

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20230

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In the Matter of	)	
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Safeguarding and Securing the Open	)	WC Docket No. 23-320
Internet	)	
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REPLY COMMENTS OF JEFFREY WESTLING AND JOSHUA T. LEVINE<sup>1</sup>

**I. Introduction and Summary**

The record strongly supports continued classification of broadband Internet access service (BIAS) as a Title I information service. As pointed out in initial comments, reclassification of BIAS as a Title II service would negatively impact broadband investment,<sup>2</sup> which in turn would threaten public safety, national security, and progress toward goals such as digital equity and universal service.<sup>3</sup> Instead of heavy-handed regulation, the Federal Communications Commission (FCC) should continue to embrace a market-driven approach to broadband.

These reply comments seek to supplement the record on a few issues that commenters raised during the initial comment period. First, the Title I approach to broadband regulation has led to a free and open Internet, and competition is rapidly increasing.<sup>4</sup> Second, the FCC should preempt state-level net

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<sup>2</sup> Dr. George S. Ford, “Investment in the Virtuous Circle: Theory and Empirics,” *Phoenix Center for Advanced Legal and Economic Policy Studies Policy Paper Number 62* p. 26 (December 2023), <https://phoenix-center.org/pcpp/PCPP62Final.pdf>; See also Dr. George S. Ford, “Does Title II Reduce Infrastructure Investment? Repairing Hooton’s Analysis,” *Phoenix Center for Advanced Legal & Economic Public Policy Studies* p. 1. (Oct. 15, 2019), <https://www.phoenix-center.org/perspectives/Perspective19-06Final.pdf>.

<sup>3</sup> Comments of Jeffrey Westling, WC Docket No. 23-320 (Dec. 14, 2023) (Westling Comments).

<sup>4</sup> Sue Marek, “ACA study finds broadband competition in U.S. is thriving,” *FierceTelecom* (June 24, 2022), <https://www.fiercetelecom.com/broadband/aca-study-finds-broadband-competition-us-thriving>; see also “92% of

neutrality laws that add additional costs and risk to broadband providers, further exacerbating the problems highlighted in the initial comments. Third, Title II is unnecessary to regulate pole attachments. Finally, this proceeding should not be used to reexamine the broadband contribution mechanism, and if the Commission does embrace a Title II approach to broadband regulation, it should forgo Section 254 and instead go through a separate rulemaking process for Universal Service Fund (USF) reform if so desired.

The Commission's work has led to a robust, competitive broadband market that has allowed for the development of the world's largest technology sector.<sup>5</sup> Continuing the current course best promotes further development and growth, while also allowing the Commission to address harms as necessary.

## **II. A Title I Approach Promotes an Open Internet**

As explained in the initial comment rounds, Title I BIAS classification has led to the most robust Internet economy in the world.<sup>6</sup> Some commenters argue that the growing tech sector necessitates further government intervention, but this growth supports continued classification as a Title I service.<sup>7</sup>

For example, Mozilla highlights numerous stats about the growth of edge providers in just the past six years under the Title I approach.<sup>8</sup> Subscription-based streaming services have doubled their users and content delivery networks such as Cloudflare have expanded locations by over three times that of 2016.<sup>9</sup> Median download speeds have increased by over 150 Mbps over the last seven years.<sup>10</sup> Mozilla argues that "the changing landscape since 2015 demonstrates an even more urgent need for protections in the US,"<sup>11</sup> but these trends in fact demonstrate the opposite: the Title I approach has led to a robust, competitive Internet ecosystem with a wide variety of options for users. BIAS providers, for their part,

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U.S. Households Get an Internet Service at Home," Leichtman Research Group (Dec. 11, 2023), <https://leichtmanresearch.com/wp-content/uploads/2023/12/LRG-Press-Release-12-11-2023.pdf>.

<sup>5</sup> Sabine Neschke, "Global Competition and the Rise of Big Tech," *Bipartisan Policy Center* (Sept. 09, 2021), <https://bipartisanpolicy.org/blog/the-rise-of-big-tech/>.

<sup>6</sup> *Id.*

<sup>7</sup> See Comments of Mozilla, WC Docket No. 23-320 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/121497799035/1>.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

have not blocked or throttled legitimate traffic because their users want to access these services, and degrading service would harm business.<sup>12</sup>

Some commentators argue that broadband markets aren't competitive, meaning firms have the incentive to extract monopoly rents through conduct such as throttling rivals for anticompetitive gains, but the argument fails to consider the widespread competitive pressures on BIAS providers. For example, the Electronic Frontier Foundation argues that cable providers have "an absolute monopoly over at least 47 million people, and another 33 million people's only 'competitive' alternative was slower and less reliable DSL."<sup>13</sup> This claim, however, relies on a 2020 report from the Institute for Self-Reliance that doesn't account for the massive rise in fixed-wireless and fiber offerings penetrating home markets over the last three years since the report's publication. What's more, the report doesn't consider mobile as a competitive alternative.<sup>14</sup> For example, fixed wireless has been dominating net subscriber additions and will capture 12 to 13 percent of the overall broadband market by 2025.<sup>15</sup> And as of 2021, 15 percent of U.S. adults are "smartphone-only."<sup>16</sup> If broadband providers attempt to extract monopoly rents, consumers can increasingly turn to these other options for BIAS, limiting the ability and incentive for BIAS providers to block or throttle content that consumers wish to access.

