Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Data Caps in Consumer Broadband Plans	)	WC Docket No. 23-199
	)	

Comments of TechFreedom

James E. Dunstan
Senior Counsel
TechFreedom
jdunstan@techfreedom.org
1500 K Street NW
Floor 2
Washington, DC 20005

November 14, 2024

Summary

The issuance of a Notice of Inquiry proposing vast new regulations on BIAS data usage just a few weeks before control of the Commission changes is the height of bad governance. While the courts wrestle with the FCC's statutory authority to regulate Internet access, the Commission lurches forward as a zombie, hoping to gobble up a few more brains before it is dispatched. The current attempt to regulate data usage caps is a misguided proceeding that could negatively impact broadband deployment, adoption, and prices.

The FCC's attempt to use Section 257 to regulate broadband data caps is weak and unconvincing. Section 257 is primarily a reporting statute aimed at identifying market barriers, not granting new regulatory powers. Prior Commissions have recognized it as such, and more importantly, have concluded that Congress never intended that the Commission could invoke it to micromanage Internet access. The current NOI's grasp for new statutory authority to regulate BIAS is just the latest "voyage of discovery" for statutory authority that simply does not exist.

Can we imagine any other utility where the government would require the utility provider to allow infinite consumption of the regulated service for a single, flat price? A situation where a low-income person living in a 700 square foot apartment would be charged the same electric bill as the millionaire with a 7,000 square foot mansion across town? Yet this the world that would result if the Data Caps NOI forces BIAS providers to offer only unlimited data plans. Gone will be MVNOs and cheap BIAS packages that offer the chance for low-income users to finally get Internet access. Instead, the poor and the old will be forced

to subsidize the young and rich, whose main use of the Internet is for entertainment purposes. And this is a "civil right" that we are supposed to defend?

The Commission should discontinue this proceeding immediately.

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Data Caps in Consumer Broadband Plans	)	WC Docket No. 23-199
	)	

Comments of TechFreedom

TechFreedom, pursuant to Sections 1.415 and 1.419 of the Commission's rules,[1] hereby files these Comments in response to the Notice of Inquiry issued by the Commission in the above-referenced proceeding on October 15, 2024.[2]

I. About TechFreedom

TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

---

[1] 47 C.F.R. §§ 1.415 & 1.419.

[2] Data Caps in Consumer Broadband Plans, Notice of Inquiry (Data Caps NOI), FCC 24-106, released October 15, 2024. The Data Caps NOI set the comment date as November 14, 2024, and the reply comment date for December 2, 2024. These Comments are timely filed.

II. Why the Hurry (Again)?

As noted in our comments in the AI Political Advertising proceeding,[3] the FCC appears to be rushing into yet another proceeding at the tail end of an administration, spooling up the communications bar to comment on whether the FCC should step in and either prohibit outright,[4] or otherwise regulate, data limits and data charges for BIAS service.[5] The FCC is thus engaging in a process that cannot possibly be completed before a new president is inaugurated on January 20, 2025 (just 60 days after the initial comments are filed in this proceeding, which itself is only at the Notice of Inquiry stage). Why?

A. The FCC's Fundamental Statutory Authority in this Area is Under Review in the Courts

The FCC issued the Data Caps NOI while courts are considering the fundamental statutory authority of the FCC to regulate BIAS providers. Why? We await the decision of the Eighth Circuit[6] on the extent of the FCC's powers under Section 60506 of the Infrastructure

---

[3] TechFreedom, Comments on Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements (Sept. 19, 2024), MB Docket No. 24-211, https://techfreedom.org/wp-content/uploads/2024/09/TechFreedom-FCC-AI-Comments.pdf.

[4] Data Caps NOI, ¶ 2 ("In light of the critical importance of broadband Internet access service, we seek comment to better understand the current state of data caps and whether data caps cause harm to competition or consumers' ability to access broadband Internet services.").

[5] While the FCC captions the proceeding "data caps," in fact, we are unaware of instances where a user exceeding the data allowance is totally "capped" or otherwise kicked off the network for the remainder of the month. Rather, most, if not all, BIAS provider contracts which do not provide unlimited data charge a fee for exceeding the data limit. While we will continue to use the FCC's term "data caps," the far better term would be "usage-based pricing," which better reflects the market realities of BIAS plans.

[6] Minnesota Telecom Alliance v. Fed. Commc'ns Comm'n, No. 24-1179 (8th Cir.). That case is fully briefed, and oral argument was held on September 25, 2024.

Act,[7] one of the claimed bases of statutory authority in the Data Caps NOI.[8] We await the decision from the Sixth Circuit on whether the classification of BIAS as between Title I and Title II is a Major Question which only Congress may answer; that court has already stayed the FCC's latest Title II order,[9] on August 1, 2024, finding that the petitioners are likely to succeed on the merits of the Major Question claim.[10] If the court rules for the petitioners at the merits stage, which seems likely, and the Title II classification is reversed, the ability of the FCC to move forward with regulating BIAS data caps will be highly doubtful, even if the next FCC were inclined to try—which is unlikely with the impending change of administrations.[11]

Obviously, the wheels of government do not grind to a halt during a presidential administration change. But neither should the Commission undertake proceedings proposing to undertake sweeping new regulations that might implicate major questions. As Cathy McMorris Rodgers, Chair of the House Energy and Commerce Committee, wrote to Chair Rosenworcel on November 6, 2024: "As a traditional part of the peaceful transfer of power, the FCC should immediately stop work on any partisan or controversial item under

---

[7] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102, 135 Stat. 429, 1184 (2021) (Infrastructure Act); 47 U.S.C. § 1752.

[8] Data Caps NOI, ¶ 46.

[9] Safeguarding and Securing the Open Internet, 89 Fed. Reg. 45404 (May 22, 2024).

[10] In re: MCP No. 185 Open Internet Rule (FCC 24-52), No. 24-7000 (6th Cir. Aug. 1, 2024) (order staying final rule), https://storage.courtlistener.com/recap/gov.uscourts.ca6.151661/gov.uscourts.ca6.151661.71.2.pdf (hereinafter Open Internet Stay Order).

[11] *See* Data Caps NOI, Dissenting Statement of Comm'r Carr, https://docs.fcc.gov/public/attachments/FCC-24-106A3.pdf ("At bottom, then, I dissent from today's NOI because I cannot support the Biden-Harris Administration's inexorable march towards rate regulation and because the FCC plainly does not have the legal authority to do so.").

consideration, consistent with applicable law and regulation."[12] Yet the Commission seeks comment after the election, with no time remaining to propose rules on data caps, let alone actually issue those rules before January 20, 2025. So, what are we doing here?

