Id.*

dispute.”<sup>592</sup> The Commission opted to base the formal complaint rules on the Part 76 cable access complaint rules, finding that those rules are “more streamlined and thus preferable.”<sup>593</sup> Citing sections 403 and 503(b) of the Act,<sup>594</sup> the Commission further observed that it has the authority to initiate enforcement actions on its own motion, including the issuance of forfeitures.<sup>595</sup>

191. *Advisory Opinions and Enforcement Advisories.* In 2015, the Commission concluded that the use of advisory opinions, similar to those issued by DOJ’s Antitrust Division, would be in the public interest and had the potential to provide clarity, guidance, and predictability concerning the Commission’s open Internet rules.<sup>596</sup> The *RIF Order* eliminated the advisory opinion process established in the *2015 Open Internet Order*, reasoning that without conduct rules, advisory opinions were no longer necessary, and concluding that the advisory opinion process did not diminish regulatory uncertainty, particularly for small providers, but rather added costs, caused uncertain timelines, and inhibited innovations.<sup>597</sup> The elimination of the advisory opinion process was based on predictive comments in the record because no ISP had yet requested an advisory opinion through the Commission’s process.<sup>598</sup> When the D.C. Circuit in *USTA* rejected the challenge to the *2015 Open Internet Order*’s general conduct standard as being unconstitutionally vague, the Court relied in part on the advisory opinion process the Commission had created in that *Order*.<sup>599</sup> The D.C. Circuit found that the opportunity for parties to obtain prospective guidance through the advisory opinion process “provide[d] regulated entities with relief from [remaining] uncertainty.”<sup>600</sup>

192. In light of the D.C. Circuit’s reasoning in *USTA*, and to advance our goal of legal certainty in the enforcement of any potential open Internet rules, we propose to adopt an advisory opinion process if we adopt a general conduct standard. We seek comment on this proposal. In practice, we believe that advisory opinions have the potential to lower costs for providers by creating certainty up front, rather than risking potentially costly formal complaint litigation, remediation, or fines after the fact. Do commenters agree? Are there examples of other federal or state advisory opinion processes from which the Commission could learn? Are there specific barriers that would prevent smaller ISPs from engaging with the advisory opinion process, and if so, how could we address them? We seek comment on whether we should adopt the mechanisms delineated in the *2015 Open Internet Order* for the issuance of advisory opinions and enforcement advisories.<sup>601</sup> What changes, if any, should we make to the process the Commission established in the *2015 Open Internet Order*?<sup>602</sup> As an alternative to adopting an advisory opinion process, would a detailed explanation of the factors the Commission would use when analyzing potential violations of the general conduct standard be sufficient under the D.C. Circuit’s reasoning to provide fair warning to regulated entities of what the standard requires?

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<sup>592</sup> *Id.* at 17987, para. 154.

<sup>593</sup> *Id.* at 17987, para. 155.

<sup>594</sup> 47 U.S.C. §§ 403 (permitting the Commission to initiate an inquiry concerning any question arising under the Act), 503(b) (authorizing the Commission to issue citations and impose forfeiture penalties for rules violations).

<sup>595</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17988, para. 160.

<sup>596</sup> *Id.* at 5706, para. 229.

<sup>597</sup> *RIF Order*, 33 FCC Rcd at 490, para. 303.

<sup>598</sup> *Id.*

<sup>599</sup> See *USTA*, 825 F.3d at 738-39 (finding that the advisory opinion procedure the Commission adopted in 2015 to accompany the standard “cure[d] it of any potential lingering constitutional deficiency”).

<sup>600</sup> *Id.* at 738 (internal citations omitted).

<sup>601</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5706-5707, paras. 229-39.

<sup>602</sup> See *id.*



## F. Investigations and Complaints

193. We next seek comment on whether it would be beneficial to re-establish a formal complaint process for complaints arising under our open Internet rules, as the Commission did in 2015. In 2015, the Commission preserved the three avenues for enforcement of its open Internet rules that the Commission had created in the *2010 Open Internet Order*:<sup>603</sup> (i) parties could file informal complaints under section 1.41 of the Commission's existing rules;<sup>604</sup> (ii) parties could file formal complaints under a new process that the Commission had created for this purpose;<sup>605</sup> or (iii) the Commission could initiate enforcement actions on its own motion.<sup>606</sup> While the informal complaint process under section 1.41 of the Commission's rules would remain available to parties with respect to any concerns arising out of any open Internet rules that may be ultimately adopted,<sup>607</sup> we seek comment on whether we should also adopt a formal complaint process. Is there value in providing parties with both of these options? Is our formal complaint process established pursuant to section 208 of the Act sufficient for this purpose, or is it necessary to establish a standalone formal complaint process?<sup>608</sup> The Commission eliminated the open Internet-specific formal complaint process in 2018.<sup>609</sup> If we were to adopt a formal complaint process, should we implement one that returns to the rules the Commission adopted in the *2010 Open Internet Order*<sup>610</sup> and preserved in the *2015 Open Internet Order*?<sup>611</sup> If not, what alternatives do commenters recommend? The section 208 formal complaint rules were modified in 2018 and consolidated with the Commission's pole attachment rules.<sup>612</sup> Should we use these existing rules for open Internet disputes? We also seek comment on whether the Commission's informal complaint mechanism would be sufficient to resolve disputes under our proposed open Internet rules.

## G. Legal Authority

194. We seek comment on our authority to adopt open Internet rules, including both the proposed conduct rules and any revised transparency rules. With respect to our proposed conduct rules, 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*.<sup>613</sup> As discussed below, we propose to return to our prior interpretation, upheld by the D.C. Circuit, that sections 706(a) and (b) of the 1996 Act are grants of regulatory authority and rely on that as a basis for our open Internet rules. We also propose to rely on our authority under Title II of the Act with forbearance where appropriate under section 10 of the Act, insofar as we reclassify BIAS as a Title II service. And we propose to once again rely on our broad spectrum management authority under Title III of the Act as additional authority specifically in the case of mobile

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<sup>603</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5710, para. 242.

<sup>604</sup> *See 2010 Open Internet Order*, 25 FCC Rcd at 17986-87, para. 153.

<sup>605</sup> *See id.* at 17987-89, paras. 154-59.

<sup>606</sup> *See id.* at 17989, para. 160.

<sup>607</sup> 47 CFR § 1.41. The informal complaint process requires no filing fee, encompasses anonymous requests, and aids the Commission in identifying potential targets for investigation.

<sup>608</sup> *See* 47 U.S.C. § 208; 47 CFR §§ 1.720-1.736; *2010 Open Internet Order*, 25 FCC Rcd at 17987-89, paras. 154-59; *2015 Open Internet Order*, 30 FCC Rcd at 5713, para. 252.

<sup>609</sup> *See RIF Order*, 33 FCC Rcd at 490, para. 302.

<sup>610</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17986-89, paras. 151-60.

<sup>611</sup> *See 2010 Open Internet Order*, 25 FCC Rcd at 17987-89, paras. 154-59; *2015 Open Internet Order*, 30 FCC Rcd at 5704-5705, 5710-14, 5715-18, paras. 226, 242-53, 257-65.

<sup>612</sup> *See Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, 33 FCC Rcd 7178 (2018).

<sup>613</sup> *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5720-31, paras. 273-98.

providers. With respect to any modifications to the transparency rule, we propose to rely on those same sources of authority along with section 257 (and associated authority now in section 13) of the Act, consistent with the reasoning of the *2010 Open Internet Order* and the *RIF Order*. We seek comment on those proposals, and any additional sources of authority for our proposed open Internet rules, both as a general matter and in the specific respects discussed below. We also seek comment on how policy goals enumerated in the Act or other federal statutes should inform our exercise of regulatory authority here.

### 1. Section 706 of the 1996 Act

195. We seek comment on returning to an interpretation of section 706 of the 1996 Act as granting the Commission regulatory authority and, in turn, relying on that authority as a basis for open Internet rules.<sup>614</sup> In particular, although the *RIF Order* departed from the Commission's prior interpretation of section 706 and instead concluded that the provision was merely hortatory,<sup>615</sup> we propose to return to the Commission's prior view and interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. We propose to do so in light of the considerations that persuaded the Commission to adopt such interpretations in the past, and that persuaded courts to affirm those interpretations.<sup>616</sup> Consistent with that prior approach, we propose to rely on section 706(a) as part of our authority for open Internet rules. We also propose to rely on section 706(b), in the event that the Commission were to conclude under section 706(a) that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. We seek comment on those proposals generally.

196. First, we seek comment on the grounds for returning to the prior judicially affirmed interpretations of sections 706(a) and (b) of the 1996 Act as granting the Commission regulatory authority. The *RIF Order* principally grounded its rationale for changing the interpretation of section 706 on its view that section 706 was better interpreted as hortatory, rather than as a grant of regulatory authority.<sup>617</sup> To the extent that we instead believe that interpreting sections 706(a) and (b) as grants of regulatory authority represent the better reading of the statute, we believe that likewise should provide a basis for us to change our interpretation. We seek comment on this view. In addition, we seek comment on any other arguments bearing on whether and to what extent we should return to the prior interpretation of sections 706(a) and (b) as grants of regulatory authority.

197. Second, we seek comment on specific rationales for interpreting sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. In the *2010 Open Internet Order*, the Commission explained why sections 706(a) and (b) each represent a grant of regulatory authority to the Commission after considering the statutory text, regulatory and judicial precedent, and legislative history, and rejecting objections to that interpretation.<sup>618</sup> In addition, in the *2015 Open Internet Order*, the Commission built on the foundation of its explanations in the *2010 Open Internet Order*, rejecting various objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority and elaborating on the

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<sup>614</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 (1996), codified at 47 U.S.C. § 1302.

<sup>615</sup> *RIF Order*, 33 FCC Rcd at 470-80, paras. 268-83.

<sup>616</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5720-24, 5731, paras. 274-82, 298 (explaining that sections 706(a) and (b) each represent a grant of regulatory authority to the Commission and that the Commission can adopt and enforce implementing rules, and rejecting arguments to the contrary); *2010 Open Internet Order*, 25 FCC Rcd at 17968-72, paras. 117-23 (explaining that sections 706(a) and (b) each represent a grant of regulatory authority to the Commission, and rejecting arguments to the contrary); *Verizon*, 740 F.3d at 635-42 (affirming as reasonable the Commission's interpretation that sections 706(a) and (b) are grants of regulatory authority); *In re FCC 11-161*, 753 F.3d 1015, 1049-54 (10th Cir. 2014) (while failing to recognize that the Commission had interpreted section 706(a) as a grant of regulatory authority in the *2010 Open Internet Order*, affirming the Commission's reliance on section 706(b) as a grant of regulatory authority); *USTA*, 825 F.3d at 733-34 (affirming as reasonable the Commission's interpretation that sections 706(a) and (b) are grants of regulatory authority).

<sup>617</sup> *RIF Order*, 33 FCC Rcd at 470, 472-73, 479-80, paras. 268, 271, 282.

<sup>618</sup> See *2010 Open Internet Order*, 25 FCC Rcd at 17968-72, paras. 117-23.

Commission's authority to adopt rules implementing that provision, and to enforce those rules.<sup>619</sup> We seek comment on that reasoning and conclusions regarding the interpretation and implementation of section 706, and on the extent to which we should rely on that today. We also seek comment on whether and to what extent we also should draw upon the reasoning of court decisions affirming the Commission's interpretation of section 706 of the 1996 Act as granting regulatory authority—in particular, the D.C. Circuit's 2014 decision in *Verizon* and its 2016 decision in *USTA*, as well as the Tenth Circuit's 2014 decision in *In re FCC 11-161*.<sup>620</sup>

198. Third, to the extent that we interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority, we propose to use that authority to adopt open Internet rules here. The Commission previously concluded in the *2015 Open Internet Order* and *2010 Open Internet Order* that open Internet rules were a reasonable way to implement Commission authority under sections 706(a) and (b),<sup>621</sup> and the nexus between open Internet rules and the directives in sections 706(a) and (b) was affirmed by the D.C. Circuit in *Verizon*.<sup>622</sup> For those same reasons, we believe the open Internet rules we seek comment on here would be a reasonable exercise of section 706(a) authority. We likewise believe that, in the event that the Commission concludes that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion under section 706(b), the open Internet rules we seek comment on here would be a reasonable exercise of authority under that provision as well.

199. Finally, we seek comment on any other issues bearing on our interpretation and implementation of section 706 of the 1996 Act here, including possible objections to the interpretation of sections 706(a) and (b) as grants of regulatory authority. For example, when the D.C. Circuit concluded that the *RIF Order* permissibly reinterpreted section 706 as hortatory, rather than as a grant of regulatory authority, the court focused on the recognized ambiguity of the statutory language and the Commission's justification "that Section 706 lacks details 'identify[ing] the providers or entities whose conduct could be regulated,' whereas other provisions of the Act that unambiguously grant regulatory authority do specify such details."<sup>623</sup> We seek comment on that rationale. How is section 706 of the 1996 Act distinct in this regard from other provisions understood as grants of authority in the Telecommunications Act of 1996, the Communications Act of 1934, or other federal statutes? The *RIF Order* itself recognized that, in relying on section 257 of the Act as authority for the transparency rule, it was interpreting that provision as a grant of authority notwithstanding its lack of any identified universe of entities from which information could be obtained, explaining that "other aspects of section 257 persuade us that our interpretation of that provision as a grant of authority."<sup>624</sup> To what extent do other aspects of section 706 bear on the reasonableness of interpreting sections 706(a) and (b) as grants of authority?

200. We also seek comment on other theories discussed in the *RIF Order* as a basis for why section 706 of the 1996 Act not just permissibly could, but affirmatively should, be interpreted as merely hortatory, rather than a grant of regulatory authority to the Commission. For example, the *RIF Order*

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<sup>619</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5720-24, 5731, paras. 274-82, 298 (discussing, for example, arguments in the *2010 Open Internet Order* and subsequent court cases affirming the view that section 706 of the 1996 Act is a grant of regulatory authority, describing the Commission's authority to adopt rules implementing section 706 and to enforce those rules based on the Act and implicit in section 706 of the 1996 Act, and further elaborating on limitations on the Commission's exercise of authority under section 706 of the 1996 Act that render it appropriately bounded, and citing, among other things, *Verizon v. FCC*, 740 F.3d at 637-43 and *In re FCC 11-161*, 753 F.3d at 1053).

<sup>620</sup> *Verizon*, 740 F.3d at 635-42; *USTA*, 825 F.3d at 734; *In re FCC 11-161*, 753 F.3d at 1049-54.

<sup>621</sup> See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5721, 5723-24, paras. 275, 281-82; *2010 Open Internet Order*, 25 FCC Rcd at 17968, 17971-72, paras. 117, 122, 123.

<sup>622</sup> *Verizon*, 740 F.3d at 642-49.

<sup>623</sup> *Mozilla*, 940 F.3d at 46 (quoting *RIF Order*, 33 FCC Rcd at 472-73, para. 271).

<sup>624</sup> *RIF Order*, 33 FCC Rcd at 472-73, para. 271 n.1000.

contended that interpreting sections 706(a) and (b) as grants of regulatory authority would allow the Commission “to impose duties or adopt regulations equivalent to those directly addressed by the provisions of the Communications Act focused on promoting competition and/or deployment that go beyond the entities, contexts, and circumstances that bounded the Communications Act provisions.”<sup>625</sup> The *RIF Order* also argued that if sections 706(a) and (b) were interpreted as grants of regulatory authority that would enable the Internet and information services to be heavily regulated in a manner inconsistent with policy goals reflected in the Act.<sup>626</sup> We seek comment on those theories. The *RIF Order* acknowledged that the Commission’s prior interpretation of section 706 was, by its own terms, constrained to be consistent with the Act, but claimed that such constraints did not adequately address the *Order*’s statutory concerns.<sup>627</sup> In the view of the *RIF Order*, seemingly the only outcomes of interpreting section 706 as granting regulatory authority would be extreme results where those constraints had little meaning and left the Commission with essentially unbounded authority or were such severe limitations as to render section 706 of little possible use.<sup>628</sup> We tentatively conclude that this view is unfounded and invite more robust analysis of these issues in the record here, along with any related arguments.

201. The *RIF Order* also cited concerns about the Commission’s ability to enforce rules implementing section 706 of the 1996 Act as further grounds for interpreting it as merely hortatory.<sup>629</sup> The *Order* did not reject the theory that section 706 could be read to include implicit enforcement authority, but contended that such implicit authority “might enable actions like declaratory rulings or cease-and-desist orders, but would not appear to encompass authority to impose penalties given the absence of statutory language clearly granting that authority.”<sup>630</sup> We seek comment on this understanding of the scope of potential enforcement authority that could be implicit in section 706. Even assuming *arguendo* that scope of enforcement authority were accurate, why should we conclude that the resulting scope of our enforcement authority is so insignificant as to counsel against interpreting sections 706(a) and (b) as grants of regulatory authority? Further, the *RIF Order* rejected the view that the use of section 4(i) of the Act to adopt rules implementing section 706 of the 1996 Act would be sufficient to bring those rules within the purview of the Commission’s enforcement authority under section 503 of the Act. The *RIF Order* reasoned that enforcement authority under section 503 is limited to rules based on substantive regulatory authority under the Act itself, rather than the rulemaking authority in section 4(i).<sup>631</sup> We seek comment on the merits of this interpretation.

