

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF HAROLD FURCHTGOTT-ROTH, KIRK R. ARNER, AND
WASHINGTON LEGAL FOUNDATION**

I. Interest

Harold Furchtgott-Roth and Kirk R. Arner of the Hudson Institute Center for the Economics of the Internet,¹ together with the Washington Legal Foundation, respectfully submit these comments in response to the Federal Communications Commission’s (the “Commission” or “FCC”) Notice of Proposed Rulemaking (“NPRM”) in this matter.²

Harold Furchtgott-Roth is a widely-recognized authority on issues related to the economics and regulation of the communications sector. He served as a commissioner of the Federal Communications Commission from 1997 through 2001. Before his appointment to the FCC, Dr. Furchtgott-Roth was chief economist for the House Committee on Commerce and a principal staff member working on legislation that became the Telecommunications Act of 1996. He currently is a senior fellow and founder of the Center for the Economics of the Internet at the Hudson Institute.

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Founded in 1977, the Washington Legal Foundation (“WLF”) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF defends free enterprise,

¹ These comments are presented by Harold Furchtgott-Roth and Kirk R. Arner in their individual capacities. They do not necessarily represent the views of the Hudson Institute, its leadership, or its other fellows.

² *In re Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23- 320, FCC 23-83 (rel. Oct. 20, 2023) (“NPRM”).

³ See, e.g., Kirk R. Arner and Harold Furchtgott-Roth, *End Comment Fraud at the Cost of a Stamp*, Wall St. J. (May 13, 2021), <https://www.wsj.com/articles/end-comment-fraud-at-the-cost-of-a-stamp-11620944367>; Kirk R. Arner and Harold Furchtgott-Roth, *Congress Shouldn’t Encourage the FTC’s Section 13(b) Abuses*, Real Clear Markets (Dec. 3, 2020), https://www.realclearmarkets.com/articles/2020/12/03/congress_shouldnt_encourage_the_ftcs_section_13b_abuses_651772.html.

individual rights, limited government, and the rule of law. To that end, WLF regularly files formal comments with federal administrative agencies, including the FCC, to ensure adherence to the rule of law.⁴ Likewise, WLF has participated as an amicus curiae in litigation challenging the FCC's regulatory authority.⁵

II. Introduction

For two decades, the core argument of network neutrality proponents⁶ has been as follows: the Internet is important; therefore, it must be regulated.⁷

For nearly as long, the Commission has sought to regulate America's broadband providers. The Commission's current NPRM in this proceeding represents a fourth bite at the apple.⁸ Yet after years of protracted legal fights and appeals, and thousands of pages added to the Federal Register, the Commission has yet to implement an enduring set of network neutrality rules.⁹

There are two simple reasons for this. *First*, the FCC lacks the statutory authority to regulate broadband providers. *Second*, even if the FCC had statutory authority to regulate broadband providers, doing so would cause more harm than good.

In its NPRM, the Commission attempts another argument: national security. This novel argument lacks both statutory authority and plausible benefits.

III. Congress, Not the FCC, Could and Should Decide Whether Title II Should Apply to Broadband Providers

⁴ See, e.g., *In re Proposed FCC Rule on Protecting Privacy*, WC Docket No. 16-106, FCC 16-39 (rel. May 27, 2016) (urging against FCC's adoption of its Proposed Rule on Protecting the Privacy of Customers of Broadband and other Telecommunications Services as exceeding the agency's statutory grant of authority).

⁵ See, e.g., *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (successfully challenging FCC's authority to order North Carolina and Tennessee to operate expanded ISPs); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (challenging FCC's authority to regulate the Internet).

⁶ For the origin of the concept of network neutrality, see Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141 (2003).