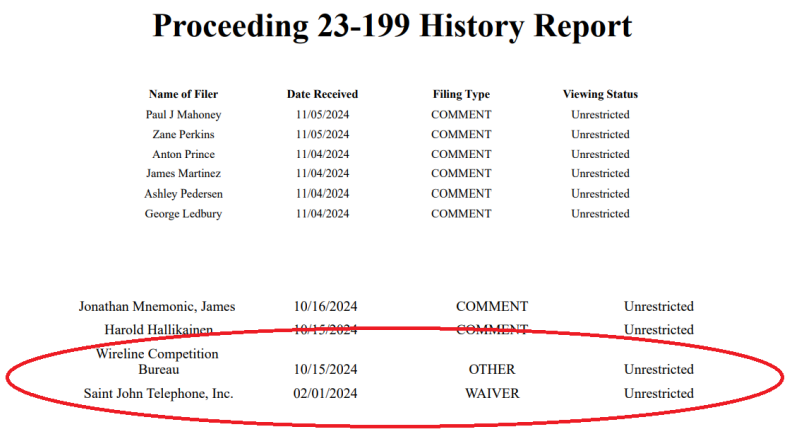
B. The Creation and Status of This Proceeding Raise Significant Questions as to Why the Data Caps NOI Was Issued Now

This is also a case of "wait, then hurry up." According to ECFS, this docket (23-199) was created on June 14, 2023.[13] Yet we can find no Public Notice indicating its creation. The docket history also fails to indicate that the FCC provided any public notice that it was creating this docket. Indeed, prior to the issuance of the Data Caps NOI, there is only one entry in the docket, and that appears to be a misfiled request for a waiver that was intended to be filed in IB Docket 23-119.

---

[12] Letter from Cathy McMorris Rodgers, Chair, H. Energy & Commerce Comm., to Jessica Rosenworcel, Chairwoman, Fed. Commc'ns, Comm'n (Nov. 6, 2024), https://d1dth6e84htgma.cloudfront.net/11_06_24_Letter_to_FCC_53b5ed67d6.pdf. Indeed, the McMorris Rodgers letter did not ask the FCC to halt all operations or proceedings. "There are many bipartisan, consensus items that the FCC could pursue to fulfill its mission before the end of your tenure. I urge you to focus your attention on these matters." *Id.*

[13] This creation date is approximately three weeks following the nomination of Anna Gomez to fill the vacant Democratic seat on the Commission; that vacancy had hamstrung the ability of Chair Rosenworcel to take on significant regulatory issues. *See Biden Announces Anna Gomez as Nominee for Fifth FCC Commissioner*, BROADBAND BREAKFAST (May 22, 2023), https://matsui.house.gov/media/in-the-news/broadband-breakfast-biden-announces-anna-gomez-nominee-fifth-fcc-commissioner.



Proceeding 23-199 History Report

Name of Filer	Date Received	Filing Type	Viewing Status
Paul J Mahoney	11/05/2024	COMMENT	Unrestricted
Zane Perkins	11/05/2024	COMMENT	Unrestricted
Anton Prince	11/04/2024	COMMENT	Unrestricted
James Martinez	11/04/2024	COMMENT	Unrestricted
Ashley Pedersen	11/04/2024	COMMENT	Unrestricted
George Ledbury	11/04/2024	COMMENT	Unrestricted
Jonathan Mnemonic, James	10/16/2024	COMMENT	Unrestricted
Harold Hallikainen	10/15/2024	COMMENT	Unrestricted
Wireline Competition Bureau	10/15/2024	OTHER	Unrestricted
Saint John Telephone, Inc.	02/01/2024	WAIVER	Unrestricted

Why was this docket created in June 2023, never publicized, and then held empty for sixteen months? Contrast this with what happened in other contemporaneously created proceedings. Docket 23-203, the All-In Pricing proceeding, was created on June 16, 2023, with an NPRM issued four days later, on June 20, 2023.[14] Docket 23-232, Advancing Understanding of Non-Federal Spectrum Usage was created on July 11, 2023, with a Public Notice released July 13, 2023 informing the public of the creation of the docket.[15] A Notice of Inquiry was issued on August 4, 2023.[16]

In contrast, this proceeding apparently was created when the FCC Chair believed she would have the votes to move forward, lurked as a ghost in the shadows for sixteen months, then sprung forth as an early Halloween gift when the Data Caps NOI was dropped

---

[14] *See* All-In Pricing for Cable and Satellite Television Service, NOI, MB Docket No. 23-202 (June 20, 2023), https://docs.fcc.gov/public/attachments/FCC-23-52A1.pdf.

[15] *See* Daij Media, LLC, Memorandum Opinion & Order, DA 240601 (June 24, 2024), https://docs.fcc.gov/public/attachments/DA-23-601A1.pdf.

[16] *See* Advancing Understand of Non-Federal Spectrum Usage, NOI, WT Docket NO. 23-232 (Aug. 4, 2023), https://docs.fcc.gov/public/attachments/FCC-23-63A1.pdf.

on October 15, with 94% of the current FCC's "term" over, and with only 95 days until a new administration takes over.

III. This Proceeding Cannot Be Resolved Until the Courts Better Define the Commission's Statutory Authority.

The Data Caps NOI spends a scant four paragraphs (two of which consist of single sentences), and 432 words on the legal authority of the Commission to regulate data caps.[17] This was no doubt intentional, given how tenuous the Commission's classification of BIAS as a Title II common carrier service appears to be. It truly is ironic that, on the one hand, the current Commission has fought so hard to treat BIAS as a utility, and on the other hand proposes to ban or heavily regulate data usage plans which provide affordable connectivity to many. Can we imagine any other utility where the government would require the utility provider to allow infinite consumption of the regulated service for a single, flat price? Could we imagine such pricing schemes for water, electricity, or natural gas? Would we tolerate a situation where a low-income person living in a 700 square foot apartment would be charged the same electric bill as the millionaire with a 7,000 square foot mansion across town? Or the same natural gas bill for the low-income person in that same 700 square foot apartment who sets their thermostat to 67 degrees to conserve gas, while the millionaire sets theirs at 74 degrees to keep their 7,000 square foot mansion warm and toasty? The inherent hypocrisy of the current Commission's approach to BIAS is revealed by this proceeding.

[17] Data Caps NOI ¶¶ 45-48 (paragraphs 47 and 48 are each one sentence long).

