

April 1, 2024

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

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

Dear Ms. Dortch:

On Thursday, March 28, 2024, Yanni Chen and I of Free Press met with Commissioner Geoffrey Starks, and with Justin Faulb, his Chief of Staff and Legal Advisor for Wireline and National Security issues. The Free Press representatives raised several topics during the meeting, as detailed below. We chiefly recounted explanations and analyses in our December 2023 initial comments¹ and January 2024 reply comments² in the above-captioned docket, and highlighted as well some issues raised by other parties to the proceeding in the intervening months.

We reiterated that Free Press analysis of internet service providers' own financial data and statements to shareholders demonstrates conclusively that the Commission's classification of broadband has no impact on deployment or investment. No amount of misleading and false narratives pushed by broadband trade associations can change this patently obvious fact. We noted that Free Press would file by today, April 1, an *ex parte* submission further detailing ISPs' investment patterns and behaviors during the various periods when Title II was restored in 2015, repealed by a vote in 2017, then promised anew by this administration and in this proceeding.³

As Free Press detailed in that *ex parte* and likewise described in our initial comments in this docket, deployment of next-generation services accelerated in both rural and urban areas following the FCC's 2015 vote to reclassify, and actually declined after the Pai FCC's 2017 repeal – though the classification decisions did not cause any such decreases or increases. In our filings, we documented numerous statements from ISPs to investors, revealing that the natural and cyclical changes in the pace of their deployment and the amount of their investment had absolutely nothing to do with FCC policy – either prior to the FCC's 2015 vote, after it, or after the Pai repeal. We also noted how ISPs' investment plans have not changed following the FCC's announcement of its proposal to restore Title II and the open internet rules now.

¹ Comments of Free Press, WC Docket No. 23-320 (filed Dec. 14, 2023) (“Free Press Comments”).

² Reply Comments of Free Press, WC Docket No. 23-320 (filed Jan. 17, 2024).

³ Free Press subsequently submitted that *ex parte* filing on equal date with this notification.

Next, we summarized Free Press’s and other commenters’ definitive explanations of the propriety of a Title II telecommunications service classification for modern broadband internet access service (“BIAS”). As Free Press has explained in painstaking detail – in this docket, and in the Commission’s prior proceedings on this same issue in 2010, 2015 and 2017 – broadband perfectly fits the legal definition of a telecommunications service that Congress crafted in its forward-looking overhaul of the Communications Act in 1996. Broadband is a service offered to the public to carry their data between the points of their choosing without altering that data.

Our initial comments dealt extensively with the DNS and caching arguments⁴ raised by ISPs and their trade associations, in their unavailing claims that these functionalities make (“BIAS”) offerings that internet users rightly perceive as telecommunications services into information services instead. We also discussed with Commissioner Starks and Mr. Faulb questions about the Commission’s authority to make this classification decision, explaining that neither the “major questions doctrine” nor current Supreme Court litigation regarding *Chevron* deference affect the Commission’s proper legal interpretation of its authorizing statute.

In any event, as Commissioner Starks rightly noted at the outset of this proceeding, there is a long history of courts deferring to the agency on this exact same issue – and upholding not only deference to the expert agency, but the telecom service classification the agency has at times adopted.⁵ We agreed with Commissioner Starks’ own analysis, which explained that “the Supreme Court also said that Congress very obviously gave [the FCC] the authority to decide the question of what counts as a telecommunications service . . . even after [the Court] decided a trilogy of cases viewed as the genesis of what we now call the major questions doctrine.”⁶

Free Press then touched on three other legal questions related to the definition of BIAS, its classification as a Title II telecommunications service, and impacts of that decision on other federal and state laws and regulations.

First, we expressed our understanding of the motivations for those suggesting that the Commission change its proposed definition of BIAS by removing the word “retail” from Section 8.2(a)(1) in the 2023 NPRM’s proposed rules; but we also noted that the definition has been the same since at least the 2010 *Open Internet Order*. As we explained, even in the absence of such a change, the Commission will retain authority under the proposed general conduct standard and Sections 201 and 202 of the Communications Act to investigate and prohibit unjust, unreasonable, and unreasonably discriminatory behavior impacting internet users.

⁴ See, e.g., Free Press Comments at 24–31; see also *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking, FCC 23-83, ¶¶ 71–75 (rel. Oct. 20, 2023) (“2023 NPRM”) (correctly proposing to classify BIAS as a telecom service, and finding that DNS and caching do not change that conclusion but can fit within the telecommunications system management exception to the definition of “information service”).

⁵ 2023 NPRM, Statement of Commissioner Geoffrey Starks (“Over the more than 20 years of courts reviewing this exact question, every single judge to take a position on the correct classification of broadband has concluded that it very obviously is a common carrier service.”).

⁶ *Id.*

On the topic of forbearance, Free Press expressed our general agreement with the forbearance decisions made in the 2015 *Open Internet Order* and proposed in the NPRM in the current docket. That includes our support for the proposal to forbear from Sections 203 and 205, and from the bulk of Section 251 of the Act, and our strong support for the proposal to forbear for now as well from Section 254(d).⁷

And with regard to preemption, Free Press reiterated its support for the Commission’s proposal to proceed incrementally on any such questions,⁸ which the NPRM proposed as a potential approach.⁹ Under such a careful incremental approach, the Commission should not conclude categorically that state laws would conflict with any proposed federal protections. We noted that compliance with both federal and state laws would be possible; and that harmonious state laws and regulatory regimes would not serve as an obstacle to fulfillment of the Commission’s objectives and the protection of internet users. For these reasons, the Commission should not conclude that federal protections must form a “ceiling” for these protections.¹⁰

Finally, Free Press made reference to certain aspects of the proposed open internet rules themselves, and to the potential for helpful clarifications of the final rules adopted in any forthcoming order in this docket.¹¹ We discussed briefly the “no-throttling” rule proposed in the NPRM, that same Notice’s reasonable network management definition, and its descriptions of the Commission’s authority under a Title II framework over non-BIAS data services and over interconnection or traffic exchange agreements. In each case, we suggested that the Commission further clarify what its proposed bright-line rules and general conduct standard already make clear: broadband providers may not use these service definitions, exemptions, or other unreasonably discriminatory practices and conduct to evade the protections afforded to internet users by the Commission’s proposed classification of BIAS and its proposed open internet rules.

Respectfully submitted,

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⁷ See Free Press Comments at 66–67 (quoting 2023 NPRM ¶ 105, which proposed “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”).

⁸ See Free Press Comments at 70.

⁹ See 2023 NPRM ¶ 96.

¹⁰ *Id.* ¶ 97.

¹¹ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Matthew F. Wood, Free Press, WC Docket No. 23-320 (filed Mar. 29, 2024). This letter, while filed the day after this meeting with Commissioner Starks and Mr. Faulb, provides additional detail on Free Press’s views and analysis on these topics.