## 2. Title II of the Act With Forbearance

202. As in the *2015 Open Internet Order*, we propose again to rely on sections 201, 202, and 208 of the Act, along with the related enforcement authorities of sections 206, 207, 209, 216, and 217, as additional legal authority for the proposed open Internet rules.<sup>632</sup> And consistent with the *2010 Open Internet Order* and the *RIF Order*,<sup>633</sup> and as affirmed by the D.C. Circuit in *Mozilla*,<sup>634</sup> we propose also to

(Continued from previous page) \_\_\_\_\_

<sup>625</sup> *Id.* at 473, para. 272.

<sup>626</sup> *Id.* at 473-74, paras. 273-74.

<sup>627</sup> *Id.* at 475-76, paras. 276-77.

<sup>628</sup> *See id.*

<sup>629</sup> *Id.* at 477-79, paras. 279-80.

<sup>630</sup> *Id.* at 477-78, para. 279.

<sup>631</sup> *Id.* at 477-79, paras. 279-80.

<sup>632</sup> *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5724-25, 5726-28, paras. 283-84, 289-92.

<sup>633</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17980-81, para. 136 n.444; *RIF Order*, 33 FCC Rcd at 445-47, paras. 232-34.

<sup>634</sup> *Mozilla*, 940 F.3d at 47-49.

rely on section 257 of the Act (now in conjunction with section 13 of the Act)<sup>635</sup> as additional legal authority for the transparency rule, as we may modify it. We seek comment on these proposals.

203. We also seek comment on any additional sources of authority under Title II of the Act that could serve as authority for open Internet rules. For example, the *RIF Order* cataloged arguments about other possible sources of Title II authority for open Internet rules in sections 251(a), 256, and 275 of the Act identified in the record there. The Commission at the time ultimately declined to rely on those sources of authority due to perceived shortcomings in the record regarding the justification for their use,<sup>636</sup> and also took the view that they would not, even in the aggregate, provide authority for the Commission to adopt open Internet rules addressing the full array of ISPs.<sup>637</sup> We seek comment on those possible sources of authority, including both more-developed explanations for how and when they could serve as regulatory authority for open Internet rules and whether there would be grounds for exercising that authority under the regulatory approach we propose here.

### 3. Title III of the Act for Mobile Providers

204. As in the *2015 Open Internet Order*, we propose to rely on our broad legal authority under Title III of the Act<sup>638</sup> to protect the public interest through spectrum licensing and regulations—including sections 303 and 316 of the Act—as additional legal authority for the proposed open Internet rules in the case of mobile BIAS.<sup>639</sup> The *RIF Order* conceded the viability of Title III authority in this regard, but declined to exercise that authority because it would be limited to rules for mobile ISPs, rather than providing authority for rules governing all ISPs.<sup>640</sup> We do not believe that concern of the *RIF Order* is likely to arise under our proposed regulatory approach here, and we seek comment on that understanding. We recognize that the D.C. Circuit’s *Mozilla* decision includes a brief statement as part of its review of the *RIF Order*’s preemption decision stating that BIAS is not “radio transmission,” so Title III does not apply.<sup>641</sup> But the *RIF Order* did not attempt to apply (or justify applying) Title III, and the *Mozilla* decision did not develop any reasoning in support of that assertion. Particularly given that backdrop, we do not believe the court’s statement should be read to call into question the Commission’s prior recognition that mobile BIAS falls within the scope of Title III. We seek comment on these views and on any additional provisions in Title III of the Act that could serve as authority for open Internet rules in the case of mobile BIAS or otherwise.

### 4. Other Possible Sources of Legal Authority

205. We seek comment on any other possible sources of legal authority for open Internet rules. For example, the *2010 Open Internet Order* relied on additional sources of authority apart from section

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<sup>635</sup> The RAY BAUM’S Act of 2018 eliminated section 257(c) of the Act, and instead included language in new section 13 of the Act, 47 U.S.C. § 163, requiring similar review under that provision. *See, e.g., Mozilla*, 940 F.3d at 47 (noting that while section 257(c) was removed from the Communications Act before the 2018 Order became effective, it was not altered in any material respect for purposes of the Commission’s authority in this regard, and that Congress emphasized that “[n]othing in this title or the amendments made by this title shall be construed to expand or contract the authority of the Commission”).

<sup>636</sup> *See, e.g., RIF Order*, 33 FCC Rcd at 445-46, paras. 284-85.

<sup>637</sup> *See, e.g., id.* at 446-47, paras. 286-88.

<sup>638</sup> *See, e.g., CellCo P’ship v. FCC*, 700 F.3d 534, 541-49 (D.C. Cir. 2012) (affirming the Commission’s data roaming rules as an exercise of the Commission’s spectrum management authority under Section 316 and 303(r)).

<sup>639</sup> *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5725, paras. 285-87.

<sup>640</sup> *See, e.g., RIF Order*, 33 FCC Rcd at 485, para. 292.

<sup>641</sup> *Mozilla*, 940 F.3d at 76.

706 of the 1996 Act and Titles II and III of the Act—in particular, sources under Title VI of the Act.<sup>642</sup> The *RIF Order* expressly declined to rely on those sources of authority given what that *Order* identified as limitations regarding the justification for the use of those authorities, as well as the *RIF Order*'s view that they would not, even in the aggregate, provide authority for the Commission to adopt open Internet rules addressing the full array of ISPs.<sup>643</sup> We seek more developed comment on that possible Title VI authority and on any other possible sources of authority under the Act.

206. In addition, we seek comment on additional sources of authority outside the Act. For example, the recent bipartisan Infrastructure Act built upon the foundation of the transparency rule and broadband label requirements from the *2015 Open Internet Order* to require the Commission to adopt new broadband label rules.<sup>644</sup> Does that law provide additional authority for rules here, particularly as it relates to possible modifications of the transparency rule?

207. We also seek comment on whether the Commission should rely on ancillary authority in conjunction with other primary sources of legal authority in adopting open Internet rules in any respects. To the extent that commenters advocate such an approach, they should explain how the prerequisites for ancillary authority would be met,<sup>645</sup> particularly by explaining why the action would help effectuate regulatory authority granted to the Commission under other statutory provisions.

## H. Other Laws and Considerations

208. The *2015 Open Internet Order* discussed the relationship between the open Internet rules adopted there and ISPs' rights or obligations with respect to other laws, safety and security considerations, or the ability of ISPs to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content.<sup>646</sup> We propose continuing that approach in the case of the rules upon which we seek comment here, and seek comment on that proposal, along with specific language for open Internet rules intended to achieve the objectives discussed below, and any additional ways in which we should account for similar interests in the codified rules.

209. Consistent with the *2015 Open Internet Order*, we propose that the open Internet rules upon which we seek comment here would not expand or contract ISPs' rights or obligations with respect to other laws or preclude them from responding to safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities.<sup>647</sup> The *2015 Open Internet Order* specifically highlighted examples of other laws imposing requirements in these respects, such as the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act, and we again seek comment as to those specific laws along with any others that should inform our analysis.<sup>648</sup> We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order*:

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<sup>642</sup> *2010 Open Internet Order*, 25 FCC Rcd at 17974-78, paras. 127-32. For example, the *2010 Open Internet Order* invoked several provisions of Title VI of the Act. See, e.g., *id.* at 17974-78, paras. 127, 129-32 (citing 47 U.S.C. §§ 536, 548)

<sup>643</sup> See, e.g., *RIF Order*, 33 FCC Rcd at 484, paras. 290-91.

<sup>644</sup> Infrastructure Act, § 60504(a).

<sup>645</sup> To exercise ancillary authority “two conditions [must be] satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

<sup>646</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5731-33, paras. 299-305.

<sup>647</sup> *Id.* at 5731-32, paras. 300-303.

<sup>648</sup> *Id.* at 5732, para. 302 (citing 47 U.S.C. § 1002(a), 50 U.S.C. §§ 1802(a)(4), 1804, 1805(c)(2), and 18 U.S.C. §§ 2518, 2705).

*Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.*<sup>649</sup>

We seek comment on this approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible emergency communications and safety and security scenarios. For example, the *2015 Open Internet Order* elected not to expand the application of its rule in this regard to public utilities and other critical infrastructure operators, reasoning that those interests otherwise were protected under the approach it adopted.<sup>650</sup> Is that same approach appropriate here, or should we address safety and security interests related to public utilities and other critical infrastructure operators in some other way in any rules we may adopt here? Should our rules go further to affirmatively require ISPs to take certain steps to address the needs of emergency communications or law enforcement, public safety, or national security authorities? For example, should the rules go further in addressing the categories of concerns raised before the Commission on remand of the *RIF Order*, such as the needs of public safety personnel; concerns about particular harms to public safety that could result from blocking, throttling, or paid prioritization; concerns about public safety needs for individuals with disabilities; or concerns related to critical infrastructure?<sup>651</sup>

210. Also consistent with the *2015 Open Internet Order*, we propose that the open Internet rules upon which we seek comment here would protect only lawful content, and would not be intended to inhibit efforts by ISPs to address unlawful transfers of content or transfers of unlawful content.<sup>652</sup> We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order*:

*Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.*<sup>653</sup>

We seek comment on that approach and on alternative approaches to protecting these interests, including whether the rule should capture other possible scenarios where ISPs might seek to address unlawful transfers of content or transfers of unlawful content.

211. We also seek comment on whether there are other categories of otherwise-applicable laws or legal requirements that should be addressed through comparable rules as those we propose to address emergency communications and safety and security scenarios and efforts by ISPs to address unlawful transfers of content or transfers of unlawful content. For example, the *RIF Remand Order* noted comments expressing concern about the possible interplay between ISPs' practices and laws protecting individuals with disabilities.<sup>654</sup> Given that the regulatory approach proposed here differs significantly from the one at issue in the *RIF Remand Order*, would such concerns still be relevant here? If so, would it be appropriate to address them through a rule specifically focused on those categories of laws? Are there additional otherwise-existing legal requirements imposed on ISPs that we should expressly accommodate in any rules we adopt?

## VI. CONSTITUTIONAL CONSIDERATIONS

212. Consistent with the constitutional considerations the Commission has evaluated in connection with its regulatory approach to BIAS in the past, we seek comment on First Amendment

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<sup>649</sup> *Id.* at 5731-32, para. 300.

<sup>650</sup> *Id.* at 5732, para. 303.

<sup>651</sup> *RIF Remand Order*, 35 FCC Rcd at 12366-68, paras. 46-65.

<sup>652</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5732-33, paras. 304-305.

<sup>653</sup> *Id.* at 5732-33, para. 304.

<sup>654</sup> *See, e.g., RIF Remand Order*, 35 FCC Rcd at 12364-66, paras. 61-63.

speech issues and Fifth Amendment takings issues. In addition, we also seek comment on any other constitutional considerations that should inform our evaluation of the issues raised in this proceeding.

#### A. First Amendment

213. We seek comment on any First Amendment implications of the issues raised in this proceeding, both as a general matter and in the specific respects discussed below. Consistent with prior Commission analyses, we believe our open Internet conduct rule proposals and any modifications to the transparency rule are permissible exercises of authority under the First Amendment.

##### 1. Free Speech Rights

214. We anticipate that our proposals would withstand any review under the First Amendment for the same reasons explained by the Commission in the *2015 Open Internet Order*.<sup>655</sup> In particular, as explained in that *Order*,<sup>656</sup> and ultimately affirmed by the D.C. Circuit in *USTA*,<sup>657</sup> under traditional First Amendment doctrine there are no First Amendment concerns raised by the conduct regulation of common carriers. We think the same reasoning is likely to apply here, and seek comment on that view.

215. Even if a court departed from the traditional common carrier First Amendment precedent, we believe that our proposed conduct rules are likely to satisfy First Amendment scrutiny for the same reasons further identified in the *2015 Open Internet Order*.<sup>658</sup> Consistent with the explanation there, we believe the conduct rules are likely to be seen as content-neutral and thus subject to intermediate First Amendment scrutiny in this scenario.<sup>659</sup> We also find it likely that the proposed rules readily could survive that level of scrutiny—advancing an important or substantial government interest unrelated to limiting speech without burdening more speech than necessary—based on the same governmental interests and nexus to the conduct rules identified by the Commission in the *2015 Open Internet Order*.<sup>660</sup> We seek comment on that view and on any additional evidence and arguments bearing on the potential application of the First Amendment in the case of the conduct rules proposed here.

216. Because the *2015 Open Internet Order* was limited to offers of “mass-market” broadband access to “all or substantially all Internet endpoints,” it would not have applied to offerings that were clearly as advertised as providing only “filtered” Internet access catering to a particular audience or as providing access only to curated content. We propose to adopt the same approach here and we seek comment on this proposal. We also seek comment on whether or to what extent ISPs engage in content moderation, curation, or otherwise limit or exercise control over what third-party content their users are able to access on the Internet.<sup>661</sup> We are aware that some social media platforms and other edge providers purport to engage in various forms of content moderation or editorial control over content they host or transmit, and typically announce that they engage in such practices in their terms of service of user agreements; is there any record of ISPs announcing and engaging in comparable activity?

217. We also seek comment on the competing First Amendment views expressed by judges in separate opinions accompanying the D.C. Circuit’s denial of requests to rehear the *USTA* case *en banc*. On one hand, then-Judge Kavanaugh’s dissent expressed First Amendment concerns with the *2015 Open Internet Order* on the theory that “the First Amendment bars the Government from restricting the editorial

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<sup>655</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5868-73, paras. 544-58.

<sup>656</sup> *Id.* at 5868-71, 5873, paras. 544-52, 558.

<sup>657</sup> *USTA*, 825 F.3d at 740-44.

<sup>658</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5872-73, paras. 553-58.

<sup>659</sup> *Id.* at 5872, paras. 553-54.

<sup>660</sup> *Id.* at 5872, paras. 554-56.

<sup>661</sup> *Cf.* *2015 Open Internet Order*, 30 FCC Rcd at 5869-70, para. 549 (finding little evidence that such ISPs exercise meaningful control over the content which their users access on the Internet).



discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market”—a showing that the Commission had not made there.<sup>662</sup> On the other hand, Judges Srinivasan and Tatel, concurring in the denial of rehearing *en banc*, responded to the dissent by arguing that “no Supreme Court decision supports the counterintuitive notion that the First Amendment entitles an ISP to engage in the kind of conduct barred by the net neutrality rule—i.e., to hold itself out to potential customers as offering them an unfiltered pathway to any web content of *their* own choosing, but then, once they have subscribed, to turn around and limit their access to certain web content based on the *ISP’s* own commercial preferences.”<sup>663</sup> We seek comment on those views.

218. Referencing statements in the First Amendment analysis in Judges Srinivasan’s and Tatel’s concurrence, the *RIF Order* contended that the *2015 Open Internet Order* “allows ISPs to offer curated services, which would allow ISPs to escape the reach of the [*2015 Open Internet Order*] and to filter content on viewpoint grounds.”<sup>664</sup> We seek comment on the accuracy of that characterization and how it should inform our analysis and approach here.

## 2. Compelled Disclosure

219. We also believe that any modifications to the transparency rule are likely to satisfy the First Amendment for the same reasons relied on by the Commission in its justification of the transparency rules at issue in the *2015 Open Internet Order* and the *RIF Order*.<sup>665</sup> As a threshold matter, as explained in the *RIF Order*, we believe the speech addressed by our transparency rule is likely to be limited to commercial speech.<sup>666</sup> We seek comment on that view.

220. We also believe that our transparency rule, as we may modify it, is likely to be understood by a court as limited to compelling the disclosure of factual, noncontroversial information under circumstances that fall within the *Zauderer* First Amendment framework, consistent with the Commission’s analysis in the *2015 Open Internet Order*.<sup>667</sup> Also consistent with the analysis in the *2015 Open Internet Order*, we believe any modifications to the transparency rule are likely to be a reasonable way of advancing government interests in preventing consumer deception, among other things, and thus would satisfy the *Zauderer* standard.<sup>668</sup> We believe any modifications to the disclosures in our transparency rule would be the sort of “purely factual and uncontroversial information about the terms under which . . . services will be available” to which *Zauderer* applies.<sup>669</sup> We seek comment on the

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<sup>662</sup> *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 476 (Kavanaugh, J., dissenting from denial of rehearing *en banc*); see also *id.* at 426-35 (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (setting forth the details of his analysis).

<sup>663</sup> *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 382 (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing *en banc*); see also *id.* at 388-93 (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing *en banc*) (setting forth the details of their analysis).