A. The FCC Lacks the Statutory Authority to Impose Utility-Style Regulation on BIAS

As mentioned above, the key statutory hooks for imposing regulations on data usage are under challenge. In staying the FCC's *Safeguarding and Securing the Open Internet*, the Sixth Circuit ruled that "petitioners are likely to succeed on the merits because the final rule implicates a major question, and the Commission has failed to satisfy the high bar for imposing such regulations."[18] Further, the court noted that the FCC's "ancillary authority" goes only so far when the underlying regulatory scheme goes beyond what Congress provided:

> The Commission separately claims clear congressional delegation of authority to classify broadband as a common carrier. It observes that it may 'prescribe such rules and regulations as may be necessary in the public interest' to effectuate Title II and other sections. 47 U.S.C. § 201(b); see id. §§ 154(i), 303(r). That is true. But such general or 'ancillary' authority to fill gaps in Congress's regulatory scheme does not suffice to show that Congress clearly delegated authority to resolve a major question like this one.[19]

If whether to classify BIAS as a common carrier service is a Major Question, so too would be the derivate question of whether to regulate data usage plans offered for BIAS services; both questions must be answered by Congress, not the FCC. Given that nearly half of subscribers to Affordable Connectivity Plans (ACP) were subject to usage limits,[20] and perhaps as many

---

[18] Open Internet Stay Order, *supra* note 10, at 6.

[19] *Id.* at 9.

[20] Data Caps NOI ¶ 13 ("approximately 48.9% of ACP subscribers were on plans that had some form of data cap.").

of 70 percent of subscribers to mobile data plans face some sort of data caps, how could data caps regulations not be a major question?[21]

Similarly, the Commission's ability to leverage the mere 304 words of Section 60506—buried in a 1039-page appropriation bill—to create sweeping new powers to regulate BIAS, is under fire.[22] In Section 60506, the FCC sees not a limited mandate from Congress to guard against disparate treatment (intentional withholding of Internet access service), but rather a massive expansion of authority to police the Internet to ensure that all have equal access to BIAS (merely disparate impact) and, thereby to regulate every aspect of BIAS offerings.[23]

The FCC *might* win one or both of these court challenges. But that seems unlikely after recent Supreme Court decisions barring agencies from embarking on "voyage[s] of discovery" to create new regulatory authority.[24] Regardless, the mere fact the fundamental

---

[21] *See* INT'L CTR. FOR L. & ECON., THE ECONOMICS OF BROADBAND DATA CAPS AND USAGE-BASED PRICING 8 (Nov. 6, 2024), https://www.fcc.gov/ecfs/document/1106029819855/1 (hereinafter ICLE Comments).

[22] *See supra* note 6.

[23] *See, e.g.*, Brief for TechFreedom as Amici Curiae Supporting Petitioners, Minn. Telecom Alliance v. Fed. Commc'ns Comm'n at 3 (8th Cir. No. 24-1179), https://techfreedom.org/wp-content/uploads/2024/04/TechFreedom-Digital-Discrimination-Amicus-Brief.pdf ("Its new rule governs not only broadband providers, but all 'entities that otherwise affect consumer access to broadband.' Conceivably this means any entity that happens to provide broadband to its customers, employees, or tenants. And the FCC's rule governs not just the price or quality of broadband service, but installation, customer service, marketing, advertising, and more. Under the ordinary standards of statutory construction, Section 60506 does not grant the FCC the authority it seeks. But the FCC's power grab is not ordinary; the usual standards do not apply. As we will explain, the FCC's rule triggers, but cannot satisfy, the major questions rule.") (citations omitted).

[24] Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 328 (2014). *See also* West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022); Loper Bright Enterp. v. Raimondo, 144 S. Ct. 2244 (2024).

metes and bounds of the FCC's powers over broadband are being hashed out in the courts calls for a dose of regulatory humility.[25]

B. The Attempt to Claim Statutory Authority Under Section 257 is a "Wafer-Thin Reed"

With its purported classification authority and Section 60506 in limbo, the Commission now fishes for a different statutory authority under which it can regulate the data plans of BIAS providers. Its new-found statutory section of choice is Section 257.[26] Enacted as part of the 1996 Telecommunication Act, in Section 257 Congress directed the FCC to begin a proceeding to "identify" "market entry barriers" and use its "authority under

---

[25] One of the hallmarks of our comments over the years, to Commissions controlled by either party, is the need for regulatory humility: understanding that agencies have no powers beyond those granted by Congress. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("No matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.") (citations omitted). *See also* Ajit Pai, Chairman, Fed. Commc'ns Comm'n, Remarks at FCC Forum on Artificial Intelligence and Machine Learning 1 (Nov. 30, 2018), https://docs.fcc.gov/public/attachments/DOC-355344A1.pdf ("And when dealing with emerging technologies, I believe that one of the foundational principles for government should be regulatory humility."); TechFreedom, Comments on Mitigation of Orbital Debris at 2 (June 27, 2024), IB Docket 18-313, https://techfreedom.org/wp-content/uploads/2024/06/TechFreedom-Orbital-Debris-Refresh-Comments-6-27-24.pdf ("Once upon a time, the Commission exercised a degree of humility about regulating outer space activities"). *See also* Press Release, TechFreedom, FCC Has No Authority to Issue Section 230 Rules (Oct. 15, 2020), https://techfreedom.org/fcc-has-no-authority-to-issue-section-230-rules/ ("The Wheeler FCC lost repeatedly in court because Wheeler was all too eager to attempt anything his general counsel told him the agency *might* get away with. Pai's legacy could have been finally breaking the FCC of that habit. Pai fought the notion of regulating Internet services as common carriers, yet now he's embracing NTIA's startling claims that the FCC can use Section 201(b), the heart of Title II, to regulate even non-common carrier services. When Democrats use this argument for their own ends, Republicans will bitterly regret that Pai embraced this dangerously broad conception of the FCC's authority.").

[26] Data Caps NOI, ¶ 257 ("Specifically, we seek comment on whether the Commission's authority to address market entry barriers related to telecommunications and information services in section 257 of the Communications Act of 1934, as amended, (Act) provides sufficient authority to take potential actions to address data caps.").

this chapter" to "eliminat[e]" such barriers "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."[27] The FCC was directed to report its findings to Congress every three years.[28] Although the reporting provision in Section 257(c) was eliminated by Congress in 2018, and moved to new Section 163,[29] this did not change the fact that, at its core, Section 257 is a reporting statute, not the delegation of new substantive authority to regulate.

Presumably, the Commission hopes that, even if it loses in both the Sixth and Eighth Circuits, the mention of "information services" Section 257 (part of Title II) would justify applying Title II regulatory powers to broadband data caps. But as the Supreme Court recently warned, plucking a long-extant statutory provision and imbuing it with new statutory authority, rests on a "wafer-thin reed."[30] The Sixth Circuit's stay order made clear: "The more an agency asks of a statute, in short, the more it must show in the statute to support its rule."[31] Judge Sutton's concurrence is even more pointed: "Only a two-faced Congress would bolster deregulation as the best means to promote the internet economy and then treat broadband providers as heavily regulated common carriers."[32] The Commission's new-found statutory wizardry in Section 257 is belied both in how the FCC

---

[27] 47 U.S.C. § 257(a).

