

FCC FACT SHEET*

Safeguarding and Securing the Open Internet

Notice of Proposed Rulemaking – WC Docket No. 23-320

Background: This *Notice of Proposed Rulemaking*, if adopted, would 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. 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. But even as our society has reconfigured itself to do so much online, 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 Federal Communications Commission had played that role, but the Commission abdicated that responsibility in 2018, just as the Internet was becoming more vital than ever. This *Notice* proposes to classify broadband Internet access service as a telecommunications service and provide the Commission with authority necessary to safeguard the open Internet, advance national security, and protect public safety. The *Notice* also proposes to reestablish conduct rules for Internet service providers that would provide a uniform, national approach for safeguarding Internet openness, replacing the current patchwork of state requirements.

What the Notice of Proposed Rulemaking Would Do:

- Propose to reestablish the framework the Commission adopted in 2015 to classify broadband Internet access service as a telecommunications service and to classify mobile broadband Internet access service as a commercial mobile service.
- Propose that reclassification would provide the Commission with additional authority to safeguard national security, advance public safety, protect consumers, and facilitate broadband deployment.
- Propose to forbear from 26 Title II provisions, and clarify that the Commission will not regulate rates or require network unbundling.
- Propose to reestablish a uniform, national regulatory approach to protect the open Internet by preventing broadband Internet access service providers from engaging in practices harmful to consumers, including:
 - Proposing to reinstate straightforward, clear rules that prohibit blocking, throttling, or engaging in paid or affiliated prioritization arrangements;
 - Proposing to reinstate a general conduct standard that would prohibit unreasonable interference or unreasonable disadvantage to consumers or edge providers; and
 - Proposing to retain the disclosure requirements under the current transparency rule and seeking comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes.

* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 23-320, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. *See* 47 CFR § 1.1200 *et seq.*

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*

Adopted: []

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* This document has been circulated for tentative consideration by the Commission at its October open meeting. The issues referenced in this document and the Commission’s ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairwoman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

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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 uniform, 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.¹ 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."² 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."³ 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.⁴

¹ 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) (*COVID-19 Telehealth Program Order*) (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) (*Digital Discrimination NPRM*) (exploring how to address digital discrimination to ensure every person has equal access to critical broadband connections).

² 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.

³ *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, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (*Internet Policy Statement*).

⁴ 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

(continued....)

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.⁵ Commission approval of these transactions was expressly conditioned on compliance with the *Internet Policy Statement*.⁶ During this time, open Internet principles were also applied to particular enforcement proceedings aimed at addressing anti-competitive behavior by service providers.⁷

6. In 2010, the Court of Appeals for the D.C. Circuit rejected the Commission’s attempt to

(Continued from previous page) _____

providers, application and service providers, and content providers.” *Internet Policy Statement*, 20 FCC Rcd at 14987-88, paras. 4-5.

⁵ *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 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, 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.

⁶ *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*).

⁷ 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*).

enforce open Internet principles based on the Commission’s Title I ancillary authority in *Comcast v. FCC*.⁸ Following *Comcast*, the Commission adopted the *2010 Open Internet Order*,⁹ 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 open and dynamic communications networks.¹⁰ The *2010 Open Internet Order* adopted three fundamental rules governing Internet service providers: (1) no blocking; (2) no unreasonable discrimination; and (3) transparency.¹¹ 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.¹² 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.¹³

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.¹⁴ 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.”¹⁵

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*.¹⁶ 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,”¹⁷ 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

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

⁹ *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*).

¹⁰ 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) (*2014 Open Internet NPRM*).

¹¹ *2010 Open Internet Order*, 25 FCC Rcd at 17906, para. 1.

¹² *Id.*

¹³ *Id.* at 17946, paras. 74-75. The *2010 Open Internet Order* also address 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.

¹⁴ *Id.* at 17951-56, paras. 80-92.

¹⁵ *Id.* at 17962, 17959, paras. 104, 99.

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

¹⁷ *Id.* at 645.

that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.”¹⁸ The court also accepted the Commission’s reinterpretation of section 706 as an independent grant of legal authority over broadband services.¹⁹ 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 Commission’s classification of those services as information services.²⁰ 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.”²¹

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.²² 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.²³ The Commission also found that broadband providers have both the incentives and ability to harm the open Internet.²⁴

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 services (or Internet interconnection services), as telecommunications services under Title II of the Act.²⁵ 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.²⁶ The Commission also reclassified mobile broadband service as a commercial mobile service.²⁷

11. In 2016, the D.C. Circuit upheld the Commission’s *2015 Open Internet Order* in full.²⁸ 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

¹⁸ *Id.* at 644.

¹⁹ *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) and 47 U.S.C. § 332(c)(2)).

²⁰ *Id.* at 635-42, 656-59.

²¹ *Id.* at 653.

²² *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).

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

²⁴ *See id.* at 5628-43, paras. 78-101.

²⁵ *See id.* at 5743-45, paras. 331-35.

²⁶ *See id.* at 5603, 5838-64, paras. 5, 493-536.

²⁷ *Id.* at 5778-90, paras. 388-408.

²⁸ *See USTA*, 825 F.3d 674.

telecommunications service.”²⁹ 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.”³⁰ The court also rejected arguments that the grant of 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.”³¹ 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.”³² 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.³³

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.³⁴ The Commission asserted that a transparency rule, together with antitrust and consumer protection laws, would be sufficient to protect consumers’ use of the Internet.³⁵ 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*.³⁶ 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,”³⁷ departing from the Commission’s prior interpretation of those provisions.³⁸ 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.³⁹ 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

²⁹ *USTA*, 825 F.3d 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.”).

³⁰ *Id.* at 705.

³¹ *Id.* at 706.

³² *Id.* at 714.

³³ *Id.* at 733-44.

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

³⁵ *Id.* at 450-52, paras. 239-45.

³⁶ *Id.* at 427, para. 195.

³⁷ *Id.* at 470, para. 268.

³⁸ 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.

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

that Title II classification depressed network investment.⁴⁰ 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.⁴¹ 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.”⁴² Ultimately, the *RIF Order*’s “anemic analysis” in that regard “barely survive[d] arbitrary and capricious review.”⁴³ The court also vacated the *RIF Order*’s blanket preemption of inconsistent state laws,⁴⁴ opening the door for several states to develop their own policies.⁴⁵ 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,”⁴⁶ And concluded that “in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.”⁴⁷

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.⁴⁸

- 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.”⁴⁹
- 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.⁵⁰
- As to the issue of Lifeline Support, the court found that the *RIF Order* “backhanded the

⁴⁰ *Id.* at 51, 52.

⁴¹ *Id.* at 52, 55.

⁴² *Id.* at 59.

⁴³ *Id.* at 59.

⁴⁴ *Id.* at 74.

⁴⁵ 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).

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

⁴⁷ *Id.* at 59.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.* at 61-62.

⁵⁰ *Id.* at 65-67.

issue” with a response that “d[id] not work,” and likewise “prove[d] unable to explain itself in this litigation either.”⁵¹

The court therefore remanded to the Commission for further consideration of those issues.⁵²

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 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.”⁵³ Judge Wilkins likewise expressed agreement with Judge Millett’s views.⁵⁴

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*.⁵⁵ 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*.⁵⁶

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 uniform, national regulatory approach. The Commission also has an important statutory mandate to protect “life and property” by supporting national security and public safety.⁵⁷ 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.

⁵¹ *Id.* at 69.

⁵² *Id.* at 18.

⁵³ *Id.* at 87, 94 (Millett, J., concurring) (citation omitted).

⁵⁴ *Id.* at 94-95 (Wilkins, J., concurring).

⁵⁵ *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.).

⁵⁶ 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).

⁵⁷ *See* 47 U.S.C. § 151.

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 healthcare, to commerce, community, and free expression.⁵⁸ 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,⁵⁹ 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.”⁶⁰ 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.⁶¹ 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.⁶² The increased importance of BIAS connections has persisted post-

⁵⁸ 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/>.

⁵⁹ 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 additional 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 Act, § 60102 (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).

⁶⁰ 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”).

⁶¹ 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 (“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”).

⁶² 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).

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 computers was eight hours, excluding passive activities, such as streaming music or video in the background.⁶³ 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 2017.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.”⁶⁷ 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.”⁶⁸ 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.”⁶⁹ 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

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

⁶⁴ OpenVault, *Broadband Insights Report (OVBI) 4Q22*, 11, 15, https://openvault.com/wp-content/uploads/2023/02/OVBI_4Q22_Report.pdf.

⁶⁵ *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).

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

⁶⁷ *USTA*, 825 F.3d at 697-98.

⁶⁸ *Id.* at 698.

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

service.⁷⁰ The Commission specifically found that ISPs market their BIAS “primarily as a conduit for the 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.⁷¹ 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.⁷² 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,⁷³ rather than its capability to generate, acquire, store, transform, process, retrieve, utilize, or make available that information.⁷⁴ Such marketing emphasizes faster speeds aimed at connecting multiple devices,⁷⁵ unlimited data for mobile service,⁷⁶ and reliable and secure coverage.⁷⁷ 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,⁷⁸ new devices,⁷⁹ access to Wi-Fi

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

⁷¹ *Id.* at 5757, para. 354.

⁷² *RIF Order*, 33 FCC Rcd at 335, para. 46.

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

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

⁷⁵ 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.”).

⁷⁶ See, e.g., T-Mobile, *Compare our unlimited cell phone plans*, <https://www.t-mobile.com/cell-phone-plans> [<https://perma.cc/FN44-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).

⁷⁷ 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.”).

⁷⁸ 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).

⁷⁹ 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).

hotspots,⁸⁰ or mobile security apps.⁸¹ We seek comment generally on how BIAS offerings are advertised 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 uniform, 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.

⁸⁰ 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-access-points> (last visited Sept. 11, 2023) (advertising "unlimited use of out-of-home Spectrum WiFi nationwide at no extra cost").

⁸¹ *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).

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 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 manner, 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.⁸² 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.⁸³ 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.⁸⁴ Our proposal would leave the existing transparency requirements undisturbed.⁸⁵ 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 uniform, nationwide framework of open Internet rules for ISPs.⁸⁶ Both the *2015 Open Internet Order* and the *RIF Order* sought to ensure that the rules they established acted as both a national uniform floor and ceiling for governance of ISP conduct.⁸⁷ In both *Orders*, the Commission expressed concern that a patchwork of state open Internet requirements could increase burdens for ISPs and hinder the broadband market.⁸⁸ With the goal of avoiding this, the Commission, in each instance, attempted to establish a framework that would preempt any inconsistent state laws.⁸⁹ 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."⁹⁰ Thus, instead of creating "a uniform set of federal regulations,"⁹¹

⁸² 47 U.S.C. § 201(b); 47 U.S.C. § 202(a).

⁸³ See *infra* section V.

⁸⁴ See *infra* section V.

⁸⁵ See *infra* section V.

⁸⁶ See *infra* section V.

⁸⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5804, para. 433 (explaining that the Commission "establish[ed] a comprehensive regulatory framework governing broadband Internet access services nationwide"); *RIF Order*, 33 FCC Rcd at 426, para. 194.

⁸⁸ 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.").

⁸⁹ 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.

⁹⁰ *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

(continued...)

the *RIF Order*'s hands-off approach to BIAS has led to the very patchwork of state-by-state open Internet requirements it sought to avoid.⁹² We remain concerned that a patchwork of 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,⁹³ thereby enabling the Commission to create a uniform 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.⁹⁴ The *RIF Remand Order*, in declining to reclassify BIAS as a telecommunications service on that basis, largely dismissed such concerns as speculative.⁹⁵ 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, a responsibility that underlies its other statutory obligations.⁹⁶ We seek comment generally on how reclassification would advance the Commission's

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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).

⁹¹ *RIF Order*, 33 FCC Rcd at 426-27, para. 194.

⁹² 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, 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). 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>.

⁹³ *See infra* section III.F.

⁹⁴ *Mozilla*, 940 F.3d at 59-63.

⁹⁵ *See, e.g., RIF Remand Order*, 35 FCC Rcd at 12356-68, paras. 49-66.

⁹⁶ 47 U.S.C. § 151 (explaining that among the reasons Congress created the Commission was "for the purpose of the national defense"); *see also* The White House, Presidential Policy Directive 21: Critical Infrastructure Security and

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fulfillment of its national security responsibilities and how it specifically would affect the Commission's efforts, in coordination with other agencies, 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.⁹⁷ Section 214, however, applies to common carriers,⁹⁸ 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.⁹⁹ 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)¹⁰⁰ and other harms in relation to the services

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Resilience (PPD-21) (Feb. 12, 2013) (directing the FCC to exercise its authority and expertise to identify and address vulnerabilities in the communications sector).

⁹⁷ 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).

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

⁹⁹ *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, FCC 22-22, 2022 WL 905270 (Mar. 23, 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).

¹⁰⁰ Today, ISPs provide BIAS through PoPs. *See China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16027, paras. 91-92, *aff'd*, *China Telecom (Americas) Corp. v. FCC* ("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

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provided by those entities pursuant to section 214 authorization.¹⁰¹ 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,"¹⁰² and it reached similar conclusions in the other proceedings.¹⁰³ 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. 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?¹⁰⁴ 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.

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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.”)

¹⁰¹ 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.” *China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16027, para. 93.

¹⁰² *China Telecom Americas Order on Revocation and Termination*, 36 FCC Rcd at 16029, para. 98, *aff'd*, *China Telecom (Americas) Corp. v. FCC*.

¹⁰³ 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.

¹⁰⁴ 47 U.S.C. § 310; 47 CFR §§ 1.5000-1.5004, 20.5.

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 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,¹⁰⁵ the Commission has undertaken significant efforts to improve supply chain security. 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;¹⁰⁶ 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;¹⁰⁷ created and maintained a list of communications equipment and services that pose an unacceptable risk to the national security (“covered equipment and services”);¹⁰⁸ 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;¹⁰⁹ and prohibited the authorization of equipment that poses a threat and the marketing and importation of such equipment in the United States.¹¹⁰ We seek comment on how reclassification may allow the Commission to further these efforts. For instance, would

¹⁰⁵ *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)).

¹⁰⁶ *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.

¹⁰⁷ 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.

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

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

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

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 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?¹¹¹ 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. . . ."¹¹² 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. 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."¹¹³ 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."¹¹⁴ Would reclassification provide the Commission with additional authority to address BGP vulnerabilities?

32. In what other ways could reclassification bolster the Commission's authority to address

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

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

¹¹³ *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>.

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

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?¹¹⁵ For example, could the Commission determine that only broadband services that meet certain cybersecurity standards constitute “advanced telecommunications capability”?¹¹⁶ 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?¹¹⁷ 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?¹¹⁸ 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?¹¹⁹ 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.”¹²⁰ Indeed, the Commission is “required to consider public safety by . . . its enabling act.”¹²¹ The *Mozilla* court explained that when “‘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

¹¹⁵ 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.”).