⁷ See, e.g., *Communicators with Michael Powell*, C-SPAN (Dec. 18, 2015), <https://www.c-span.org/video/?401727-1/communicators-michael-powell> (6:44-7:15) ("Look, I think what's happened unfortunately and a lot of lazy thinking is common carriage or utility regulation is the same thing as saying something's important and indispensable. It's really important to me, so why wouldn't it be a utility?"); *FACT SHEET: National Security and Public Safety Impacts of Restoring Broadband Oversight*, FCC Office of the Chairwoman, <https://docs.fcc.gov/public/attachments/DOC-397494A1.pdf> ("The pandemic made it crystal clear that broadband is not nice-to-have, but need-to-have for everyone, everywhere. The FCC has a responsibility to respond to this new reality by restoring broadband oversight and adopting net neutrality protections.").

⁸ See *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14986 (2005) ("2005 Policy Statement"); *In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (2008) ("2008 NN Order"); *In re Preserving the Open Internet*, 25 FCC Rcd 17905 (2010) ("2010 NN Order"); *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("2015 NN Order").

⁹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *In re Restoring Internet Freedom*, 33 FCC Rcd 311 (2017) ("RIF Order").

The most important topic in this proceeding is whether crafting new network neutrality rules applying Title II of the 1934 Communications Act to broadband providers is within the bounds of the Commission’s statutory authority. We examine this topic through four related questions:

1. Did Congress give the Commission specific instructions about whether and how to regulate broadband?
2. If so, did Congress specifically instruct the Commission to include broadband services under Title II?
3. If not, is it possible that Congress implicitly instructed the Commission to include broadband services under Title II?
4. Could Congress specifically instruct the Commission to include broadband services under Title II?

We review each question in turn.

1. Did Congress give the Commission specific instructions about whether and how to regulate broadband?

The word “broadband” appears many times in Title 47 of the U.S. Code. Chapter 12 of Title 47, titled “Broadband,” contains Sections 1301 through 1305, which specifically cover the subject.¹⁰ None of these sections speak of broadband as a telecommunications service or direct the Commission to regulate broadband as a common carrier under Title II.

The Telecommunications Act of 1996 birthed, among other things, Section 706—what is now Section 1302 of Title 47.¹¹ In 1996, most consumer Internet access was via dial-up modem services through businesses such as AOL.¹² Section 1302 speaks of “advanced telecommunications capability,” but not as a telecommunications service.¹³ More troubling is that “advanced telecommunications capability” is defined as a “switched” capability, even though little broadband today is “switched.”¹⁴ Section 1302 does not instruct the Commission to regulate any form of broadband service as a Title II service. Perhaps most importantly, it is hard to infer that broadband access is a telecommunications service from Section 1302, given that a federal court rejected that very interpretation in 2010.¹⁵

The other sections of Chapter 12 originate from Public Law 110-385, passed in October 2008.¹⁶ By this time, broadband services over fiber, coaxial cable, DSL, and wireless services were common.¹⁷ But these other sections do not speak of broadband as a telecommunications

¹⁰ 47 U.S.C. §§ 1301-1305.

¹¹ Pub. L. 104–104, title VII, § 706, Feb. 8, 1996, 110 Stat. 153.

¹² Farhad Manjoo, *Jurassic Web*, Slate (Feb. 24, 2009), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

¹³ 47 U.S.C. § 1302.

¹⁴ *Id.*

¹⁵ *Verizon*, 740 F.3d at 623.

¹⁶ Pub. L. 110–385, 122 Stat. 4096 (2008).

¹⁷ John B. Horrigan, *Broadband Adoption in the United States*, Pew Research Center (July 2, 2008), <https://www.pewresearch.org/internet/2008/07/02/broadband-adoption-in-the-united-states/>.

service. Simply put, in 2008, Congress instructed the Commission about the statutory treatment of broadband but did not instruct it to regulate broadband as a telecommunications service.

2. *If so, did Congress specifically instruct the Commission to include broadband services under Title II?*

Title II of the Communications Act contains dozens of statutory sections, stretching from Section 201 to Section 276.¹⁸ The word “broadband” does not appear even once in Title II. Nor does the phrase “network neutrality” appear in Title 47 of the U.S. Code. Thus, Congress has never instructed the FCC to include broadband under the banner of Title II.