[28] 47 U.S.C. § 257(c).

[29] *See* Data Caps NOI, n. 89.

[30] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (2021) ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium. Section 361(a) is a wafer-thin reed on which to rest such sweeping power.").

[31] Open Internet Stay Order, *supra* note 10, at 6.

[32] *Id.* at 12 (Sutton, J., concurring).

has traditionally interpreted its congressional mandate under Section 257, and the absence of its prior use as a substantive grant of authority for anything more than reporting and disclosure requirements.

In its original report to Congress in 1997,[33] issued under Democratic FCC Chair Reed Hundt, the Commission said this about Section 257: "Our actions demonstrate our intention to comply fully with the congressional directive of Section 257 and to advance the clear *pro-competitive and deregulatory goals* of the 1996 Act."[34] That report went on to make clear that Congress never intended for the Commission to use Section 257 as an excuse to micromanage telecommunications or information service offerings in America:

> First, with respect to "vigorous economic competition," we have defined the term "market entry barrier" in a manner that facilitates entry by small businesses yet avoids unwarranted regulatory intervention that could distort a competitive marketplace. By including only those impediments that significantly distort market operations and harm consumer welfare within the definition of "market entry barriers," the Commission has recognized that economically unjustified intervention actually would thwart the policy goal of promoting vigorous competition.[35]

Indeed, according to the 1997 Report, regulatory intervention triggered by review under Section 257, and supported by *other* substantive regulatory authority, would be justified only in the event of a clear market disruption.

> From a public policy perspective, and consistent with the "pro-competitive, deregulatory national policy framework" established by Congress in the 1996 Act, we do not regard all impediments or obstacles to small business entry to necessarily be "market entry barriers" that require governmental intervention under Section 257. Instead, we believe that the term "market entry barrier" as used in Section 257(a) is primarily intended to encompass those impediments

---

[33] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, FCC 97-164 (May 8, 1997), https://transition.fcc.gov/Bureaus/OGC/Orders/1997/fcc97164.txt.

[34] *Id.* ¶ 2 (emphasis added).

[35] *Id.* ¶ 3 (footnote omitted).

> to entry within the Commission's jurisdiction that justify regulatory intervention because they so significantly distort the operation of the market and harm consumer welfare.[36]

In short, the Commission closest in time to when Congress passed the 1996 Telecommunications Act saw its powers under Section 257 to be limited by traditional economic thinking, and to be exercised only in cases of significant market distortion. Contrast that approach to Section 257 with the Data Caps NOI, which never references any economic analysis (or even the FCC's own Office of Economics and Analytics),[37] and merely seizes on the placement of the term "information services" in Section 257 to grasp for vast regulatory powers.

Moreover, the FCC has never attempted to use Section 257 as the primary basis for substantive regulations on information service providers. In the nearly twenty years between enactment in 1996 and the 2015 Open Internet Order,[38] we could find no instances where the FCC relied on Section 257 as the primary statutory authority to undertake any substantive regulations on information services. The Data Caps NOI cites to the 2018 *RIFO* Order as justification for using Section 257 here.[39] TechFreedom has criticized that portion of the *RIFO* Order,[40] and even the *Mozilla* court agreed that the FCC's BIAS transparency rule

---

[36] *Id.* ¶ 16 (footnote omitted).

[37] *Economics & Analytics*, https://www.fcc.gov/economics-and-analytics (last visited Nov. 14, 2024).

[38] Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015).

[39] Data Caps NOI ¶ 45 (citing RIF Order, 33 FCC Rcd at 445-47, ¶¶ 232-33 (quoting 47 U.S.C. § 257(a))).

[40] TechFreedom, Comments on NTIA Petition for Rulemaking to Clarify Section 230, RM-11862 (Sept. 2, 2020), https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-%E2%80%93-9.2.2020.pdf.

(requiring disclosure of BIAS provider practices) was merely consistent with the reporting requirements of Section 257.[41] And indeed, in both the *OIO* and *RIFO*, Section 257 was used as justification only for requiring BIAS providers to disclose their practices, nothing close to the level of substantive regulation suggested in the Data Caps NOI.[42]

IV. Prohibiting or Restricting Data Caps Would Severely Harm the Internet Ecosystem

The message delivered in the Data Caps NOI is clear: "In light of the critical importance of broadband Internet access service, we seek comment to better understand the current state of data caps and whether *data caps cause harm to competition or consumers' ability to access broadband Internet services*."[43] The stage is set, as Commissioner Carr warns: "[W]ith today's Notice of Inquiry, the FCC itself starts down the path of directly regulating rates. It does so by seeking comment on controlling the price of broadband capacity ('data caps'). Prohibiting customers from choosing to purchase plans with data caps—which are

---

[41] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 48-49 (D.C. Cir. 2019) ("Section 257(a) simply requires the FCC to consider 'market entry barriers for entrepreneurs and other small businesses.' 47 U.S.C. § 257(a). The disclosure requirements in the transparency rule are in service of this obligation. The Commission found that the elements of the transparency rule in the 2018 Order will 'keep entrepreneurs and other small businesses effectively informed of [broadband provider] practices so that they can develop, market, and maintain Internet offerings.' In fact, the Order takes care to describe the specific requirements of the rule to 'ensure that consumers, entrepreneurs, and other small businesses receive sufficient information to make [the] rule effective.'") (internal citations omitted).

[42] The only other instance we can find of an FCC order citing to Section 257 as statutory authority was in the FCC's 2023 scam texting order. *See* Targeting and Eliminating Unlawful Text Messages Report and Order and Further Notice of Proposed Rulemaking, 38 FCC Rcd 2744 (2023). Yet that reference to Section 257 appears only in the Regulatory Flexibility Analysis, ¶ 3. In the substantive order itself, the FCC found statutory authority under the TCPA and Truth in Caller ID Acts. *Id.* ¶¶ 38-39.

[43] Data Caps NOI ¶ 2 (emphasis added).

more affordable than unlimited ones—necessarily regulates the service rates they are paying for."[44]

A. BIAS May be Essential, But for What Services?

The Data Caps NOI begins thusly:

> Access to the Internet is not a luxury. It is essential for modern life. Nothing made this as clear as the COVID-19 pandemic, when people across the country turned to broadband connections to support their day-to-day activities. As a result, today we are consuming more data than ever before, and the trend shows no signs of slowing down. With many individuals and families more dependent on fixed and mobile broadband networks for work, healthcare services, education, and social activities, and an increasing number of connected devices that use the Internet for functionality, it is one of the Commission's foremost priorities to ensure consumers across the nation have meaningful access to broadband Internet services.[45]

In addition, "[t]he Commission has recognized that individuals living in the United States increasingly rely on fixed and mobile BIAS in order to fully participate in society."[46] Commission Starks has gone further, arguing that Internet access is a "civil right."[47] Presumptively, at least according to the Data Caps NOI, limitations on data usage imposed by BIAS providers somehow restrict this supposed right.