¹¹⁶ 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.”).

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

¹¹⁸ 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>.

¹¹⁹ 47 U.S.C. § 218.

¹²⁰ *RIF Remand Order*, 35 FCC Red at 12336, para. 21.

¹²¹ *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 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”).

‘must take into account its duty to protect the public.’¹²² 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.¹²³ 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.¹²⁴ We seek comment on the *RIF Order*’s policy rationales and framework for protecting against harms elsewhere in this *Notice*,¹²⁵ 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.¹²⁶ 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.¹²⁷ 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.¹²⁸ 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.¹²⁹

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),¹³⁰ would classification of BIAS as a telecommunications service

¹²² *Mozilla*, 940 F.3d. at 60.

¹²³ 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.”).

¹²⁴ *RIF Remand Order*, 35 FCC Rcd at 12336 and 12344-68, paras. 20 and 32-66.

¹²⁵ See *infra* sections III.B.6 and V.A.6.

¹²⁶ *RIF Remand Order*, 35 FCC Rcd at 12341, para. 27.

¹²⁷ *Id.* at 12341, para. 27.

¹²⁸ 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.

¹²⁹ See *infra* section V.A.2.

¹³⁰ *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

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.¹³¹ 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?¹³²

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.¹³³ 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.¹³⁴ 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.¹³⁵ What effect, if any, would Title II classification of BIAS have on these

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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).

¹³¹ 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).

¹³² 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).

¹³³ *RIF Remand Order*, 35 FCC Rcd at 12342, para. 29.

¹³⁴ *Id.* at 12341, para. 27.

¹³⁵ *Implementing Kari's Law and Section 506 of RAY BAUM's Act et al.*, 34 FCC Rcd at 6655-91, paras. 137-220; 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); *Implementing Kari's Law and Section 506 of RAY BAUM's Act; Inquiry Concerning 911 Access, Routing, and Location in Enterprise Communications System; Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules*, PS Docket Nos. 18-261 and 17-239, GN Docket No. 11-117, Report and Order, 34 FCC Rcd 6607, 6612-13, paras. 14-16 (2019); *Implementation of the National Suicide Hotline Improvement Act of 2018*, WC Docket No. 18-336, 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).

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 911¹³⁶ or over the use of Wi-Fi calling¹³⁷ 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,¹³⁸ and the Commission has taken several steps to improve access to IP-enabled 911 communications for people with disabilities.¹³⁹ 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.¹⁴⁰ In particular, members of the public often rely on BIAS during emergencies to enable them to find and receive potentially life-saving information.¹⁴¹ 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.'"¹⁴² The COVID-19 pandemic, severe 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

¹³⁶ 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); 911.gov, *Next Generation 911*, <https://www.911.gov/issues/ng911/> (last updated June 9, 2023).

¹³⁷ 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>.

¹³⁸ 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>.

¹³⁹ *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) (CVAA) (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").

¹⁴⁰ *RIF Remand Order*, 35 FCC Rcd at 12342, para. 29.

¹⁴¹ *Id.* at 12342, para. 29.

¹⁴² *Id.* (quoting CTIA Comments at 21).

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.¹⁴³

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 threats¹⁴⁴ and BIAS connections are increasingly important for in-home monitoring of individuals who are elderly or disabled.¹⁴⁵ 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,¹⁴⁶ 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,¹⁴⁷ 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 errors¹⁴⁸ or misconfigurations?¹⁴⁹ Under rules implemented

¹⁴³ *Id.* at 12343, para. 30.

¹⁴⁴ *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-Reach-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%.”).

¹⁴⁵ 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/>.

¹⁴⁶ See 47 CFR § 4.9.

¹⁴⁷ See *id.*

¹⁴⁸ 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 Actions at 12-13 (2022), https://www.oecd-ilibrary.org/science-and-technology/routing-security_40be69c8-en;jsessionid=CtmViajgUFWAaAC8wqNIZWSQuFGFXlhZKMQ-eGU.ip-10-240-5-167.

¹⁴⁹ *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

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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.¹⁵⁰ 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?¹⁵¹ How, if at all, would reclassification allow us to further our goal to improve the reliability of wireless networks?¹⁵² Would broadband reclassification give the Commission additional authority to facilitate the use of Wi-Fi calling during emergencies or network outages,¹⁵³ 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.

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

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Nos. 21-346 and 15-80, ET Docket No. 04-35, Notice of Proposed Rulemaking, 36 FCC Rcd 14802, 148014, para. 30 (2021).

¹⁵⁰ *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).

¹⁵¹ *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).

¹⁵² *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).

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

privacy infringements and data breaches by communications providers.¹⁵⁴ 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,¹⁵⁵ according the category of customer proprietary network information (CPNI) the greatest level of protection.¹⁵⁶

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.¹⁵⁷ The *RIF Order* eliminated these statutory protections for broadband customers and surrendered the Commission's authority over ISPs' privacy and data protection practices.¹⁵⁸ 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. Additionally, we note that the *RIF Order* left ISPs subject to a patchwork of state privacy and data security requirements,¹⁵⁹ instead of a uniform, nationwide framework under section 222. We seek comment on these views.

43. Based on the foregoing, we once again propose herein not to forbear from section 222.¹⁶⁰ 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 uniform 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.¹⁶¹

¹⁵⁴ 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).

¹⁵⁵ 47 U.S.C. § 222(a).

¹⁵⁶ 47 U.S.C. § 222(c).

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

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

¹⁵⁹ See IAPP, *US State Privacy Legislation Tracker*, <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/> (last updated Sept. 15, 2023); see also Maine Rev. Stat. § 9301.

¹⁶⁰ See *infra* section IV.B.

¹⁶¹ 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.¹⁶² 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?

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

¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ 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*,¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ Although section 332(e)(7) of the Act, and Commission interpretation thereof,

¹⁶³ 47 U.S.C. § 224(b).

¹⁶⁴ 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).

¹⁶⁵ See *RIF Remand Order*, 35 FCC Rcd at 12370-71, paras. 71-72.

¹⁶⁶ *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.

¹⁶⁷ *RIF Order on Remand*, 33 FCC Rcd at 12370-77, paras. 71-81.

¹⁶⁸ *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).

¹⁶⁹ 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?¹⁷⁰ 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.¹⁷¹

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴

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 2011, Pub L. No. 112-96, 126 Stat. 156 (2012) (codified at 47 U.S.C. § 6409(a)(1)).

¹⁷⁰ See *2018 Wireless Infrastructure Order*, 33 FCC Rcd at 9093, para. 18 (quoting 47 U.S.C. § 337(c)(7)(B)(v)).

¹⁷¹ *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7806, para. 167; *2018 Wireless Infrastructure Order*, 33 FCC Rcd at 9108, para. 36.

¹⁷² 47 U.S.C. § 254(c)(1).

¹⁷³ *Mozilla*, 940 F.3d at 68-70.

¹⁷⁴ 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) (*USF/ICC Transformation Order*).

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,¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ In 2019, the Commission

¹⁷⁵ 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).

¹⁷⁶ See 47 CFR §§ 54.413 and 54.414 (establishing Link Up support and the reimbursement process for Link Up).

¹⁷⁷ See *supra* note 59.

¹⁷⁸ 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, 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,¹⁷⁹ and on the Commission’s authority to target different kinds of entities, including telecommunications providers, MVPDs, and broadband-only providers.¹⁸⁰ In 2022, relying on sections 201 and 628 of the Act,¹⁸¹ 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.¹⁸² 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. *Digital Equity.* We invite commenters to address how our proposed classification may promote or inhibit advances in diversity, equity, inclusion, and accessibility. The Commission is engaged in a continuing effort to advance digital equity for all,¹⁸³ including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. We believe BIAS connections promote diversity of viewpoints by allowing traditionally disadvantaged communities to express themselves outside of traditional media.¹⁸⁴ Social media websites and other platforms particularly have become important platforms for free expression, political engagement, and social activism.¹⁸⁵ 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.”¹⁸⁶ Accordingly, we invite comment on any equity-related considerations¹⁸⁷ associated with

¹⁷⁹ *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).

¹⁸⁰ *Id.* at 5720-21, paras. 32-35.

¹⁸¹ 47 U.S.C. § 201(b), 548(b).

¹⁸² *See Improving Competitive Broadband Access to Multiple Tenant Environments*, GN 17-142, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448 (2022).

¹⁸³ 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.

¹⁸⁴ *See* Comments of Voices for Internet Freedom Coalition, et al., WC Docket No. 17-108, 2-3 (July 19, 2017).

¹⁸⁵ *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 (“[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.”).

¹⁸⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5663, para. 143 (citing 47 U.S.C. § 230(a)(3)).

¹⁸⁷ 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 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

(continued....)

classifying BIAS as a telecommunications service and any benefits or drawbacks of such classification for relevant communications.

5. Access for Persons with Disabilities

54. 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.”¹⁸⁸ 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.¹⁸⁹ In addition, section 718 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.¹⁹⁰ 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?¹⁹¹

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

55. 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.¹⁹² However, the *RIF Order* gave little weight to the *2015 Open Internet Order*’s showing that investment continued for broadband services that were regulated as Title II common carrier services during that two-decade period, including digital subscriber line (DSL), which was regulated as such until 2005.¹⁹³

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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).

¹⁸⁸ 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, deaf-blind, 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).

¹⁸⁹ 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)”).

¹⁹⁰ 47 U.S.C. § 619.

¹⁹¹ 47 U.S.C. § 255.

¹⁹² *RIF Order*, 33 FCC Rcd at 362-63, para. 86-87.

¹⁹³ *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

(continued....)

56. 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,”¹⁹⁴ 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.¹⁹⁵ 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,¹⁹⁶ 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,¹⁹⁷ even as the Commission seemed to recognize the weaknesses of those studies.¹⁹⁸ Additionally, similar to the *2015 Open Internet Order* record,¹⁹⁹ the *RIF Order*’s record showed opposing views on the likely long-term effects of the Commission’s regulatory decisions on investment.²⁰⁰ 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.”²⁰¹ 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.²⁰² 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 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.

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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, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14843, 14858, para. 5 (2005) (*Wireline Broadband Classification Order*).

¹⁹⁴ *RIF Order*, 33 FCC Rcd at 364, para. 89.

¹⁹⁵ *See id.* at 365, para. 91 (discussing the *RIF Order* record on this issue).

¹⁹⁶ *See 2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

¹⁹⁷ *RIF Order*, 33 FCC Rcd at 365-66, paras. 91-93.

¹⁹⁸ *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.* 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”).

¹⁹⁹ *See 2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

²⁰⁰ *See RIF Order*, 33 FCC Rcd at 370-71, para. 102 (discussing the *RIF Order* record on this issue).

²⁰¹ *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

²⁰² *See id.* at 5791, para. 410 (noting that “regulation is just one of many factors affecting investment decisions”).

57. 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. 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?²⁰³

C. Scope of Reclassification

58. *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.²⁰⁴ The Commission has chiefly retained this definition since it first defined broadband Internet access service in the *2010 Open Internet Order*.²⁰⁵ We seek comment on whether there is any reason to depart from this definition of broadband Internet access service.

59. 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.”²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ 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?²⁰⁹

60. 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 platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless

²⁰³ See NTIA, BroadbandUSA, *Federal Funding*, <https://broadbandusa.ntia.doc.gov/resources/federal/federal-funding> (last visited Sept. 20, 2023).

²⁰⁴ 47 CFR § 8.1(b); see also *id.* Part 8.

²⁰⁵ 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 and Appx. A, Final Rules; *RIF Order*, 33 FCC Rcd at 318-20, paras. 21-25.

²⁰⁶ See *2015 Open Internet Order*, 30 FCC Rcd at 5683-84, para. 189; *RIF Order*, 33 FCC Rcd at 318, para. 21, n.58.

²⁰⁷ These programs statutorily support BIAS regardless of its classification status.

²⁰⁸ See *2015 Open Internet Order*, 30 FCC Rcd at 5683-84, para. 189; *RIF Order*, 33 FCC Rcd at 318, para. 21, n.58.

²⁰⁹ See *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Order on Reconsideration, FCC 23-68, at 6-8, paras. 24-26 and Appendix A (rel. Aug. 29, 2023) (*Broadband Label Reconsideration Order*).

services using licensed or unlicensed spectrum), and satellite.²¹⁰ 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.”²¹¹ 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.²¹² 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.²¹³ 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.²¹⁴ We seek comment on our proposals.

61. 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.²¹⁵ 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.²¹⁶ Such proposed findings are consistent with the manner in which the Commission has historically defined broadband Internet access service,²¹⁷ and we seek comment on any changed circumstances that would justify a different outcome.

62. 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).²¹⁸ We seek comment on how we should view these services for purposes of defining broadband Internet access service—are these types of

²¹⁰ See *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337; *RIF Order*, 33 FCC Rcd at 319, para. 22.

²¹¹ *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).

²¹² *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).

²¹³ *RIF Order*, 33 FCC Rcd at 319, para. 22; see also *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337.

²¹⁴ *2015 Open Internet Order*, 30 FCC Rcd at 5746-47, para. 337; *RIF Order*, 33 FCC Rcd at 319, para. 22.

²¹⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, para. 24.

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

²¹⁷ See *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, para. 25.

²¹⁸ See, e.g., Enterprise IoT Insights, “NTT Rolls Out 5G IoT Service in the U.S. via its Transtel Subsidiary,” May 17, 2022, <https://enterpriseiotinsights.com/20220517/internet-of-things/ntt-rolls-out-5g-iot-service-us-via-transtel-subsidiary>.

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?

63. *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.²¹⁹ 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.²²⁰ 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?

64. 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.²²¹ 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.”²²² We seek comment on our proposed approach.

65. *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.”²²³ We seek comment on this position. As the Commission explained in 2015, “[t]he representation to retail customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes

²¹⁹ *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.

²²⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5697, para. 209.

²²¹ 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.

²²² *Id.*

²²³ *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.”).

the promise to make the interconnection arrangements necessary to allow that access”²²⁴ and “the promise to transmit traffic to and from those Internet end points back to the user.”²²⁵ 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,²²⁶ 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.’”²²⁷ 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?

66. 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 services²²⁸ from the scope of broadband Internet access service?²²⁹ 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

67. 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 authority to interpret and implement the Communications Act of 1934.²³⁰ Both the *2015 Open Internet*

²²⁴ See *2015 Open Internet Order*, 30 FCC Rcd at 5610, 5693-94, paras. 28, 204.

²²⁵ *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).

²²⁶ 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”).

²²⁷ *Verizon*, 740 F.3d at 653.

²²⁸ 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.

²²⁹ See *2015 Open Internet Order*, 30 FCC Rcd at 5749, para. 340; *RIF Order*, 33 FCC Rcd at 320, paras. 24-25.

²³⁰ See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943) (“[i]n the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers”); *United States v. Storer*

Order and the *RIF Order* recognized this authority.²³¹ 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.²³² 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.”²³³ 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.