<sup>664</sup> *RIF Order*, 33 FCC Rcd at 470, para. 266 (citing *U.S. Telecom Ass’n v. FCC*, 855 F.3d at 389 (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing *en banc*)).

<sup>665</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5873-75, paras. 559-63; *RIF Order*, 33 FCC Rcd at 448-50, paras. 235-38.

<sup>666</sup> *RIF Order*, 33 FCC Rcd at 448, para. 235 n.854.

<sup>667</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5874, para. 561 (discussing, among other cases, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). Under *Zauderer’s* rational basis test, mandatory factual disclosures will be sustained “as long as disclosure requirements are reasonably related to the State’s interest.” *Zauderer*, 471 U.S. at 651; see also, e.g., *Am. Meat Inst. v. U.S. Dep’t. of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*).

<sup>668</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5874-75, paras. 562-63.

<sup>669</sup> See *Nat’l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer*, 471 U.S. at 651).

continued applicability of that analysis from the *2015 Open Internet Order*.

221. Alternatively, to the extent that a court evaluated any modifications to the transparency rule under the *Central Hudson* framework, which applies generally to commercial speech, we believe it also likely would satisfy First Amendment scrutiny under that standard for the same reasons given in that regard in the *RIF Order*.<sup>670</sup> We believe any modifications to the transparency rule are likely to directly advance substantial government interests and be no more extensive than necessary, for reasons such as those identified in the *RIF Order*.<sup>671</sup> We seek comment on these views and any other First Amendment considerations.

## B. Fifth Amendment Takings

222. Consistent with the conclusions in the *2015 Open Internet Order*, we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in *per se* takings because we do not anticipate that they would grant third parties a right to physical occupation of the ISPs’ property.<sup>672</sup> And as the *2015 Open Internet Order* recognized, where private parties voluntarily open their networks to end users and edge providers, reasonable regulation of the use of their property poses no takings issue.<sup>673</sup> We seek comment on the continued applicability of those analyses here and any other considerations relevant to possible *per se* takings arguments.

223. Also consistent with the conclusions in the *2015 Open Internet Order*, we do not believe the proposals in this Notice—either the proposed classification decisions or the proposed rules—are likely to result in regulatory takings.<sup>674</sup> Outside of *per se* takings cases, courts analyze putative government takings through “essentially ad hoc, factual inquiries” into a variety of unweighted factors such as the “economic impact of the regulation,” the degree of interference with “investment-backed expectations,” and “the character of the government action.”<sup>675</sup> The *2015 Open Internet Order* weighed these factors and concluded that the actions taken there did not constitute regulatory takings, and we believe the same is likely to be true of our proposals here.<sup>676</sup> We seek comment on these views.

## VII. PROCEDURAL MATTERS

224. *Ex Parte Rules*. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>677</sup> 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

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<sup>670</sup> See, e.g., *RIF Order*, 33 FCC Rcd at 448, para. 235.

<sup>671</sup> *RIF Order*, 33 FCC Rcd at 448-50, paras. 235-38.

<sup>672</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5875-77, paras. 564-68.

<sup>673</sup> *Id.* at 5877-78, para. 569.

<sup>674</sup> *Id.* at 5878-79, paras. 570-73.

<sup>675</sup> *Id.* at 5878, para. 570 (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (internal quotation marks omitted)).

<sup>676</sup> *2015 Open Internet Order*, 30 FCC Rcd at 5878-79, paras. 570-73.

<sup>677</sup> 47 CFR § 1.1200(a).

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).<sup>678</sup> Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

225. *Comment Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>679</sup> 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) or by paper. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Electronic Filers: Comments may be filed electronically by accessing ECFS at <https://www.fcc.gov/ecfs>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Paper filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings.<sup>680</sup>
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority Mail must be addressed to 45 L Street NE, Washington, D.C. 20554.

226. *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](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530.

227. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>681</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>682</sup> Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible impact of the rule and policy changes contained in this Notice of Proposed Rulemaking. The IRFA is set forth in Appendix B.

228. *Paperwork Reduction Act.* This document contains proposed new or 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 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,<sup>683</sup> we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

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<sup>678</sup> 47 CFR § 1.1206(b).

<sup>679</sup> 47 CFR §§ 1.415, 1.419.

<sup>680</sup> See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, DA 20-304, Public Notice, 35 FCC Rcd 2788 (2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

<sup>681</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>682</sup> *Id.*

<sup>683</sup> See 44 U.S.C. § 3506(c)(4).

229. *Providing Accountability Through Transparency Act.* The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule.<sup>684</sup> Accordingly, the Commission will publish the required summary of this Notice of Proposed Rulemaking/Further Notice of Proposed Rulemaking on <https://www.fcc.gov/proposed-rulemakings>.

230. *Further Information.* For additional information on this proceeding, contact the Wireline Competition Bureau at [OpenInternet2023@fcc.gov](mailto:OpenInternet2023@fcc.gov).

#### VIII. ORDERING CLAUSES

231. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 3, 4(i)-(j), 10, 13, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, and 548 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C §§ 151, 152, 153, 154(i)-(j), 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, and 1302, that this Notice of Proposed Rulemaking IS ADOPTED.

232. 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 and 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before December 14, 2023, and reply comments on or before January 17, 2024.

233. IT IS FURTHER ORDERED that the Office of the Secretary, 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

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<sup>684</sup> 5 U.S.C. § 553(b)(4). The Providing Accountability Through Transparency Act, Pub. L. No. 118-9 (2023), amended section 553(b) of the Administrative Procedure Act.

**APPENDIX A**  
**Proposed Rules**

For the reasons discussed in the document, the Federal Communications Commission proposes to amend 47 CFR parts 8 and 20 as follows:

**PART 8 — [AMENDED]**

1. Amend part 8 by revising the part heading to read as follows:

**PART 8 – SAFEGUARDING AND SECURING THE OPEN INTERNET**

2. The authority citation for part 8 is revised to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 160, 163, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 501, 503, 522, 536, 548, 1302, 1753.

3. Add § 8.2 to read as follows:

**§ 8.2 Conduct-based rules.**

- (a) *Definitions.* For purposes of this section:

- (1) *Broadband Internet access service* means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.
- (2) *Edge provider* means any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.
- (3) *End user* means any individual or entity that uses a broadband Internet access service.
- (4) *Reasonable network management* means a network management practice that has a primarily technical network management justification, but does not include other business practices. A network management practice 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.

- (b) *No blocking.* 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.
- (c) *No throttling.* 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.
- (d) *No paid prioritization.* A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping,

prioritization, resource reservation, or other forms of preferential traffic management, either (1) in exchange for consideration (monetary or otherwise) from a third party, or (2) to benefit an affiliated entity. The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

- (e) *General conduct standard.* Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (1) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (2) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.
- (f) *Effect on other obligations or authorizations.* Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so. Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

## PART 20 – COMMERCIAL MOBILE SERVICES

4. The authority citation for part 20 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 152(a), 154(i), 155, 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 610, 615, 615a, 615b, and 615c, unless otherwise noted.

5. Amend § 20.3 by revising paragraph (b) in the definition of “Commercial mobile radio service” and the definition of “Public Switched Network” to read 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, including a mobile broadband Internet access service as defined in § 8.2 of this chapter.

\* \* \* \* \*

*Public Switched Network.* The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.

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## APPENDIX B

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> 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 the *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments 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).<sup>2</sup> In addition, the *Notice* and IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>3</sup>

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

2. In the *Notice*, we propose to reestablish the Commission's authority over broadband Internet access service (BIAS) by classifying BIAS as a telecommunications service under Title II of the Communications Act of 1934, as amended (Act). We further propose to reclassify mobile BIAS as a commercial mobile service. The COVID-19 pandemic showed how essential BIAS connections are for consumers' participation in today's society and economy, for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service. Notable among these is enabling the Commission to safeguard the fair and open Internet through a national regulatory approach. The Commission also has an important statutory mandate to protect "life and property" by supporting national security and public safety.<sup>4</sup>

3. Restoring Title II authority will allow the Commission to safeguard and secure the open Internet in three significant ways. First, this authority will allow the Commission to protect consumers, including by issuing straightforward, clear rules to prevent Internet service providers from engaging in practices harmful to consumers, competition, and public safety, and by establishing a national regulatory approach rather than disparate requirements that vary state-by-state. Second, reclassification will strengthen the Commission's ability to secure communications networks and critical infrastructure against national security threats. Third, the reclassification will enable the Commission to protect public safety during natural disasters and other emergencies. We also anticipate that the proper classification of BIAS as a telecommunications service will enhance the Commission's ability to advance other important interests, including protection of consumers' privacy and data security interests and consumers' ability to access BIAS. Beyond these areas, we believe that classification of BIAS as a telecommunications service represents the best reading of the text of the Act in light of the marketplace reality of how the service is offered and perceived today.

4. To protect the openness of the Internet, we propose to return to the basic framework the Commission adopted in 2015 by reinstating straightforward, clear rules that are designed to prevent internet service providers (ISPs) from engaging in practices harmful to consumers, competition, and public safety, and that would provide the basis for a national regulatory approach toward BIAS, consistent with the Commission's longstanding policy approach to protect Internet openness prior to the *RIF Order*. We first propose to reinstate the rules adopted in the *2015 Open Internet Order* that prohibit

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<sup>1</sup> 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).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> See 47 U.S.C. § 151.

ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We similarly propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Finally, with regard to transparency, we propose to retain the current disclosures, and we seek comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes we should consider. We believe that the rules we propose today will establish a baseline that the Commission can use to prevent and address conduct that harms consumers and competition when it occurs.

## **B. Legal Basis**

5. The proposed action is authorized pursuant to sections 1, 2, 4(i)-(j), 13, 201, 202, 208, 257, 303, and 316, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 163, 201, 202, 208, 257, 303, 316, and 1302.

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

6. 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.<sup>5</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>6</sup> In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.<sup>7</sup> 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 Small Business Administration (SBA).<sup>8</sup>

### **1. Total Small Entities**

7. *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, at the outset, three broad groups of small entities that could be directly affected herein.<sup>9</sup> 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.<sup>10</sup> These types of small businesses represent 99.9 % of all businesses in the United States, which translates to 33.2 million businesses.<sup>11</sup>

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<sup>5</sup> See 5 U.S.C. § 603(b)(3).

<sup>6</sup> See *id.* § 601(6).

<sup>7</sup> See *id.* § 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.”

<sup>8</sup> See 15 U.S.C. § 632.

<sup>9</sup> See 5 U.S.C. § 601(3)-(6).

<sup>10</sup> See SBA, Office of Advocacy, “What’s New With Small Business?” (Mar. 2023), <https://advocacy.sba.gov/wp-content/uploads/2023/03/Whats-New-Infographic-March-2023-508c.pdf>.

<sup>11</sup> *Id.*



8. 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.”<sup>12</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.<sup>13</sup> Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>14</sup>

9. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>15</sup> U.S. Census Bureau data from the 2017 Census of Governments<sup>16</sup> indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>17</sup> Of this number, there were 36,931 general purpose governments (county,<sup>18</sup> municipal, and town or township<sup>19</sup>) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts<sup>20</sup> with enrollment

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<sup>12</sup> See 5 U.S.C. § 601(4).

<sup>13</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number of small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations – Form 990-N (e-Postcard), “Who must file,” <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>14</sup> See Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for businesses for the tax year 2020 with revenue less than or equal to \$50,000 for Region 1-Northeast Area (58,577), Region 2-Mid-Atlantic and Great Lakes Areas (175,272), and Region 3-Gulf Coast and Pacific Coast Areas (213,840) that includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

<sup>15</sup> See 5 U.S.C. § 601(5).

<sup>16</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>17</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also tbl.2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>18</sup> See *id.* at tbl.5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>19</sup> See *id.* at tbl.6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>20</sup> See *id.* at tbl.10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also tbl.4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes\_Special Purpose Local Governments by State\_Census Years 1942 to 2017.

populations of less than 50,000.<sup>21</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>22</sup>

## 2. Wired Broadband Internet Access Service Providers

10. *Wired Broadband Internet Access Service Providers (Wired ISPs).*<sup>23</sup> Providers of wired broadband Internet access service include various types of providers except dial-up Internet access providers. Wireline service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission’s rules.<sup>24</sup> Wired broadband Internet services fall in the Wired Telecommunications Carriers industry.<sup>25</sup> The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small.<sup>26</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>27</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>28</sup>

11. Additionally, according to Commission data on Internet access services as of June 30, 2019, nationwide there were approximately 2,747 providers of connections over 200 kbps in at least one direction using various wireline technologies.<sup>29</sup> The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA’s small business size standard. However, in light of the general data on fixed technology service providers in the Commission’s *2022 Communications*

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<sup>21</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>22</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations tbls. 5, 6 & 10.

<sup>23</sup> Formerly included in the scope of the Internet Service Providers (Broadband), Wired Telecommunications Carriers, and All Other Telecommunications small entity industry descriptions.

<sup>24</sup> See 47 CFR § 1.7001(a)(1).

<sup>25</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers,”* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>26</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>27</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

<sup>28</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>29</sup> See Federal Communications Commission, *Internet Access Services: Status as of June 30, 2019* at 27, Fig. 30 (*IAS Status 2019*), Industry Analysis Division, Office of Economics & Analytics (March 2022). The report can be accessed at <https://www.fcc.gov/economics-analytics/industry-analysis-division/iad-data-statistical-reports>. The technologies used by providers include aDSL, sDSL, Other Wireline, Cable Modem, and FTTP). Other wireline includes: all copper-wire based technologies other than xDSL (such as Ethernet over copper, T-1/DS-1, and T3/DS-1), as well as power line technologies which are included in this category to maintain the confidentiality of the providers.

*Marketplace Report*,<sup>30</sup> we believe that the majority of wireline Internet access service providers can be considered small entities.

### 3. Wireline Providers

12. *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.<sup>31</sup> 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 Voice-over Internet Protocol (VoIP) services, wired (cable) audio and video programming distribution, and wired broadband Internet services.<sup>32</sup> By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.<sup>33</sup> Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.<sup>34</sup>

13. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>35</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>36</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>37</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 4,590 providers that reported they were engaged in the provision of fixed local services.<sup>38</sup> Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees.<sup>39</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

14. *Incumbent Local Exchange Carriers (Incumbent LECs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers.

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<sup>30</sup> See *Communications Marketplace Report*, GN Docket No. 22-203, 2022 WL 18110553 at 10, paras. 26-27, Figs. II.A.5-7 (2022) (*2022 Communications Marketplace Report*).

<sup>31</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Fixed Local Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, and Other Local Service Providers. Local Resellers fall into another U.S. Census Bureau industry group and therefore data for these providers is not included in this industry.

<sup>35</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>36</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>37</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>38</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>. <https://docs.fcc.gov/public/attachments/DOC-379181A1.pdf>

<sup>39</sup> *Id.*

Wired Telecommunications Carriers<sup>40</sup> is the closest industry with an SBA small business size standard.<sup>41</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>42</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>43</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>44</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 1,212 providers that reported they were incumbent local exchange service providers.<sup>45</sup> Of these providers, the Commission estimates that 916 providers have 1,500 or fewer employees.<sup>46</sup> Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

15. *Competitive Local Exchange Carriers (Competitive LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.<sup>47</sup> Wired Telecommunications Carriers<sup>48</sup> is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>49</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>50</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>51</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 3,378 providers that reported they were

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<sup>40</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>41</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>42</sup> *Id.*

<sup>43</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>44</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>45</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>46</sup> *Id.*

<sup>47</sup> Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

<sup>48</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>49</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>50</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>51</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

competitive local exchange service providers.<sup>52</sup> Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees.<sup>53</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

16. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers<sup>54</sup> is the closest industry with an SBA small business size standard.<sup>55</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>56</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.<sup>57</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>58</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 127 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates that 109 providers have 1,500 or fewer employees.<sup>59</sup> Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

17. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable industry with an SBA small business size standard is Wired Telecommunications Carriers.<sup>60</sup> The SBA small business size standard classifies a business as small if it has 1,500 or fewer employees.<sup>61</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>62</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>63</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were

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<sup>52</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>55</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>56</sup> *Id.*

<sup>57</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

<sup>58</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>59</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>60</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>61</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>62</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

<sup>63</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

20 providers that reported they were engaged in the provision of operator services.<sup>64</sup> Of these providers, the Commission estimates that all 20 providers have 1,500 or fewer employees.<sup>65</sup> Consequently, using the SBA's small business size standard, all of these providers can be considered small entities.

18. *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. Wired Telecommunications Carriers<sup>66</sup> is the closest industry with an SBA small business size standard.<sup>67</sup> The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.<sup>68</sup> U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.<sup>69</sup> Of this number, 2,964 firms operated with fewer than 250 employees.<sup>70</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 90 providers that reported they were engaged in the provision of other toll services.<sup>71</sup> Of these providers, the Commission estimates that 87 providers have 1,500 or fewer employees.<sup>72</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

#### 4. Wireless Providers – Fixed and Mobile

19. The broadband Internet access service provider category covered by this *Notice* 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 services, 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.