But which services, exactly, are "essential?" What is there a "civil right" to, precisely? The Data Caps NOI glosses over this critical question. Is the ability to binge watch "The

---

[44] *Id. See also* Data Caps NOI, Dissenting Statement of Comm'r Carr, https://docs.fcc.gov/public/attachments/FCC-24-106A3.pdf.

[45] Data Caps NOI ¶ 1.

[46] *Id.* ¶ 3.

[47] *See* Rev. Al Sharpton, Geoffrey Starks, Comm'r, Fed. Commc'ns Comm'n, et. al, *Broadband Access is a Civil Right We Can't Afford to Lose—But Many Can't Afford to Have*, ESSENCE (Dec. 6, 2020), https://www.essence.com/news/broadband-access-is-a-civil-right-we-cant-afford-to-lose-but-many-cant-afford-to-have/.

Penguin" or "Grotesquerie," or play Fortnite more than 20 hours a week[48] essential to "participate in society"? While the Data Caps NOI references important services such as healthcare and telehealth,[49] these are lumped in with other data-intensive services, including entertainment.[50] If a discussion is to be had about regulating usage limits imposed by BIAS providers, that discussion should be honest.

Clearly, the greatest demand for data is for entertainment. "It's well-known that data usage is lowest among residential customers around 4 a.m., increases throughout the day, and peaks around 9 p.m."[51] As the two graphs below from the ICLE study indicate, the volume of data usage per user is much higher for residential subscribers than for business subscribers. If residential use was for "business" or "civic engagement,"[52] such use would more closely match business use. It doesn't precisely because residential subscribers consume much more data for entertainment purposes.

---

[48] *See* Josh Howarth, *Fortnite User & Growth Stats 2024*, EXPLODING TOPICS (July 22, 2024), https://explodingtopics.com/blog/fortnite-stats.

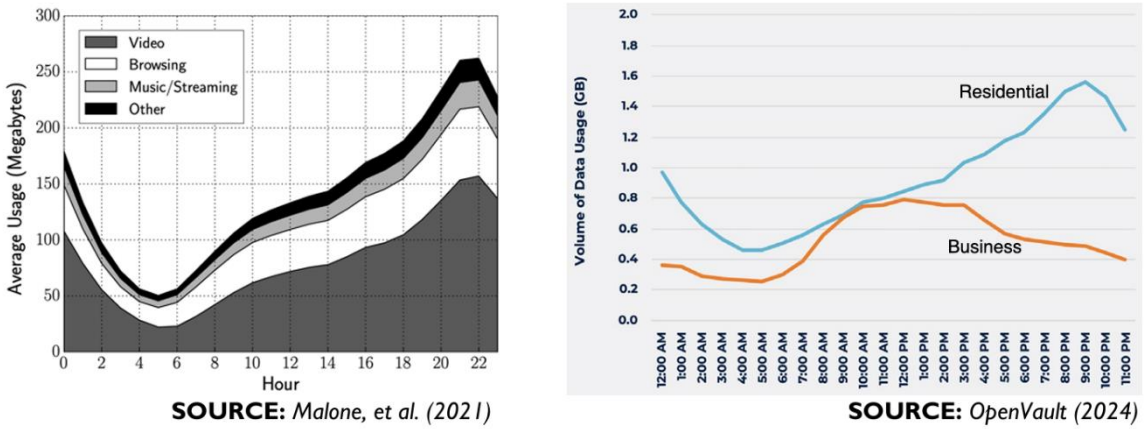
[49] Data Caps NOI ¶¶ 20, 40.

[50] *Id.* ¶ 20 ("Are there certain types of BIAS uses that typically cause consumers to exceed their data caps (e.g., video streaming, video conferences, online gaming, telehealth)?").

[51] ICLE Comments (citing ERIC FRUITS ET AL., INT'L CTR. FOR L. & ECON., THE ECONOMICS OF BROADBAND DATA CAPS AND USAGE-BASED PRICING 10 (2024), https://laweconcenter.org/wp-content/uploads/2024/10/Data-Caps-2024.pdf).

[52] *See* Data Caps NOI ¶ 3.

FIGURE 2: Data Usage by Hour of Day



SOURCE: *Malone, et al. (2021)* **SOURCE:** *OpenVault (2024)*

Source: 1 ICLE Comments, p. 10.

If the FCC believes it has the power to regulate data rates, why not specify what consumers can use data allowances for, as it does through its E-rate regulations?[53] But of course, any such regulation would be content-based, and therefore highly unlikely to survive First Amendment scrutiny. So, the Commission is left with claiming a civil right to entertainment.

[53] *See* 47 C.F.R. § 54.500 ("For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes."); *E-Rate Schools & Libraries USF Program*, https://www.fcc.gov/general/e-rate-schools-libraries-usf-program ("E-Rate program rules require schools and libraries to use E-Rate-supported services, including Wi-Fi hotspots and services used off-premises, primarily for educational purposes. In addition to requiring schools and libraries to use the existing E-Rate certifications to ensure that the off-premises use of E-Rate-funded Wi-Fi hotspots and services is primarily for an educational purpose, the Order requires eligible schools and libraries to maintain and publicly post an acceptable use policy (AUP) that states that the off-premises use of the Wi-Fi hotspot and/or service is primarily for educational purposes as defined in 47 C.F.R. § 54.500 and that the Wi-Fi hotspot and/or service is for use by students, school staff members, and/or library patrons who need it.").

B. Punishing BIAS Providers for *Temporarily* Lifting Data Caps During COVID Ensures that Such 'Good Neighbor' Policies will Never Be Repeated

The next bit of regulatory dishonesty apparent in the Data Caps NOI is the claim that, since some providers voluntarily waived some data caps during COVID, this means that there is no justification for data usage limits,[54] or, in the alternative, that the FCC should at least have the power to declare an emergency and order BIAS providers to waive any data caps or charges.[55] We've noted elsewhere the fact that the U.S. portion of the Internet performed admirably during COVID (as opposed to the dismal results for the highly-regulated European Internet during the same period), precisely because, at that time, BIAS was a lightly-regulated Title I service, which had spurred significant investment in capacity just prior to the onset of COVID.[56] It was because of the Commission's wisdom in 2018 to return BIAS to

[54] Data Caps NOI ¶ 5 ("Many fixed and mobile BIAS providers temporarily or permanently refrained from enforcing or imposing data caps in response to the COVID-19 pandemic. Reports indicate that the temporary suspension of data caps does not appear to have significantly affected fixed network performance, despite the fact that demand for broadband data significantly increased during the pandemic.") (footnotes omitted.).