68. 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.”²³⁴ 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.”²³⁵ 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.”²³⁶ When Congress enacted the definitions of “telecommunications service” and “information service” in the 1996 Act,²³⁷ it substantially incorporated the “basic” and “enhanced” service classifications from the *Computer Inquiries* line of decisions.²³⁸

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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’”); *Brand X*, 545 U.S. 967, 980-82 (2005) (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) (*NARUC I*) (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”).

²³¹ See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5742, 5743-44, paras. 328, 331-32, 333-35; *RIF Order*, 33 FCC Rcd at 403-405, paras. 155-56.

²³² See, e.g., *Mozilla*, 940 F.3d at 23-24, 43, 50, 53-54, 55-56, 63-64; *USTA*, 825 F.3d at 701-702, 704, 708-10, 723-24.

²³³ *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64) (emphasis added; internal quotation marks omitted).

²³⁴ 47 U.S.C. § 153(50).

²³⁵ 47 U.S.C. § 153(53).

²³⁶ 47 U.S.C. § 153(24).

²³⁷ 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).

²³⁸ 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.

(continued....)

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.²³⁹ Thus, there is no disputing that until 2005, Title II applied to the transmission component of DSL service.²⁴⁰ 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.

69. 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.’”²⁴¹ If the provider is offering “telecommunications” to the public for a fee, then the service is necessarily a telecommunications service.²⁴² Thus, in 2015, the Commission 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.²⁴³ Consistent

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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 & Commc’ns 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*).

²³⁹ 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.

²⁴⁰ See, e.g., *Wireline Broadband Classification Order*, 20 FCC Rcd at 14858, para. 5.

²⁴¹ *2015 Open Internet Order*, 30 FCC Rcd at 5757, para. 355.

²⁴² *Id.* at 5757, para. 355.

²⁴³ *Id.* at 5757-58, para. 356.

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 telecommunications²⁴⁴—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.

70. *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.”²⁴⁵ As discussed above,²⁴⁶ we believe that users rely on BIAS to transmit “information of the user’s choosing,” “between or among points specified by the user.”²⁴⁷ 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.’”²⁴⁸ 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.”²⁴⁹ 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.²⁵⁰ 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.”²⁵¹ 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 *2015 Open Internet Order*.²⁵² We seek comment on the analysis that BIAS provides “telecommunications,” including whether there is any reason to depart from it.

71. We further tentatively conclude that there is no change or modification to the form or

²⁴⁴ *Id.*; see also *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting) (quoting *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4799, para. 1).

²⁴⁵ 47 U.S.C. § 153(50).

²⁴⁶ See *supra* section III.A; see also *2015 Open Internet Order*, 30 FCC Rcd at 5761, para. 361.

²⁴⁷ 47 U.S.C. § 153(50).

²⁴⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5761-62, para. 361.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *RIF Order*, 33 FCC Rcd at 341-43, para. 52.

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.²⁵³ 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?

72. *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.²⁵⁴ 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,”²⁵⁵ 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.²⁵⁶ 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,”²⁵⁷ and the *RIF Order* does not appear to disturb this finding. We seek comment on this analysis.

73. *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.”²⁵⁸ 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 service²⁵⁹—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 end user functionality in tandem with edge providers,”²⁶⁰ 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

²⁵³ *2015 Open Internet Order*, 30 FCC Rcd at 5762-63, para. 362.

²⁵⁴ *See supra* section III.A.

²⁵⁵ 47 U.S.C. § 153(53) (defining “telecommunications service”).

²⁵⁶ *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”).

²⁵⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5763-64, para. 363.

²⁵⁸ 47 U.S.C. § 153(24).

²⁵⁹ *RIF Order*, 33 FCC Rcd at 322-25, paras. 30-32.

²⁶⁰ *Id.* at 323-24, para. 31.

either the ISP or a third party of the end user's choice.²⁶¹ 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."²⁶² We seek comment on this proposed analysis.

74. 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."²⁶³ 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."²⁶⁴ 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."²⁶⁵ On review of the *RIF Order*, Judge Millet 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."²⁶⁶ 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."²⁶⁷ 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.

75. 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 with respect to BIAS,²⁶⁸ and we seek comment on this tentative conclusion. In the *2015 Open Internet*

²⁶¹ *See id.* at 339, para. 50.

²⁶² 47 U.S.C. § 153(24).

²⁶³ 47 U.S.C. § 153(24).

²⁶⁴ *2015 Open Internet Order*, 30 FCC Rcd at 5765, para. 365.

²⁶⁵ *RIF Order*, 33 FCC Rcd at 325, para. 33.

²⁶⁶ *Mozilla*, 940 F.3d at 90 (Millet, J., concurring); *see also id.* at 94-95 (Wilkins, J., concurring) ("As Judge Millet'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.").

²⁶⁷ *Mozilla*, 940 F.3d at 91 (Millet, J., concurring).

²⁶⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5765-69, paras. 366-69.

Order, the Commission analogized DNS to adjunct-to-basic services,²⁶⁹ 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.”²⁷⁰ 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.²⁷¹ 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.²⁷² 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.

76. 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 2015.²⁷³ 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.²⁷⁴ 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.²⁷⁵ 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.”²⁷⁶ 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

²⁶⁹ “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 Amendment of Section 64.702 of the Comm’n’s Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, 421, para. 98 (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); *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) (*NATA/Centrex Order*). 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 NATA/Centrex Order*, 101 FCC 2d at 359-61, paras. 24, 27, 28.

²⁷⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5765-69, paras. 366-69.

²⁷¹ *RIF Order*, 33 FCC Rcd at 331, para. 39.

²⁷² *Id.* at 326-27, para. 34.

²⁷³ *See 2015 Open Internet Order*, 30 FCC Rcd at 5769-70, para. 370.

²⁷⁴ *See id.*

²⁷⁵ *RIF Order*, 33 FCC Rcd at 338-39, paras. 49-50.

²⁷⁶ *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?

77. For the same reasons the Commission found in 2015, we believe that caching,²⁷⁷ 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.²⁷⁸ 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.

78. 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*.²⁷⁹ 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.

79. 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,²⁸⁰ 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.²⁸¹ 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,”²⁸² 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

²⁷⁷ Caching is the storing of copies of content at locations in the network closer to subscribers than their original sources.

²⁷⁸ *RIF Order*, 33 FCC Rcd at 332-33, para. 42.

²⁷⁹ *Mozilla*, 940 F.3d at 91 (Millett, J., concurring).

²⁸⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5771-72, para. 373.

²⁸¹ *Id.* at 5773, paras. 376-77.

²⁸² *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?

80. *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 cases²⁸³—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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

81. 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.”²⁸⁷ 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,²⁸⁸ 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?²⁸⁹ 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?²⁹⁰

82. 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.

²⁸³ 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) (*Brown & Williamson*).

²⁸⁴ *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*).

²⁸⁵ 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*).

²⁸⁶ *RIF Order*, 33 FCC Rcd at 407-408, para. 161

²⁸⁷ 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).

²⁸⁸ See *supra* para. 68.

²⁸⁹ See *West Virginia v. EPA*, 142 S. Ct. at 2610-12.

²⁹⁰ 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?

83. 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.²⁹¹

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

84. 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.²⁹² 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.

85. 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.”²⁹³ 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.

86. We also propose to return to the *2015 Open Internet Order*'s determination that mobile BIAS is an interconnected service.²⁹⁴ 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). . . .”²⁹⁵ 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.²⁹⁶ 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

²⁹¹ 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.

²⁹² *2015 Open Internet Order*, 30 FCC Rcd at 5778-90, paras. 388-408.

²⁹³ 47 U.S.C. § 332(d)(1).

²⁹⁴ *2015 Open Internet Order*, 30 FCC Rcd at 5779-5788, paras. 390-402.

²⁹⁵ 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.

²⁹⁶ *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.”²⁹⁷ The Commission reversed course in the *RIF Order*, reinstating the prior definition of “public switched network.”²⁹⁸ 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.²⁹⁹ Continued growth of mobile BIAS is expected, with one forecast predicting that there will be 410 million 5G mobile subscriptions in North America by 2028.³⁰⁰ 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 our rules,³⁰¹ 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.”³⁰² 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.

87. 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.³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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 propose to support this finding by applying the Commission’s analysis from the *2015 Open Internet*

²⁹⁷ *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)). For example, services that use 4G and 5G technology are now IP-based and leverage broadband architecture.

²⁹⁸ *RIF Order*, 33 FCC Rcd at 355, para. 75.

²⁹⁹ CTIA, *2023 Annual Survey Highlights* (July 25, 2023), <https://www.ctia.org/news/2023-annual-survey-highlights>.

³⁰⁰ Ericsson, *Wireless Mobility Report* (June 2023), <https://www.ericsson.com/en/reports-and-papers/mobility-report/reports/june-2023>.

³⁰¹ 47 CFR § 20.3 (definition of “public switched network”).

³⁰² *2015 Open Internet Order*, 30 FCC Rcd at 5779, para. 391.

³⁰³ *Id.* at 5785-86, para. 398.

³⁰⁴ *Id.* at 5785-86, paras. 398-99.

³⁰⁵ *Id.*

*Order*³⁰⁶ to today's marketplace. We seek comment on our proposed approach.

88. 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.³⁰⁷ 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."³⁰⁸ 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."³⁰⁹ 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.³¹⁰ 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*.

89. 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.³¹¹ 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.³¹² 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."³¹³ 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."³¹⁴ 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.

90. 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.³¹⁵ 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 intent to apply common carrier treatment to telecommunications services."³¹⁶ The Commission found that

³⁰⁶ *Id.* at 5779-88, paras. 390-402.

³⁰⁷ *Id.* at 5786-87, paras. 400-401.

³⁰⁸ *Id.* at 5787, para. 401.

³⁰⁹ *Id.*

³¹⁰ Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

³¹¹ *2015 Open Internet Order*, 30 FCC Rcd at 5778-88, para. 402, n.1175; 47 CFR § 20.3.

³¹² *2015 Open Internet Order*, 30 FCC Rcd at 5778-88, para. 402, n.1175.

³¹³ *See id.* at 5787-88, para. 402.

³¹⁴ *See RIF Order*, 33 FCC Rcd at 356-57, 358, paras. 77, 80.

³¹⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5788, para. 403.

³¹⁶ *Id.*

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.”³¹⁷ We seek comment on this proposal.

91. 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.”³¹⁸ 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.³¹⁹ 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.³²⁰ 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.”³²¹ 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.³²² We seek comment on this proposal and on any other or different definition of “functional equivalent” that the Commission should adopt.

92. 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 successfully in the marketplace.³²³ We seek comment on this view and on any policy consequences that

³¹⁷ *Id.*

³¹⁸ *Id.* at 5789, para. 404.

³¹⁹ *RIF Order*, 33 FCC Rcd at 361, para. 84.

³²⁰ *Id.*

³²¹ 47 U.S.C. § 332(d)(3).

³²² *RIF Order*, 33 FCC Rcd at 361, para. 84.

³²³ *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;*

(continued....)

commenters believe may result from the proposed reclassification of mobile BIAS.

F. Preemption of State and Local Regulation of Broadband Service

93. We seek comment on how best to exercise our preemption authority to ensure that BIAS is governed by a national, uniform framework. We agree with the *RIF Order* that “the regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.”³²⁴ The *RIF Order* adopted an expansive preemption decision intended to achieve that objective, 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.³²⁵ 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.”³²⁶ 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.³²⁷ 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 to guard against state and local requirements that not only can lead to a regulatory patchwork, but also those that we may affirmatively choose to reject.

94. We seek comment on the best sources of preemption authority for us to use to preserve a national regulatory framework. 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.³²⁸ We also expect that our proposed regulatory

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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, 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.

³²⁴ *RIF Order*, 33 FCC Rcd at 426-27, para. 194.

³²⁵ *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).

³²⁶ *Mozilla*, 940 F.3d at 75.

³²⁷ See *supra* note 45.

³²⁸ 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

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approach could make it more straightforward to rely on various express preemption provisions in the Act, such as the preemption that accompanies forbearance under section 10(e),³²⁹ the preemption that arises when state requirements hinder provision of services covered under sections 253 or 332(c)(7) of the Act,³³⁰ the preemption of state requirements contrary to federal universal service policies under section 254(f),³³¹ 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.³³² We also believe that statutory reservations of state authority, such as section 601 of the 1996 Act,³³³ are best interpreted narrowly—as courts have done in the past—and would not affect the Commission’s exercise of authority that Congress actually has provided.³³⁴ We seek comment on these views and on any additional sources of statutory authority for preemption.

95. 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 uniform federal framework. Should we adopt a broad preemption decision like the Commission did in the *RIF Order*—one that would have a stronger legal foundation? 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?³³⁵

96. We also seek comment on how best to define the scope of preemption to ensure that BIAS principally is governed by a uniform federal framework. For example, should open Internet

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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, 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.”).

³²⁹ 47 U.S.C. § 160(e).

³³⁰ 47 U.S.C. §§ 253, 332(c)(7).

³³¹ 47 U.S.C. § 254(f).

³³² 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)).

³³³ Telecommunications Act of 1996, § 601(c)(1), codified at 47 U.S.C. § 157 (“This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”).

³³⁴ See, e.g., *In re: FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014) (explaining that “§ 601(c)(1) does not limit Congress’s actual delegation of authority to the FCC,” and citing *Qwest Corp. v. Minnesota Pub. Utilities Comm’n*, 684 F.3d 721, 731 (8th Cir. 2012) and *Farina, v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010)).

³³⁵ 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).

conduct rules of the sort proposed below³³⁶ 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 otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.”³³⁷ 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,³³⁸ field preemption,³³⁹ or conflict preemption?³⁴⁰

IV. PROPOSED FORBEARANCE

97. 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.”³⁴¹ 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

³³⁶ See *infra* section V.

³³⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5804, para. 433.

³³⁸ See, e.g., *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (*Oneok*) (Congress may preempt state law “through express language in a statute.”).

³³⁹ *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 and 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”).

³⁴⁰ 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”).

³⁴¹ *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*).

access service.³⁴²

98. 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 *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,³⁴³ 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

99. 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).”³⁴⁴ We seek comment on how to interpret those statements in the *RIF Order*.

100. 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.”³⁴⁵ 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,³⁴⁶ and the D.C. Circuit rejected challenges to that forbearance approach in its *USTA* decision.³⁴⁷ 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.³⁴⁸

³⁴² See *2015 Open Internet Order*, 30 FCC Rcd at 5814, paras. 451-52.

³⁴³ As discussed *infra*. at para. 108, we propose to forbear from applying common carrier roaming requirements, conditioned on compliance with our data roaming rules.

³⁴⁴ *RIF Order*, 33 FCC Rcd at 416-17, para. 174.

³⁴⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5806-07, para. 438.

³⁴⁶ See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5805-5808, 5838-41, 5864-67, paras. 435-39, 493-96, 537-42.