20. *Wireless Broadband Internet Access Service Providers (Wireless ISPs or WISPs).*<sup>73</sup> Providers of wireless broadband Internet access service include fixed and mobile wireless providers. The

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<sup>64</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>. <https://docs.fcc.gov/public/attachments/DOC-379181A1.pdf>

<sup>65</sup> *Id.*

<sup>66</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>67</sup> See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

<sup>68</sup> *Id.*

<sup>69</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>70</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>71</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> Formerly included in the scope of the Internet Service Providers (Broadband), Wireless Telecommunications Carriers (except Satellite), and All Other Telecommunications small entity industry descriptions.

Commission defines a WISP as “[a] company that provides end-users with wireless access to the Internet[.]”<sup>74</sup> Wireless service that terminates at an end user location or mobile device and enables the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction is classified as a broadband connection under the Commission’s rules.<sup>75</sup> Neither the SBA nor the Commission have developed a size standard specifically applicable to Wireless Broadband Internet Access Service Providers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite).<sup>76</sup> The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>77</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.<sup>78</sup> Of that number, 2,837 firms employed fewer than 250 employees.<sup>79</sup>

21. Additionally, according to Commission data on Internet access services as of June 30, 2019, nationwide there were approximately 1,237 fixed wireless and 70 mobile wireless providers of connections over 200 kbps in at least one direction.<sup>80</sup> The Commission does not collect data on the number of employees for providers of these services, therefore, at this time we are not able to estimate the number of providers that would qualify as small under the SBA’s small business size standard. However, based on data in the Commission’s *2022 Communications Marketplace Report* on the small number of large mobile wireless nationwide and regional facilities-based providers, the dozens of small regional facilities-based providers and the number of wireless mobile virtual network providers in general,<sup>81</sup> as well as on terrestrial fixed wireless broadband providers in general,<sup>82</sup> we believe that the majority of wireless Internet access service providers can be considered small entities.

22. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves.<sup>83</sup> 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.<sup>84</sup> The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>85</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms in this

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<sup>74</sup> Federal Communications Commission, Internet Access Services: Status as of June 30, 2019 at 27, Fig. 30 (*IAS Status 2019*), Industry Analysis Division, Office of Economics & Analytics (March 2022). The report can be accessed at <https://www.fcc.gov/economics-analytics/industry-analysis-division/iad-data-statistical-reports>.

<sup>75</sup> See 47 CFR § 1.7001(a)(1).

<sup>76</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>77</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>78</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>79</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>80</sup> See *IAS Status 2019*, Fig. 30.

<sup>81</sup> See *2022 Communications Marketplace Report*, 2022 WL 18110553 at 27, paras. 64-68.

<sup>82</sup> *Id.* at 8, para. 22.

<sup>83</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>84</sup> *Id.*

<sup>85</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

industry that operated for the entire year.<sup>86</sup> Of that number, 2,837 firms employed fewer than 250 employees.<sup>87</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services.<sup>88</sup> Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees.<sup>89</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

23. *Wireless Communications Services.* Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to part 27 of the Commission's rules.<sup>90</sup> Wireless Telecommunications Carriers (*except* Satellite)<sup>91</sup> is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>92</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>93</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>94</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

24. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.<sup>95</sup>

25. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction

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<sup>86</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>87</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>88</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>89</sup> *Id.*

<sup>90</sup> See 47 CFR §§ 27.1 – 27.1607.

<sup>91</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (*except* Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>92</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>93</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>94</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>95</sup> See 47 CFR §§ 27.201 – 27.1601. The Designated entities sections in Subparts D – Q each contain the small business size standards adopted for the auction of the frequency band covered by that subpart.



does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

26. *Wireless Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Wireless Resellers. The closest industry with an SBA small business size standard is Telecommunications Resellers.<sup>96</sup> The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.<sup>97</sup> Establishments in this industry resell telecommunications and they do not operate transmission facilities and infrastructure.<sup>98</sup> Mobile virtual network operators (MVNOs) are included in this industry.<sup>99</sup> Under the SBA size standard for this industry, a business is small if it has 1,500 or fewer employees.<sup>100</sup> U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services during that year.<sup>101</sup> Of that number, 1,375 firms operated with fewer than 250 employees.<sup>102</sup> Thus, for this industry under the SBA small business size standard, the majority of providers can be considered small entities.

27. *1670–1675 MHz Services.* These wireless communications services can be used for fixed and mobile uses, except aeronautical mobile.<sup>103</sup> Wireless Telecommunications Carriers (except Satellite)<sup>104</sup> is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>105</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>106</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>107</sup> Thus

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<sup>96</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517911 Telecommunications Resellers,” <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See 13 CFR § 121.201, NAICS Code 517911 (as of 10/1/22, NAICS Code 517121).

<sup>101</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517911, <https://data.census.gov/cedsci/table?y=2017&n=517911&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>102</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>103</sup> See 47 CFR § 27.902.

<sup>104</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>105</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>106</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>107</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

28. According to Commission data as of November 2021, there were three active licenses in this service.<sup>108</sup> The Commission's small business size standards with respect to 1670–1675 MHz Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For licenses in the 1670-1675 MHz service band, a “small business” is defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and a “very small business” is defined as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years.<sup>109</sup> The 1670-1675 MHz service band auction's winning bidder did not claim small business status.<sup>110</sup>

29. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

30. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite).<sup>111</sup> The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees.<sup>112</sup> For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year.<sup>113</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>114</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 331 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services.<sup>115</sup> Of these providers, the Commission estimates that 255

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<sup>108</sup> Based on a FCC Universal Licensing System search on November 8, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, “Match only the following radio service(s)”, Radio Service = BC; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>109</sup> See 47 CFR § 27.906(a).

<sup>110</sup> See *1670–1675 MHz Band Auction Closes; Winning Bidder Announced; FCC Form 600s Due May 12, 2003*, Public Notice, DA-03-1472, Report No. AUC-03-46-H (Auction No.46) (May 2, 2003).

<sup>111</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>112</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>113</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>114</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>115</sup> Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report at 26*, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

providers have 1,500 or fewer employees.<sup>116</sup> Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

31. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum encompasses services in the 1850-1910 and 1930-1990 MHz bands.<sup>117</sup> The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite).<sup>118</sup> The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>119</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>120</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>121</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

32. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service.<sup>122</sup> The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years.<sup>123</sup> Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.<sup>124</sup>

33. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

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<sup>116</sup> *Id.*

<sup>117</sup> See 47 CFR § 24.200.

<sup>118</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite),"* <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>119</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>120</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIRM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIRM&hidePreview=false>.

<sup>121</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>122</sup> Based on a FCC Universal Licensing System search on November 16, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = CW; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>123</sup> See 47 CFR § 24.720(b).

<sup>124</sup> See Federal Communications Commission, Office of Economics and Analytics, Auctions, Auctions 4, 5, 10, 11, 22, 35, 58, 71 and 78, <https://www.fcc.gov/auctions>.

34. *Specialized Mobile Radio Licenses.* Special Mobile Radio (SMR) licenses allow licensees to provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz spectrum bands on a commercial basis including but not limited to services used for voice and data communications, paging, and facsimile services, to individuals, Federal Government entities, and other entities licensed under Part 90 of the Commission's rules. Wireless Telecommunications Carriers (except Satellite)<sup>125</sup> is the closest industry with an SBA small business size standard applicable to these services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>126</sup> For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.<sup>127</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>128</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 95 providers that reported they were of SMR (dispatch) providers.<sup>129</sup> Of this number, the Commission estimates that all 95 providers have 1,500 or fewer employees.<sup>130</sup> Consequently, using the SBA's small business size standard, these 119 SMR licensees can be considered small entities.<sup>131</sup>

35. Based on Commission data as of December 2021, there were 3,924 active SMR licenses.<sup>132</sup> However, since the Commission does not collect data on the number of employees for licensees providing SMR services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard. Nevertheless, for purposes of this analysis the Commission estimates that the majority of SMR licensees can be considered small entities using the SBA's small business size standard.

36. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698-746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services.<sup>133</sup> Wireless Telecommunications Carriers (*except Satellite*)<sup>134</sup> is the closest industry with an

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<sup>125</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (except Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>126</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>127</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>128</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>129</sup> Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> We note that there were also SMR providers reporting in the "Cellular/PCS/SMR" classification, therefore there are maybe additional SMR providers that have not been accounted for in the SMR (dispatch) classification.

<sup>132</sup> Based on a FCC Universal Licensing System search on December 15, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match radio services within this group", Radio Service = SMR; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>133</sup> See Federal Communications Commission, Economics and Analytics, Auctions 44, 49, 60: Lower 700 MHz Band, Fact Sheet, Permissible Operations, <https://www.fcc.gov/auction/44/factsheet>, <https://www.fcc.gov/auction/49/factsheet>, <https://www.fcc.gov/auction/60/factsheet>.

SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>135</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>136</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>137</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

37. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses.<sup>138</sup> The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding \$15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>139</sup> In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses,<sup>140</sup> twenty-six winning bidders claiming a small business classification won 214 licenses,<sup>141</sup> and three winning bidders claiming a small business classification won all five auctioned licenses.<sup>142</sup>

38. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or

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<sup>134</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (except Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>135</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>136</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>137</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>138</sup> Based on a FCC Universal Licensing System search on December 14, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = WY, WZ; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>139</sup> See 47 CFR § 27.702(a)(1)-(3).

<sup>140</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 44: Lower 700 MHz Guard Bands, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/44/charts/44cls2.pdf>.

<sup>141</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 49: Lower 700 MHz Guard Bands, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/49/charts/49cls2.pdf>.

<sup>142</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 60: Lower 700 MHz Guard Bands, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/60/charts/60cls2.pdf>.

transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

39. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746-806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758-763 MHz and 788-793 MHz bands.<sup>143</sup> Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services.<sup>144</sup> Wireless Telecommunications Carriers (*except* Satellite)<sup>145</sup> is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>146</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>147</sup> Of that number, 2,837 firms employed fewer than 250 employees.<sup>148</sup> Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

40. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses.<sup>149</sup> The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, 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, and a "very small business" 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.<sup>150</sup> Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.<sup>151</sup>

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<sup>143</sup> See 47 CFR § 27.4.

<sup>144</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 73: 700 MHz Band, Fact Sheet, Permissible Operations, <https://www.fcc.gov/auction/73/factsheet>. We note that in Auction 73, Upper 700 MHz Band C and D Blocks as well as Lower 700 MHz Band A, B, and E Blocks were auctioned.

<sup>145</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (*except* Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>146</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>147</sup> See U.S. Census Bureau, 2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>148</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>149</sup> Based on a FCC Universal Licensing System search on December 14, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = WP, WU; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>150</sup> See 47 CFR § 27.502(a).

41. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

42. *700 MHz Guard Band Licensees.* The 700 MHz Guard Band encompasses spectrum in 746-747/776-777 MHz and 762-764/792-794 MHz frequency bands. Wireless Telecommunications Carriers (*except* Satellite)<sup>152</sup> is the closest industry with an SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>153</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>154</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>155</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

43. According to Commission data as of December 2021, there were approximately 224 active 700 MHz Guard Band licenses.<sup>156</sup> The Commission's small business size standards with respect to 700 MHz Guard Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, 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, and a "very small business" 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.<sup>157</sup> Pursuant to these definitions, five winning bidders claiming one of the small business status classifications won 26 licenses, and one winning bidder claiming small business won two licenses.<sup>158</sup> None of the winning bidders claiming a small business status classification in these 700 MHz

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<sup>151</sup> See *Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73*, Public Notice, DA-08-595, Attachment A, Report No. AUC-08-73-I (Auction 73) (March 20, 2008). The results for Upper 700 MHz Band C Block can be found on pp. 62-63.

<sup>152</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite),"* <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>153</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>154</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFI, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFI&hidePreview=false>.

<sup>155</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>156</sup> Based on a FCC Universal Licensing System search on December 14, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = WX; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>157</sup> See 47 CFR § 27.502(a).

<sup>158</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 33: Upper 700 MHz Guard Bands, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/33/charts/33cls2.pdf>, Auction 38: Upper 700 MHz Guard Bands, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/38/charts/38cls2.pdf>.

Guard Band license auctions had an active license as of December 2021.<sup>159</sup>

44. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

45. *Air-Ground Radiotelephone Service.* Air-Ground Radiotelephone Service is a wireless service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.<sup>160</sup> A licensee may provide any type of air-ground service (i.e., voice telephony, broadband Internet, data, etc.) to aircraft of any type, and serve any or all aviation markets (commercial, government, and general). A licensee must provide service to aircraft and may not provide ancillary land mobile or fixed services in the 800 MHz air-ground spectrum.<sup>161</sup>

46. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).<sup>162</sup> The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>163</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>164</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>165</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

47. Based on Commission data as of December 2021, there were approximately four licensees with 110 active licenses in the Air-Ground Radiotelephone Service.<sup>166</sup> The Commission's small business size standards with respect to Air-Ground Radiotelephone Service involve eligibility for bidding credits and installment payments in the auction of licenses. For purposes of auctions, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, has average

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<sup>159</sup> Based on a FCC Universal Licensing System search on December 14, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = WX; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>160</sup> 47 CFR § 22.99.

<sup>161</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 65: 800 MHz Air-Ground Radiotelephone Service, Fact Sheet, Permissible Operations, <https://www.fcc.gov/auction/65/factsheet>.

<sup>162</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (*except* Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>163</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>164</sup> See U.S. Census Bureau, 2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePrevious=false>.

<sup>165</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>166</sup> Based on a FCC Universal Licensing System search on December 20, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service = CG, CJ; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.



gross revenues not exceeding \$40 million for the preceding three years, and a “very small business” as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding \$15 million for the preceding three years.<sup>167</sup> In the auction of Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the two winning bidders claimed small business status.<sup>168</sup>

48. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, the Commission does not collect data on the number of employees for licensees providing these services therefore, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA’s small business size standard.

49. Advanced Wireless Services (AWS) - (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); 2000-2020 MHz and 2180-2200 MHz (AWS-4). Spectrum is made available and licensed in these bands for the provision of various wireless communications services.<sup>169</sup> Wireless Telecommunications Carriers (except Satellite)<sup>170</sup> is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>171</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>172</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>173</sup> Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

50. According to Commission data as December 2021, there were approximately 4,472 active AWS licenses.<sup>174</sup> The Commission’s small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission 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

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<sup>167</sup> See 47 CFR § 22.223(b).

<sup>168</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 65: 800 MHz Air-Ground Radiotelephone Service, Summary, Closing Charts, Licenses by Bidder, <https://www.fcc.gov/sites/default/files/wireless/auctions/65/charts/65cls2.pdf>.

<sup>169</sup> See 47 CFR § 27.1(b).

<sup>170</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>171</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>172</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>173</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>174</sup> Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, “Match only the following radio service(s)”, Radio Service = AD, AH, AT, AW; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

entity with average annual gross revenues for the preceding three years not exceeding \$15 million.<sup>175</sup> Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses.<sup>176</sup> In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.<sup>177</sup>

51. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

52. *3650–3700 MHz band.* Wireless broadband service licensing in the 3650–3700 MHz band provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz).<sup>178</sup> Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis.<sup>179</sup> Wireless broadband services in the 3650–3700 MHz band fall in the Wireless Telecommunications Carriers (*except* Satellite)<sup>180</sup> industry with an SBA small business size standard that classifies a business as small if it has 1,500 or fewer employees.<sup>181</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>182</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>183</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

53. The Commission has not developed a small business size standard applicable to 3650–3700 MHz band licensees. Based on the licenses that have been granted, however, we estimate that the majority of licensees in this service are small Internet access service providers. As of November 2021, Commission data shows that there were 902 active licenses in the 3650–3700 MHz band.<sup>184</sup> However,

<sup>175</sup> See 47 CFR §§ 27.1002, 27.1102, 27.1104, 27.1106.

<sup>176</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 66: Advanced Wireless Services (AWS-1), Summary, Spreadsheets, <https://www.fcc.gov/sites/default/files/wireless/auctions/66/charts/66cls2.pdf>.

<sup>177</sup> See *Auction of Advanced Wireless Services (AWS-3) Licenses Closes; Winning Bidders Announced for Auction 97*, Public Notice, DA-15-131, Attachments A-B, (Auction No. 97) (January 30, 2015).

<sup>178</sup> See 47 CFR §§ 90.1305, 90.1307.

<sup>179</sup> See *id.* § 90.1309.

<sup>180</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (*except* Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>181</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>182</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePrevious=false>.

