Comments of Jennifer Huddleston, Technology Policy Research Follow, in response to Notice of Proposed Rulemaking on Safeguarding and Securing the Open Internet

I appreciate the opportunity to provide comments related to the Federal Communications Commission (FCC)'s Notice of Proposed Rulemaking on Safeguarding and Securing the Open Internet. This comment does not represent the views of any particular party or special interest group but is intended to assist regulators in considering the impact that a return of such regulation would have on innovation, the underlying concerns about the agency's authority to engage in such rulemaking without appropriate delegation from Congress, and other worries.

In that regard, I seek to emphasize two key points:

1. The Repeal of Title II shows that this rulemaking is not required, and that US internet infrastructure is strong and innovative under a light touch approach to regulation.
2. The Title II classification of the internet, colloquially known as "net neutrality," is likely to fall under the major questions doctrine and, therefore, action in the absence of a delegation by Congress is outside of the agency's scope.

The Internet's Robustness Following the Restoring Internet Freedom Order Shows a Light Touch Approach to Regulation Supports Innovation and Investment that Leads to Robust Internet Infrastructure

The internet infrastructure in the US remains robust with significant investments in both innovation and deployment free from the restrictions of Title II regulations. In fact, the internet has flourished, even when faced with the unprecedented stress test of COVID-19 that caused a sudden uptick in usage. This is in large part due to the light-touch regulatory approach that allows and encourages adaptation and responses to consumers' needs and demands.

In the United States, the internet service providers not only kept up with extreme demand, but they did not have to throttle services like Netflix in the process — unlike more heavily regulated internet infrastructure.[1] Investment in internet infrastructure remains high, and we continue to see innovation that furthers the robustness and security of this important tool. Given this result, there has not been a public outcry to reinstate net neutrality. While there may be anecdotal complaints about an individual incident or customer service experience, the public is not more generally expressing dissatisfaction with the quality, options, or cost of services available to them. If the regulation was to negatively impact the options available via government mandates that could

[1] Hadas Gold, "Netflix and YouTube are slowing down in Europe to keep the internet from breaking," *CNN,* March 20, 2020, https://www.cnn.com/2020/03/19/tech/netflix-internet-overload-eu/index.html.

eliminate certain options or otherwise diminish the existing internet service available, the agency may find itself facing public displeasure for meddling with a system in which the market was working.

Not only did the internet survive its greatest challenge, the doomsday scenarios of the internet without net neutrality did not come to fruition. Despite "net neutrality" advocates claims, the internet did not load one word at a time and companies did not charge piecemeal prices for its access; minority voices, feminists, and LGBTQ communities were not suppressed or silenced, as feared.[2]

Enacting Title II Classification Is a Major Question and The Agency Lacks Proper Authority to Enact It

In the 2022 *West Virginia v. Environmental Protection Agency* decision, the Supreme Court held that Congress did not grant the EPA authority to use generation-shifting measures to cap greenhouse gas emissions as it did in its Clean Power Plan, as such action would fall under the "major questions doctrine" and therefore require more specific congressional approval. As the Court noted, such actions require "something more than a merely plausible textual basis for the [reason] agency action is necessary."[3] It is likely that the action by the FCC to reinstate net neutrality and reclassify internet service providers under Title II regulation would face similar challenges.

In fact, in his dissent on the challenge to the initial attempts to instate net neutrality under the 2015 Open Internet Order, then Judge Brett Kavanaugh noted that Congress intends to make such a major policy decision, and they are not left to an agency in a broad general delegation.[4] This dissent pre-dated recent precedent that invoked the major questions doctrine regarding the EPA's authority but would support that the courts are at least likely to question a spontaneous action by the FCC on Title II classification without a congressional delegation. Additionally, the agency is unlikely to be able to merely rely on statutory ambiguity and broad delegation given not only the precedent in *West Virginia v. Environmental Protection Agency*, but also the current challenge to *Chevron* deference before the Supreme Court.[5]

As the Free State Foundation's Randolph May wrote, "Until such time as Congress clearly grants the FCC the authority to adopt new net neutrality regulations, the Commission would be wise to focus its time and resources on actions — such as, for example, overseeing the disbursement of billions of dollars in subsidies to promote broadband deployment and adoption — that can make

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[2] Donald Kimball, "As Biden Tries to Revive Net Neutrality, Remember Proponents' Bogus Claims", *National Review,* October 10, 2023, https://www.nationalreview.com/2023/10/as-biden-tries-to-revive-net-neutrality-remember-proponents-bogus-claims/.

[3] West Virginia v. Environmental Protection Agency, 597 U.S. (2022).

[4] U.S Telecom Association v. Federal Communications Commission, 855 F.3d 381 (D.C. Cir. 2017).

[5] Anastasia P. Boden, Thomas A. Berry, and Isaiah McKinney, "*Loper Bright Enterprises v. Raimondo",* Cato Institute Legal Brief, July 21, 2023, https://www.cato.org/legal-briefs/loper-bright-enterprises-v-raimondo-0.

a meaningful difference in closing remaining digital divides, while at the same time surviving judicial review."[6]

Conclusion

Reinstating a restrictive regulatory regime under Title II would have significant consequences that could undermine innovation, investment in strong internet infrastructure, and even raise free speech concerns.[7] The continued innovation and investment of internet infrastructure following the removal of the previous regulations shows that such regulations are unnecessary. Furthermore, the FCC would be likely to face a significant challenge to its authority to enact such regulations were it to engage in that action without clear congressional delegation on the matter.

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[6] Randolph May, "There's Little Question Net Neutrality Is a Major Question", *Notice & Comment* (blog), *Yale Journal on Regulation*, September 27, 2023, https://www.yalejreg.com/nc/theres-little-question-net-neutrality-is-a-major-question-by-randolph-may/.

[7] Brent Skorup, "The First Amendment, ISPs, and Net Neutrality", *Plain Text*, September 3, 2015, https://readplaintext.com/the-first-amendment-isps-and-net-neutrality-7bb5ec56b795.