³⁴⁷ *USTA*, 825 F.3d at 726-33.

³⁴⁸ 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

(continued....)

101. We also 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.³⁴⁹ In 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.”³⁵⁰ 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?

102. 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*.³⁵¹ 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.³⁵² We propose to follow the same approach here, and seek comment on that proposal.

B. Proposed Forbearance

103. 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.³⁵³ 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;³⁵⁴
- “[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”;³⁵⁵

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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*).

³⁴⁹ *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).

³⁵⁰ *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5867, para. 542 (discussing the general approach).

³⁵¹ *RIF Order*, 33 FCC Rcd at 418-19, paras. 177, 179.

³⁵² *2015 Open Internet Order*, 30 FCC Rcd at 5819, para. 460 n.1378.

³⁵³ *Id.* at 5616-18, 5804-64, paras. 51-59, 434-536.

³⁵⁴ *Id.* at 5818, para. 457.

³⁵⁵ *Id.* at 5817-18, para. 456.

- Section 222 of the Act, “which establishes core customer privacy protections”;³⁵⁶
- Section 224 of the Act and the Commission’s implementing rules, “which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way”;³⁵⁷
- 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”;³⁵⁸
- 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,”³⁵⁹ 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.³⁶⁰

104. We believe that Commission *ex ante* 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 issues on an *ex post* basis.³⁶¹ While we do not propose to forbear from sections 201 and 202 of the Act, we “do not and cannot envision adopting new *ex ante* rate regulation” of BIAS,³⁶² and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of *ex ante* 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.³⁶³

105. 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.”³⁶⁴ The Commission also did not forbear from applying provisions of the Act or Commission

³⁵⁶ *Id.* at 5817-18, para. 456; *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*, 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 and n.6 (2017).

³⁵⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5817-17, para. 456; *see also id.* at 5831-33, paras. 478-85.

³⁵⁸ *Id.* at 5817-18, para. 456; *see also id.* at 5824-30, paras. 468-77.

³⁵⁹ *Id.* at 5817-18, para. 456; *see also id.* at 5834-38, paras. 486-92.

³⁶⁰ *Id.* at 5863-64, paras. 534-36.

³⁶¹ *Id.*

³⁶² *Id.* at 5814, para. 451.

³⁶³ *Id.* at 5835, para. 488.

³⁶⁴ *Id.* at 5860-61, para. 529; *see also id.* at 5861-63, paras. 531-33.

rules that already applied to BIAS irrespective of the Title II classification of that service.³⁶⁵ 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,³⁶⁶ provisions that simply reserve state authority,³⁶⁷ and the CALEA requirements in section 229.³⁶⁸ In addition, the Commission did not forbear from provisions that would benefit ISPs.³⁶⁹ This would include, for example, preemption provisions such as those in sections 253 and 332(c) of the Act,³⁷⁰ as well as liability limitation provisions in sections 223, 230, and 231 of the Act.³⁷¹ 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*.³⁷²

106. 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.³⁷³ 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."³⁷⁴ 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."³⁷⁵ 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.³⁷⁶ 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

³⁶⁵ *Id.* at 5861, para. 530; *see also id.* at 5861-63, paras. 531-33.

³⁶⁶ *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.

³⁶⁷ *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).

³⁶⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5861-63, para. 533.

³⁶⁹ *Id.* at 5862, para. 532.

³⁷⁰ 47 U.S.C. §§ 253, 332(c).

³⁷¹ *2015 Open Internet Order*, 30 FCC Rcd at 5862, para. 532.

³⁷² *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).

³⁷³ *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5838-60, paras. 493-528.

³⁷⁴ 47 U.S.C. § 151.

³⁷⁵ 47 U.S.C. § 154(n).

³⁷⁶ *Mozilla v. FCC*, 940 F.3d 1, 59-63 (D.C. Cir. 2019).

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.³⁷⁷

107. 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 tentatively conclude that we should exclude that provision from any forbearance granted here.³⁷⁸ 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?³⁷⁹ 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?³⁸⁰ 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.³⁸¹ 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,³⁸² or in some other manner? We also seek comment on any implementation issues concerning our domestic section 214 requirements.

108. 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.³⁸³ 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

³⁷⁷ See *supra* sections III.B.2 and III.B.3.

³⁷⁸ See *supra* para. **Error! Reference source not found.**

³⁷⁹ 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).

³⁸⁰ 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).

³⁸¹ *2015 Open Internet Order*, 30 FCC Rcd at 5822-24, paras. 466-67.

³⁸² The Commission previously has granted blanket domestic section 214 entry authority. 47 CFR § 63.01.

³⁸³ 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*).

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.³⁸⁴

109. 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 pole attachments and to provide universal service support for low income households.³⁸⁵ 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*.³⁸⁶ We seek comment on whether there are additional or different ways those interests should be reflected in the tailoring of forbearance here.

110. 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?

111. 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.³⁸⁷ Conditioned in that manner, the Commission was able to find the statutory forbearance criteria satisfied.³⁸⁸ 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.³⁸⁹ 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.

112. 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."³⁹⁰ Consequently, under the *2015 Open Internet Order*, Internet traffic exchange was subject to the same forbearance as BIAS more generally.³⁹¹ 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.

³⁸⁴ 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).

³⁸⁵ *Mozilla*, 940 F.3d at 1, 65-70.

³⁸⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5817-18, 5831-33, 5834-38, paras. 456, 478-85, 486-92.

³⁸⁷ *Id.* at 5857-58, paras. 523-26.

³⁸⁸ *Id.*

³⁸⁹ *See, e.g., id.* at 5848, 5864, paras. 510 n.1559, 537.

³⁹⁰ *Id.* at 5686-87, para. 195.

³⁹¹ *See, e.g., id.* at 5686-87, para. 195 and n.485 (discussing the legal authority available for oversight of Internet traffic exchange, and cross-referencing the *2015 Open Internet Order*'s forbearance discussion).

113. 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

114. 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 strong standard of conduct designed to prevent deployment of new practices that would harm Internet openness, and enhancements to the existing transparency rule.³⁹² In the *RIF Order*, the Commission broke with this longstanding approach by altogether eliminating the open Internet conduct rules,³⁹³ 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 uniform, national regulatory approach toward BIAS.

115. 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.³⁹⁴ 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

116. 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.³⁹⁵ 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, reliance on the Commission’s communications sector expertise to address harmful conduct, ISPs’ incentives and abilities to harm Internet openness, the effects of harmful conduct on consumer demand and edge innovation, 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

117. In the *2015 Open Internet Order*, the Commission found that Internet openness helps

³⁹² *Id.* at 5603, para. 4.

³⁹³ *RIF Order*, 33 FCC Rcd 311.

³⁹⁴ *See supra* notes 1 and 59.

³⁹⁵ *See supra* section III.A.

promote innovation, investment, and free expression, among other goals.³⁹⁶ 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.”³⁹⁷ 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.

118. 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.”³⁹⁸ 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.”³⁹⁹ 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

119. 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.⁴⁰⁰ The *Mozilla* court highlighted this charge and recognized the significance of it, emphasizing that “whenever public safety is involved, lives are at stake.”⁴⁰¹ 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.”⁴⁰² 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.⁴⁰³ 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.⁴⁰⁴ We now seek comment on our belief that maintaining the *RIF Order*’s *ex post* enforcement framework will provide insufficient

³⁹⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5625-26, para. 76.

³⁹⁷ *Id.* at 5627, para. 77.

³⁹⁸ *RIF Order*, 33 FCC Rcd at 402-403, para. 153.

³⁹⁹ *Id.* at 402-03, para. 153 n.558.

⁴⁰⁰ *See supra* para. **Error! Reference source not found.**; 47 U.S.C. § 151.

⁴⁰¹ *Mozilla*, 940 F.3d at 59-60, 62.

⁴⁰² *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”).

⁴⁰³ *2015 Open Internet Order*, 30 FCC Rcd at 5654-55, 5689-90, paras. 126, 199.

⁴⁰⁴ *See supra* section III.B.2.

protection against conduct harms, which includes harms to public safety or national security.⁴⁰⁵ 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 tentative conclusion.⁴⁰⁶

120. 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,⁴⁰⁷ and that “[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.”⁴⁰⁸ 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.

121. 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

122. 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.⁴⁰⁹ 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.”⁴¹⁰ 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

⁴⁰⁵ See *infra* section V.A.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).

⁴⁰⁶ 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.

⁴⁰⁷ See *supra* section III.B.5.

⁴⁰⁸ California Public Utilities Commission Comments, WC Docket Nos. 17-108, 17-287, and 11-42, at 10 (Apr. 20, 2020).

⁴⁰⁹ *2010 Open Internet Order*, 25 FCC Rcd at 17915, para. 21; *2015 Open Internet Order*, 30 FCC Rcd at 5625, para. 75.

⁴¹⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5629, para. 80.

users.”⁴¹¹ 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.⁴¹² The Commission also concluded that ISPs “have the technical ability to act on incentives to harm the open Internet.”⁴¹³

123. The *RIF Order* offered several reasons for rejecting the prior rationales, including ISPs’ economic incentives and supposed material competitive restraints.⁴¹⁴ 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.”⁴¹⁵ 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.”⁴¹⁶ However, consumers may lack access to both fixed and mobile connections,⁴¹⁷ 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.”⁴¹⁸ We seek comment on this analysis.

124. 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.⁴¹⁹ 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.

125. 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*

⁴¹¹ *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).

⁴¹² 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).

⁴¹³ See *id.* 5634, para. 85 (describing the tools ISPs have at their disposal to monitor and regulate the flow of traffic over their networks).

⁴¹⁴ *RIF Order*, 33 FCC Rcd at 379, 382, paras. 117, 123.

⁴¹⁵ *Mozilla*, 940 F.3d. at 57.

⁴¹⁶ *RIF Order*, 33 FCC Rcd at 391, para. 136.

⁴¹⁷ 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).

⁴¹⁸ *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*).

⁴¹⁹ *RIF Order*, 33 FCC Rcd at 378, para. 116.

Order and *2015 Open Internet Order*.⁴²⁰ How have changes in the marketplace or technology since 2015 affected 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 services with BIAS.⁴²¹ Do these affiliate relationships and vertically integrated offerings create additional incentive for ISPs to favor those services over others? We seek comment on this analysis.

126. 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.

127. 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.⁴²² While competition in the mobile BIAS market is somewhat more significant, fixed and mobile services have not proven to be substitutable.⁴²³ To what extent does the state of competition affect ISPs' incentives to limit openness? 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.⁴²⁴

128. 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

⁴²⁰ *2010 Open Internet Order*, 25 FCC Rcd at 17915, at para. 21; *2015 Open Internet Order*, 30 FCC Rcd at 5625, para. 75.

⁴²¹ 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 *infra* note 78.

⁴²² 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.

⁴²³ 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”).

⁴²⁴ See *supra* section III.

ISPs regularly throttle video content.⁴²⁵ 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 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,⁴²⁶ 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.⁴²⁷ 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 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

129. 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

⁴²⁵ 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>.

⁴²⁶ 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).

⁴²⁷ 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).

consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.”⁴²⁸ 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*.⁴²⁹ The validity of the virtuous cycle was upheld by both the *Verizon* court and the *USTA* court.⁴³⁰ 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.⁴³¹

130. 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.⁴³² 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, 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 somewhat above the competitive level will be small and spread out over all ISPs,⁴³³ 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.

131. 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

⁴²⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5663, para. 142.

⁴²⁹ *2010 Open Internet Order*, 25 FCC Rcd at 17927, para. 38; *2015 Open Internet Order*, 30 FCC Rcd at 5625-26, paras. 75-76.

⁴³⁰ *Verizon*, 740 F.3d at 644; *USTA*, 825 F.3d at 707.

⁴³¹ *RIF Order*, 33 FCC Rcd at 380, para. 119.

⁴³² 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.

⁴³³ 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.

meet that demand. Stalled ISP network improvements ultimately will undermine new edge innovation and consumer demand. We seek comment on this proposed analysis.

132. 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 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

133. 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.⁴³⁴ 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.”⁴³⁵ 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

134. 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.⁴³⁶ 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.”⁴³⁷ 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.”⁴³⁸ We believe

⁴³⁴ See *RIF Order*, 33 FCC Rcd at 393-403, paras. 140-54.

⁴³⁵ 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.

⁴³⁶ 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.”).

⁴³⁷ *Mozilla*, 940 F.3d. at 56.

⁴³⁸ *Id.* at 65.

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.

135. 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 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.⁴³⁹ 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.

136. *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.⁴⁴⁰ 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.⁴⁴¹ 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.

137. *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.⁴⁴² 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.”⁴⁴³ The *RIF Order* also seems to concede that blocking, throttling, and discrimination may be permitted under its chosen oversight and enforcement framework,⁴⁴⁴ and that paid prioritization may be found to be permissible in many instances.⁴⁴⁵

⁴³⁹ See *2015 Open Internet Order*, 30 FCC Rcd at 5733-34, 5745, paras. 307-308, 335.

⁴⁴⁰ See *RIF Order*, 33 FCC Rcd at 437-45, paras. 215-31.

⁴⁴¹ Indeed, the *RIF Order* requires only 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. *RIF Order*, 33 FCC Rcd at 450, para. 240.

⁴⁴² See *id.* at 393-403, paras. 140-54.

⁴⁴³ *Mozilla*, 940 F.3d at 59.

⁴⁴⁴ *RIF Order*, 33 FCC Rcd at 467, para. 264; *id.* at 396, para. 142; *id.* at 397, n.519.

⁴⁴⁵ *Id.* at 465, para. 261.

138. 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.⁴⁴⁶ Congress has also created other exceptions to the FTC’s consumer protection authority⁴⁴⁷ and assigned consumer protection responsibilities to other agencies that have expertise in both consumer protection and the relevant industry.⁴⁴⁸ 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.

139. 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.⁴⁴⁹ 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.”⁴⁵⁰ However, the “rule of reason” analysis includes a subjective determination about whether alleged economic benefits outweigh recognized consumer harms.⁴⁵¹ 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

⁴⁴⁶ 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-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”).

⁴⁴⁷ 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.”).

⁴⁴⁸ 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.”).

⁴⁴⁹ 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).

⁴⁵⁰ *RIF Order*, 33 FCC Rcd at 397, para. 143.

⁴⁵¹ 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)).

public interest standard of the Act?⁴⁵² Even if strict application of antitrust law does not reveal a violation 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?

140. *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.”⁴⁵³ 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 the antitrust rules, 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*.

141. 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,⁴⁵⁴ 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.⁴⁵⁵ 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.⁴⁵⁶ 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.⁴⁵⁷ 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

⁴⁵² 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 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. FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

⁴⁵³ *RIF Order*, 33 FCC Rcd at 313, para. 4.

⁴⁵⁴ See *supra* para. 127.

⁴⁵⁵ See *2022 Communications Marketplace Report* at Figs. II.A.28 and II.A.29, paras. 56-58.