<sup>183</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>184</sup> Based on a FCC Universal Licensing System search on November 19, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, “Match only the following radio service(s)”, Radio Service = NN; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

54. *Fixed Microwave Services.* Fixed microwave services include common carrier,<sup>185</sup> private-operational fixed,<sup>186</sup> and broadcast auxiliary radio services.<sup>187</sup> They also include the Upper Microwave Flexible Use Service (UMFUS),<sup>188</sup> Millimeter Wave Service (70/80/90 GHz),<sup>189</sup> Local Multipoint Distribution Service (LMDS),<sup>190</sup> the Digital Electronic Message Service (DEMS),<sup>191</sup> 24 GHz Service,<sup>192</sup> Multiple Address Systems (MAS),<sup>193</sup> and Multichannel Video Distribution and Data Service (MVDDS),<sup>194</sup> where in some bands licensees can choose between common carrier and non-common carrier status.<sup>195</sup> Wireless Telecommunications Carriers (*except* Satellite)<sup>196</sup> is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>197</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>198</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>199</sup> Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

55. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based on average gross revenues (small, very small, and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as

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<sup>185</sup> See 47 CFR Part 101, Subparts C and I.

<sup>186</sup> See *id.* Subparts C and H.

<sup>187</sup> 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 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.

<sup>188</sup> See 47 CFR Part 30.

<sup>189</sup> See 47 CFR Part 101, Subpart Q.

<sup>190</sup> See *id.* Subpart L.

<sup>191</sup> See *id.* Subpart G.

<sup>192</sup> See *id.*

<sup>193</sup> See *id.* Subpart O.

<sup>194</sup> See *id.* Subpart P.

<sup>195</sup> See 47 CFR §§ 101.533, 101.1017.

<sup>196</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (*except* Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>197</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>198</sup> See U.S. Census Bureau, 2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>199</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.<sup>200</sup>

56. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

57. *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,"<sup>201</sup> 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)).<sup>202</sup> Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.<sup>203</sup>

58. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).<sup>204</sup> The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.<sup>205</sup> U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.<sup>206</sup> Of this number, 2,837 firms employed fewer than 250 employees.<sup>207</sup> Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

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<sup>200</sup> See 47 CFR §§ 101.538(a)(1)-(3), 101.1112(b)-(d), 101.1319(a)(1)-(2), and 101.1429(a)(1)-(3).

<sup>201</sup> The use of the term "wireless cable" does not imply that it constitutes cable television for statutory or regulatory purposes.

<sup>202</sup> See 47 CFR § 27.4; see also 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).

<sup>203</sup> Generally, a wireless cable system may be described as a microwave station transmitting on a combination of BRS and EBS channels to numerous receivers with antennas, such as single-family residences, apartment complexes, hotels, educational institutions, business entities and governmental offices. The range of the transmission depends upon the transmitter power, the type of receiving antenna, and the existence of a line-of-sight path between the transmitter or signal booster and the receiving antenna.

<sup>204</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (*except* Satellite)," <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>205</sup> See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

<sup>206</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>207</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

59. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses.<sup>208</sup> The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues that exceed \$3 million and did not exceed \$15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues that exceed \$15 million and did not exceed \$40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>209</sup> Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won four licenses, one bidder claiming the very small business status won three licenses, and two bidders claiming entrepreneur status won six licenses.<sup>210</sup> One of the winning bidders claiming a small business status classification in the BRS license auction has an active license as of December 2021.<sup>211</sup>

60. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than \$55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues that are not more than \$20 million for the preceding five (5) years.<sup>212</sup> In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

## 5. Satellite Service Providers

61. *Satellite Telecommunications.* This industry 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."<sup>213</sup> Satellite telecommunications service providers include satellite

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<sup>208</sup> Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service =BR, ED; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>209</sup> See 47 CFR § 27.1218(a).

<sup>210</sup> See Federal Communications Commission, Economics and Analytics, Auctions, Auction 86: Broadband Radio Service, Summary, Reports, All Bidders, <https://www.fcc.gov/sites/default/files/wireless/auctions/86/charts/86bidder.xls>.

<sup>211</sup> Based on a FCC Universal Licensing System search on December 10, 2021, <https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp>. Search parameters: Service Group = All, "Match only the following radio service(s)", Radio Service =BR; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

<sup>212</sup> See 47 CFR § 27.1219(a).

<sup>213</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517410 Satellite Telecommunications," <https://www.census.gov/naics/?input=517410&year=2017&details=517410>.

and earth station operators. The SBA small business size standard for this industry classifies a business with \$38.5 million or less in annual receipts as small.<sup>214</sup> U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year.<sup>215</sup> Of this number, 242 firms had revenue of less than \$25 million.<sup>216</sup> Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services.<sup>217</sup> Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees.<sup>218</sup> Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

62. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.<sup>219</sup> 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.<sup>220</sup> Providers of Internet services (e.g. dial-up ISPs) or VoIP services, via client-supplied telecommunications connections are also included in this industry.<sup>221</sup> The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small.<sup>222</sup> U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year.<sup>223</sup> Of those firms, 1,039 had revenue of less than \$25 million.<sup>224</sup> Based on this data, the Commission estimates that the majority of "All Other Telecommunications" firms can be considered small.

## 6. Cable Service Providers

63. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of

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<sup>214</sup> See 13 CFR § 121.201, NAICS Code 517410.

<sup>215</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 517410, <https://data.census.gov/cedsci/table?y=2017&n=517410&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>216</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>217</sup> Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report at 26*, Table 1.12 (2022), <https://docs.fcc.gov/public/attachments/DOC-391070A1.pdf>.

<sup>218</sup> *Id.*

<sup>219</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517919 All Other Telecommunications," <https://www.census.gov/naics/?input=517919&year=2017&details=517919>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See 13 CFR § 121.201, NAICS Code 517919 (as of 10/1/22, NAICS Code 517810).

<sup>223</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 517919, <https://data.census.gov/cedsci/table?y=2017&n=517919&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>224</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

programs on a subscription or fee basis.<sup>225</sup> 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.<sup>226</sup> The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.<sup>227</sup> The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small.<sup>228</sup> Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year.<sup>229</sup> Of that number, 149 firms operated with revenue of less than \$25 million a year and 44 firms operated with revenue of \$25 million or more.<sup>230</sup> Based on this data, the Commission estimates that a majority of firms in this industry are small.

64. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standard 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.<sup>231</sup> Based on industry data, there are about 420 cable companies in the U.S.<sup>232</sup> Of these, only seven have more than 400,000 subscribers.<sup>233</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>234</sup> Based on industry data, there are about 4,139 cable systems (headends) in the U.S.<sup>235</sup> Of these, about 639 have more than 15,000 subscribers.<sup>236</sup> Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

65. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a “small cable operator,” which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one 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

<sup>225</sup> See U.S. Census Bureau, *2017 NAICS Definition, “515210 Cable and Other Subscription Programming,”* <https://www.census.gov/naics/?input=515210&year=2017&details=515210>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See 13 CFR § 121.201, NAICS Code 515210 (as of 10/1/22, NAICS Code 516210).

<sup>229</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515210, <https://data.census.gov/cedsci/table?y=2017&n=515210&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>. The US Census Bureau withheld publication of the number of firms that operated for the entire year to avoid disclosing data for individual companies (see Cell Notes for this category).

<sup>230</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue in all categories of revenue less than \$500,000 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in these categories). Therefore, the number of firms with revenue that meet the SBA size standard would be higher than noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>231</sup> 47 CFR § 76.901(d).

<sup>232</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>233</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>234</sup> 47 CFR § 76.901(c).

<sup>235</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

<sup>236</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

\$250,000,000.<sup>237</sup> For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice.<sup>238</sup> Based on industry data, only six cable system operators have more than 677,000 subscribers.<sup>239</sup> Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>240</sup> Therefore, 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. Other

66. *Electric Power Generators, Transmitters, and Distributors.* The U.S. Census Bureau defines the utilities sector industry as comprised of “establishments, primarily engaged in generating, transmitting, and/or distributing electric power.”<sup>241</sup> Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.<sup>242</sup> This industry group is categorized based on fuel source and includes Hydroelectric Power Generation, Fossil Fuel Electric Power Generation, Nuclear Electric Power Generation, Solar Electric Power Generation, Wind Electric Power Generation, Geothermal Electric Power Generation, Biomass Electric Power Generation, Other Electric Power Generation, Electric Bulk Power Transmission and Control, and Electric Power Distribution.<sup>243</sup>

67. The SBA has established a small business size standard for each of these groups based on the number of employees which ranges from having fewer than 250 employees to having fewer than 1,000 employees.<sup>244</sup> U.S. Census Bureau data for 2017 indicate that for the Electric Power Generation, Transmission and Distribution industry there were 1,693 firms that operated in this industry for the entire

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<sup>237</sup> 47 U.S.C. § 543(m)(2).

<sup>238</sup> *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (CSB 2001) (*2001 Subscriber Count PN*). In this Public Notice, the Commission determined that there were approximately 67.7 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* We recognize that the number of cable subscribers changed since then and that the Commission has recently estimated the number of cable subscribers to traditional and telco cable operators to be approximately 49.8 million. *See 2022 Communications Marketplace Report*, 2022 WL 18110553 at 80, para. 218, Fig. II.E.1. However, because the Commission has not issued a public notice subsequent to the *2001 Subscriber Count PN*, the Commission still relies on the subscriber count threshold established by the *2001 Subscriber Count PN* for purposes of this rule. *See* 47 CFR § 76.901(e)(1).

<sup>239</sup> S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

<sup>240</sup> 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 § 76.901(e) of the Commission’s rules. *See* 47 CFR § 76.910(b).

<sup>241</sup> *See* U.S. Census Bureau, *2017 NAICS Definition, “Sector 22- Utilities, 2211 Electric Power Generation, Transmission and Distribution,”* <https://www.census.gov/naics/?input=2211&year=2017&details=2211>.

<sup>242</sup> *See id.*

<sup>243</sup> *Id.*

<sup>244</sup> *See* 13 CFR § 121.201, NAICS Codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 221121, 221122.



year.<sup>245</sup> Of this number, 1,552 firms had less than 250 employees.<sup>246</sup> Based on this data and the associated SBA size standards, the majority of firms in this industry can be considered small entities.

68. *All Other Information Services.* This industry comprises establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals).<sup>247</sup> The SBA small business size standard for this industry classifies firms with annual receipts of \$30 million or less as small.<sup>248</sup> U.S. Census Bureau data for 2017 show that there were 704 firms in this industry that operated for the entire year.<sup>249</sup> Of those firms, 556 had revenue of less than \$25 million.<sup>250</sup> Consequently, we estimate that the majority of firms in this industry are small entities.

69. *Internet Service Providers (Non-Broadband).* Internet access service providers using client-supplied telecommunications connections (e.g., dial-up ISPs) as well as VoIP service providers using client-supplied telecommunications connections fall in the industry classification of All Other Telecommunications.<sup>251</sup> The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small.<sup>252</sup> For this industry, U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year.<sup>253</sup> Of those firms, 1,039 had revenue of less than \$25 million.<sup>254</sup> Consequently, under the SBA size standard a majority of firms in this industry can be considered small.

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<sup>245</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 2211, <https://data.census.gov/cedsci/table?y=2017&n=2211&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePreview=false>.

<sup>246</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>247</sup> See U.S. Census Bureau, *2017 NAICS Definition, "519190 All Other Information Services,"* <https://www.census.gov/naics/?input=519190&year=2017&details=519190>.

<sup>248</sup> See 13 CFR § 121.201, NAICS Code 519190 (as of 10/1/22, NAICS Codes 519290).

<sup>249</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 519190, <https://data.census.gov/cedsci/table?y=2017&n=519190&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>250</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue of less than \$100,000 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in this category). Therefore, the number of firms revenue that meet the SBA size standard would be higher than noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>251</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517919 All Other Telecommunications,"* <https://www.census.gov/naics/?input=517919&year=2017&details=517919>.

<sup>252</sup> See 13 CFR § 121.201, NAICS Code 517919 (as of 10/1/22, NAICS Code 517810).

<sup>253</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 517919, <https://data.census.gov/cedsci/table?y=2017&n=517919&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>254</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

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

70. In the *Notice*, we largely seek to reestablish the framework the Commission previously adopted in the *2015 Open Internet Order*.<sup>255</sup> We first propose to reclassify BIAS as a telecommunications service under Title II of the Act and to reclassify mobile BIAS as a commercial mobile service. We also propose to reestablish rules to prevent ISPs from engaging in practices harmful to consumers, competition, and public safety and that provide the foundation for a national regulatory approach toward BIAS. Specifically, we propose to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. We further propose to reinstate the general conduct standard adopted in the *2015 Open Internet Order*, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. Additionally, we propose to retain current disclosure obligations for ISPs, and seek comment on the means of disclosure, the interplay between the transparency rule and current broadband label requirements, as well as any additional enhancements or changes the Commission should consider. While we expect the proposals in the *Notice* will impose new or additional reporting, recordkeeping and/or other compliance obligations on small and other entities, we also anticipate that the burden for small and other entities to comply with the reclassification and rules will be minimal, as they will be entering a regulatory framework with which they are already and recently familiar. At this time however, the Commission is not in a position to determine whether, if adopted, our proposals and the matters upon which we seek comment will require small entities to hire professionals to comply with the proposed rules in the *Notice*, and cannot quantify the cost of compliance with the potential rule changes discussed herein. We seek comment from small entities that have concerns about potential hardships or other matters related to our proposed rules, and with compliance, should they be adopted.

71. Certain compliance obligations regarding the content of transparency disclosures that we discuss in the *Notice* and seek comment on are beyond those that currently exists. For instance, we seek comment on additional disclosure specifications that were established in the *2015 Open Internet Order* and repealed by the *RIF Order*, including commercial terms about price and related terms and their relationship with disclosures regarding privacy and redress options, and about performance characteristics related to network performance and network practices. We also seek comment on whether ISPs should disclose additional information regarding their performance measurement methodologies and practices. We discuss additional disclosure requirements that were not adopted in the *2015 Open Internet Order*, such as those regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage. We also ask if ISPs should be required to make more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps. Further, we seek comment on whether to incorporate into the transparency rule the Commission's clarifications and guidance regarding prior versions of the transparency rule, such as point-of-sale disclosures, service descriptions, disclosures for the benefit of edge providers, disclosures regarding security measures, and consistency between ISPs' disclosures under the transparency rule and their advertising claims or other public statements. We also discuss how providers would make the required disclosures, such as via a publicly available website, by transmitting disclosures directly to the Commission, and by additional locations or means. Additionally, we seek comment on whether such disclosures should be in a machine-readable format and regarding the accessibility of such disclosures to individuals with disabilities. Lastly, we explore what, if any, recordkeeping requirements we should implement as a means for ISPs to provide the types of information or records needed to support the content of their disclosures.

72. The Commission seeks comment on all of the above proposals to evaluate whether

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<sup>255</sup> *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) (*2015 Open Internet Order*).

compliance with these requirements would cause an undue burden on small or other entities, if adopted. We therefore expect the information we receive in comments, including cost and benefit data, to help the Commission further identify and evaluate relevant matters for small entities, such as compliance costs, and other burdens that may result from the proposals and inquiries we make in the *Notice*.

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

73. 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 such 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 such small entities.<sup>256</sup>

74. At the outset of the reclassification discussion, we request information on the benefits and burdens of the proposed reclassification, and specifically request feedback on the impact on small businesses and small ISPs. We also request feedback on the proposed conduct rules prohibiting ISPs from blocking or throttling the information transmitted over their networks, or engaging in paid or affiliated prioritization arrangements, and the general conduct rule, all of which, as we discuss in the *Notice*, track the specific language from the *2015 Open Internet Order*. We believe our proposal to reestablish the framework from the Commission's 2015 decision could minimize the economic impact for small entities that already have experience operating under, and complying with, the *2015 Open Internet Order*.

75. We also believe and tentatively conclude that the proposed reclassification of BIAS as a telecommunications service will enhance the Commission's ability to continue to advance national security and preserve public safety by protecting the nation's communications networks from potential entities, equipment, and services that pose threats to national security and law enforcement. However, in the alternative to reclassification, we consider, inquire, and seek comment on whether there is other authority that can be used by the Commission that would allow it to protect the nation's communications networks against ISPs that pose threats national security and law enforcement. To the extent there is such an alternative available to the Commission, in the *Notice*, we request that commenters specify the statutory authority, and how this authority can be used by the Commission to address national security and law enforcement concerns. We believe reclassification also will protect the information of small and other telecommunications carriers, equipment manufacturers, and other entities that interact with ISPs that are potential national security threats, or are owned or controlled by, or subject to the jurisdiction or direction of foreign adversaries. Accordingly, we seek comment on how reclassification of BIAS will affect ISPs as well as telecommunications carriers and equipment manufacturers, and other entities that interact with ISPs, if adopted.

76. In the *Notice*, we indicate that as part of our proposal to reinstate the reclassification of BIAS as a telecommunications service, we will continue to define BIAS as defined in part 8 of the Commission's rules<sup>257</sup> and "mass market" as defined in the *2015 Open Internet Order* and *RIF Order*.<sup>258</sup> We consider whether there are reasons for the Commission to modify these definitions. Similarly, we consider whether there is any reason to depart from our tentative conclusion that BIAS is a telecommunications service and our supporting analysis. Further, while we propose to reinstate the

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<sup>256</sup> 5 U.S.C. § 603(c).

