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

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

COMMENTS OF THE
COMPETITIVE ENTERPRISE INSTITUTE

COMPETITIVE ENTERPRISE INSTITUTE
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The Competitive Enterprise Institute ("CEI") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") adopted on October 19, 2023, in the above-captioned proceeding.[1] CEI is a strong supporter of a fast, open, and fair Internet and the free market policies, private investment, and innovation that make it possible. CEI submits that the Federal Communications Commission ("Commission") should abandon its proposed application of utility-style regulation to broadband and instead continue the current highly successful light touch regulatory approach.

I. INTRODUCTION AND SUMMARY

Section 230(b)(2) of the Telecommunications Act contains the policy that underpinned a years-long bipartisan consensus, seeking to preserve a free market for the Internet "unfettered by Federal or State regulation."[2] Despite a disruption of that policy from 2015 to 2017, the United States currently enjoys some of the highest capacity and most resilient broadband networks in the world thanks to free market policies that promote private investment and innovation. American

[1] Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76,048 (proposed Nov. 3, 2023) [hereinafter NPRM].

[2] 47 U.S.C. § 230(b)(2).

broadband consumers benefit from this approach while real world experience with utility-style regulation in the United States and Europe shows that it will lead to an inferior consumer broadband experience.

The proposals in the NPRM applying the heavy-handed utility-style regulation of Title II of the Communications Act of 1934 to broadband will impose burdensome and unnecessary obligations on Internet service providers ("ISPs"), treating them like old fashioned circuit switched telephone companies.[3] The Commission attempts to mitigate these burdens with forbearance that can be revoked at any time, producing ongoing uncertainty. When this uncertainty is coupled with the obligations that will be applied, including the Commission's authority over rates in Sections 201(b) and 202(a) of the Communications Act, the result is regulatory overreach that will chill investment and innovation and harm the consumer broadband experience.[4]

Additionally, the Commission claims a need for "net neutrality" and proposes utility regulation, bright line rules, and a general conduct rule in order to produce a "fast, open and fair" Internet. In reality, the Internet is already fast, open, and fair, and imposing utility-style regulation on broadband will deliver an Internet that is less fast, less open, and less fair.

II. LIGHT TOUCH REGULATION IS A SUCCESS

The Commission should abandon its effort to impose Title II on broadband. Despite hyperbolic statements in the wake of the 2018 *Restoring Internet Freedom Order*[5] that "the

[3] 47 U.S.C. § 151.

[4] 47 U.S.C. § 201(b); 47 U.S.C. § 202(a).

[5] 33 FCC Rcd. 311 (2018).

internet is dying" and that Internet service could be sold in bundles that force consumers to pay a premium to access social media, the current "light touch" regulatory model embraced in the *Restoring Internet Freedom Order* serves consumers well, and the predicted horribles have not occurred.[6] Instead, the light touch model has enabled the private investment and innovation that has produced the high capacity and resilient broadband networks that consumers enjoy today.

Indeed, broadband networks are thriving. A USTelecom study shows that broadband providers invested $102.4 billion in network capital investments in 2022 alone and $2.1 trillion since 1996.[7] The well-capitalized broadband networks in the United States stand in stark contrast to European broadband networks, and the United States benefits from a 3 to 1 advantage in per household capital expenditure.[8]

Nevertheless, the Commission is intent on applying Title II, and its net neutrality predicate is that the Internet should be "fast, open and fair."[9] The Commission is therefore conducting a proceeding to produce a fast, open, and fair Internet when the Internet in the United States is already fast, open, and fair. Consumers can visit any lawful website and stream any

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[6] Restoring Internet Freedom Declaratory Ruling, Report and Order, and Order, 83 Fed. Reg. 7852 (Feb. 22, 2018); *see* Farhad Manjoo, *The Internet Is Dying. Repealing Net Neutrality Hastens That Death*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/technology/internet-dying-repeal-net-neutrality.html; *see* Keith Collins, *Why Net Neutrality Was Repealed and How It Affects You*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-rules.html.

[7] USTELECOM, THE BROADBAND ASSOCIATION, 2022 BROADBAND CAPEX REPORT (2023), https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf.

[8] USTELECOM, THE BROADBAND ASSOCIATION, US V. EU BROADBAND TRENDS 2012-2022 1, 11, (2023), https://ustelecom.org/research/2022-broadband-capex/ [hereinafter USTELECOM US-EU BROADBAND TRENDS].

[9] FCC Fact Sheet, Safeguarding and Securing the Open Internet, Notice of Proposed Rulemaking – WC Docket 23-320 (Sept. 28, 2023), https://docs.fcc.gov/public/attachments/DOC-397309A1.pdf.

lawful content. ISPs are not blocking or throttling traffic or engaging in paid prioritization.[10] There is simply no need for Title II.

The Commission should therefore not attempt to fix what is already working. The Commission's proposals will hinder the investment, innovation, and resiliency that are the pillars of broadband networks in the United States today.

III. BROADBAND SHOULD NOT BE SUBJECTED TO UTILITY-STYLE REGULATION.

A) Utilities are Not Exemplars.

In the initial fact sheet, Chair Rosenworcel proposes to apply Title II to affirm "that broadband service is on par with water, power, and phone service; that is: essential."[11] Technologically advanced broadband networks may be essential, but essential does not equal utility. Many products and services, such as food and clothing, are essential but very few are utilities. Equating ISPs with utilities will damage broadband service quality and investment, leading to an inferior consumer experience. In fact, the Commission should refrain from applying utility-style regulation to broadband *because* it is essential.