[55] *Id.* ¶ 22 ("As noted, some BIAS providers waived their data caps during the COVID-19 pandemic. Should such moratoria continue to be voluntary in the future? What is the Commission's role in ensuring that consumers have access to meaningful BIAS in times of emergency?") (footnotes omitted).

[56] *See* TechFreedom, Comments on Safeguarding & Securing the Open Internet at 3 (Dec. 14, 2023), WC Docket No. 23-320, https://techfreedom.org/wp-content/uploads/2023/12/TechFreedom-Title-II-Comments-12.14.23.pdf ("The U.S. Internet survived COVID far better than Europe's highly regulated networks. Broadband networks kept up with unprecedented demands while children were locked down at home and forced to learn over video, and adults worked from home. The broadband industry survived this monumental stress test with flying colors, all without the FCC micromanaging—or having the power to micromanage—every aspect of broadband deployment, operations, and marketing.") (footnotes omitted.).

Title I that providers had the incentive to invest $158.1 billion in 2018-2019;[57] this expanded broadband capacity right before COVID hit, and made it possible for providers to temporarily suspend data caps. We do not know whether U.S. providers would suffer the same fate as Europe during COVID were data caps banned now, when, according to OpenVault, data consumption has increased by over 70 percent between 2019 and 2022.[58] Are we willing to take that risk by taking away providers' ability to manage their networks through tools such as data usage limits?

The Data Caps NOI fails even to *ask* what the economic impact of waiving those data caps was at the time, or what it would be going forward. Again, sound economic thinking has no place with this Commission, which apparently believes that the cost of providing BIAS service is effectively zero. While the marginal costs of providing an additional GB of data per subscriber might be low, that figure fails to account for the overall network investment that must be recouped via charges to subscribers. Because of this, pricing BIAS is a complex process, as the ICLE Comments point out:

> The provider's challenge is to develop a pricing program that simultaneously maximizes revenue and minimizes costs. The appropriate strategy to maximize revenue is not as simple as "raise prices." Rather, the provider must account for how consumers will respond. Provider entry and intermodal competition from 5G, fixed wireless, and satellite means that more than 94% of U.S. consumers can now access high-speed broadband from three or more providers. This increased competition constrains each provider's power over pricing. Moreover, the recent rollout of broadband "nutrition labels" provides

---

[57] *See* Mike Saperstein, *Broadband Investment Remains High in 2019*, USTELECOM (Dec. 23, 2020), https://ustelecom.org/research/broadband-investment-remains-high-in-2019/#:~:text=Network%20Investment,-From%201996%20through&text=USTelecom%20has%20published%20its%20broadband,in%20the%20month%20of%20April.%E2%80%9D.

[58] *See* BROADBAND INSIGHTS REPORT (OVBI): 4Q22, OPENVAULT (Feb. 2023), https://openvault.com/wp-content/uploads/2023/02/OVBI_4Q22_Report.pdf; OV BROADBAND INSIGHTS REPORT (OVBI): 2Q24, OPENVAULT (Aug. 2024), https://openvault.com/wp-content/uploads/2024/08/OpenVault_2Q24_OVBI_Report_v3.pdf.

> consumers with information to do an "apples-to-apples" comparison across providers and plans, further increasing competition.[59]

Reducing provider flexibility is pricing by regulating data usage will inevitably lead to higher prices for consumers.

Similarly, the Data Caps NOI cites to the fact that the FCC imposed a prohibition on data caps on the Charter/Time Warner merger order as further justification for prohibiting or otherwise regulating data caps.[60] Yet the concessions a BIAS provider might have made in order to get approval from the FCC for a major acquisition says little about the economic cost it bore in not imposing data caps on users. It merely says that the value of the deal could absorb the cost of not having data caps. It says nothing, for example, as to whether smaller BIAS providers could absorb such costs. Further as we've noted before, imposing merger conditions such as this represent bad public policy.[61] Using prior merger conditions as justification for imposing similar regulations on all BIAS providers is an even worse approach to governance.

But the Commission can rest assured that if it attempts to convert voluntary pledges into regulatory commitments, the chance of BIAS providers "taking one for the team" will end forever. Why do the right thing in the short term if it's weaponized against you in future regulations?

---

[59] ICLE Comments at 14.

[60] Data Caps NOI ¶ 7.

[61] *See* Press Release, TechFreedom, FCC Should Approve Charter-TWC Merger Without Conditions (Oct. 13, 2015), https://techfreedom.org/fcc-should-approve-charter-twc-merger-without/ ("The FCC's practice of regulating through merger review creates an inconsistent framework in which different rules are applied to different companies. Further, it encourages rival companies to use the FCC's merger review process to lobby for burdensome conditions on their competitors."). *See also TWC-Charter Merger and FCC Extortion*, TECH POLICY PODCAST (Apr. 27, 2016), https://techfreedom.org/69-twc-charter-merger-and-fcc-extortion-2/.

C. Public Safety Concerns About Data Caps Are Misplaced: the Internet Was Never Intended to be Part of an "End-to-End Emergency Infrastructure" and Emergency Messages Are Not Subject to Data Caps

The Data Caps NOI asks whether data usage limits might impact public safety operations.[62] In doing so, the Commission repeats the mistake it has made over and over: assuming that the Internet and BIAS access is part of the overall public safety infrastructure in this country. They are not. More importantly, public safety needs do not provide separate statutory authority for the Commission to regulate data plans provided by BIAS providers. The mistake centers around *dicta* in the *Mozilla* case, in which the court, as part of its remand of a portion of the *RIFO*, directed the FCC to "consider the implications for public safety of its changed regulatory posture in the 2018 Order."[63] In doing so, the *Mozilla* court cited as authority *Nuvio Corp. v. FCC*.[64]

The problem is that the "end-to-end emergency communications infrastructure and programs" at issue in *Nuvio* was the nationwide 911 system fully codified in the Wireless Communications and Public Safety Act of 1999,[65] not the Internet or BIAS, which was never mentioned in that statute. The only issue in *Nuvio* was whether, in adopting a 120-day period for VoIP providers to implement 911, the FCC properly balanced the specific statutory commandment to establish a ubiquitous 911 system in exercising its discretion to decide how best to "encourage and support efforts by States to deploy comprehensive end-to-end

---

[62] Data Caps NOI ¶ 22 ("How do data caps affect consumers' use of E-911 services, emergency alerts, or other public safety services offered over the Internet, if at all? We seek comment on what steps, if any, the Commission should take to ensure that public safety is not impacted by data caps.").

[63] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 59 (D.C. Cir. 2019).