<sup>257</sup> 47 CFR § 8.1(b).

<sup>258</sup> See *2015 Open Internet Order*, 30 FCC Rcd at 5683-84, para. 189; *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 318, para. 21 n.58 (2017).

classification of mobile BIAS as a commercial mobile service as adopted in the *2015 Open Internet Order*, alternatively, we propose to find that mobile BIAS is the functional equivalent of a commercial mobile service and, therefore, not private mobile service, even if mobile BIAS does not meet the definition of “commercial mobile service.” The *Notice* seeks comment on these matters.

77. The specific conduct rules we propose in the *Notice* would prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. In the alternative, we consider whether the need to prohibit any of these practices has been eliminated by any new technical advancements or market developments. We also consider whether our proposed no-blocking rule which tracks the language of the rule we adopted *2015 Open Internet Order*, and would apply to both fixed and mobile ISPs, continues to be the best no-blocking principle for ISPs. The no-blocking rule is a broadly accepted principle in the industry, including by ISPs, and many ISPs continue to advertise a commitment to open Internet principles on their websites, which includes commitments not to block traffic except in certain circumstances, notwithstanding the 2017 repeal of the no-blocking rule. Similarly, after the repeal of the no-throttling rule, ISPs continue to advertise on their websites that they do not throttle traffic except in limited circumstances. As a result, we believe the economic impact on, and costs to comply with the proposed no-blocking rule, and the no throttling of lawful Internet traffic rule, will be minimal for small ISPs. We however seek information on specific costs and burdens these rules would impose for small ISPs.

78. Regarding our proposed ban on paid prioritization practices, we take steps to minimize the economic impact for small ISPs by requesting information on the compliance costs small ISPs would incur as a result of such a ban, and by exploring whether there are alternatives we can take to protect consumers, and the open Internet from the harms of paid prioritization practices that should be considered as an alternative to a flat ban. Similarly, we consider whether there is another standard we should adopt to establish a general conduct rule, as an alternative to the general conduct standard for ISPs we propose in the *Notice* that tracks the *2015 Open Internet Order*. We specifically inquire whether we should instead rely on the “just and reasonable” and “unreasonable discrimination” standards in sections 201 and 202 of the Act.<sup>259</sup> The *Notice* seeks comment on these matters.

79. We further propose to build upon the foundation of our existing transparency requirement adopted in the *2010 Open Internet Order*,<sup>260</sup> and the new broadband label requirements the Commission put in place to give consumers a convenient tool to research and compare broadband offerings.<sup>261</sup> We propose possible modifications or additions to the requirements pertaining to the content of required disclosure and the means of disclosure to update the transparency rule, to ensure that sufficient information is made available to end users, edge providers, the broader Internet community, and the Commission, which allows for the timely and effective assessment of ISPs’ terms and conditions for BIAS. Specific disclosure modification alternatives we consider, and seek comment on include whether to: (1) require disclosures regarding the source, location, timing, or duration of network congestion, packet corruption and jitter, or disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage, (2) require more detailed disclosures regarding the requirements, restrictions, or standards for enforcement of data caps; (3) require specific content of particular relevance to edge providers, the broader Internet community, or the Commission, and (4) require different disclosures tailored to different audiences, and specifically, whether different content disclosures should be required for mobile ISPs than for fixed ISPs. Further, as

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<sup>259</sup> 47 U.S.C. §§ 201(b), § 202(a).

<sup>260</sup> *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17936-37, para. 53 (2010).

<sup>261</sup> See *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-86 (rel. Nov. 17, 2022); *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Order on Reconsideration, FCC 23-68 (rel. Aug. 29, 2023).

an alternative to modifications that only add disclosure requirements, we inquire, and seek comment on whether under the current transparency rule there is certain content that is required to be disclosed that should no longer be required after weighing the relevant policy considerations at stake.

80. As we discuss in the *Notice*, our objectives for proposing modifications to the means of disclosure requirements for ISPs is to ensure that we are taking the appropriate steps to facilitate the availability of the content of the required disclosures in a timely and effective manner, without undue burdens on ISPs. Thus, while we consider and seek comment on alternatives to modify the means of disclosure requirements for ISPs such as, (1) whether any additional requirements are warranted regarding ISPs' website disclosures under the transparency rule, (2) whether disclosures under the transparency rule should be required in additional locations, and (3) possible direct notification requirements, we also consider whether there are existing means of disclosure requirements that should be eliminated because the burdens imposed by these requirements outweigh their benefits. We believe that to the extent that there are content and/or means of disclosure requirements that can be removed, removal of these requirements could reduce the impact for small entities of any additional requirements that may be adopted.

81. Our assessment of how to implement any rules we may adopt relating to the transparency rule seeks to identify any implementation issues for small and other ISPs that may be associated with potential modifications. We specifically seek to understand the impacts for small ISPs, such as whether smaller ISPs need extra time to implement any modifications to the transparency rule.

82. More generally we consider implementation alternatives that include, (1) whether the Commission should adopt new safe harbors for compliance with the transparency rule, (2) whether there are safe harbors the Commission should adopt for compliance with the transparency rule as a whole, similar to the broadband label safe harbor adopted in the *2015 Open Internet Order*, and (3) whether the Commission should adopt recordkeeping requirements governing the types of information or records ISPs rely upon to support the content of their disclosures made under the transparency rule. With regard to any recordkeeping requirements, we seek information on specific ways information could be retained that could minimize the burden on small and other ISPs, and what recordkeeping timeframe would best balance the benefits to the Commission of having the required information available against the compliance burden for small and other ISPs. Overall, the Commission's objective is to determine the most cost-effective ways of ensuring that consumers, and edge providers receive the information they need in a timely and effective manner, while minimizing the implementation and compliance burdens for small and other ISPs, consistent with these goals.

83. In the *Notice* and summarized above, we discuss the potential effects our rule proposals and alternatives could have on small entities, and seek comment on these matters. We also discuss that the Commission envisions the proposed BIAS reclassification as a means to provide the basis for a national regulatory approach rather than a patchwork of state requirements, which could help streamline and minimize regulatory requirements for small entities. Further, we propose broad forbearance from statutory requirements and Commission regulations for ISPs, and note that the proposed forbearance could substantially lessen the economic impact of the proposed actions on small entities. Accordingly, before reaching final conclusions, and taking action in this proceeding, the Commission expects to further consider the economic impact on small entities, and additional alternatives that are consistent with its goal of safeguarding and securing the open Internet, while also imposing minimal burdens on small entities, based on comments filed in response to the *Notice* and this IRFA.

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

84. None.

**STATEMENT OF  
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

It was three-and-a-half years ago when we were told to stay home, hunker down, and move work, life, and school online. But too many of us were left out and left behind, without the broadband connections required for day-to-day life. We all saw it: kids with laptops perched on their knees, lingering outside of fast food restaurants just to catch a wireless signal to go to online class, adults sitting in parked cars wherever they could find Wi-Fi so they could keep up with family, friends, and work, and seniors who had to turn down telemedicine appointments because they didn't have the bandwidth they needed to keep up with their healthcare.

That moment made it crystal clear that broadband is no longer nice-to-have; it's need-to-have for everyone, everywhere. Broadband is an essential service. That's why Congress invested tens of billions of dollars into building out our networks and making access more affordable and equitable, including the historic \$65 billion investment in the Bipartisan Infrastructure Law. And this is why at the Federal Communications Commission we stood up the Affordable Connectivity Program, which is helping 21 million households get online and stay online. We understand that in the United States we need broadband to reach 100 percent of us—and we need it fast, open, and fair.

But even as we reconfigured our lives to do anything and everything online, our institutions failed to keep pace. Today, there is no expert agency ensuring that the internet is fast, open, and fair. And for everyone, everywhere to enjoy the full benefits of the internet age, internet access needs to be more than just accessible and affordable. The internet needs to be open.

That is why for as long as I have served on the FCC, I have supported net neutrality. But in 2017, despite overwhelming opposition, the FCC repealed net neutrality and stepped away from its Title II authority over broadband. This decision put the agency on the wrong side of history, the wrong side of the law, and the wrong side of the American public. Remember 80 percent of people in this country support net neutrality.

Today, we begin a process to make this right. We propose to reinstate enforceable, bright-line rules to prevent blocking, throttling, and paid prioritization. These rules are legally sustainable because they track those that were upheld in court in 2016—from front to back. They would ensure that the internet remains open and a haven for creating without permission, building community beyond geography, and organizing without physical constraints.

But re-enacting legally sustainable net neutrality rules is not the end of the story. Because in the subsequent years, events proved why broadband is essential—and why we need to restore this agency's Title II authority.

Let's talk about public safety. With Title II classification, the FCC would have the authority to intervene when firefighters in Santa Clara, California had the wireless connectivity on one of their command vehicles throttled when responding to wildfires. Title II would also bolster our authority to require providers to address internet outages, like in Hope Village, a neighborhood in Detroit that suffered through a 45-day internet outage during the pandemic and had little recourse. Because when the FCC turned away from overseeing broadband, the only mandatory outage reporting system we can have in place is focused on long distance voice service outages—and in a modern digital economy where we live our lives online let's face it, that doesn't cut it.

Consider national security. While the agency has taken a series of bipartisan actions to reduce our dependence on insecure telecommunications equipment and keep potentially-hostile actors from connecting to our networks, it is not enough to keep our adversaries at bay. When we stripped state-affiliated companies from China of their authority to operate in the United States, that action did not

extend to broadband services, thanks to the retreat from Title II. This is a national security loophole that needs to be addressed.

Think about cybersecurity. We are actively working with our federal partners on cybersecurity planning, coordination, and response, including on issues like secure internet routing in order to prevent malicious actors from exploiting protocols that make it possible for them to hijack our internet traffic. But without reclassification, we have limited authority to incorporate updated cybersecurity standards into our network policies.

Look at privacy. The law requires telecommunications providers to protect the confidentiality of the proprietary information of their customers. That means that these providers cannot sell your location data, among other sensitive information. Those privacy protections currently extend to voice customers but not broadband subscribers. Does that really make sense? Do we want our broadband providers selling what we do online? Scraping our service for a payday from new artificial intelligence models? Doing any of this without our permission?

Let me say a few words about what we are not doing here. This is not a stalking horse for rate regulation. Nope. No how, no way. We know competition is the best way to bring down rates for consumers. And approaches like the Affordable Connectivity Program are the best bet for making sure service is affordable for all. We will not let broadband providers, gatekeepers to the internet, dictate what we can and cannot say online. And we will not undermine incentives to invest in broadband networks, which were robust as ever when these rules were in place. On top of that, Title II will make it easier for competitive providers to access pole attachments and apartment buildings.

Plus, restoring our open internet policies will mean that a uniform legal framework applies to the whole country. Because if you hear cries that nothing has happened since the FCC retreated from net neutrality and are asking yourself what is the big deal, think again. Because when the FCC stepped back from having these policies in place, the court said states can step in. So when Washington withdrew, California rode in with its own regime. Other states, too. All in all, nearly a dozen put net neutrality rules in state law, executive orders, or contracting policies. So in effect, we have open internet policies that providers are abiding by right now—they are just coming from Sacramento and places like it. But when you are dealing with the most essential infrastructure in the digital age, come on, it's time for a national policy.

In the wake of the pandemic, we know that broadband is a necessity, not a luxury. That's why we made a historic commitment to connecting all of us to broadband. Now we have work to do to make sure that it's fast, open, and fair.

For their work on this rulemaking, I want to thank Callie Coker, Adam Copeland, CJ Ferraro, Trent Harkrader, Melissa Kirkel, Chris Laughlin, and Jodie May from the Wireline Competition Bureau; Garnet Hanley and Jennifer Salhus from the Wireless Telecommunications Bureau; Jerusha Barnett, Diane Burstein, Erica McMahon, Suzy Rosen Singleton, and Kristi Thornton from the Consumer and Governmental Affairs Bureau; Hunter Deeley, Loyaan Egal, Pam Gallant, Rosemary McEnery, and Rakesh Patel from the Enforcement Bureau; Justin Cain, Ken Carlberg, John Evanoff, David Furth, Deb Jordan, Nicole McGinnis, Zenji Nakazawa, Erika Olsen, Austin Randazzo, Jim Schlicting, and Chris Smeenck from the Public Safety and Homeland Security Bureau; Eugene Kiselev, Giulia McHenry, Eric Ralph, and Michelle Schaefer from the Office of Economics and Analytics; Malena Barzilai, Sarah Citrin, Michael Janson, Doug Klein, Marcus Maher, Rick Mallen, Scott Noveck, Anjali Singh, Elliot Tarloff, and Chin Yoo from the Office of General Counsel; and Denise Coca, Kathleen Collins, Francis Gutierrez, Gabrielle Kim, Ethan Lucarelli, and Thomas Sullivan from the Office of International Affairs.

DISSENTING STATEMENT OF COMMISSIONER BRENDAN CARR

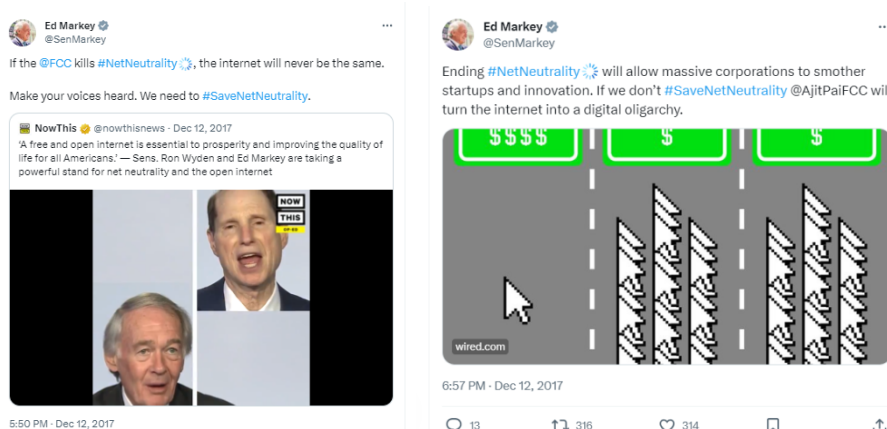
Re: Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

Six years ago, Americans lived through one of the greatest hoaxes in regulatory history. They were told that the FCC’s 2017 decision to overturn the Obama Administration’s failed, two-year experiment with government control of the Internet—known as Title II—would quite literally break the Internet. It was a viral disinformation campaign replete with requisite doses of Orwellian wordplay. Lots of discussion about “net neutrality” and virtually none about the actual issue before the FCC: Title II and the agency’s application of sweeping, 1930s-era utility regulations to the Internet. Rather than shedding light on this debate, far too many people in DC simply fanned the false flames of fear. While some have tried to memory hole this entire episode, it is important to remember what we were told about Title II.

Senator Bernie Sanders stated that “This is the end of the Internet as know it” and “If this passes, the internet and its free exchange of information as we have come to know it will cease to exist.”



Senator Ed Markey stated that “If the @FCC kills #NetNeutrality, the internet will never be the same” and that “If we don’t #SaveNetNeutrality @AjitPaiFCC will turn the Internet into a digital oligarchy.”



Senator John Tester wrote that “Ending #NetNeutrality ends the Internet as we know it.”





Senate Democrats asserted that “If we don’t save net neutrality, you’ll get the internet one word at a time.”



The media parroted these false claims. The *New York Times* ran an article headlined “The Internet Is Dying. Repealing Net Neutrality Hastens That Death.” The article went on to state that “a vote . . . by the Federal Communications Commission to undo net neutrality would be the final pillow in its face.”



*GQ*—not one to let a cultural moment pass by apparently—published, in its news section, an article titled “How the FCC’s Killing of Net Neutrality Will Ruin the Internet Forever.”



Not to be outdone, *CNN* ran a bolded, banner headline across the top of its main page proclaiming the “End of the internet as we know it.”



The false claims only accelerated from there. The co-founder of a progressive organization said this of the Republicans involved in the net neutrality repeal: “They hate Americans, freedom, the flag, and the 1stAm.”



Not surprisingly, people believed the Apocalyptic rhetoric that the so-called “experts” on this issue were feeding them. One person was sentenced to prison for threatening to murder the family of then FCC Chairman Ajit Pai over Title II. Another was indicted for calling in a bomb threat to the FCC’s headquarters, which resulted in us having to evacuate the Commission meeting room during our vote on repealing Title II.

The left screenshot shows a news release from the United States Attorney's Office, Eastern District of Virginia, dated Friday, May 11, 2018. The headline is "Man Sentenced for Threatening to Murder Family of FCC Chairman". The text mentions that a California man was sentenced to more than one and a half years in prison for threatening to kill the family of Ajit Pai, Chairman of the Federal Communications Commission. The right screenshot is from the United States Department of Justice, District of Columbia, dated Thursday, May 24, 2018. The headline is "California Man Indicted on Charges Stemming from Hoax Bomb Threats to FCC and FBI Headquarters". The text mentions that a California man was indicted on charges of threatening to bomb the FCC and FBI headquarters.