3. *If not, is it possible that Congress implicitly instructed the Commission to include broadband services under Title II?*

In its 2015 network neutrality order, the FCC argued that Congress had implicitly instructed the Commission to include broadband services under Title II.¹⁹ The argument was as follows: (a) under *Chevron* deference, the FCC has the authority and the discretion to interpret its statutory language and the definitions of terms in those statutes;²⁰ and (b) by the FCC’s own statutory interpretation, broadband access is a telecommunications service to which Title II regulations would apply.²¹

We see two weak links in this implicit authority logic. First, it relies heavily on *Chevron* deference, without which the legal basis disappears. Second, even with *Chevron* deference granted to the Commission, at least two questions limit the reasonability and plausibility of the Commission’s interpretation of broadband as a telecommunications service: *First*, why did Congress in 2008, in its explicit instructions to the FCC about the regulation of broadband in a chapter titled “Broadband,” not clearly state that broadband should be treated as a telecommunications service under Title II? *Second*, why did Congress create this separate chapter for “Broadband,” *outside* of Title II, if not to clarify that broadband was to be understood as existing outside the bounds of Title II?

Congress was neither silent nor ambiguous about the regulation of broadband by the FCC.²² Congress clearly addressed broadband regulation, but not by classifying it as a Title II service.

Nor does federal statutory policy support expanded regulation of Title II to services not previously regulated under Title II. It instead dictates that “i[t] is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”²³ and that “[t]he Internet and other interactive computer services have flourished, to the benefit of all

¹⁸ 47 U.S.C. §§ 201-76.

¹⁹ 2015 NN Order.

²⁰ *Id.* at ¶¶ 143-45.

²¹ *Id.*

²² Silence or ambiguity are the usual standards for *Chevron* deference. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

²³ 47 U.S.C. § 230(b)(2).

Americans, with a minimum of government regulation.”²⁴ The preamble to the Telecommunications Act of 1996, which modified much of Title II, states its purpose as “[t]o promote competition and reduce regulation,”²⁵ not to increase regulation. These statutory passages do not favor new government regulation of the Internet or broadband access absent additional, explicit congressional authority or clarification.

4. *Could Congress specifically instruct the Commission to include broadband services under Title II?*

Congress could specifically instruct the Commission to include broadband services under Title II or otherwise craft network neutrality rules. Many such bills have been introduced in Congress but have failed to pass a vote.²⁶ The clearest interpretation of the introduction of such bills is that many members of Congress recognize that the FCC lacks the authority to regulate broadband services under Title II. The clearest interpretation of the failure of Congress to pass any such bills into law is that a Congressional majority does not seek to grant the FCC such authority.

While the Commission’s 2015 network neutrality rules were upheld by a federal appeals court before their repeal,²⁷ the question of Commission authority to regulate broadband access as a Title II service has never reached the Supreme Court. In recent years, the Court has reinvigorated the major questions doctrine, which dictates that if a regulation involves an issue of major economic or political importance, Congress must have clearly delegated authority to the relevant agency for the regulation to withstand legal scrutiny.²⁸

At least one Supreme Court Justice is already on the record saying that it is “indisputable” that Title II presents a major question and that “any other conclusion would fail the straight-face test.”²⁹ Two former Obama solicitor generals recently penned an op-ed arguing that not only would the rules from this proceeding introduce a major question, but that they likely would not survive judicial review.³⁰

IV. Network Neutrality is an Unnecessary Solution in Search of a Problem That Has Only Ever Done More Harm Than Good

²⁴ 47 U.S.C. § 230(a)(4).

²⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

²⁶ *Internet Freedom and Nondiscrimination Act of 2006*, S. 2360, 109th Cong. (2006); *Communications Opportunity, Promotion and Enhancement Bill of 2006*, H.R. 5252, 109th Cong. (2006); *Network Neutrality Act of 2006*, H.R. 5273, 109th Cong. (2006); *Internet Freedom and Nondiscrimination Act of 2006*, H.R. 5417, 109th Cong. (2006); *Internet Freedom Preservation Act*, S. 215, 110th Cong. (2007); *Internet Freedom Preservation Act of 2008*, H.R. 5353, 110th Cong. (2008); *Internet Freedom Preservation Act of 2009*, H.R. 3458, 111th Congress (2009); *Data Cap Integrity Act of 2012*, S. 3703, 112th Congress (2012); *Save Net Neutrality Act of 2017*, H.R. 4584, 115th Congress (2017); *Save the Internet Act of 2019*, S. 682, 116th Congress (2019); *Net Neutrality and Broadband Justice Act*, S. 4676, 117th Congress (2022).

²⁷ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

²⁸ *West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022).

²⁹ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 424 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

³⁰ Donald B. Verrilli, Jr. and Ian Heath Gershengorn, *Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine*, Bloomberg Law (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

Over half a century ago, the FCC applied a regulatory “light touch” to what would evolve into today’s broadband networks.³¹ In subsequent proceedings, across changes in administrations and even federal statutes, the Commission affirmed this approach.³²

In the words of one former Commissioner, the Internet has been “the greatest deregulatory success story of all time.”³³ Modern computers and the networks that connect them have transformed the way Americans work, live, shop, travel, fall in love, and so much more. The creation of AOL, MySpace, YouTube, Skype, and countless other pioneering websites and services occurred against the backdrop of an Internet ecosystem of permissionless innovation free from the shackles of burdensome regulations.³⁴

Despite the triumph of the Internet in the ’90s and early 2000s, some academics and regulators began to fear that broadband providers would act as “gatekeepers” preventing their customers from accessing the online content of their choice.³⁵ In the mid 2000s, streaming video and VoIP services began to compete with, and sometimes supplant, traditional cable TV and telephone services.³⁶ Consequently, the chief “gatekeeping” concern at the time was that cable Internet providers that also offered TV and telephone services would block or hinder their broadband customers’ access to online competitors like Netflix or Skype. Customers would be so frustrated that they would opt to subscribe to the offending cable and telephone services instead, network neutrality proponents feared.³⁷

Asserting ancillary authority under Section 706,³⁸ and invoking Title II of the 1934 Communications Act, the Commission sought to implement rules to regulate the Internet three separate times.³⁹ The first two of these attempts were struck down in federal court.⁴⁰ The third

³¹ *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Tentative Decision, 28 F.C.C.2d 291 (1970); *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision, 28 F.C.C.2d 267 (1971).

³² *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d. 384 (1980); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

³³ Robert McDowell, *Hands off the Internet*, Pioneer Press (Apr. 12, 2010), <https://www.twincities.com/2010/04/12/robert-mcdowell-hands-off-the-internet/>.

³⁴ Download: *The True Story of the Internet Episode 4 - People Power* (Discovery Channel 2008), available at <https://youtu.be/zYnODQzO9B8?si=v0JzYrLoKkpTwp95>.

³⁵ See, e.g., Wu, *supra* n.6.

³⁶ *Netflix Everywhere: Sorry Cable, You’re History*, *Wired* (Sept. 21, 2009), <https://www.wired.com/2009/09/ff-netflix/>; Brian Santo, *The Consumer Electronics Hall of Fame: Roku DVP N1000*, *IEEE Spectrum* (Dec. 6, 2018), <https://spectrum.ieee.org/the-consumer-electronics-hall-of-fame-roku-dvp-n1000>; *Hulu Launches Private Beta, Makes Very Good First Impressions*, *TechCrunch* (Oct. 28, 2007), <https://techcrunch.com/2007/10/28/hulu-launches-private-beta-first-impressions-very-good/>; Jordan Novet, *The rise and fall of Skype*, *CNBC* (July 2, 2023), <https://www.cnn.com/2023/07/02/the-rise-and-fall-of-skype.html>.