⁴⁵⁶ See *id.*

⁴⁵⁷ *Id.* at Fig. II.A.28, para. 56.

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? For example, if it were to lead to regulatory action on the part of the Commission, how much time would pass between the initiation of behavior and the regulatory action taking effect? We seek comment on the foregoing.

142. 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?

143. *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.⁴⁵⁸ 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 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.

144. Research in innovation economics suggests that edge innovation is heterogeneous.⁴⁵⁹ 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.

⁴⁵⁸ *RIF Order*, 33 FCC Rcd at 299-300, para. 149.

⁴⁵⁹ See, e.g., Carlyss Y. Baldwin and Kim B. Clark, *Design rules: the power of modularity*. MIT Press, 2000.

145. *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.⁴⁶⁰ 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 uniform, national regulatory framework.⁴⁶¹ We seek comment on the costs of this patchwork approach.

146. 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,⁴⁶² which can result in unforeseen outcomes, and the antitrust rule of reason relies on a case-by-case evaluation.⁴⁶³ 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

147. 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.

148. The conduct rules we propose track the language of the rules the Commission adopted in the *2015 Open Internet Order*.⁴⁶⁴ In 2015, the Commission found that blocking, throttling, and paid prioritization arrangements were three practices that "in particular demonstrably harm the open Internet."⁴⁶⁵ 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."⁴⁶⁶ Even while eliminating these protections in 2018, the *RIF Order* still recognized the harms of blocking and throttling practices⁴⁶⁷ and required disclosure of such practices under its revised transparency rule.⁴⁶⁸ 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,

⁴⁶⁰ See *RIF Order*, 33 FCC Rcd at 450, para. 239.

⁴⁶¹ See *supra* para. **Error! Reference source not found.**

⁴⁶² 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).

⁴⁶³ 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.").

⁴⁶⁴ *2015 Open Internet Order*, 30 FCC Rcd at 5648, 5651, and 5653, paras. 112, 119, and 125.

⁴⁶⁵ *Id.* at 5647, para. 110.

⁴⁶⁶ *Id.*

⁴⁶⁷ See *RIF Order*, 33 FCC Rcd at 468, para. 265.

⁴⁶⁸ See *id.* at 440, para. 220.

however, we seek comment at a broader level on whether these three practices are still the key threats to Internet openness.

149. 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.⁴⁶⁹ We also believe that many ISP investment decisions over the next several years will be significantly influenced by the influx of federal and state funding allocated to ISPs to support infrastructure deployment and broadband connectivity.⁴⁷⁰ 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.⁴⁷¹ 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.”⁴⁷² We seek comment on these views.

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

150. 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.⁴⁷³ 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.⁴⁷⁴ 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.”⁴⁷⁵ As discussed above, we tentatively conclude that ISPs continue to have the incentive and ability to engage in practices that threaten Internet openness,⁴⁷⁶ 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.

151. 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.”⁴⁷⁷ 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*:

⁴⁶⁹ See *2015 Open Internet Order*, 30 FCC Rcd at 5612-13, 5619-25, paras. 38-40, 64-74.

⁴⁷⁰ 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).

⁴⁷¹ See *2015 Open Internet Order*, 30 FCC Rcd at 5606, para. 11; *supra* section V.A.4.

⁴⁷² *2015 Open Internet Order*, 30 FCC Rcd at 5791, para. 410.

⁴⁷³ See *id.* at 5628, para. 78.

⁴⁷⁴ See *id.* at 5628-43, paras. 78-101.

⁴⁷⁵ *RIF Order*, 33 FCC Rcd at 378, para. 117; see also *id.* at 378-93, paras. 116-39.

⁴⁷⁶ See *supra* section V.A.3.

⁴⁷⁷ *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).

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 not fit clearly into any of these categories.⁴⁷⁸ 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 customer.⁴⁷⁹ 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.⁴⁸⁰ We seek comment on these proposals. What other consequences of a no-blocking rule should we consider?

152. As far back as the Commission’s *Internet Policy Statement* in 2005, major providers have broadly accepted a no-blocking principle.⁴⁸¹ Even after the repeal of the no-blocking rule, many providers continue to advertise a commitment to open Internet principles on their websites, which include commitments not to block traffic except in certain circumstances.⁴⁸² 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. We seek comment on this analysis. Furthermore, because this principle is so widely accepted, including by ISPs, we anticipate compliance costs will be minimal. Finally, we seek comment on whether the predictive reasoning underlying the Commission’s repeal of the no-blocking rule in 2018 proved accurate.⁴⁸³ We 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.⁴⁸⁴ 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

153. Next, we propose to adopt a rule to prevent ISPs from throttling lawful content,

⁴⁷⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5648-49, para. 113.

⁴⁷⁹ *Id.* at 5649, para. 113.

⁴⁸⁰ *Id.*

⁴⁸¹ 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.

⁴⁸² 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).

⁴⁸³ *RIF Order*, 33 FCC Rcd at 466, para. 263.

⁴⁸⁴ 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).

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.”⁴⁸⁵ In 2015, the Commission concluded that a standalone prohibition was required to prevent ISPs from impairing or degrading lawful Internet traffic.⁴⁸⁶ The Commission used the term “throttling” to refer to 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.⁴⁸⁷

154. 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.⁴⁸⁸ 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.⁴⁸⁹ 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.⁴⁹⁰ We seek comment on these proposals. What other aspects and consequences of a no-throttling rule should we consider?

155. 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.⁴⁹¹ 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.⁴⁹² 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.

156. As discussed above, because broadband connections were so essential during the

⁴⁸⁵ *2010 Open Internet Order*, 25 FCC Rcd at 17943, para. 66.

⁴⁸⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5651, para. 119.

⁴⁸⁷ *See id.* at 5651, para. 120.

⁴⁸⁸ *Id.* at 5651, para. 119.

⁴⁸⁹ *Id.* at 5651-52, para. 120.

⁴⁹⁰ *See id.*

⁴⁹¹ *Id.* at 5652, para. 122.

⁴⁹² *Id.*

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*.⁴⁹³ We believe 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."⁴⁹⁴ 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.⁴⁹⁵ 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 2018.⁴⁹⁶ 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

157. 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 affiliated⁴⁹⁷ 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."⁴⁹⁸ We tentatively conclude that this reasoning remains applicable today. We seek comment on this proposal and the underlying analysis.

158. 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:

⁴⁹³ 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).

⁴⁹⁴ *RIF Order*, 33 FCC Rcd at 468, para. 265.

⁴⁹⁵ 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).

⁴⁹⁶ *RIF Order*, 33 FCC Rcd at 466, para. 263.

⁴⁹⁷ 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).

⁴⁹⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5653, para. 125.

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 Internet into a “fast” lane for those with the means and will to pay and a “slow” lane for everyone else.⁴⁹⁹ 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.⁵⁰⁰ 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.⁵⁰¹ 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?

159. Previously, the Commission has found it well-established that ISPs have both the incentive and the ability to engage in paid prioritization.⁵⁰² 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.⁵⁰³ Some ISPs continue to advertise that they do not engage in paid or affiliated prioritization practices.⁵⁰⁴ 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.”⁵⁰⁵ We tentatively conclude that this reasoning remains valid today, and we seek comment on this tentative conclusion, and any alternatives we should consider.

160. 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.⁵⁰⁶ We seek comment on that assessment from 2018. In

⁴⁹⁹ *See id.* at 5653-54, para. 126.

⁵⁰⁰ *Id.* at 5654-55, para. 126.

⁵⁰¹ *Id.* at 5655-56, para. 127.

⁵⁰² *Id.* at 5655, 5628-43, paras. 127, 78-101.

⁵⁰³ *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”).

⁵⁰⁴ 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, 2022); *Network Practices*, AT&T, <https://about.att.com/sites/broadband/network> [<https://perma.cc/S9HK-A6WA>] (last visited Sept. 20, 2023).

⁵⁰⁵ 2015 *Open Internet Order*, 30 FCC Rcd at 5656, para. 127.

⁵⁰⁶ *RIF Order*, 33 FCC Rcd at 456-57, para. 253.

weighing the costs and benefits, the Commission did not identify specific compliance costs, but rather identified the costs in the form of forgone benefits.⁵⁰⁷ 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.⁵⁰⁸ 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 divide by reducing BIAS subscription prices for consumers.⁵⁰⁹ 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.

161. 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."⁵¹⁰ 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.⁵¹¹ 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.⁵¹² 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.

162. 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.⁵¹³ The applicant could make such a showing by providing evidence that the practice furthers competition, innovation, consumer demand, or investment.⁵¹⁴ Second, the applicant would need to demonstrate that the practice does not harm the nature of the open Internet.⁵¹⁵ 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.⁵¹⁶ We seek comment on the continued relevance of these four examples. Should the Commission consider other factors when

⁵⁰⁷ *Id.* at 456-57, para. 253.

⁵⁰⁸ See *2015 Open Internet Order*, 30 FCC Rcd at 5654-55, para. 126.

⁵⁰⁹ *RIF Order*, 33 FCC Rcd at 464, para. 260.

⁵¹⁰ 47 CFR § 1.3.

⁵¹¹ 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).

⁵¹² *2015 Open Internet Order*, 30 FCC Rcd at 5658, para. 130.

⁵¹³ *Id.* at 5658, para. 131.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

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?⁵¹⁷

4. General Conduct Rule

163. 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 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.⁵¹⁸ 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.”⁵¹⁹ 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.⁵²⁰ 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.”⁵²¹ 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.

164. 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.⁵²² 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?

165. 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

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 5659-60, para. 135.

⁵¹⁹ *Id.*

⁵²⁰ *See id.* at 5609, para. 21.

⁵²¹ *Id.* at 5659, para. 136.

⁵²² *See id.* at 5660, para. 137.

the standard.⁵²³ Second, we propose a non-exhaustive list of factors that we would consider to aid in our analysis.⁵²⁴ These factors would include: (i) whether a practice allows end-user control and enables consumer choice;⁵²⁵ (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices;⁵²⁶ (iii) whether a practice affects consumers' ability to select, access, or use lawful broadband services, applications, or content;⁵²⁷ (iv) the effect a practice has on innovation, investment, or broadband deployment;⁵²⁸ (v) whether a practice threatens free expression;⁵²⁹ (vi) whether a practice is application agnostic;⁵³⁰ 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.⁵³¹ 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?

166. 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.⁵³² 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."⁵³³ 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?⁵³⁴ 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

⁵²³ *2015 Open Internet Order*, 30 FCC Rcd at 5661, para. 138.

⁵²⁴ *Id.* at 5661, para. 138.

⁵²⁵ *Id.* at 5661-62, para. 139 ("End-User Control").

⁵²⁶ *Id.* at 5662, para. 140 ("Competitive Effects").

⁵²⁷ *Id.* at 5662, para. 141 ("Consumer Protection").

⁵²⁸ *Id.* at 5663, para. 142 ("Effect on Innovation, Investment, or Broadband Deployment").

⁵²⁹ *Id.* at 5663, para. 143 ("Free Expression").

⁵³⁰ *Id.* at 5663-64, para. 144 ("Application Agnostic").

⁵³¹ *Id.* at 5664, para. 145 ("Standard Practices").

⁵³² 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.

⁵³³ *RIF Order*, 33 FCC Rcd at 452-53, paras. 246-47.

⁵³⁴ *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 out these practices) *with RIF Order*, 33 FCC Rcd at 455, para. 250 (discussing the rescinding 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).

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’”⁵³⁵ 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 consumer protection enforcement in place through the FTC, while imposing negative benefits in the form of delayed or never-brought-to-market innovations.⁵³⁶ 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.

167. 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.⁵³⁷ 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.⁵³⁸ 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

168. 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*,⁵³⁹ but also the broadband label the Commission adopted in 2022, which gives consumers a convenient tool to research and compare broadband offerings.⁵⁴⁰ 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.

⁵³⁵ *RIF Order*, 33 FCC Rcd at 454, para. 249.

⁵³⁶ *Id.* at 494, paras. 317-18.

⁵³⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5660, para. 137.

⁵³⁸ Section 201(b) requires that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or feign communications by wire or radio] service, 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).

⁵³⁹ 47 CFR § 8.1(a).

⁵⁴⁰ 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.

1. Policy Benefits of Transparency Requirements

169. 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.”⁵⁴¹ The Commission echoed this policy judgment in the *2015 Open Internet Order*,⁵⁴² 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.”⁵⁴³ 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.”⁵⁴⁴ 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.”⁵⁴⁵ We seek comment on how the Commission can ensure that its transparency rule most effectively advances these longstanding policy goals.

170. 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*.⁵⁴⁶ 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*.⁵⁴⁷ 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.”⁵⁴⁸ We seek comment on the interplay between the broadband label

⁵⁴¹ *2010 Open Internet Order*, 25 FCC Rcd at 17936-37, para. 53.

⁵⁴² See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5669, para. 154.

⁵⁴³ *Id.* at 5672, para. 162.

⁵⁴⁴ *RIF Order*, 33 FCC Rcd at 438, para. 216.

⁵⁴⁵ *Id.* at 435, para. 210.

⁵⁴⁶ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60504(a), 135 Stat. 429 (2021) (Infrastructure Act); 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”).

⁵⁴⁷ *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.

⁵⁴⁸ *Broadband Label Reconsideration Order*, FCC 23-68, para. 4.

requirements adopted in the *Broadband Label Order*, the possible amendments raised in the *Broadband Label Further Notice*,⁵⁴⁹ 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?

2. Content of Required Disclosures

171. 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.”⁵⁵⁰ Are the current requirements of the transparency rule sufficient to enable that deeper dive into details of broadband Internet service offerings?

172. 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.⁵⁵¹ 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.⁵⁵² Regarding the disclosure of performance characteristics, the *2015 Open Internet Order* provided additional specifications regarding the disclosure of network performance⁵⁵³ and network practices.⁵⁵⁴ The *RIF Order* eliminated those enhancements under the theory that their burdens to ISPs exceeded their benefits.⁵⁵⁵ 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.”⁵⁵⁶ 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.⁵⁵⁷ We seek comment on these assessments,

⁵⁴⁹ See generally *Broadband Label Further Notice*, FCC 22-86, paras. 131-53 (seeking comment on possible additions or modifications to the broadband label rules).

⁵⁵⁰ *Broadband Label Order*, FCC 22-86, para. 107.

⁵⁵¹ 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).

⁵⁵² *2015 Open Internet Order*, 30 FCC Rcd at 5672-73, para. 164.

⁵⁵³ *Id.* at 5673-75, paras. 166-67.

⁵⁵⁴ *Id.* at 5676-77, para. 169.

⁵⁵⁵ *RIF Order*, 33 FCC Rcd at 437-38, para. 215.

⁵⁵⁶ *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)).

⁵⁵⁷ *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.

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 despite those metrics not being of significant value to the average consumer?