Now, moving on from those clearly deranged individuals, let's turn back to some of the very specific harms that Title II's proponents predicted. They said that the prices for broadband would spike, that you would be charged for each website you wanted to visit, and that the Internet itself would slow down.

Did any one of those predictions come to pass? Of course not. Since the FCC's 2017 decision to return the Internet to the same successful and bipartisan regulatory framework under which it thrived for decades, broadband speeds in the U.S. have increased, prices are down, competition has intensified, and record-breaking new broadband builds have brought millions of Americans across the digital divide.

Here are just some of the facts:

- **Internet Speeds are up:**
  - Average fixed download speeds in the U.S. have increased over 3.5-fold or nearly 260% since 2017, as shown by Ookla data.
  - Average mobile download speeds have increased over 6-fold or 456% since 2017, as shown by Ookla data.
  - The U.S. now has one of the highest average fixed broadband download speeds in the world, as shown by Ookla data.
- **Competition has increased:**
  - The percentage of Americans with access to two or more high-speed, fixed ISPs has increased by about 30% since 2017—up from 229 million in 2017 to approximately 295 million in 2022, according to FCC measures.
  - New forms of intermodal competition have also emerged and increased since 2017.
    - The new generation of low-earth orbit satellites is one example. Starlink, which launched its first satellite in 2019, now offers high-speed broadband throughout the entire United States.
    - New fixed wireless services represent additional competition as well. The number of Americans that can now choose fixed, high-speed or 5G for home broadband as an alternative to fiber or other wired connections has grown exponentially from effectively zero in 2017. 5G fixed wireless providers now cover more than 94 million homes and businesses. Indeed, fixed wireless services accounted for 90% of net broadband additions in 2022.
- **The Digital Divide is narrowing:**
  - Telecom crews recently set records for new high-speed fiber builds—with builders adding over 400,000 route miles in 2022 alone—which represents more than a 50% increase over 2016 numbers and enough new fiber to wrap around the Earth over 16 times.

- In 2017, there were about 100,000 outdoor small cell nodes and that number has now increased over 4-fold to 452,000 by year end 2022.
- **Prices are down:**
  - In real terms, prices for Internet services are down and, on a price per megabyte basis, they have fallen substantially since 2017.

In other words, utility-style regulation of the Internet was never about improving your online experience—that was just the sheep’s clothing. It was always about government control. But don’t take my word for it.

Last month, when reports emerged that the FCC would soon head down the path of applying vast and expansive utility-style controls to the Internet, two of President Obama’s former Solicitors General, Donald B. Verrilli, Jr. and Ian Heath Gershengorn, published their views. The two Obama Administration alums described Title II this way: “classifying broadband internet access service as Title II telecommunications service would ‘bring about an enormous and transformative expansion in [the agency’s] regulatory authority . . . over the national economy.’” Continuing, the former Solicitors General stated that regulating the Internet as a Title II utility service “would vastly expand the Commission’s authority and would transform the way a federal agency regulates a vitally important element of our economy and the personal and social lives of hundreds of millions of Americans.”

They’re telling the truth. The FCC should follow that example and level with the American people. Years into this discussion, the public deserves an honest debate about the future of Internet regulation—not just the repeated and talismanic invocation of the phrase “net neutrality.” We should be talking about whether it makes sense for this agency to apply 1930s-era government controls to the modern Internet. We should be talking about whether Washington should reserve to itself the freewheeling power to micromanage how networks function through an undefined general conduct standard.

After all, you might expect some degree of regulatory humility after the 2017 predictions failed to materialize and it became clear to everyone (other than partisan activists) that Title II is a solution that won’t work to a problem that does not exist. But you will find none of that in today’s Notice. Instead, the proponents of Title II are moving full steam ahead. Gone are the old justifications—replaced with new ones. The goalposts have moved, but the goal remains the same: increasing government control of the Internet.

The new justifications for Title II that have been conjured up this time around are just as farfetched as the ones activists made up in 2017. They do not withstand even casual scrutiny.

We’re now told that Title II is necessary for national security. But the Notice identifies no gap in national security that Title II would fill. Indeed, Congress has already empowered Executive Branch agencies with national security expertise, including the DOJ, DHS, and Treasury, with the lead when it comes to security issues in the communications sector. It would be incredible, if it were true, that the FCC has known about a national security threat for years now and simply stood by the wayside, did not seek to eliminate it through existing authorities or new ones, and waited to raise it until now—in fact, that is not credible. The Administration has the power it needs to deal with any bad actors, without Title II.

We’re now told that Title II is necessary for law enforcement, too. But the FCC applied the Communications Assistance for Law Enforcement Act or CALEA to broadband providers long ago, without Title II regulation.

We’re now told that Title II is necessary for outage reports as well, which advance public safety. Except, the FCC already requires outage reports from services that are not subject to Title II, like VoIP.

We’re now told that Title II is necessary because COVID-19 demonstrated the importance of connectivity. But this takes the lessons learned from the pandemic and turns them on their heads. COVID-19 exposed the error of applying Title II-like utility regulations to the Internet as the European

Union has long done. As I detailed in a separate statement,<sup>1</sup> when online traffic spiked during COVID-19, EU officials asked Netflix and other streamers to ration their service to keep the continent's slow, fragile networks from breaking. The U.S. had no need to ration service—our network speeds exceeded theirs by 83%. This is because our Title I regulatory approach encouraged investment and buildout. America's networks are not only faster than those in Europe, they are more competitive, cover a much higher percentage of households, and benefit from levels of per household investment that are 3 times higher than in Europe. So, no, now is not the time to make America's broadband networks look more like Europe's.

We're now told that Title II is necessary to stop ISPs from engaging in blocking, throttling, or anti-consumer prioritization. Wrong again. We have a free and open Internet today without Title II. ISPs aren't engaging in that conduct for reasons that have nothing to do with Title II. The DC Circuit made this clear when it reviewed the FCC's 2015 Title II rules. There, now Chief Judge Srinivasan and Judge Tatel joined in a statement expressly noting that—even with the FCC's Title II decision in place—ISPs are free to engage in “blocking websites,” the “throttling of certain applications chosen by the ISP,” and even the “filtering of content into fast (and slow) lanes based on the ISP's commercial interests,” provided they disclose those practices. In other words, Title II does not even accomplish the purported goal that its advocates claim they seek.

But enough about what Title II fails to do. Let's talk about what utility-style rules do achieve.

For one, Title II includes rate regulation, as today's Notice expressly proposes. There is no more surefire way of killing off investment and innovation than putting price controls squarely on the table. Adjudicating broadband rates under a “just and reasonable” standard should be a nonstarter.

For another, Title II would strip the nation's lead consumer protection agency—the Federal Trade Commission—of 100% of its authority over broadband. That includes exempting ISPs from the FTC's privacy rules. What's more, federal law now prohibits the FCC from reimposing its old broadband privacy rules on ISPs.

For still another, Title II will hit Americans in their pocketbook. In fact, prices for utility-regulated services like electricity, water, and gas have been increasing over two times faster than the prices for Internet services. Monopoly regulation invariably leads to monopoly prices.

For yet another, Title II targets free data plans and pro-consumer zero rating offerings. So if you like your plan, you may not be able to keep your plan.

Title II will also slow down America's rural ISPs. Small and rural providers are already facing significant headwinds due to inflation and the Administration's failure to streamline the permitting process. The last thing that these broadband builders need right now is a regulatory onslaught from Washington. Yet that is precisely what Title II utility-style regulation entails. As the FCC determined in 2017, the agency's 2015 experiment with Title II regulation negatively impacted small ISPs that serve rural communities. Indeed, those small ISPs *reduced* broadband infrastructure investment due to the FCC's 2015 Title II decision.

It should be clear by now that the FCC's efforts to revive utility-style regulation of the Internet is not good policy—that is why its proponents keep layering on new shades of lipstick. But if that's not enough to convince you, it's also bad on the law.

Here, I once again agree with President Obama's lawyers. In the submission that the two respected Solicitors General released last month, they addressed head on the question of the FCC's legal authority in light of the sea change in administrative law that has taken place since the FCC's 2015 Title

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<sup>1</sup> Press Release, FCC Commissioner Brendan Carr, Following Europe's Approach to Internet Regulation—With Its Sweeping Government Controls—Would Be a Serious Mistake, as COVID-19 Showed (Oct. 4, 2023), <https://docs.fcc.gov/public/attachments/DOC-397479A1.pdf>.

II decision. In their words, an FCC decision applying Title II to the Internet today “would be struck down by the Supreme Court” under the major questions doctrine, as *West Virginia v. EPA* makes clear. Indeed, as the two appellate lawyers succinctly put it, the legal question “is an easy one:”

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.<sup>2</sup>

While some argue that the Supreme Court’s *Brand X* opinion supports an FCC decision to classify broadband as a Title II service, the former Obama Solicitors General put that claim to rest too. As they explain, the Supreme Court’s finding of statutory ambiguity in *Brand X* precludes the FCC from applying Title II today because the Supreme Court requires more than mere ambiguity before a court can rule in favor of an agency that is seeking to expand its authority on a major question like this one.

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Finally, I think it is important to take a step back. The hockey star Wayne Gretzky famously described his play by stating: “I skate to where the puck is going, not where it has been.” In my view, every government official should strive to meet the Gretzky test. One of the things we must do is focus on emerging trends and challenges. We should lay the foundation for new innovations and new forms of competition. We should tackle the issues consumers care about now and into the future.

We should not spend our time staring into the regulatory rear-view mirror or relitigating disputes that have long since passed from relevancy. Yet that is precisely what the agency does today with Title II. I would encourage my colleagues to change course and focus the FCC’s work on the numerous, important subjects that Congress has authorized the Commission to address—from rural broadband to spectrum to universal service reform. Heading down the path to Title II will not only push vital FCC matters onto the back burner, it will knock many of them off the stove altogether.

So how did we get here? I don’t mean how did we get here in the sense that President Biden signed an executive order in 2021 calling on the FCC to take this step. I don’t mean how did we get here in the sense that President Obama published a YouTube video in 2014 to pressure (successfully, I might add) the then FCC Chair into embracing Title II. I mean it in a more fundamental way: how did we really get here?

The answer to that question goes back almost 20 years—all the way back to 2005. That is when a handful of then-emerging Silicon Valley upstarts, including Google, first asked DC to heavily regulate their ISP competitors. The tech companies wanted to create a moat around their business models to foreclose any competition for decades to come and to divert attention away from their abusive conduct. So Big Tech’s allies came up with a catchy branding for their regulatory rent seeking: “net neutrality.”

But what has happened in the many years since Google first launched this effort? Well, predictably, it is the tech companies—not ISPs—that have emerged as dominant gatekeepers that are abusing market power. Big Tech is the one blocking the sharing of disfavored news stories, not ISPs. Big Tech is the one threatening to freeze payment accounts and fine users for the content of their speech, not ISPs. And Big Tech is the one censoring lawful videos and documentaries, not ISPs.

Indeed, the Biden Administration is currently suing Google and others because the Administration believes that they have amassed too much power and must be reined in. Yet the FCC is

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<sup>2</sup> Donald B. Verrilli, Jr. and Ian Heath Gershengorn, Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine at 12 (Sept. 20, 2023) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)), <https://aboutblaw.com/bazq>; see also Press Release, FCC Commissioner Brendan Carr, Carr Agrees With President Obama’s Lawyers On Internet Regulation (Sept. 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-397209A1.pdf>.

proposing to extend new protections to those very same corporations through Title II—just what Google first asked for all those years ago. Talk about backwards looking.

In closing, I am well aware that neither my position nor reason will prevail today. Reinstating Title II is now an article of faith for many in Washington (and a handy fundraising tool to boot). But make no mistake: any FCC decision to impose Title II on the Internet will be overturned by the courts, by Congress, or by a future FCC.

I dissent.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No 23-320, Notice of Proposed Rulemaking (October 19, 2023).

Now, more than ever, the internet must remain free and open.

In my years as a Commissioner, I've learned that there is simply no way to overstate broadband's impact on the lives of individual Americans. Take, for example, "Queen Bea," as she is known at the Yesler Terrace public housing facility in Seattle, Washington. Talk about a mega-watt smile. Queen Bea experienced homelessness for a number of years. She was able to find housing just as the pandemic started, and critically just as she became ill and lost some of her mobility. She took advantage of that time to go back to school, having previously stopped her formal education in the 8th grade. With a broadband connection, she literally and figuratively "zoomed" through her education and training, and learned how to use a computer and applications like Excel. When we met, she proudly told me that she has become an educator herself in the community—training others on how to utilize and upgrade their computer skills because she wanted to help others learn as well. She told me "it was a blessing to have the internet." Amen to that.

Or consider Ms. Ana, the leader of the Bethel Native Corporation. She graciously welcomed me into her home in Bethel, Alaska this past summer with a bowl of moose chili. There are no major roads to Bethel; if you want to leave town or visit, you do it by boat or plane. As we ate, Ms. Ana told me about the exciting vision of tomorrow: new fiber deployments that would enable her community of 6,000—and the residents of even smaller villages along the Kuskokwim River—to secure the necessities of modern life without having to leave the place they call home. Employment through remote work. Healthcare through telehealth visits. Better education for their kids.

And let me tell you about Ms. Eleanor, a senior living in Boston's Roxbury neighborhood. She would visit the Grove Hall library to use the computer, until she ultimately got online herself through the library's "Tech Goes Home" program, which helps residents purchase affordable laptops and broadband. With a twinkle in her eye, Ms. Eleanor told me she loves to learn new line dances online and that the internet helps her stay active.

These are stories I've heard. People I know. From the single-story pueblos of New Mexico to the skyscrapers in New York; family farmers to small business owners; the youngest learner to the eldest senior—no one should tell these Americans how they can and can't use the internet. And no one should be able to leverage or exploit the connection they cherish. Each in their own special way shared with me how essential their connection to the internet is. And I'm here today to tell them—I've got your back.

And some today may want to talk about the proper regulatory framework. One of the reasons I firmly support today's *Notice* is because it proposes to return us to our roots—a framework that has governed the internet's growth going back to 1998, through Republican and Democratic Administrations alike, when the Commission first classified DSL broadband as a common-carrier service<sup>1</sup> and went on to adopt principles to ensure broadband networks are widely deployed, open, affordable, and accessible to all consumers.<sup>2</sup>

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<sup>1</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, paras.36-37 (1998).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Policy Statement, 20 FCC Rcd 14986 (2005). The 2015 *Open Internet Order* adopted those principles into rules. See *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5603, para. 4 (2015) (*2015 Open Internet Order*), *pet. for review denied*, U.S.

(continued....)



It's a framework that puts users in charge of what they do online—and not the companies they pay for a connection.

It's a framework that protects consumers in their use of an essential service—instead of simply trusting ISPs to do the right thing.

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And it's a framework that recognizes network security is national security—instead of hoping for the best in a world where so many wish us harm. Congress created the Commission, in part, “for the purpose of the national defense.”<sup>3</sup> In today's world, that mission is more important than ever. Wars in Ukraine and the Middle East include significant cyber components<sup>4</sup> and every minute, bad actors—at times backed by nation states, including Russia and China—probe our broadband networks for weakness and launch potentially crippling cyberattacks. ISPs are working hard to protect their networks, and we are working with them on that urgent goal. But we can't afford to rely on self-regulation alone. Not when our national security is at stake. Our nation's networks are simply too vital.

Reclassification would place the Commission on firm footing to protect Americans and partner even more effectively with our sister national security agencies on the same goal. Those partners have already asked the FCC to examine all solutions and authority to help secure our networks.<sup>5</sup> And gaps in our authority have already manifested and hindered our ability to defend against known threats.

Here's one example. We rightfully (and unanimously) revoked the international section 214 authorizations of certain Chinese providers following recommendations from the Executive Branch. However, because of the repeal of the 2015 open internet rules, those revocations only prohibited those specific Chinese providers from offering common-carrier service. Our national security action did not touch their BIAS offerings, meaning that providers already identified as posing an unacceptable national security and law enforcement risk may be operating BIAS networks in the United States without recourse. Whether or not they offer BIAS, they could be interconnecting with networks and gaining access to important internet points-of-presence and data centers. This is part of a larger problem—which is why I continue to call for a closer look at the threats that adversarial providers pose to our data and data centers. The rules proposed in the *Notice* can better equip us with the tools we need to protect Americans against these risks.

It's not just national security that would benefit. More and more, BIAS offerings form an integral part of public safety communications. As an example, I'm reminded of my time visiting a large Public Safety Answering Point in Las Vegas. Packed in the PSAP were dedicated 911 communications technicians who spend their shifts answering calls non-stop and saving people's lives. One thing was obvious – many of those in need rely on broadband to call for help. This is even more profound for individuals with disabilities who use broadband to call 911 for help through VRS and other apps. At the same time, public safety entities often rely on public broadband to share data with emergency responders

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*Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017) (*USTA*), *cert. denied*, 139 S. Ct. 453 (2018).