³⁷ See, e.g., *Net Neutrality: Last Week Tonight with John Oliver* (HBO), YouTube, https://youtu.be/fpbOEoRrHyU?si=_KAAtcBiRbKrga44.

³⁸ 47 U.S.C. § 1302.

³⁹ *2008 NN Order*; *2010 NN Order*; *2015 NN Order*.

⁴⁰ *Comcast*, 600 F.3d at 642; *Verizon*, 740 F.3d at 623.

set of rules survived federal circuit court review and was in place for two years, but ultimately, it was repealed by a subsequent Commission.⁴¹

Network neutrality proponents' predictions about the end of network neutrality were dire. Proponents claimed that, absent network neutrality rules, the Internet would be a “hellscape of extra fees, slow-loading apps[,] and censorship.”⁴² The Internet would load “one word at a time.”⁴³ A “final pillow” would be applied to the Internet’s “dying” face.⁴⁴ Protests were endless and emphatic.⁴⁵ Tensions hit a fever pitch when a bomb threat was called into a 2017 Commission meeting where 2015-era rules were repealed.⁴⁶

Yet in the years both preceding 2015 and after 2017, almost entirely absent any form of network neutrality rules, America’s Internet infrastructure flourished. Since 2017, speeds are up, latency is down, and competition among providers is more ferocious than ever before.⁴⁷ Today, Internet service is available at home or on the go via traditional copper, fiber optic, fixed wireless, mobile wireless, and satellite networks. Mobile networks evolved from 2G, to 3G, to 4G, and now 5G technologies, with speeds in some areas exceeding one gigabit per second.⁴⁸ Wireless network operators offer both mobile plans as well as plans that directly compete with traditional home offerings.⁴⁹ Innovative services like SpaceX’s Starlink help bridge the “digital divide” and even facilitate battlefield communications for American military and ally operations.⁵⁰

⁴¹ RIF Order.

⁴² Evan Greer, *Ending net neutrality will destroy everything that makes the internet great*, NBC News (Nov. 22, 2017), <https://www.nbcnews.com/think/opinion/ending-net-neutrality-will-destroy-everything-makes-internet-great-ncna823301>.

⁴³ Senate Democrats (@SenateDems), X (Feb. 27, 2018), <https://x.com/SenateDems/status/968525820410122240?s=20>.

⁴⁴ Farhad Manjoo, *The Internet Is Dying. Repealing Net Neutrality Hastens That Death*, N.Y. Times (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/technology/internet-dying-repeal-net-neutrality.html>.

⁴⁵ See, e.g., *ADVISORY: Hundreds to Protest Today at FCC Headquarters in ‘Wake-Up Call’ to Save the Internet*, Free Press (Dec. 14, 2017), <https://www.freepress.net/news/press-releases/advisory-hundreds-protest-today-fcc-headquarters-wake-call-save-internet>; *FCC Protest Rally*, C-SPAN (May 18, 2017), <https://www.c-span.org/video/?428678-1/fcc-protest-rally>.

⁴⁶ Colin Lecher, *FCC evacuates net neutrality vote after bomb threats*, The Verge (Dec. 24, 2017), <https://www.theverge.com/us-world/2017/12/14/16777178/fcc-net-neutrality-vote-evacuation>.

⁴⁷ Ajit Pai, *The Death of the Internet, Five Years Later*, National Review (June 11, 2023), <https://www.nationalreview.com/2023/06/the-death-of-the-internet-five-years-later/>.