173. 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 a revised transparency rule should 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,"⁵⁵⁸ discussing point-of-sale disclosures, service descriptions, the extent of required disclosures, disclosures for the benefit of edge providers, and disclosures regarding security measures.⁵⁵⁹ 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.⁵⁶⁰ 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*.⁵⁶¹ The *RIF Order* subsequently eliminated the enhancements adopted in 2015, and the clarifications in the *2016 Advisory Guidance* along with it.⁵⁶² The *RIF Order* endorsed the clarifications in the *2011 Advisory Guidance*,⁵⁶³ 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?

174. 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."⁵⁶⁴ Should we continue that approach here, or make use of the MBA program

⁵⁵⁸ *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) (*2011 Advisory Guidance*).

⁵⁵⁹ *2011 Advisory Guidance*, 26 FCC Rcd at 9413-18.

⁵⁶⁰ *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) (*2014 Advisory Guidance*).

⁵⁶¹ *Guidance on Open Internet Transparency Requirements*, Public Notice, 31 FCC Rcd 5330 (CTO/OGC/EB 2016) (*2016 Advisory Guidance*).

⁵⁶² See, e.g., *RIF Order*, 33 FCC Rcd at 442, para. 225.

⁵⁶³ See, e.g., *id.* at 440-41, 444-45, paras. 220 n.814, 222 n.818, 229-30.

⁵⁶⁴ *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

(continued....)

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?⁵⁶⁵ Should we clarify that certain sources 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?

175. 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,”⁵⁶⁶ packet corruption and jitter,⁵⁶⁷ 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.”⁵⁶⁸ 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

176. 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.”⁵⁶⁹ 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.⁵⁷⁰ 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”⁵⁷¹ and in a uniform format that will best assist consumers in comparing pricing, fees, performance characteristics, and data allowances across different providers.⁵⁷² 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?

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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.

⁵⁶⁵ 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).

⁵⁶⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5675-76, para. 168.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.* at 5677, para. 170.

⁵⁶⁹ *RIF Order*, 33 FCC Rcd at 444, para. 229.

⁵⁷⁰ *Broadband Label Order*, FCC 22-86, paras. 90-92.

⁵⁷¹ *Id.* at para. 93.

⁵⁷² *Id.* at para. 65.

177. 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 *Open Internet Order* and the clarification found in the *2011 Advisory Guidance*."⁵⁷³ 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 broadband consumer labels?⁵⁷⁴

178. 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?⁵⁷⁵

179. Ensuring that disclosures under the transparency rule are accessible to individuals with disabilities is a priority.⁵⁷⁶ The *RIF Order* explained that ISPs making website disclosures under the transparency rule must make them "in a manner accessible by people with disabilities."⁵⁷⁷ 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?⁵⁷⁸ 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).⁵⁷⁹ In the *Broadband Label Further Notice*, it sought comment on whether to adopt specific criteria, based on the WCAG standard.⁵⁸⁰ 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?

180. 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,⁵⁸¹ but the *RIF Order* eliminated that requirement.⁵⁸² The Commission also recently declined to

⁵⁷³ *RIF Order*, 33 FCC Rcd at 444, para. 229.

⁵⁷⁴ 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).

⁵⁷⁵ 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).

⁵⁷⁶ 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.

⁵⁷⁷ *RIF Order*, 33 FCC Rcd at 444, para. 229.

⁵⁷⁸ See generally WC3 Web Accessibility Initiative, *WCAG 2 Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag> (last updated July 24, 2023).

⁵⁷⁹ *Broadband Label Order*, FCC 22-86, paras. 81-82.

⁵⁸⁰ *Broadband Label Further Notice*, FCC 22-86, para. 133.

⁵⁸¹ *2015 Open Internet Order*, 30 FCC Rcd at 5677, para. 171.

⁵⁸² *RIF Order*, 33 FCC Rcd at 444-45, para. 230.

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.⁵⁸³ 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.

181. Finally, we seek comment on any other changes to our transparency rule regarding the 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

182. 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.

183. 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 proposed to be modified here, 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*?⁵⁸⁴

184. 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.⁵⁸⁵ 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?

185. 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

186. *Internet Traffic Exchange*. We propose to decline to apply any open Internet rules to

⁵⁸³ *Broadband Label Order*, FCC 22-86, paras. 105-106.

⁵⁸⁴ *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) (*Broadband Label Public Notice*) (approving consumer labels for use as safe harbors).

⁵⁸⁵ *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).

Internet traffic exchange.⁵⁸⁶ 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.”⁵⁸⁷ We believe that the best approach with respect to Internet traffic exchange is to “watch, learn, and act as required” but to not intervene with prescriptive rules.⁵⁸⁸ We seek comment on our proposed approach.

187. *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.⁵⁸⁹ 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.⁵⁹⁰ 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*.⁵⁹¹ 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.”⁵⁹² 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

188. 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.

189. 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.⁵⁹³ 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.”⁵⁹⁴

⁵⁸⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5687, para. 195.

⁵⁸⁷ *Id.* at 5686, para. 193.

⁵⁸⁸ *Id.* at 5611, para. 31.

⁵⁸⁹ *Id.* at 5700, para. 215.

⁵⁹⁰ *Id.*

⁵⁹¹ *RIF Order*, 33 FCC Rcd at 441, para. 220; *2010 Open Internet Order*, 25 FCC Rcd at 17952, para. 82.

⁵⁹² *2015 Open Internet Order*, 30 FCC Rcd at 5700, para. 215.

⁵⁹³ *2010 Open Internet Order*, 25 FCC Rcd at 17986, para. 151.

⁵⁹⁴ *Id.* at 17986, para. 153.

“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.”⁵⁹⁵ 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 dispute.”⁵⁹⁶ 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.”⁵⁹⁷ Citing sections 403 and 503(b) of the Act,⁵⁹⁸ the Commission further observed that it has the authority to initiate enforcement actions on its own motion, including the issuance of forfeitures.⁵⁹⁹

190. *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.⁶⁰⁰ We seek comment on whether this conclusion remains valid today. We also 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 to advance our goal of legal certainty in the enforcement of any potential open Internet rules.⁶⁰¹ 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.⁶⁰² We seek comment on the *RIF Order*’s assessments regarding the advisory opinion process, which were based on predictive comments in the record because no ISP had yet requested an advisory opinion through the Commission’s process.⁶⁰³ 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? If commenters support the adoption of an advisory opinion process, what changes, if any, should we make to the process the Commission established in the *2015 Open Internet Order*?⁶⁰⁴

191. 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*.⁶⁰⁵ The D.C. Circuit found that the opportunity

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at 17987, para. 154.

⁵⁹⁷ *Id.* at 17987, para. 155.

⁵⁹⁸ 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).

⁵⁹⁹ *2010 Open Internet Order*, 25 FCC Rcd at 17988, para. 160.

⁶⁰⁰ *Id.* at 5706, para. 229.

⁶⁰¹ *Id.* at 5706-5710, paras. 229-39.

⁶⁰² *RIF Order*, 33 FCC Rcd at 490, para. 303.

⁶⁰³ *Id.*

⁶⁰⁴ See *2015 Open Internet Order*, 30 FCC Rcd at 5706-5707, paras. 229-39.

⁶⁰⁵ 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”).

for parties to obtain prospective guidance through the advisory opinion process “provide[d] regulated entities with relief from [remaining] uncertainty.”⁶⁰⁶ In light of the D.C. Circuit’s reasoning in *USTA*, we seek comment on whether an advisory opinion process is necessary if we adopt a general conduct standard. Or would a detailed explanation of the factors the Commission would use when analyzing potential violations of the standard be sufficient under the D.C. Circuit’s reasoning to provide fair warning to regulated entities of what the standard requires?

F. Investigations and Complaints

192. 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*:⁶⁰⁷ (i) parties could file informal complaints under section 1.41 of the Commission’s existing rules;⁶⁰⁸ (ii) parties could file formal complaints under a new process that the Commission had created for this purpose;⁶⁰⁹ or (iii) the Commission could initiate enforcement actions on its own motion.⁶¹⁰ 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,⁶¹¹ 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?⁶¹² The Commission eliminated the open Internet-specific formal complaint process in 2018.⁶¹³ 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*⁶¹⁴ and preserved in the *2015 Open Internet Order*?⁶¹⁵ 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.⁶¹⁶ 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

193. 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

⁶⁰⁶ *Id.* at 738 (internal citations omitted).

⁶⁰⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5710, para. 242.

⁶⁰⁸ *See 2010 Open Internet Order*, 25 FCC Rcd at 17986-87, para. 153.

⁶⁰⁹ *See id.* at 17987-89, paras. 154-59.

⁶¹⁰ *See id.* at 17989, para. 160.

⁶¹¹ 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.

⁶¹² *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.

⁶¹³ *See RIF Order*, 33 FCC Rcd at 490, para. 302.

⁶¹⁴ *2010 Open Internet Order*, 25 FCC Rcd at 17986-89, paras. 151-60.

⁶¹⁵ *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, and 5715-18, paras. 226, 242-53, and 257-65.

⁶¹⁶ *See Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, 33 FCC Rcd 7178 (2018).

rules in the *2015 Open Internet Order*.⁶¹⁷ 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 providers. With respect to the proposed 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

194. 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.⁶¹⁸ 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,⁶¹⁹ 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.⁶²⁰ 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.

195. 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.⁶²¹ 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.

⁶¹⁷ See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5720-31, paras. 273-98.

⁶¹⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 (1996), codified at 47 U.S.C. § 1302.

⁶¹⁹ *RIF Order*, 33 FCC Rcd at 470-80, paras. 268-83.

⁶²⁰ 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).

⁶²¹ *RIF Order*, 33 FCC Rcd at 470, 472-73, 479-80, paras. 268, 271, 282.

196. 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.⁶²² 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 Commission's authority to adopt rules implementing that provision, and to enforce those rules.⁶²³ 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*.⁶²⁴

197. 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),⁶²⁵ 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*.⁶²⁶ 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.

198. 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."⁶²⁷ 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

⁶²² See *2010 Open Internet Order*, 25 FCC Rcd at 17968-72, paras. 117-23.

⁶²³ 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 623, 637-43 (D.C. Cir. 2014) and *In re FCC 11-161*, 753 F.3d 1015, 1053 (10th Cir. 2014)).

⁶²⁴ *Verizon*, 740 F.3d at 635-42; *USTA*, 825 F.3d at 734; *In re FCC 11-161*, 753 F.3d at 1049-54.

⁶²⁵ 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.

⁶²⁶ *Verizon*, 740 F.3d at 642-49.

⁶²⁷ *Mozilla*, 940 F.3d at 46 (quoting *RIF Order*, 33 FCC Rcd at 472-73, para. 271).

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.”⁶²⁸ To what extent do other aspects of section 706 bear on the reasonableness of interpreting sections 706(a) and (b) as grants of authority?

199. 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* 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.”⁶²⁹ 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.⁶³⁰ 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.⁶³¹ 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.⁶³² 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.

200. 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.⁶³³ 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.”⁶³⁴ 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).⁶³⁵ We seek comment on the merits of this interpretation.

2. Title II of the Act With Forbearance

201. As in the *2015 Open Internet Order*, we propose again to rely on sections 201, 202, and

⁶²⁸ *RIF Order*, 33 FCC Rcd at 472-73, para. 271 n.1000.

⁶²⁹ *Id.* at 473, para. 272.

⁶³⁰ *Id.* at 473-74, paras. 273-74.

⁶³¹ *Id.* at 475-76, paras. 276-77.

⁶³² *See id.*

⁶³³ *Id.* at 477-79, paras. 279-80.

⁶³⁴ *Id.* at 477-78, para. 279.

⁶³⁵ *Id.* at 477-79, paras. 279-80.

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.⁶³⁶ And consistent with the *2010 Open Internet Order* and the *RIF Order*,⁶³⁷ and as affirmed by the D.C. Circuit in *Mozilla*,⁶³⁸ we propose also to rely on section 257 of the Act (now in conjunction with section 13 of the Act)⁶³⁹ as additional legal authority for the transparency rule, as we propose to modify it here. We seek comment on these proposals.

202. 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,⁶⁴⁰ 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.⁶⁴¹ 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

203. As in the *2015 Open Internet Order*, we propose to rely on our broad legal authority under Title III of the Act⁶⁴² 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.⁶⁴³ 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.⁶⁴⁴ 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.⁶⁴⁵ 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

⁶³⁶ See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5724-25, 5726-28, paras. 283-84, 289-92.

⁶³⁷ *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.

⁶³⁸ *Mozilla*, 940 F.3d at 47-49.

⁶³⁹ 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”).

⁶⁴⁰ See, e.g., *RIF Order*, 33 FCC Rcd at 445-46, paras. 284-85.

⁶⁴¹ See, e.g., *id.* at 446-47, paras. 286-88.

⁶⁴² 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)).

⁶⁴³ See, e.g., *2015 Open Internet Order*, 30 FCC Rcd at 5725, paras. 285-87.

⁶⁴⁴ See, e.g., *RIF Order*, 33 FCC Rcd at 485, para. 292.

⁶⁴⁵ *Mozilla*, 940 F.3d at 76.

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

204. 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 706 of the 1996 Act and Titles II and III of the Act—in particular, sources under Title VI of the Act.⁶⁴⁶ 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.⁶⁴⁷ We seek more developed comment on that possible Title VI authority and on any other possible sources of authority under the Act.

205. 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.⁶⁴⁸ Does that law provide additional authority for rules here, particularly as it relates to possible modifications of the transparency rule?

206. 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,⁶⁴⁹ particularly by explaining why the action would help effectuate regulatory authority granted to the Commission under other statutory provisions.

H. Other Laws and Considerations

207. 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.⁶⁵⁰ 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.

208. 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.⁶⁵¹ The *2015 Open Internet Order* specifically highlighted examples of other laws imposing

⁶⁴⁶ *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)

⁶⁴⁷ *See, e.g., RIF Order*, 33 FCC Rcd at 484, paras. 290-91.

⁶⁴⁸ Infrastructure Act, § 60504(a).

⁶⁴⁹ 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).

⁶⁵⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5731-33, paras. 299-305.

⁶⁵¹ *Id.* at 5731-32, paras. 300-303.

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.⁶⁵² We propose to adopt the same rule language in this regard as was adopted in the *2015 Open Internet Order*:

*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.*⁶⁵³

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.⁶⁵⁴ 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?⁶⁵⁵

209. 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.⁶⁵⁶ 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.*⁶⁵⁷

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.

210. 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.⁶⁵⁸ 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

⁶⁵² *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).

⁶⁵³ *Id.* at 5731-32, para. 300.

⁶⁵⁴ *Id.* at 5732, para. 303.

⁶⁵⁵ *RIF Remand Order*, 35 FCC Rcd at 12366-68, paras. 46-65.

⁶⁵⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5732-33, paras. 304-305.

⁶⁵⁷ *Id.* at 5732-33, para. 304.