<sup>3</sup> 47 U.S.C. § 151.

<sup>4</sup> See e.g., *Cyber Operations during the Russo-Ukrainian War*, Center for Strategic and International Studies, July 13, 2023, <https://www.csis.org/analysis/cyber-operations-during-russo-ukrainian-war>; Sam Sabin, *Hackers Make Their Mark in Israel-Hamas Conflict*, AXIOS, Oct. 10, 2023, <https://www.faxios.com/2023/10/10/hackers-ddos-israel-hamas-conflict>.

<sup>5</sup> See e.g., Reply Comments, Jen Easterly, Director, Cybersecurity and Infrastructure Security Agency at 6 (PS Docket 22-90), filed June 28, 2022 (recommending the FCC review all options and look beyond the status quo to further BGP's security and that the FCC work with its partners to examine all potential solutions and what authorities it can bring to bear to mitigate this critical risk).

and communicate in real time. The Commission must be able to protect consumers and public safety professionals in their use of these services. The rules proposed in the *Notice* would help us to do just that.

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Some have questioned our authority to act even though the D.C. Circuit upheld the exact rules we propose to reinstate. They predict that the Supreme Court will no longer defer to reasonable interpretations of agency statutes and that the loss of deference spells the loss of a free and open internet. Staying within our statutory bounds is extremely important to me, and I'm going to take a close look at the record on this question. But there's a long history here.

Over the more than 20 years of courts reviewing this exact question, every single judge to take a position on the correct classification of broadband has concluded that it very obviously is a common-carrier service. Three Supreme Court justices explicitly stated the answer was “perfectly clear.”<sup>6</sup> How many judges have ever said that broadband plainly is not a common-carrier service? That answer is perfectly clear, too. It's zero. Not a single one.

There's more. Over those 20 years, the Supreme Court also said that Congress very obviously gave us the authority to decide the question of what counts as a telecommunications service.<sup>7</sup> It did so even after it decided a trilogy of cases viewed as the genesis of what we now call the major questions doctrine.<sup>8</sup> Evidently, calling a telecommunications service, “telecommunications service,” as we've done for years, isn't packing a mountain into a statutory molehill.<sup>9</sup> Even if it somehow were, shoehorning broadband into the definition of an “information service” surely would be much more of one.<sup>10</sup>

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We need to remember that, as we adopt this *Notice*, we are not reinventing the wheel. The 2015 *Open Internet Order* adopted rules designed to protect an open internet by prohibiting conduct that we should agree are harmful. Don't block legal content, don't throttle legal content, don't engage in paid prioritization. Don't make it harder for the internet to drive competition, create new ideas, and spur new

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<sup>6</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014 (2005) (*Brand X*). (Scalia, J., dissenting) (“[I]t remains perfectly clear that someone who sells cable-modem service is ‘offering’ telecommunications”); *id.* at 1005 (Justices Souter and Ginsburg joining as to that part of the dissent). A fourth justice said the question could go either way—but called the case for classifying broadband as an “information service” only “just barely” reasonable. *Id.* at 1003 (Breyer, J., concurring). See also *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (Thomas, J., concurring) (concluding that “the 1996 Telecommunications Act compels the conclusion that cable modem contains a telecommunications service component”); *Mozilla v. FCC*, 940 F.3d 1, 90 (D.C. Cir. 2019) (*Mozilla*) (Millett, J., concurring) (“[T]he roles of DNS and caching themselves have changed dramatically since *Brand X* was decided. And they have done so in ways that strongly favor classifying broadband as a telecommunications service, as Justice Scalia had originally advocated.”) (citing *Brand X*, 545 U.S. at 1012–1014 (Scalia, J., dissenting)).

<sup>7</sup> *Brand X*, 545 U.S. at 981-982 (finding “no difficulty” leaving classification to the FCC’s discretion and explaining that “no one questions that” broadband classification lies “within the Commission’s jurisdiction”).

<sup>8</sup> See *MCI v. AT&T*, 512 U.S. 218, 231 (1994); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). See also *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (discussing these cases).

<sup>9</sup> See *USTA*, 855 F.3d at 383 (“Assuming the existence of the [major questions] doctrine . . . , and assuming further that the rule in this case qualifies as a major one so as to bring the doctrine into play, the question posed by the doctrine is whether the FCC has clear congressional authorization to issue the rule. The answer is yes.”) (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing *en banc*).

<sup>10</sup> *Mozilla*, 940 F.3d at 93 (Millett, J., concurring) (calling the Commission’s 2018 definition of “information services,” “novel and utterly capacious”).

technologies. More fundamentally, don't make broadband the only essential service in America without real oversight. Certainly not when our security and public safety are at stake.

I look forward to reviewing the record, and thank the Chairwoman for supporting my edits to the item, including those to further support how important this proceeding is to our national security. I thank the many at the Commission who have worked on this issue for their dedicated work.

**DISSENTING STATEMENT OF  
COMMISSIONER NATHAN SIMINGTON**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

The Notice we approved today proposes rules that are unnecessary, dangerously overbroad, and unlikely to survive judicial review. They are unlikely to serve the public interest. If implemented, they would ban or cripple services and products that Americans want. As such, I have no choice but to dissent.

**The Proposed Rules are Unnecessary**

To show why the rules are unnecessary, let's briefly consider failed claims by Title II advocates.

**Free Speech.** American consumer internet service providers (ISPs) don't restrict free speech – they promote it very visibly. Americans' speech is suppressed, not by ISPs, but mostly by Big Tech platforms. Title II advocates always claimed that we needed Title II for free speech, even calling it “the First Amendment issue of our time.” It turns out that American ISPs are not the problem, and the inventor of net neutrality thinks that the First Amendment is “obsolete” anyway.

**The Internet Wasn't Destroyed.** When it became clear that they didn't care about free speech, Title II advocates shifted to saying that “the survival of the internet” was at risk. They helpfully made specific claims that are easy to check. Some of these were “it will cost 25 cents to send a tweet,” “it will cost two dollars to search on Google,” and “you'll get the Internet one word at a time.” Obviously, none of this happened.

**People Didn't Die.** This one really shouldn't need too many examples. People claimed that ending Title II net neutrality would kill people. It didn't.

**But Won't It Make The Internet Faster and Cheaper?** American broadband service used to be slower than Europe's. That's no longer true. Depending on the ranking, the United States is typically tenth or eleventh in the world, ahead of countries with legal net neutrality like Finland, Norway, the United Kingdom, and Germany. Most of the countries ahead of us are smaller countries like Monaco and Singapore that have fewer challenges with geography than we do. These gains came in while home broadband was a Title I service. If someone thinks it would have been even better under Title II, that's a hard case to make. We are faster than lots of countries with legal net neutrality.

As for price, the Chairwoman is on the record saying that she has no plans to regulate prices under Title II. And if we tried, it would probably be impossible to set a fair price. We couldn't do it properly when we were just regulating one big phone company. How could we do it for dozens of ISPs, including satellites and radio ISPs?

**What About National Security?** The FCC can ban foreign companies from having phone company licenses. These rules would extend the concept to ISPs. That isn't the worst idea, but the U.S. Government doesn't need the FCC to grab this power through Title II. It has CFIUS and the ICTS Supply Chain Rule, and Congress could pass a law tomorrow if it thinks there are any gaps.

**The Proposed Rules are Dangerously Overbroad**

Several effects of the rules should worry everyone who hopes for more advanced technology. It's easy to say that “regulation kills innovation,” but Americans deserve concrete examples.

**5G Will Be Crippled.** Once 5G technology is everywhere, a phone company can “slice” its network so that different phones and other devices get different features. For example, one “slice” could carry emergency services calls, another one could monitor traffic and report into an app, and a third could support high-volume video. Multiple services on a single network could be banned under Title II. Without advanced uses for 5G, there's no point in upgrading.

**Consumers Will Pay for Traffic Dumping.** Title II is attractive to Big Tech companies because “no throttling” means “you have to take all incoming traffic and charge your customer for it.” So if an internet company sends a lot of traffic your way, your ISP will have to charge you for the expense of building a network that can handle it, while the internet company makes all the profit. This is such a big problem in other countries that the EU, Canada and South Korea all adopted or are adopting laws to charge high-traffic companies for network charges.

**Factories Won’t Get Service.** Modern wireless technology enables reaction times 10 times faster than the fastest human and AI training can make manufacturing more efficient. This is already happening in other countries, like China. The “general conduct standard” in the proposed rules would make this technology risky to build because if there was ever any crossover with consumer service, the technology would come under Title II. Think of it this way: if having a computer put you under Title II, we’d never have put computers in factories.

### **The Proposed Rules are Unlikely to Survive Judicial Review**

I’m not going to tell the courts how to rule on the “major questions doctrine” or on whether the Section 10 forbearances that this order uses will hold up in court. (If they don’t hold up, then the Title II regime falls apart.) But I will note that an agency constantly changing its mind without any evidence of a problem is classic arbitrary and capricious behavior.

Additionally, focusing on ISPs when they are less powerful and monopolistic than Big Tech companies raises still more questions about arbitrary and capricious action. The FCC hasn’t really addressed whether internet companies that aren’t ISPs could still be “common carriers” under the Part I rules of Title II. If they can, that should be the first place we go to protect free speech and consumer choice.

### **The Proposed Rules Do Not Serve the Public Interest**

I can’t be the only person who’s noticed that tech seems to be slowing down. Not computers—new computer advances are happening all the time, from AI chatbots writing your grocery list to decoding burned scrolls in Ancient Greek. But not that much seems to cash out into real, tangible improvements to daily life.

The physical world is hard for computers to deal with. They can play grandmaster chess more easily than recognizing expressions on faces. I believe that we need much more connectivity and computing to solve the hard problems of safer, better cars; cheaper, more energy-efficient manufacturing; and life-saving emergency response anywhere on the planet. All these are potentially held back by Title II classification of broadband. What we’re doing right now is working fine. Service has gotten faster, better, and cheaper quickly, so much so that some of our old broadband programs don’t even count as broadband any more. Our expectations are up and we should keep them there.

Everything that “internet freedom” and “network neutrality” meant in the early days of the Internet has just become normal today, without the FCC having to enforce it. You can freely access legal content, browse sites of your choice, connect any device through any protocol you want, and run any application you want without your ISP forcing you to use slow routing. All those things happened through normal marketplace operations and consumer expectations. We are now faced with advocates who can’t accept that we have de facto net neutrality; no wonder the rationales keep changing.

One final comment on internet speeds. A lot of internet plumbing had to be re-imagined to let one home router connected to one wire carry voice, video, data and gaming all at once. Most of the growing pains in getting here weren’t about line speed. They were about technical problems like bufferbloat (routers “buffering” too much data) or router firmware that couldn’t serve the different needs of VoIP and web traffic at the same time. Network engineering is hard and competitive, and most of the advances in this area are about managing traffic.

ISPs are serving consumers better than they ever have before, and forcing utility regulation onto them now is the wrong move at the wrong time.

**STATEMENT OF  
COMMISSIONER ANNA M. GOMEZ**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

Today's world depends so much on being connected. Broadband access to the Internet is not only a vital tool for education, health care, and communicating with loved ones; it is a critical conduit that is essential for modern life. As a country, we have recognized the significant importance of connectivity and have made a historic investment in broadband for all. And at the same time, at a national level, we do not have a regulatory framework to ensure that this critical conduit remains accessible and secure.

I want to be very clear about what we are considering. Today, we are opening a proceeding to seek public comment about how best to safeguard and secure broadband infrastructure, protect consumers, and ensure that the Internet remains open and available to all content providers and consumers. We propose to align the ongoing historic federal investment in broadband deployment with policies that will protect the openness and integrity of these same networks. This proceeding is not about controlling Internet content. It is not about stifling investment, regulating rates, or reducing competition. It is not about controlling the Internet.

Instead, the proposed net neutrality rules will ensure that access to the Internet remains open, so that all viewpoints—including ones with which I disagree—are heard, without discrimination. More so, these principles protect consumers while also maintaining a healthy competitive broadband Internet ecosystem, because we know that competition is required for access to a healthy, open Internet that is accessible for all.

Our goal is to implement this framework in a way that continues to encourage the massive investment in broadband we saw while net neutrality policies were in place prior to 2017 and the continued massive investment in broadband we saw while net neutrality rules remained in place after 2017, as states implemented a patchwork of rules in response to the elimination of federal protections. As we are pursuing re-establishing these rules, we must also be cognizant of the potential effects on Internet Service Providers, especially smaller Internet Service Providers. Many of these providers play a crucial role in fostering competition, especially in underserved and rural areas. We must make sure that net neutrality rules do not place an undue burden on these smaller providers while still upholding the core principles of an open Internet. I welcome their feedback in this proceeding.

Most importantly, we must prioritize consumers. We must pay attention to communities who have been historically left on the wrong side of the digital divide. While we all risk to lose out by not taking action to ensure that we have proper guardrails in place, it is historically underserved communities who risk to lose the most.

I look forward to a substantial record developing, and listening to consumers and stakeholders on the best approaches to keep the critical resource of the Internet open and accessible for all. Thank you to the staff throughout the agency for their work on this item, and to the Wireline Competition Bureau for leading the drafting efforts.

**DECLARACIÓN DE LA COMISIONADA  
ANNA M. GOMEZ**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

El mundo de hoy depende mucho de nuestra conexión a internet. El acceso a internet de banda ancha no solo es una herramienta vital para la educación, la atención de salud y para comunicarnos con nuestros seres queridos. También es un conducto de crítica importante, esencial para la vida moderna. Como país, hemos reconocido la significativa importancia de la conectividad y hemos realizado una inversión histórica destinada a que la internet de banda ancha sea para todos. Y al mismo tiempo, a nivel nacional, no contamos con un marco regulatorio para asegurarnos de que este conducto de crítica importante siga siendo accesible y seguro.

Quiero ser muy clara en relación con lo que estamos considerando. Hoy, damos inicio a un procedimiento para recibir comentarios del público sobre la mejor manera de salvaguardar y asegurar la infraestructura de banda ancha, proteger a los consumidores y garantizar que la internet permanezca abierta y disponible para todos los proveedores de contenido y para todos los consumidores. Proponemos alinear la histórica inversión federal destinada actualmente a la instalación de banda ancha con políticas que protejan la apertura y la integridad de dichas redes. Este procedimiento no consiste en controlar el contenido de internet. No consiste en sofocar la inversión, regular las tarifas o reducir la competencia. No consiste en controlar la internet.

Por el contrario, las reglas propuestas para la neutralidad de la red garantizarán que el acceso a internet permanezca abierto, de modo que se escuchen todos los puntos de vista, incluidos aquellos con los que no estoy de acuerdo, sin hacer diferencias. Más aún, estos principios protegen a los consumidores y al mismo tiempo mantienen un ecosistema de internet de banda ancha robusto y competitivo, porque sabemos que se requiere competencia para acceder a una internet robusta, abierta y accesible para todos.

Nuestra meta es implementar este marco legal para seguir fomentando la inversión a gran escala en banda ancha que vimos cuando se establecieron las políticas de neutralidad de la red, antes de 2017 y que se mantenga la inversión a gran escala en banda ancha que vimos cuando se mantuvieron las políticas de neutralidad de la red, después de 2017, mientras algunos estados implementaron paulatinamente sus propias reglas, tras la eliminación de las protecciones federales. Mientras buscamos restablecer estas reglas, también debemos reconocer los potenciales efectos en los proveedores de servicios de internet (*Internet Service Providers*), especialmente sobre las pequeñas empresas proveedoras de servicios de internet. Muchos de estos proveedores juegan un papel crucial en el fomento de la competencia, especialmente en áreas no atendidas y en áreas rurales. Debemos asegurarnos de que las reglas de neutralidad de la red no signifiquen una carga excesiva en estos proveedores de menor tamaño, mientras nos apegamos a los principios fundamentales de una internet abierta. Estoy disponible a escuchar sus puntos de vista en este procedimiento.

Y lo más importante, debemos priorizar a los consumidores. Debemos prestar atención a las comunidades que históricamente han quedado en el lado equivocado de la brecha digital. Aunque todos nos arriesgamos al fracaso si no tomamos medidas para garantizar las protecciones adecuadas, son las comunidades que históricamente han sido desatendidas las que arriesgan mayores pérdidas.

Espero que haya un registro sustancial de comentarios y así poder conocer la opinión de los consumidores y de otras partes interesadas respecto a cuáles serían las mejores formas y enfoques para que este recurso de crítica importante que es la internet se mantenga abierto y accesible para todos. Gracias al personal de toda la agencia por su trabajo en este tema y a la oficina de competencia en línea fija (*Wireline Competition Bureau*) por liderar los esfuerzos de redacción.