Further, to the extent that the Commission believes broadband markets still lack sufficient competition, it should encourage such competition, not create de facto monopolies through regulation. As the trend above indicates, firms continue to invest in disruptive technologies to break into cable monopoly markets, which only exist because of government regulation.<sup>17</sup> Instead of doubling down and entrenching

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<sup>12</sup> Westling Comments at 2-3.

<sup>13</sup> Comments of the Electronic Frontier Foundation, WC Docket No. 23-320 p. 6 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/1215074196426/1>.

<sup>14</sup> Christopher Mitchell & Katie Kienbaum, "Most Americans Have No Real Choice in Internet Providers," *Institute for Self-Reliance* (Aug. 12, 2020), <https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers/>.

<sup>15</sup> Mike Dano, "FWA to remain 'biggest disruptor' through 2024," *LightReading* (June 29, 2023), <https://www.lightreading.com/fixed-wireless-access/fwa-to-remain-biggest-disruptor-through-2024>.

<sup>16</sup> Andrew Perrin, "Mobile Technology and Home Broadband 2021," *Pew Research Center* (June 3, 2021), <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/#:~:text=Smartphone%20dependency%3A%20Some%2015%25%20of,such%20a%20connection%20at%20home>.

<sup>17</sup> Clint Bolick, "Cable Television: An Unnatural Monopoly," *Cato Institute Policy Analysis No. 34* (Mar. 13, 1984), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa034.pdf>.

these firms, the Commission should embrace a regulatory environment that allows start-ups and rivals to see a return on investment if they attempt to break into these markets, not one that adds additional risk and uncertainty. This, in turn, would further mitigate risks to the open Internet, all while still allowing Federal Trade Commission and Department of Justice enforcement of federal antitrust laws to target anticompetitive behavior.<sup>18</sup>

Moreover, a reversion to Title II classification of BIAS networks could stifle innovations related to traffic management and cybersecurity, both of which promote an open Internet. Recent advancements in artificial intelligence (AI) and other machine learning capabilities can promote network optimization and maximize spectral efficiency, ensuring robust speeds and greater reliability for end-users.<sup>19</sup> AI applications can also provide predictive network monitoring and management, anticipating vulnerabilities in a network and recommending patches before they occur.<sup>20</sup> These practices, however, could be stymied by a regime that requires networks to treat all traffic equally. Rather than improve network functionality and safety, the proposed rules would limit the use of emerging technologies that can make telecommunications networks faster, smarter, and safer, enabling more competition in edge markets and providing consumers with more services that operate over the Internet.

### **III. The Commission Should Preempt State Net Neutrality Laws**

Many commentators argue that the FCC should only preempt incompatible state laws, rather than establishing a uniform national framework for network neutrality.<sup>21</sup> While some comments pushed back

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<sup>18</sup> Roslyn Layton & Tom W. Struble, “Net Neutrality Without the FCC? Why the FTC Can Regulate Broadband Effectively,” *The Federalist Society* (Nov. 15, 2017), <https://fedsoc.org/fedsoc-review/net-neutrality-without-the-fcc-why-the-ftc-can-regulate-broadband-effectively#:~:text=Once%20its%20jurisdiction%20is%20restored,any%20harmful%20net%20neutrality%20violations>.

<sup>19</sup> Lory Seraydarian, “AI-Powered Network Optimization in Telecommunications,” *platAI* (Apr. 26, 2023), <https://plat.ai/blog/ai-powered-network-optimization-in-telecommunication/>.

<sup>20</sup> “The Role of Artificial Intelligence in Telecommunications Network Traffic Management,” *Utilities One* (Aug. 19, 2023), <https://utilitiesone.com/the-role-of-artificial-intelligence-in-telecommunications-network-traffic-management>.

<sup>21</sup> See Comments of the Public Utilities Commission, WC Docket No. 23-320 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/1214142323252/1>. <https://www.fcc.gov/ecfs/document/1214142323252/1> (“However, protecting consumers, public safety and critical infrastructure, advancing universal service, and ensuring a safe, reliable, and accessible communications network are core areas of state regulation as well... The CPUC urges

on these arguments, notably highlighting how states could setup de facto rules for the entire country,<sup>22</sup> allowing states to establish their own net neutrality regimes that go beyond the FCC’s order will further disincentive investment.

