

Congress of the United States
Washington, DC 20510

April 23, 2024

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street, N.E.
Washington, D.C. 20554

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320

Dear Chairwoman Rosenworcel:

We write to express our opposition to your recently circulated draft order to reclassify broadband Internet access as a public utility. Your draft order, which would regulate the broadband industry with an even heavier hand than the 2015 Title II Order, circumvents the text of the Communications Act of 1934 and would inflict serious damage on the competitive U.S. broadband industry. Rather than proceeding on a course that would assuredly be reversed in court—as even President Obama’s Solicitor General and Acting Solicitor General have recognized¹—we ask that you end this proceeding and maintain the existing classification, which is faithful to the law as drafted by Congress.

As the Federal Communications Commission (FCC) has recognized throughout most of the Internet’s existence,² and the Supreme Court agreed in its only decision on point,³ broadband Internet access is an information service. The Telecommunications Act of 1996, which added the terms “information service” and “telecommunications service” to the Communications Act, is explicit and dispositive on this point. Broadband provides consumers with capabilities for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

¹ Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine* at 10, 13 (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

² See *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 ¶ 34 (2018) (“RIF Order”), *pet’ns for review denied in relevant part*, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019); *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), *vacated on other grounds*, Verizon v. FCC, 740 F.3d 623, 635–42 (D.C. Cir. 2014); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901 (2007); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005); *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (“Cable Modem Declaratory Ruling”); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998).

³ NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005) (upholding *Cable Modem Declaratory Ruling*).

available information via telecommunications.”⁴ Although broadband providers *make use of* “telecommunications,” they do not separately *offer* telecommunications to end users.⁵ And broadband Internet access services continue to be offered in the same manner as when the Supreme Court upheld the information-service classification in 2005: the only service broadband providers “offer to members of the public is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.”⁶ Indeed, the integration of numerous information-processing capabilities over time into providers’ broadband offerings—including Domain Name System (DNS), caching, distributed denial-of-service mitigation and other malware protections, routing and border gateway protocol security, and advanced network management practices—bolsters the conclusion that broadband is an information service.

Other portions of the Communications Act confirm this point. In section 230(f)(2), Congress defined the term “interactive computer service” to mean “any *information service . . .* that provides or enables computer access by multiple users to a computer server, *including specifically a service . . . that provides access to the Internet.*”⁷ In the very next section, Congress explicitly distinguished between a “telecommunications carrier” and a “person engaged in the business of providing an Internet access service.”⁸ And in section 223(e)(6), Congress provided that “[n]othing in this section shall be construed to treat interactive computer services,” which, as noted, include Internet access services, “as common carriers or telecommunications carriers.”⁹

Not only is broadband aligned with the statutory definition of “information service,” but the definition of “telecommunications service” is inapplicable on its face. A “telecommunications service” is a transmission service that does not involve any “change in the form or content” of information sent by the user.¹⁰ Yet broadband providers must reconfigure packets of data retrieved from websites to deliver it in a format usable by consumers. And broadband providers do not transmit such packets “between or among points *specified by the user.*”¹¹ Rather, broadband providers determine how to route Internet content to and from their subscribers, using sophisticated features including advanced DNS and caching. Internet communications are not prototypical telecommunications services—such as traditional telephone services—that merely connect one user to another.

Congress’s decision to treat broadband Internet access as an information service, rather than a telecommunications service, was a deliberate policy choice.¹² Congress recognized that “[t]he Internet and other interactive computer services have flourished, to the benefit of all

⁴ 47 U.S.C. § 153(24).

⁵ See *Brand X*, 545 U.S. at 998–99.

⁶ *Id.* at 999–1000.

⁷ 47 U.S.C. § 230(f)(2) (emphases added).

⁸ 47 U.S.C. § 231(b)(1) & (2).

⁹ 47 U.S.C. § 223(e)(6).

¹⁰ 47 U.S.C. §§ 153(50), (53).

¹¹ *Id.* § 153(50) (emphasis added).

¹² The Commission and the courts have consistently recognized that the “information service” and “telecommunications service” definitions are mutually exclusive. See, e.g., *RIF Order* ¶ 53 & n.194 (noting the Commission’s “long-standing” recognition of this point and citing examples of supporting precedent).

Americans, with a minimum of government regulation,” and accordingly decreed that it “is the policy of the United States . . . to promote the continued development of the internet and other interactive computer services . . . [and] 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.”¹³

Your proposal to reclassify broadband as a telecommunications service does the exact opposite. It would give the Commission largely unfettered power to impose (and allow states to impose) rate regulation, tariffing requirements, unbundling obligations, entry and exit regulation, and taxation of broadband—the antithesis of leaving broadband “unfettered” by regulation as the law requires. Congress has had many opportunities to give the FCC such power, yet it has never done so in any of its ample legislative enactments regarding broadband over the past two decades.¹⁴ Rather, legislators have repeatedly considered but ultimately rejected efforts to replace the longstanding light-touch framework with common carrier regulation.¹⁵ And for good reason: Title II will inflict significant damage on consumers by chilling investment and innovation.

Finally, recent jurisprudence from the Supreme Court confirms that the Commission has no power to impose Title II on the broadband industry. As the Commission’s record demonstrates, the question of whether broadband should be subject to public utility regulation is an issue of “vast economic and political significance,” such that the Commission must identify “clear authorization from Congress” to justify such a decision.¹⁶ Our review of the relevant statutory provisions leaves no doubt that, far from possessing the type of “clear” statutory authority required under Supreme Court precedent, the Commission lacks *any* authority to subject broadband services to common-carrier regulation.¹⁷

In short, your proposal to reclassify broadband under Title II conflicts with the text of the Communications Act. Moreover, binding Supreme Court precedent confirms that the only body that can authorize public utility regulation of broadband is Congress. We therefore urge you to reverse course and maintain the Commission’s classification of broadband as an information service.