⁴⁸ Jessica Dolcourt, *We ran 5G speed tests on Verizon, AT&T, EE and more: Here's what we found*, Cnet (July 3, 2019), <https://www.cnet.com/tech/mobile/features/we-ran-5g-speed-tests-on-verizon-at-t-ee-and-more-heres-what-we-found/>; Joanna Stern, *5G Testing Results: Pack Your Tent and Cooler*, Wall St. J. (July 18, 2019), https://www.wsj.com/video/series/joanna-stern-personal-technology/5g-testing-results-pack-your-tent-and-cooler/4B6C8856-6D45-46B8-969D-0C4A03F04C37?mod=BOLvidctr_pos0; Joanna Stern, *5G Can Replace Your Home Internet—Your Motor-Home Internet, That Is*, Wall St. J. (Aug. 17, 2020), https://www.wsj.com/video/series/joanna-stern-personal-technology/5g-can-replace-your-home-internet-your-motor-home-internet-that-is/7F63C2CF-6425-4307-B078-5D9C05CFC9C9?mod=BOLvidctr_pos7.

⁴⁹ *Donald Faison Gets Zach Braff to Switch to T-Mobile Home Internet | T-Mobile*, YouTube, <https://youtu.be/ZP6P0oDUynE?si=Y7BFOWyho1gHSbxq>; *Verizon Home Internet | Cut | Verizon :30*, YouTube, https://youtu.be/EvveqqtDTAU?si=ZAkFt0LaSx_NgOP; *Noise Cancelling*, YouTube, <https://youtu.be/sbMT0kM0TtQ?si=wkdMIJrEkaYc6Eux>.

⁵⁰ Mike Stone and Joey Roulette, *SpaceX’s Starlink wins Pentagon contract for satellite services to Ukraine*, Reuters (June 1, 2021), <https://www.reuters.com/business/aerospace-defense/pentagon-buys-starlink-ukraine-statement-2023-06-01/>; *Starlink Internet to Help Bridge Digital Divide in Marin County*, GovTech.com (Dec. 5, 2022),

Without network neutrality rules, Americans also faced the COVID-19 pandemic and in many instances were legally barred from working in-person. But thanks to robust broadband networks and apps like Zoom, millions of Americans continued to work from home at the dining room table.⁵¹ Many of them still do so to this day.⁵² Broadband providers’ potential leverage was arguably at its peak at this time, making it the ultimate natural experiment to see if network neutrality proponents’ nightmares would come true. Yet American broadband providers did not block, throttle, or otherwise hinder subscribers’ access to online content. Nor did American broadband networks crumble under the weight of increased traffic from the work-at-home crowd. Instead, it was in Europe, with its heavily-regulated broadband sector, where services like YouTube and Netflix were degraded at the behest of government in order to keep their Internet infrastructure afloat.⁵³ American Internet customers, meanwhile, continued to stream their favorite shows and movies uninterrupted and at full 4K quality.

Indeed, rather than an absence of network neutrality rules harming the Internet, it has been their imposition that has done damage. This damage has been tangible, not theoretical. The age of Title II network neutrality rules in 2015 and 2016 marked the first time in American history outside of a major recession that broadband providers decreased investment in their networks year-over-year.⁵⁴ More recently, California’s state-level network neutrality rules jeopardized veterans’ access to mobile telemedicine services that they previously accessed freely and without limits.⁵⁵ The general practice of “zero rating”—that is, not counting certain data uses against a user’s data cap—has frequently been seen as a direct violation of the concept of

<https://www.govtech.com/network/starlink-internet-to-help-bridge-digital-divide-in-marin-county>; Patrick Thibodeau, *Starlink coverage can make remote work very remote*, TechTarget (May 2, 2022),

<https://www.techtarget.com/searchhrsoftware/news/252516597/Starlink-coverage-can-make-remote-work-very-remote>.

⁵¹ *Telework during the COVID-19 pandemic: estimates using the 2021 Business Response Survey*, U.S. Bureau of Labor Statistics Monthly Labor Review (Mar. 2022), <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm>.

⁵² Jeffrey M. Jones, *Remote Work Stable at Higher Rate Post-Pandemic*, Gallup (Sept. 15, 2023), <https://news.gallup.com/poll/510785/remote-work-stable-higher-rate-post-pandemic.aspx>.