[64] Nuvio Corp. v. Fed. Commc'ns Comm'n, 473 F.3d 302, 307 (D.C. Cir. 2006).

[65] Pub. L. No. 106–81, § 3, 113 Stat. 1286, 1287.

emergency communications infrastructure and programs."[66] The *Nuvio* court ruled that the FCC was justified in imposing such a tight window for VoIP providers to implement 911, despite the compliance burdens for providers, given the specific congressional mandate under Section 615-a1 for the FCC to advance public safety through establishment of a 911 emergency calling system.[67] Because *Nuvio* involved the Commission's invocation of its statutory duty to implement a fully functional 911 system despite the "economic cost of compliance,"[68] the court did not have to decide the issue for which *Mozilla* cites the decision: how much weight Section 151 requires the FCC to give to public safety interests versus all other factors.[69]

BIAS has never been considered part of Section 615's "end-to-end emergency communications infrastructure"—and for good reason. Although we've come to expect BIAS to provide always-on, always-available connectivity, BIAS—and the Internet as a whole—was never designed to a sufficiently rigorous standard that BIAS could be ensured to function

---

[66] 47 U.S.C. § 615.

[67] *Nuvio Corp. v. FCC*, 473 F.3d at 303 ("Petitioners, providers of the newly-emerging technology of Internet telephone service, challenge an order of the [FCC] that gave them only 120 days to do what is already required of providers of traditional telephone service: transmit 911 calls to a local emergency authority. We deny their consolidated petition for review because we conclude that the Commission adequately considered not only the technical and economic feasibility of the deadline, inquiries made necessary by the bar against arbitrary and capricious decision-making, but also the public safety objectives the Commission is required to achieve.").

[68] *Id.* at 307.

[69] It is true that the *Nuvio* court cited both Section 615 specific mandate (to promote E-911 deployment) and Section 151's broad statement (that one of the purposes of the FCC was to promote public "safety of life and property." *Id.* at 307–08; 47 U.S.C. § 151. But since Section 615 clearly applied to the facts of that case, the only question under Section 151 was whether the FCC's short window of 120 days for VoIP carriers to implement E911 would further or hinder public safety, and the court deferred to the FCC's conclusion that such a timeline would, indeed, further public safety. The *Nuvio* court made no separate, independent finding of the Commission's compliance with Section 151.

in an emergency. BIAS can go down in power outages, whereas we expect to be able to dial 911 on our landline or wireless phones in an emergency.[70]

So while having the ability to pass public safety information on to citizens is a laudable use of the Internet, state and local governments cannot reasonably rely on the Internet or BIAS offerings as a primary system to disseminate public safety information.[71] They rely on the Internet to disseminate information at their own peril, especially given the other means of providing such information through the broadcast EAS system and the Wireless Emergency Alert (WEA) system, which are not subject to data caps.[72] As justification for data

---

[70] *See* Preserving the Open Internet et al., GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 56 (2009) ("The Internet has traditionally relied on an end-to-end, open architecture, in which network operators use their 'best effort' to deliver packets to their intended destinations without quality-of-service guarantees"). *See also* Andrea Seabrook, *System that Made Internet Possible Turns 25*, NPR (Jan. 5, 2008), https://www.npr.org/transcripts/17872707?storyId=17872707&ft=nprml&f=17872707?storyId=17872707&ft=nprml&f=17872707 (NPR interview with TCP/IP co-creator Vint Cerf describing the "best efforts" nature of the Internet). Compare this "best efforts" system design with FCC rules requiring telecommunications carriers to ensure that 911 calls go through, even during power outages. Ensuring Continuity of 911 Communications, 30 FCC Rcd 8677 ¶ 1 (2015) ("In this Report and Order, the Federal Communications Commission (FCC or Commission) takes important steps to ensure continued public confidence in the availability of 911 service by providers of facilities-based fixed, residential voice services in the event of power outages").

[71] *See* Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 60 (D.C. Cir. 2019) (Santa Clara County "and its fire department have implemented new, Internet-based services that depend on community members' speedy and unimpeded access to broadband Internet"). But there is no such thing as "unimpeded access to broadband Internet," because the Internet itself was not built with those capabilities. The very robustness of the Internet as a whole is based on protocols that ***assume*** impediments to getting data from one point to another, thus the packet switched network design that breaks data down to multiple packets and sends them over multiple routes and reintegrates them back at the destination, with the hope that all the data comes through. *See supra* note 70.

[72] *See IPAWS Myths vs. Facts*, FEMA, https://www.fema.gov/emergency-managers/practitioners/integrated-public-alert-warning-system/public/myths-facts#:~:text=Myth%3A%20WEA%20uses%20your%20cellular%20data%20and%20increases,cellular%20data%20and%20does%20not%20affect%20phone%20bills (last visited Nov. 14, 2024, 10:13 AM) ("WEA does not use customer cellular data and does not affect phone bills.

caps regulation, public safety is just as much of a red herring as it was for Internet regulation writ large.

D. Prohibiting or Highly Regulating Data Usage Plans Will Destroy the Entire MNVO Market and Rob Low-Income Users of Affordable BIAS Plans

One early casualty of data usage regulations would be the Mobile Virtual Network Operators (MVNOs) that serve over 36 million subscribers.[73] As the Data Caps NOI acknowledges: "MVNOs purchase mobile wireless services wholesale from facilities-based providers and resell the services to consumers. They generally do not own any network facilities themselves."[74] They are often the cheapest available option for mobile BIAS services. They are profitable only because they are able purchase the correct amount of data from facilities-based providers and then sell that data at retail. They can only do this if they are able to accurately predict the data usage of their customers, and where necessary, limit that data use. Were MVNOs required to provide unlimited data to their retail customers, they would have to increase substantially the amount of data they purchase from facilities-based carriers, and those low-cost plans from services such as Mint Mobile and TracFone would

---

WEA is not a text message, email or phone call."). *See also Wireless Emergency Alerts FAQs*, VERIZON https://www.verizon.com/support/wireless-emergency-alerts-faqs/?msockid=0c8722db980769d227c7364899b068e7 (last visited Nov. 14, 2024, 10:15 AM) ("we provide Wireless Emergency Alerts for free.").

[73] US MVNO MARKET SIZE & SHARE ANALYSIS - GROWTH TRENDS & FORECASTS (2024 - 2029), MORDOR INTELLIGENCE (2024), https://www.mordorintelligence.com/industry-reports/united-states-mobile-virtual-network-operator-mvno-market.