Sincerely,

¹³ 47 U.S.C. §§ 230(a)(1) & (4), (b)(1)–(2).

¹⁴ *See, e.g.*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); Broadband Deployment Accuracy and Technological Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020); Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 133 Stat. 158 (2020); Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010).

¹⁵ *See, e.g.*, Net Neutrality and Broadband Justice Act of 2022, H.R. 8573, 117th Cong. § 2 (2022) (proposing to amend the Communications Act’s definition of telecommunications service to “include[] the offering of broadband internet access service”); Save the Internet Act of 2019, H.R. 1644, 116th Cong. § 2(b)–(c) (2019) (proposing to reinstate the FCC’s 2015 Title II Order, which classified broadband as a telecommunications service).

¹⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

¹⁷ *See U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (explaining in detail how the major questions doctrine precludes the FCC from imposing Title II regulation on broadband).



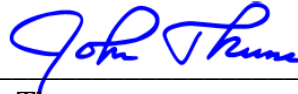
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Committee on Energy and Commerce



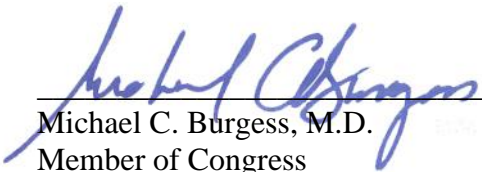
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Ranking Member
Committee on Commerce, Science, and
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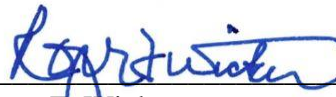
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Michael C. Burgess, M.D.
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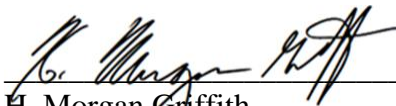
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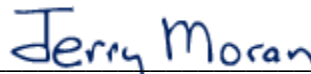
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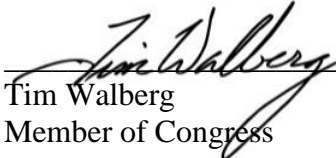
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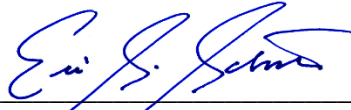
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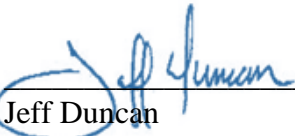
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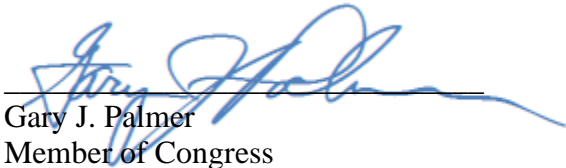
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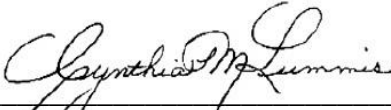
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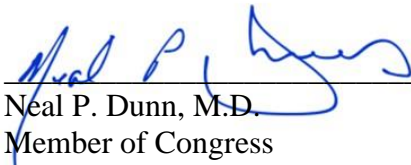
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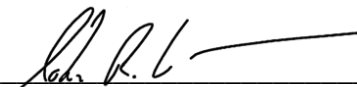
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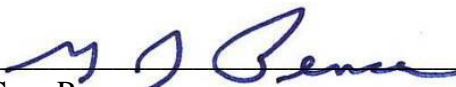
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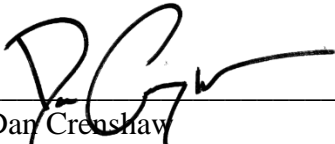
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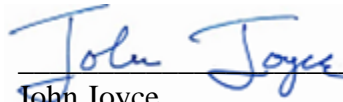
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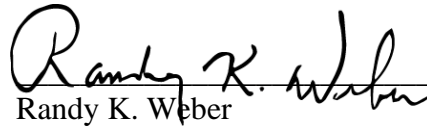
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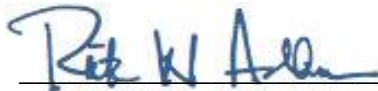
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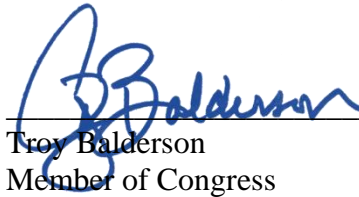
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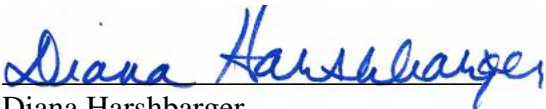
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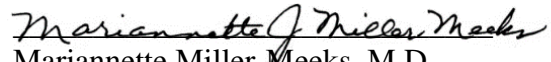
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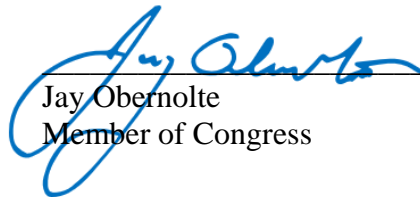
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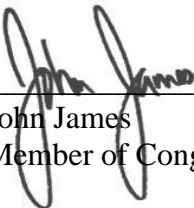
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