⁶⁵⁸ *See, e.g., RIF Remand Order*, 35 FCC Rcd at 12364-66, paras. 61-63.

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

211. 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 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

212. 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 proposed modifications to the transparency rule are permissible exercises of authority under the First Amendment.

1. Free Speech Rights

213. 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*.⁶⁵⁹ In particular, as explained in that *Order*,⁶⁶⁰ and ultimately affirmed by the D.C. Circuit in *USTA*,⁶⁶¹ 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.

214. 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*.⁶⁶² 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.⁶⁶³ 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*.⁶⁶⁴ 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.

215. 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.⁶⁶⁵ We are aware that some social media platforms and other edge providers

⁶⁵⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5868-73, paras. 544-58.

⁶⁶⁰ *Id.* at 5868-71, 5873, paras. 544-52, 558.

⁶⁶¹ *USTA*, 825 F.3d at 740-44.

⁶⁶² *2015 Open Internet Order*, 30 FCC Rcd at 5872-73, paras. 553-58.

⁶⁶³ *Id.* at 5872, paras. 553-54.

⁶⁶⁴ *Id.* at 5872, paras. 554-56.

⁶⁶⁵ *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).

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 or user agreements; is there any record of ISPs announcing and engaging in comparable activity?

216. 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 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.⁶⁶⁶ 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."⁶⁶⁷ We seek comment on those views.

217. 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."⁶⁶⁸ We seek comment on the accuracy of that characterization and how it should inform our analysis and approach here.

2. Compelled Disclosure

218. We also believe that the proposed 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*.⁶⁶⁹ 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.⁶⁷⁰ We seek comment on that view.

219. We also believe that our transparency rule, as we propose to modify it here, 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*.⁶⁷¹ Also consistent with the analysis in the *2015 Open Internet Order*, we believe our proposed modifications to the transparency rule are likely to be a

⁶⁶⁶ *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).

⁶⁶⁷ *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).

⁶⁶⁸ *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*)).

⁶⁶⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5873-75, paras. 559-63; *RIF Order*, 33 FCC Rcd at 448-50, paras. 235-38.

⁶⁷⁰ *RIF Order*, 33 FCC Rcd at 448, para. 235 n.854.

⁶⁷¹ *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*).

reasonable way of advancing government interests in preventing consumer deception, among other things, and thus would satisfy the *Zauderer* standard.⁶⁷² We believe that the disclosures required by our proposed transparency rule are the sort of “purely factual and uncontroversial information about the terms under which . . . services will be available” to which *Zauderer* applies.⁶⁷³ We seek comment on the continued applicability of that analysis from the *2015 Open Internet Order*.

220. Alternatively, to the extent that a court evaluated the transparency rule with the modifications proposed here 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*.⁶⁷⁴ We believe our proposed modified transparency rule is likely to directly advance substantial government interests and be no more extensive than necessary, for reasons such as those identified in the *RIF Order*.⁶⁷⁵ We seek comment on these views and any other First Amendment considerations.

B. Fifth Amendment Takings

221. 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.⁶⁷⁶ 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.⁶⁷⁷ We seek comment on the continued applicability of those analyses here and any other considerations relevant to possible *per se* takings arguments.

222. 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.⁶⁷⁸ 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.”⁶⁷⁹ 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.⁶⁸⁰ We seek comment on these views.

VII. PROCEDURAL MATTERS

223. *Ex Parte Rules*. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁶⁸¹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two

⁶⁷² *2015 Open Internet Order*, 30 FCC Rcd at 5874-75, paras. 562-63.

⁶⁷³ See *Nat’l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer*, 471 U.S. at 651).

⁶⁷⁴ See, e.g., *RIF Order*, 33 FCC Rcd at 448, para. 235.

⁶⁷⁵ *RIF Order*, 33 FCC Rcd at 448-50, paras. 235-38.

⁶⁷⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5875-77, paras. 564-68.

⁶⁷⁷ *Id.* at 5877-78, para. 569.

⁶⁷⁸ *Id.* at 5878-79, paras. 570-73.

⁶⁷⁹ *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)).

⁶⁸⁰ *2015 Open Internet Order*, 30 FCC Rcd at 5878-79, paras. 570-73.

⁶⁸¹ 47 CFR § 1.1200(a).

business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b).⁶⁸² Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

224. *Comment Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,⁶⁸³ 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.⁶⁸⁴
- 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.

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

226. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁸⁵ 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."⁶⁸⁶ 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.

⁶⁸² 47 CFR § 1.1206(b).

⁶⁸³ 47 CFR §§ 1.415, 1.419.

⁶⁸⁴ 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>.

⁶⁸⁵ 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).

⁶⁸⁶ *Id.*

227. *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 107-198,⁶⁸⁷ we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

228. *Further Information.* For additional information on this proceeding, contact the Wireline Competition Bureau at OpenInternet2023@fcc.gov.

VIII. ORDERING CLAUSES

229. Accordingly, IT IS ORDERED, pursuant to the authority contained in 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, that this Notice of Proposed Rulemaking IS ADOPTED.

230. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before December 14, 2023, and reply comments on or before January 17, 2024.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁸⁷ See 44 U.S.C. § 3506(c)(4).

APPENDIX A

Proposed Rules

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

1. Amend the heading of part 8 to read as follows:

PART 8 – SECURING AND SAFEGUARDING THE OPEN INTERNET

2. Amend the authority citation for part 8 to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 152, 154, 163, 201, 202, 208, 257, 303, 316, 1302.

3. Add new section 8.2 as follows:

§ 8.2 Conduct-Based Rules.

- (a) *Definitions.* For purposes of this subsection:

- (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 is 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.

- (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) 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.
- (g) 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. Revise section 20.3 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 Section 8.2.

* * * * *

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

A. Need for and Objectives of the Proposed Rules

2. Today we propose to reestablish the Federal Communications Commission's authority over broadband Internet access service by classifying it as a telecommunications service under Title II of the Communications Act. We further propose to reclassify mobile BIAS as a commercial mobile service. 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.

3. 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 Federal Communications Commission had played that role, but the Commission abdicated that responsibility in 2018, just as the Internet was becoming more vital than ever. 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 uniform, 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. 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.

B. Legal Basis

4. The legal basis for any action that may be taken pursuant to the Notice is contained in 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.

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

² See 5 U.S.C. § 603(a).

³ *Id.*

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

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

1. Total Small Entities

6. 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.⁸ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration’s (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.⁹ These types of small businesses represent 99.9 percent of all businesses in the United States, which translates to 33.2 million businesses.¹⁰

7. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹¹ 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.¹² 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.¹³

⁴ See 5 U.S.C. § 603(b)(3).

⁵ See 5 U.S.C. § 601(6).

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

⁷ See 15 U.S.C. § 632.

⁸ See 5 U.S.C. § 601(3)-(6).

⁹ See SBA, Office of Advocacy, “What’s New With Small Business?,” <https://advocacy.sba.gov/wp-content/uploads/2023/03/Whats-New-Infographic-March-2023-508c.pdf>. (Mar. 2023)

¹⁰ *Id.*

¹¹ See 5 U.S.C. § 601(4).

¹² 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.

¹³ 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-

(continued...)

8. 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.”¹⁴ U.S. Census Bureau data from the 2017 Census of Governments¹⁵ indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.¹⁶ Of this number, there were 36,931 general purpose governments (county,¹⁷ municipal, and town or township¹⁸) with populations of less than 50,000 and 12,040 special purpose governments—-independent school districts¹⁹ with enrollment populations of less than 50,000.²⁰ 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.”²¹

2. Wired Broadband Internet Access Service Providers²²

9. 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

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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.

¹⁴ See 5 U.S.C. § 601(5).

¹⁵ 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>.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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.

²⁰ 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.

²¹ 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.

²² Formerly included in the scope of the Internet Service Providers (Broadband), Wired Telecommunications Carriers and All Other Telecommunications small entity industry descriptions.

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.²³ Wired broadband Internet services fall in the Wired Telecommunications Carriers industry.²⁴ The SBA small business size standard for this industry classifies firms having 1,500 or fewer employees as small.²⁵ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.²⁶ Of this number, 2,964 firms operated with fewer than 250 employees.²⁷

10. 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.²⁸ 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 Marketplace Report*,²⁹ we believe that the majority of wireline Internet access service providers can be considered small entities.

3. Wireline Providers

11. *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.³⁰ 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 VoIP services, wired (cable) audio and video programming distribution, and wired broadband Internet services.³¹ By exception, establishments providing satellite television distribution services using facilities

²³ See 47 CFR § 1.7001(a)(1).

²⁴ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

²⁵ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

²⁶ 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>.

²⁷ *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.

²⁸ 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.

²⁹ 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*).

³⁰ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

³¹ *Id.*

and infrastructure that they operate are included in this industry.³² Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers.³³

12. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.³⁴ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.³⁵ Of this number, 2,964 firms operated with fewer than 250 employees.³⁶ 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.³⁷ Of these providers, the Commission estimates that 4,146 providers have 1,500 or fewer employees.³⁸ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

13. *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. Wired Telecommunications Carriers³⁹ is the closest industry with an SBA small business size standard.⁴⁰ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁴¹ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁴² Of this number, 2,964 firms operated with fewer than 250 employees.⁴³ 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.⁴⁴ Of these providers, the Commission estimates that 916 providers have

³² *Id.*

³³ 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.

³⁴ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

³⁵ 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: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

³⁶ *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.

³⁷ 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>

³⁸ *Id.*

³⁹ See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁴⁰ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁴¹ *Id.*

⁴² 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: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁴³ *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.

1,500 or fewer employees.⁴⁵ 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.

14. *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.⁴⁶ Wired Telecommunications Carriers⁴⁷ is the closest industry with a 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.⁴⁸ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.⁴⁹ Of this number, 2,964 firms operated with fewer than 250 employees.⁵⁰ 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 competitive local exchange service providers.⁵¹ Of these providers, the Commission estimates that 3,230 providers have 1,500 or fewer employees.⁵² Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

15. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers⁵³ is the closest industry with a SBA small business size standard.⁵⁴ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁵⁵ U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year.⁵⁶ Of this number, 2,964 firms operated with fewer than 250 employees.⁵⁷

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⁴⁴ 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>.

⁴⁵ *Id.*

⁴⁶ 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.

⁴⁷ See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁴⁸ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁴⁹ 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>.

⁵⁰ *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.

⁵¹ 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>.

⁵² *Id.*

⁵³ See U.S. Census Bureau, *2017 NAICS Definition*, "517311 Wired Telecommunications Carriers," <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁵⁴ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁵⁵ *Id.*

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.⁵⁸ 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.

16. *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 a SBA small business size standard is Wired Telecommunications Carriers.⁵⁹ The SBA small business size standard classifies a business as small if it has 1,500 or fewer employees.⁶⁰ U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁶¹ Of this number, 2,964 firms operated with fewer than 250 employees.⁶² Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 20 providers that reported they were engaged in the provision of operator services.⁶³ Of these providers, the Commission estimates that all 20 providers have 1,500 or fewer employees.⁶⁴ Consequently, using the SBA's small business size standard, all of these providers can be considered small entities.

17. *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 Carriers⁶⁵ is the closest industry with a SBA small business size standard.⁶⁶ The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.⁶⁷ U.S. Census

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⁵⁶ 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>.

⁵⁷ *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.

⁵⁸ 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>.

⁵⁹ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁶⁰ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁶¹ 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>.

⁶² *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.

⁶³ 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>

⁶⁴ *Id.*

⁶⁵ See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

⁶⁶ See 13 CFR § 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

⁶⁷ *Id.*

Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year.⁶⁸ Of this number, 2,964 firms operated with fewer than 250 employees.⁶⁹ 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.⁷⁰ Of these providers, the Commission estimates that 87 providers have 1,500 or fewer employees.⁷¹ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

4. Wireless Providers – Fixed and Mobile

18. 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.

19. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves.⁷² 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.⁷³ The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.⁷⁴ U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.⁷⁵ Of that number, 2,837 firms employed fewer than 250 employees.⁷⁶ 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

⁶⁸ 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: EC1700SIZEEMPfirm, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁶⁹ *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.

⁷⁰ 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>

⁷¹ *Id.*

⁷² 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>.

⁷³ *Id.*

⁷⁴ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

⁷⁵ 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>.

⁷⁶ *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.

wireless services.⁷⁷ Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees.⁷⁸ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

20. *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.⁷⁹ Wireless Telecommunications Carriers (*except* Satellite)⁸⁰ 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.⁸¹ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.⁸² Of this number, 2,837 firms employed fewer than 250 employees.⁸³ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

21. 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 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.⁸⁴

22. 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.

23. *Wireless Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Wireless Resellers. The closest industry with a SBA small

⁷⁷ 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>.

⁷⁸ *Id.*

⁷⁹ See 47 CFR §§ 27.1 – 27.1607.

⁸⁰ 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>.

⁸¹ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

⁸² 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>.

⁸³ *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.

⁸⁴ 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.

business size standard is Telecommunications Resellers.⁸⁵ 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.⁸⁶ Establishments in this industry resell telecommunications and they do not operate transmission facilities and infrastructure.⁸⁷ Mobile virtual network operators (MVNOs) are included in this industry.⁸⁸ Under the SBA size standard for this industry, a business is small if it has 1,500 or fewer employees.⁸⁹ U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services during that year.⁹⁰ Of that number, 1,375 firms operated with fewer than 250 employees.⁹¹ Thus, for this industry under the SBA small business size standard, the majority of providers can be considered small entities.

24. *1670–1675 MHz Services.* These wireless communications services can be used for fixed and mobile uses, except aeronautical mobile.⁹² Wireless Telecommunications Carriers (except Satellite)⁹³ 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.⁹⁴ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.⁹⁵ Of this number, 2,837 firms employed fewer than 250 employees.⁹⁶ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

25. According to Commission data as of November 2021, there were three active licenses in this service.⁹⁷ 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

⁸⁵ See U.S. Census Bureau, *2017 NAICS Definition, “517911 Telecommunications Resellers,”* <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See 13 CFR § 121.201, NAICS Code 517911 (as of 10/1/22, NAICS Code 517121).

⁹⁰ 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: EC1700SIZEEMPfirm, NAICS Code 517911, <https://data.census.gov/cedsci/table?y=2017&n=517911&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

⁹¹ *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.

⁹² See 47 CFR § 27.902.

⁹³ 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>.

⁹⁴ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

⁹⁵ 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>.

⁹⁶ *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.

⁹⁷ 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.

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.⁹⁸ The 1670-1675 MHz service band auction’s winning bidder did not claim small business status.⁹⁹

26. 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.

27. *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).¹⁰⁰ The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees.¹⁰¹ For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year.¹⁰² Of this number, 2,837 firms employed fewer than 250 employees.¹⁰³ 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.¹⁰⁴ Of these providers, the Commission estimates that 255 providers have 1,500 or fewer employees.¹⁰⁵ Consequently, using the SBA’s small business size standard, most of these providers can be considered small entities.

28. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum encompasses services in the 1850-1910 and 1930-1990 MHz bands.¹⁰⁶ The closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite).¹⁰⁷ The SBA small business size standard for this industry

⁹⁸ See 47 CFR § 27.906(a).

⁹⁹ 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).

¹⁰⁰ 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>.

¹⁰¹ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁰² 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>.

¹⁰³ *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.

¹⁰⁴ 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>.

¹⁰⁵ *Id.*

¹⁰⁶ See 47 CFR § 24.200.

¹⁰⁷ 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>.

classifies a business as small if it has 1,500 or fewer employees.¹⁰⁸ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁰⁹ Of this number, 2,837 firms employed fewer than 250 employees.¹¹⁰ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

29. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service.¹¹¹ 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.¹¹² Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.¹¹³

30. 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.

31. *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)¹¹⁴ is the closest industry with a 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.¹¹⁵ For this industry, U.S. Census Bureau data for 2017 show

¹⁰⁸ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁰⁹ 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>.

¹¹⁰ *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.

¹¹¹ 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.

¹¹² See 47 CFR § 24.720(b).

¹¹³ 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>.

¹¹⁴ 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>.

¹¹⁵ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

that there were 2,893 firms in this industry that operated for the entire year.¹¹⁶ Of this number, 2,837 firms employed fewer than 250 employees.¹¹⁷ 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.¹¹⁸ Of this number, the Commission estimates that all 95 providers have 1,500 or fewer employees.¹¹⁹ Consequently, using the SBA's small business size standard, these 119 SMR licensees can be considered small entities.¹²⁰

32. Based on Commission data as of December 2021, there were 3,924 active SMR licenses.¹²¹ 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.

33. *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.¹²² Wireless Telecommunications Carriers (*except* Satellite)¹²³ is the closest industry with a 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.¹²⁴ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹²⁵ Of this number, 2,837 firms employed fewer than 250 employees.¹²⁶ Thus under the SBA

¹¹⁶ 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>.

¹¹⁷ *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.

¹¹⁸ 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>

¹¹⁹ *Id.*

¹²⁰ 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.

¹²¹ 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.

¹²² See Federal Communications Commission, Economics and Analytics, Auctions, 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>.

¹²³ 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>.

¹²⁴ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹²⁵ 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>.

size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

34. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses.¹²⁷ 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.¹²⁸ In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses,¹²⁹ twenty-six winning bidders claiming a small business classification won 214 licenses,¹³⁰ and three winning bidders claiming a small business classification won all five auctioned licenses.¹³¹

35. 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.

36. *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.¹³² 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

(Continued from previous page)

¹²⁶ *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.

¹²⁷ 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.

¹²⁸ See 47 CFR § 27.702(a)(1)-(3).

¹²⁹ 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>.

¹³⁰ 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>.

¹³¹ 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>.

¹³² See 47 CFR § 27.4.

broadcasting services.¹³³ Wireless Telecommunications Carriers (*except* Satellite)¹³⁴ is the closest industry with a 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.¹³⁵ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹³⁶ Of that number, 2,837 firms employed fewer than 250 employees.¹³⁷ 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 152 active Upper 700 MHz Band licenses.¹³⁸ 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" 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.¹³⁹ Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.¹⁴⁰

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 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. *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

¹³³ 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.

¹³⁴ 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>.

¹³⁵ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹³⁶ 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>.

¹³⁷ *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.

¹³⁸ 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.

¹³⁹ See 47 CFR § 27.502(a).

¹⁴⁰ 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.

Carriers (*except* Satellite)¹⁴¹ is the closest industry with a 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.¹⁴² U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁴³ Of this number, 2,837 firms employed fewer than 250 employees.¹⁴⁴ 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 224 active 700 MHz Guard Band licenses.¹⁴⁵ 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" 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.¹⁴⁶ 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.¹⁴⁷ None of the winning bidders claiming a small business status classification in these 700 MHz Guard Band license auctions had an active license as of December 2021.¹⁴⁸

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.

¹⁴¹ 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>.

¹⁴² See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁴³ 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>.

¹⁴⁴ *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.

¹⁴⁵ 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.

¹⁴⁶ See 47 CFR § 27.502(a).

¹⁴⁷ 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>.

¹⁴⁸ 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.

42. *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.¹⁴⁹ 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.¹⁵⁰

43. The closest industry with an SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).¹⁵¹ The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.¹⁵² U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁵³ Of this number, 2,837 firms employed fewer than 250 employees.¹⁵⁴ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

44. Based on Commission data as of December 2021, there were approximately four licensees with 110 active licenses in the Air-Ground Radiotelephone Service.¹⁵⁵ 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 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.¹⁵⁶ In the auction of Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the two winning bidders claimed small business status.¹⁵⁷

45. 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

¹⁴⁹ 47 CFR § 22.99.

¹⁵⁰ 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>.

¹⁵¹ 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>.

¹⁵² See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁵³ 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>.

¹⁵⁴ *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.

¹⁵⁵ 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.

¹⁵⁶ See 47 CFR § 22.223(b).

¹⁵⁷ 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>.

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.

46. *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.¹⁵⁸ Wireless Telecommunications Carriers (*except* Satellite)¹⁵⁹ is the closest industry with a 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.¹⁶⁰ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁶¹ Of this number, 2,837 firms employed fewer than 250 employees.¹⁶² Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

47. According to Commission data as December 2021, there were approximately 4,472 active AWS licenses.¹⁶³ 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 entity with average annual gross revenues for the preceding three years not exceeding \$15 million.¹⁶⁴ Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses.¹⁶⁵ In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.¹⁶⁶

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

¹⁵⁸ See 47 CFR § 27.1(b).

¹⁵⁹ 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>.

¹⁶⁰ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁶¹ 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>.

¹⁶² *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.

¹⁶³ 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.

¹⁶⁴ See 47 CFR §§ 27.1002, 27.1102, 27.1104, 27.1106.

¹⁶⁵ 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>.

¹⁶⁶ 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).

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.

49. *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).¹⁶⁷ Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis.¹⁶⁸ Wireless broadband services in the 3650–3700 MHz band fall in the Wireless Telecommunications Carriers (*except* Satellite)¹⁶⁹ industry with an SBA small business size standard that classifies a business as small if it has 1,500 or fewer employees.¹⁷⁰ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁷¹ Of this number, 2,837 firms employed fewer than 250 employees.¹⁷² Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

50. 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 (ISPs). As of November 2021, Commission data shows that there were 902 active licenses in the 3650–3700 MHz band.¹⁷³ However, 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.

51. *Fixed Microwave Services.* Fixed microwave services include common carrier,¹⁷⁴ private-operational fixed,¹⁷⁵ and broadcast auxiliary radio services.¹⁷⁶ They also include the Upper

¹⁶⁷ See 47 CFR §§ 90.1305, 90.1307.

¹⁶⁸ See *id.* § 90.1309.

¹⁶⁹ 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>.

¹⁷⁰ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁷¹ 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&hidePrevious=false>.

¹⁷² *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.

¹⁷³ 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.

¹⁷⁴ See 47 CFR Part 101, Subparts C and I.

¹⁷⁵ See *id.* Subparts C and H.

¹⁷⁶ 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.

Microwave Flexible Use Service (UMFUS),¹⁷⁷ Millimeter Wave Service (70/80/90 GHz),¹⁷⁸ Local Multipoint Distribution Service (LMDS),¹⁷⁹ the Digital Electronic Message Service (DEMS),¹⁸⁰ 24 GHz Service,¹⁸¹ Multiple Address Systems (MAS),¹⁸² and Multichannel Video Distribution and Data Service (MVDDS),¹⁸³ where in some bands licensees can choose between common carrier and non-common carrier status.¹⁸⁴ Wireless Telecommunications Carriers (*except* Satellite)¹⁸⁵ is the closest industry with a 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.¹⁸⁶ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁸⁷ Of this number, 2,837 firms employed fewer than 250 employees.¹⁸⁸ Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

52. 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 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 Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.¹⁸⁹

53. 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.

¹⁷⁷ See 47 CFR Part 30.

¹⁷⁸ See 47 CFR Part 101, Subpart Q.

¹⁷⁹ See *id.* Subpart L.

¹⁸⁰ See *id.* Subpart G.

¹⁸¹ See *id.*

¹⁸² See *id.* Subpart O.

¹⁸³ See *id.* Subpart P.

¹⁸⁴ See 47 CFR §§ 101.533, 101.1017.

¹⁸⁵ 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>.

¹⁸⁶ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁸⁷ 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>.

¹⁸⁸ *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.

¹⁸⁹ See 47 CFR §§ 101.538(a)(1)-(3), 101.1112(b)-(d), 101.1319(a)(1)-(2), and 101.1429(a)(1)-(3).

54. *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,”¹⁹⁰ 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)).¹⁹¹ 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.¹⁹²

55. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite).¹⁹³ The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees.¹⁹⁴ U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.¹⁹⁵ Of this number, 2,837 firms employed fewer than 250 employees.¹⁹⁶ Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

56. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses.¹⁹⁷ 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 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

¹⁹⁰ The use of the term “wireless cable” does not imply that it constitutes cable television for statutory or regulatory purposes.

¹⁹¹ 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).

¹⁹² 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.

¹⁹³ 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>.

¹⁹⁴ See 13 CFR § 121.201, NAICS Code 517312 (as of 10/1/22, NAICS Code 517112).

¹⁹⁵ 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>.

¹⁹⁶ *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.

¹⁹⁷ 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.

average gross revenues 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.¹⁹⁸ Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business status won three licenses and two bidders claiming entrepreneur status won six licenses.¹⁹⁹ One of the winning bidders claiming a small business status classification in the BRS license auction has an active licenses as of December 2021.²⁰⁰

57. 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.²⁰¹ 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

58. *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."²⁰² Satellite telecommunications service providers include satellite 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.²⁰³ U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year.²⁰⁴ Of this number, 242 firms had revenue of less than \$25 million.²⁰⁵ Additionally, based on Commission data in the 2022 Universal Service Monitoring

¹⁹⁸ See 47 CFR § 27.1218(a).

¹⁹⁹ 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>.

²⁰⁰ 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.

²⁰¹ See 47 CFR § 27.1219(a).

²⁰² See U.S. Census Bureau, *2017 NAICS Definition*, "517410 Satellite Telecommunications," <https://www.census.gov/naics/?input=517410&year=2017&details=517410>.

²⁰³ See 13 CFR § 121.201, NAICS Code 517410.

²⁰⁴ 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>.

²⁰⁵ *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.

Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services.²⁰⁶ Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees.²⁰⁷ Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

59. *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.²⁰⁸ 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.²⁰⁹ Providers of Internet services (e.g. dial-up ISPs) or Voice over Internet Protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry.²¹⁰ The SBA small business size standard for this industry classifies firms with annual receipts of \$35 million or less as small.²¹¹ U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year.²¹² Of those firms, 1,039 had revenue of less than \$25 million.²¹³ Based on this data, the Commission estimates that the majority of "All Other Telecommunications" firms can be considered small.

6. Cable Service Providers

60. *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 programs on a subscription or fee basis.²¹⁴ 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.²¹⁵ The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.²¹⁶ The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small.²¹⁷ Based on U.S. Census Bureau data for 2017, 378 firms

²⁰⁶ 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>.

²⁰⁷ *Id.*

²⁰⁸ See U.S. Census Bureau, *2017 NAICS Definition*, "517919 All Other Telecommunications," <https://www.census.gov/naics/?input=517919&year=2017&details=517919>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See 13 CFR § 121.201, NAICS Code 517919 (as of 10/1/22, NAICS Code 517810).

²¹² 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>.

²¹³ *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.

²¹⁴ 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>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See 13 CFR § 121.201, NAICS Code 515210 (as of 10/1/22, NAICS Code 516210).

operated in this industry during that year.²¹⁸ 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.²¹⁹ Based on this data, the Commission estimates that a majority of firms in this industry are small.

61. *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.²²⁰ Based on industry data, there are about 420 cable companies in the U.S.²²¹ Of these, only seven have more than 400,000 subscribers.²²² In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²²³ Based on industry data, there are about 4,139 cable systems (headends) in the U.S.²²⁴ Of these, about 639 have more than 15,000 subscribers.²²⁵ Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

62. *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 \$250,000,000."²²⁶ 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.²²⁷ Based on industry data, only six cable system operators have more than 677,000 subscribers.²²⁸

²¹⁸ 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).

²¹⁹ *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.

²²⁰ 47 CFR § 76.901(d).

²²¹ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

²²² 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).

²²³ 47 CFR § 76.901(c).

²²⁴ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

²²⁵ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

²²⁶ 47 U.S.C. § 543(m)(2).

²²⁷ *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 *Communications Marketplace Report*, GN Docket No. 22-203, 2022 WL 18110553 at 80, para. 218, Fig. II.E.1. (2022) (2022 Communications Marketplace Report). However, because the Commission has not issued

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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.²²⁹ 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 Telecommunications

63. *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.”²³⁰ 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.²³¹ 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.²³²

64. 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.²³³ 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 year.²³⁴ Of this number, 1,552 firms had less than 250 employees.²³⁵ Based on this data and the associated SBA size standards, the majority of firms in this industry can be considered small entities.

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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).

²²⁸ 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).

²²⁹ 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).

²³⁰ 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>.

²³¹ See *id.*

²³² *Id.*

²³³ See 13 CFR § 121.201, NAICS Codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 221121, 221122.

²³⁴ 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>.

²³⁵ *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.

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

65. As indicated above, the Notice proposes to return BIAS to its classification as a telecommunications service under Title II of the Act, and further proposes to reclassify mobile BIAS as a commercial mobile service. The Notice also proposes to reinstate straightforward, clear rules of the road 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 uniform, national regulatory approach toward BIAS. Specifically, the Notice proposes to adopt rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. The Notice also proposes 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, the Notice proposes to retain the current disclosures, and seeks comment on the means of disclosure, the interplay between the transparency rule and the broadband label requirements, and any additional enhancements or changes the Commission should consider.

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

66. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²³⁶ The Commission expects to consider all of these factors when we have received substantive comment from the public and potentially affected entities.

67. The Commission also expects to consider the economic impact on small entities, as identified in comments filed in response to the Notice and this IRFA, in reaching its final conclusions and taking action in this proceeding. We seek comment here on the effect the various proposals described in the Notice, and summarized above, will have on small entities, and on what effect alternative rules would have on those entities. How can the Commission achieve its goal of safeguarding the open Internet while also imposing minimal burdens on small entities? What specific steps could the Commission take in this regard? As discussed in the Notice, the proposed approach would provide the basis for a uniform, national regulatory approach rather than disparate requirements that vary state-by-state, which could help streamline and minimize regulatory requirements for small entities. The Notice also proposes broad forbearance from statutory requirements and Commission regulations for broadband Internet access service providers, and we note that the proposed forbearance could substantially lessen the economic impact of the proposed actions on small entities. The Notice specifically seeks comment on the impact of reclassification on small businesses and entities, including small ISPs.

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

68. None.

²³⁶ 5 U.S.C. § 603(c).