[74] Data Caps NOI n. 69 (citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 et al., WT Docket No. 11-186, Sixteenth Report, 28 FCC Rcd 3700, 3738, ¶ 29 (2013)).

vanish, or increase substantially in cost to consumers, the exact opposite from what the Data Caps NOI hopes to achieve.[75]

E. Fundamentally, Regulating Data Usage Means Making the Poor and Old Subsidize the Rich and Young

The ICLE Comments provide the best analysis of the impact regulating data usage would have on the Internet ecosystem:

> Usage-based pricing can foster fairness and economic efficiency. More importantly, usage-based pricing can improve broadband affordability and, in turn, foster increased adoption. Under flat-rate pricing, all consumers pay the same amount regardless of usage, potentially leading to overuse by heavy users and cross subsidization by light users. With usage-based pricing, consumers who use less data pay less, consumers who use more pay more, and no group of consumers cross-subsidize usage by other users. Service that was unaffordable to some consumers under flat-rate pricing may become affordable to those who use less data, thereby expanding adoption among that cohort. Regulations that ban or severely restrict data caps and usage-based pricing run the risk of reducing affordability, hindering adoption, and producing outcomes that many would see as unfair.
>
> Moreover, usage-based pricing provides more options for consumers than flat-rate pricing and can generate additional revenue to fund network improvements and expansion. Importantly, these usage-based pricing strategies can make previously unprofitable broadband deployments economically viable, particularly in underserved areas. By enabling ISPs to recover more of their investment costs from heavy users, while potentially offering lower-priced plans to light users, usage-based pricing can drive increased broadband deployment and adoption, as well as foster a more robust, innovative internet ecosystem. Regulations that ban or severely restrict usage-based pricing therefore could also have the undesired consequence of stifling innovation, investment, and deployment.[76]

---

[75] *See* Data Caps NOI ¶ 24 ("We also seek comment on whether data caps have a disproportionate impact on low-income consumers, or consumers from historically disadvantaged communities, and if so, what steps the Commission can take to mitigate these effects.").

[76] ICLE Comments at 2.

This is entirely consistent with what the FCC used to think. In its 2010 Order, the FCC restated what any sensible economist would say: "prohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users."[77] And who are these lighter users? Older Americans, for one. As one study showed (albeit sampling users in Switzerland), "Research shows that, compared to younger adults, older adults use the internet less frequently and with lower intensity."[78] Another study indicates that seniors are less likely to have smartphones, and if they do, they use them far less extensively than do younger adults.[79] This indicates that they don't need higher-priced "all you can eat" mobile data plans. Similarly, the poor tend to use less data than the rich,[80] meaning that forcing BIAS providers to offer unlimited data plans to all (at higher prices), means that the poor are subsidizing the rich. Is that the desired

---

[77] Preserving the Open Internet Broadband Industry Practices, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, at 72 (Dec. 23, 2010), https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf.

[78] Ronny König & Alexander Seifert, *Internet usage, frequency and intensity in old age during the COVID-19 pandemic–a case study for* Switzerland, FRONTIERS (Oct. 26, 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10639129/.

[79] *Older Adults and Technology Use: Adoption is Increasing, but Many Seniors Remain Isolated from Digital Life* 8, PEW RSCH. CTR. (Apr. 3, 2014), https://www.pewresearch.org/wp-content/uploads/sites/9/2014/04/PIP_Seniors-and-Tech-Use_040314.pdf ("But even as cell phones are becoming more common among seniors, smartphones have yet to catch on with all but small pockets of the older adult population. Just 18% of seniors are smartphone adopters (this is well below the national adoption rate of 55%) and their rate of smartphone adoption has been growing at a relatively modest pace.").

[80] *See Share of adults in the United States who are online almost constantly as of September 2023, by income*, STATISTA (Apr. 8, 2024), https://www.statista.com/statistics/497066/usa-adults-online-constantly-income/ (52% of adults with incomes over $100,000 report that they are online "constantly," as opposed to only 37% of adults with incomes below $30,000).

outcome of this proceeding? Or is the ultimate goal, as suggested by Commissioner Carr, to highly regulate data caps *and* ultimately regulate broadband rates?[81]

In addition, there is a strong suggestion that usage-based pricing can drive broadband deployment deeper into unserved areas. "Importantly, [usage-based pricing and data caps] strategies could make previously unprofitable broad band deployments economically viable, particularly in underserved areas. By enabling ISPs to recover more of their investment costs from heavy users, while potentially offering lower-priced plans to light users, usage-based pricing could drive increased broadband deployment and adoption as well as fostering a more robust, innovative internet ecosystem."[82]

In contrast, regulating yet another aspect of BIAS services could further distort an industry that is already becoming less and less driven by market forces. There is already a significant question, for example, as to whether major existing BIAS providers will participate in the BEAD program in states which intend to regulate rates. "The impediment really is I think some states, it appears, could have [BEAD] rules that are not conducive to private investment or to our investment. And so there could be some limitation to the total amount we invest that's related to our lack of willingness to bid in states where we won't be able to get the returns because the rules aren't conducive to it."[83]

---

[81] Data Caps NOI, Dissenting Statement of Comm'r Carr.

[82] ICLE Comments at 18.

[83] *See* Ted Hearn, *Charter CFO Jessica Rischer Warns About BEAD Regulations*, BROADBAND BREAKFAST (May 22, 2024), https://broadbandbreakfast.com/charter-cfo-warns-about-bead-regulations/. *See also From Introduction to Implementation: A BEAD Program Progress Report, Hearing Before the Sub-comm. on Commc'ns & Tech. of the H. Comm. on Energy & Com.*, (Opening Remarks of Cathy McMorris Rogers, Chair) (Sept. 10, 2024), https://energycommerce.house.gov/posts/chair-rodgers-opening-remarks-at-hearing-to-assess-bead-program-implementation ("Unfortunately, NTIA has only

V. Conclusion

The path forward for broadband is clear: Either allow markets to work to drive down costs and increase competition, or meddle in every aspect of the provision of BIAS to decrease private investment and raise prices for all, potentially making broadband unaffordable to a large segment of the population. The choice should be easy, and Congress was correct back in 1996 when it said we should "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[84] The FCC used to agree, as it said in 1997, related to its authority to regulate under Section 257. For this FCC to embark on yet another proceeding that would negatively impact deployment, adoption, and prices, shows how far the Commission seeks to stray from its statutory authority and congressional mandate. The Commission should discontinue this proceeding.

Respectfully submitted,

_____/s/_____
James E. Dunstan
Senior Counsel
TechFreedom
jdunstan@techfreedom.org
1500 K Street NW
Floor 2
Washington, DC 20005

November 14, 2024

---

furthered our concerns by taking actions that will lead to increased costs and longer timelines for broadband deployment. NTIA's decision to pressure states to regulate the rates charged for broadband service—despite the law strictly prohibiting rate regulation—will make this program less attractive to the providers needed to participate for BEAD's success.").

[84] 47 U.S.C. § 230(b)(2).