⁵³ Christopher S. Yoo, *Coronavirus Crisis Vindicates the FCC’s ‘Net Neutrality’ Rollback*, Wall St. J. (April 14, 2020), <https://www.wsj.com/articles/coronavirus-crisis-vindicates-the-fccs-net-neutrality-rollback-11586906742>; Nicolas Vega, *Netflix, YouTube speeds throttled across Europe as millions stay home*, N.Y. Post (Mar. 20, 2020), <https://nypost.com/2020/03/20/netflix-youtube-speeds-throttled-across-europe-as-millions-stay-home/>.

⁵⁴ *U.S. Broadband Capex Growth Propels Deployment*, USTelecom (July 31, 2019), <https://www.ustelecom.org/u-s-broadband-capex-growth-propels-deployment/> (noting a decrease from \$78 billion in capex investment in 2014 to \$77.5 billion in 2015 and \$74.8 billion in 2016). See also George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, The Phoenix Center (Apr. 25, 2017), <https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf> (“Between 2011 and 2015 (the last year data are available), the threat of reclassification reduced telecommunications investment by about 20% to 30%, or about \$30 to \$40 billion annually. Actual investment averaged \$126 billion annually, a sizable expenditure, but the counterfactual analysis indicates the average investment over the five-year window would have been about \$160 billion (or more) annually. That is, over the interval 2011 to 2015, another \$150-\$200 billion in additional investment would have been made “but for” Title II reclassification.”).

⁵⁵ Editorial Board, *Net Neutrality Nails Veterans*, Wall St. J. (March 25, 2021), <https://www.wsj.com/articles/net-neutrality-nails-veterans-11616711836>.

network neutrality.⁵⁶ Yet “zero rating” affords consumer benefits otherwise unavailable; it is hard to view the practice as anything but consumer welfare-enhancing.

Most importantly, network neutrality proponents’ fears have never materialized. There is no widespread evidence of ISPs meddling with their subscribers’ access to content. As for “gatekeeping” concerns, the online video marketplace has only become more competitive in recent years. Netflix, Hulu, HBO, and traditional cable TV compete today with the likes of Apple, Disney, Amazon, and countless other market entrants. Comcast in particular—a company that is a broadband and cable TV operator, in addition to a creator of movies and TV shows—decided to compete with streamers by creating Peacock, rather than degrade or limit access to competition for their traditional cable TV business. The net result is that streaming viewership today outnumbers cable and antenna TV audiences.⁵⁷ As for phone service—Zoom, Teams, Webex, FaceTime, and the like dominate communications both at home and in the workplace today.⁵⁸ Their development has not been hindered by cable companies’ telephone offerings.

Given the total lack of statutory authority for Title II regulation of broadband access, the Commission might hypothetically attempt to rely on empirical evidence suggesting that American consumers have been substantially harmed by the absence of network neutrality rules. We have yet to see such evidence. In fact, the currently available empirical evidence, as discussed above, reveals exactly the opposite: American consumers do not benefit from network neutrality rules.

V. Title II Network Neutrality Rules Would Harm, Not Help, America’s National Security

A novel argument for the proposed rules in this proceeding is that network neutrality rules are somehow vital to America’s national security interests.⁵⁹ In particular, the Commission claims that a hostile government could build or acquire a broadband provider in the United States. Absent network neutrality rules, the Commission claims, the federal government would be powerless to block it.

This claim is incorrect. The executive branch’s Committee on Foreign Investment in the United States, otherwise known as CFIUS, can and does review investments by foreign entities

⁵⁶ Barbara van Schewick, *T-Mobile’s Binge On Violates Key Net Neutrality Principles*, The Center for Internet and Society (Jan. 29, 2016), <https://cyberlaw.stanford.edu/blog/2016/01/t-mobiles-binge-violates-key-net-neutrality-principles>.