Every investment decision comes with risk. When a BIAS provider examines whether to upgrade or expand coverage, regulatory costs, right-of-way access fees, pole attachments, and myriad other factors and conditions can negatively impact the potential return on investment.<sup>23</sup> As potential return decreases, so too does the likelihood the BIAS provider will make the investment at all.

If the Commission does decide to impose Title II regulations, including rules against blocking and throttling, at a bare minimum the Commission should ensure that its rules set a uniform national standard for broadband providers to follow. A patchwork of state laws would add significant confusion and uncertainty, as well as additional compliance costs, for broadband providers making nationwide decisions regarding their network management practices.<sup>24</sup>

#### **IV. The Commission Can Rely on Existing Authority To Regulate Pole Attachments**

Some commenters raise concerns about the FCC’s ability to apply Section 224 to regulate rates for pole attachments. Next Century Cities correctly explains that the Mozilla court raises doubts about the applicability of Section 224 to broadband only providers, as the section only applies to cable television systems and telecommunications service.<sup>25</sup> Of course, when the same infrastructure would provide both

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the FCC to act in a way that does not impede states’ ability to regulate in these areas.”); *see also* Comments of Public Knowledge, WC Docket No. 23-320 p. 100 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/12141254615295/1> (“[The Commission] should not issue blanket preemption statements, nor assume that states that different approaches that do not expressly conflict with FCC rules should be preempted.”).

<sup>22</sup> Comments of U.S. Chamber of Commerce, WC Docket No. 23-320 pp. 64-65 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/1214121718819/1>.

<sup>23</sup> *See, e.g.*, Jeffrey Westling, “2020 Broadband Scorecard,” *R Street Institute* (Feb. 10, 2021), <https://www.rstreet.org/research/2020-broadband-scorecard-report/>.

<sup>24</sup> For example, an International Technology and Innovation Foundation study found that over a 10-year period, compliance with 50 different sets of privacy laws could cost the economy \$1 trillion. These types of costs would likewise be felt with a patchwork of broadband regulations. Daniel Castro et al., “The Looming Cost of a Patchwork of State Privacy Laws,” *Information Technology & Innovation Foundation* (January 24, 2022), <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws/>.

<sup>25</sup> Comments of Next Century Cities, WC Docket No. 23-320 pp. 7-8 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/12140454423479/1>; *Mozilla v. Federal Communications Commission*, No.18-

telecommunications and broadband services, Section 224 would apply, but BIAS-only providers would not benefit from the oversight.

Despite the benefits of 224, and the fact that as a policy matter Section 224 should extend to broadband-only providers, the Commission shouldn't throw the baby out with the bath water. If courts determine that Title I authority is insufficient to establish similar rules for BIAS-only providers, it is the job of Congress, not the FCC, to expand this authority. Further, almost all traffic operates over a network owned and operated by either a cable company or a telecommunications service provider.<sup>26</sup> So long as these firms continue to offer both services, their pole attachments will be covered by Section 224.

#### **V. If the Commission Does Reclassify Broadband as a Title II Service, It Should Forebear Application of Section 254**

Some commentators also argue that the FCC should not forebear Section 254 USF contributions application to BIAS providers.<sup>27</sup> While reforms to USF and broadband support is likely needed, this proceeding should not extend to this question, and the FCC should forebear applicability of Section 254.

The USF contribution mechanism increasingly relies on a diminishing base of users, and as a result the Commission should examine different USF reforms.<sup>28</sup> Even if the Commission does plan to reexamine contribution or USF reform more broadly, it should do so after completing this proceeding. Numerous proposals to reform the USF contribution mechanism, such as by including large technology companies who utilize the most bandwidth or by making USF a direct appropriation from Congress, have been floated by a wide range of parties. The merits of these ideas should be fully vetted, rather than in a wholly separate proceeding about competition and in which most commentators haven't weighed in on the

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1051 (D.C. Cir. 2019),

[https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf)

<sup>26</sup> Comments of Techfreedom, WC Docket No. 17-108 et al., pp. 10-11 (Apr. 20, 2020), <https://techfreedom.org/wp-content/uploads/2020/04/TechFreedom-Net-Neutrality-RIFO-Comments.pdf>.

<sup>27</sup> See *Comments of INCOMPAS*, WC Docket No. 23-320 pp.53-54 (Dec. 14, 2023), <https://www.fcc.gov/ecfs/document/1214097190544/1>; See also Comments of Public Knowledge at 96.

<sup>28</sup> Juan Londoño, "The Debate on Universal Service Fund Reform: A Primer," American Action Forum (Jan. 12, 2020), <https://www.americanactionforum.org/insight/the-debate-on-universal-service-fund-reform-a-primer/>.

question of USF obligations. Further, with non-USF-related support programs such as the Broadband Equity Access and Deployment program being implemented, the urgency for reform is diminished.

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