⁵⁷ Wynne Davis, *Streaming outperforms both cable and broadcast TV for the first time ever*, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1118203023/streaming-cable-broadcast-tv>.

⁵⁸ *20 Astonishing Video Conferencing Statistics for 2023*, Digital in the Round, <https://digitalintheround.com/video-conferencing-statistics/>; Katie Canales, *Apple saw its ‘highest volume of FaceTime calls’ last Christmas as families spent the holidays apart*, Business Insider (Jan. 27, 2021), <https://www.businessinsider.com/apple-facetime-calls-highest-volume-christmas-tim-cook-2021-1>.

⁵⁹ *NPRM* at ¶¶ 25-29. See also *FACT SHEET: National Security and Public Safety Impacts of Restoring Broadband Oversight*, FCC Office of the Chairwoman, <https://docs.fcc.gov/public/attachments/DOC-397494A1.pdf>; The FCC (@FCC), X (Oct. 17, 2023), <https://x.com/FCC/status/1714327562481029433?s=20>.

in the United States. CFIUS maintains, and has repeatedly exercised, the authority to block investments deemed hostile to the national security interests of the United States.⁶⁰

Moreover, the FCC lacks statutory authority to consider national security in its Title II regulations. The FCC has statutory authority to consider national security only narrowly in the context of (1) the licensing of radio stations and wireless licenses owned or controlled by foreign governments or, for broadcast licenses, licensing to foreign entities⁶¹ and (2) the licensing of certain satellite services.⁶² Also, under war powers, the President may alter the provisions of Commission rules for purposes of national security.⁶³ None of these statutory passages concerning national security pertain to Commission promulgation of regulations under Title II.

The FCC is an independent regulatory agency staffed by civilian attorneys and other professionals. It is not a national security agency. As a result, the FCC is not privy to the vast wealth of classified information related to national security that other agencies are privy to—nor should it be.

Additionally, at the core of network neutrality is the concept of non-discrimination. Under network neutrality principles, broadband providers cannot block or throttle access to websites—potentially including those that are reprehensible or controlled by America’s adversaries. Websites theoretically operated by the KKK, ISIS, Hamas, or others with the intent to harm American national security or spread anti-American terrorist propaganda would be comforted in the knowledge that American broadband providers might hesitate to work with law enforcement to limit access to their websites, fearful doing so might violate network neutrality principles codified in federal regulation by the FCC.⁶⁴

VI. Conclusion

When the Commission adopts new rules, it ought only do so when the adoption of such rules is clearly within the confines of the law and clearly results in more good than harm. For the reasons stated above, we respectfully believe that the rules contemplated by the NPRM in this proceeding, if enacted, would fail both these crucial tests.

⁶⁰ Jay Peters, *Grindr has been sold by its Chinese owner after the US expressed security concerns*, The Verge (Mar. 6, 2020), <https://www.theverge.com/2020/3/6/21168079/grindr-sold-chinese-owner-us-cfius-security-concerns-kunlun-lgbtq>; *President Trump Orders Divestiture of StayNTouch, Inc. by Shiji Group of China*, Covington Alert (Mar. 9, 2020), <https://www.cov.com/en/news-and-insights/insights/2020/03/president-trump-orders-divestiture-of-stayntouch-inc-by-shiji-group-of-china>; Alan Rappeport and Cecilia Kang, *U.S. Calls Broadcom’s Bid for Qualcomm a National Security Risk*, N.Y. Times (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/business/qualcomm-broadcom-cfius.html>.

⁶¹ 47 U.S.C. §§ 305, 310.

⁶² 47 U.S.C. §§ 761, 765.

⁶³ 47 U.S.C. § 606.

⁶⁴ See Jon Fingas, *Senator wants promises that net neutrality doesn't help terrorists*, Engadget (Aug. 16, 2015), <https://news.yahoo.com/2015-08-16-feinstein-wants-net-neutrality-anti-terrorism-promise.html>.

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