The proposed rule would be a utility-style regulation of broadband Internet access services. In its no-throttling and paid prioritization provisions, it restricts how networks may

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[10] *See Network Practices*, AT&T, https://about.att.com/sites/broadband/network (last visited Dec. 13, 2023); *Network Management*, VERIZON, https://www.verizon.com/about/our-company/network-management (last visited Dec. 13, 2023); *Internet Broadband Disclosures*, XFINITY, https://www.xfinity.com/policies/internet-broadband-disclosures (last visited Dec. 13, 2023).

[11] Fact Sheet: *FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules* (Sept. 26, 2023), https://www.fcc.gov/document/chairwoman-rosenworcel-proposes-restore-net-neutrality-rules.

distribute their services.[12] Its broad and ill-defined "reasonable network management" standard and "general conduct standard" confer almost unlimited authority on the FCC to sanction business practices because it finds them unreasonable.[13] Regulating rates and services according to a standard of reasonableness is a hallmark of utility regulation.[14]

Title II was written to apply to copper line, circuit switched telephone networks that were the technology of the Bell and other monopoly networks in 1934 and to regulate those networks as public utilities. The Communications Act's latest update, the Telecommunications Act of 1996, was also largely written to apply to telephone networks, opening the local and long distance telephone markets to competition.[15] These dated technology-based statutes and the concept of utility are an ill fit for today's technologically sophisticated and dynamic broadband networks.

Additionally, broadband is different from services such as water and electricity where every consumer requires the same thing from the service (i.e., water to flow when the tap is opened). Broadband is fundamentally different in that each consumer has different needs. Some only use email while others use high capacity applications such as streaming and gaming. There is no one size fits all. In addition, consumers can choose among different speed and price options, and whether to obtain service from a wireless or wireline ISP (or both).

The actual experience with utilities in the United States and Europe demonstrates that utility-style regulation offers no guarantees. For example, it's common for American water

[12] 88 Fed. Reg. 76,048, 76,096 (to be codified at 47 C.F.R. § 8.2(c), (d)).

[13] *Id.* (to be codified at 47 C.F.R. § 8.2(a)(4), (e)).

[14] *Cf. Idaho Power & Light v. Blomquist*, 141 P. 1083, 1093 (Idaho 1914).

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

systems to have water mains more than 75 years old.[16] Recently, a 120-year-old water main in New York City burst, flooding Times Square and the subway system.[17]

Water main breaks and flooded streets occur all too frequently. The American Society of Civil Engineers 2021 Report Card for America's Infrastructure states that there is a water main break every 2 minutes and an estimated 6 billion gallons of treated water is lost each day, enough to fill over 9,000 swimming pools. The report card also indicates that funding for drinking water infrastructure "has not kept pace with the growing need to address aging infrastructure systems."[18]

The failure of Jackson, Mississippi's water treatment plant in 2022 caused a multi-day outage in which over 150,000 people were left without safe drinking water.[19] The failure was attributed to decades of underinvestment, causing the federal government to provide $600 million to stabilize and repair the water system.[20] Earlier this year the NEW YORK TIMES

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[16] Ahsa Prihar, *The Average Water Main in Philadelphia is 76 Years Old, and January Sees an Average of More than 175 Breaks*, BILLYPENN AT WHYY (Jan. 30, 2022), https://billypenn.com/2022/01/30/philadelphia-water-main-breaks-system-age-repair-cost/.

[17] Erin Nolan, *Water Main Break in Midtown Manhattan Floods Subway System*, N.Y. TIMES (Aug. 29, 2023), https://www.nytimes.com/2023/08/29/nyregion/nyc-water-main-break-subway.html.

[18] AMERICAN SOCIETY OF CIVIL ENGINEERS, 2021 INFRASTRUCTURE *REPORT CARD* 35 (2021), https://infrastructurereportcard.org/wp-content/uploads/2017/01/Drinking-Water-2021.pdf.

[19] Char Adams, *Jackson, Mississippi's Water Crisis Persists as National Attention and Help Fade Away*, NBC NEWS (Jan. 17, 2023), https://www.nbcnews.com/news/nbcblk/jackson-mississippi-still-dealing-water-crisis-rcna65563.

[20] Stephanie Ramos and Ted Henifin, *Jackson Water Crisis Caused by 'Decades of Under-investment,' says DOJ-appointed Manager*, ABC NEWS (Feb. 20, 2023) https://abcnews.go.com/US/jackson-water-crisis-caused-decades-investment-doj-appointed/story?id=97334421; *ICYMI: President Biden Announces $115 Million for Jackson, Mississippi Water Infrastructure*, THE AMERICAN PRESIDENCY PROJECT (June 6, 2023), https://www.presidency.ucsb.edu/documents/icymi-president-biden-announces-115-million-for-jackson-mississippi-water-infrastructure.

reported that Jackson's water system is so broken that "one pipe leaks 5 million gallons a day," enough water to serve the daily needs of 50,000 people.[21]

Other utilities have issues as well. In heavily regulated California, Pacific Gas & Electric's ("PG&E") utility networks have been responsible for loss of life and billions of dollars in damages. In 2010, after a PG&E gas pipeline explosion in San Bruno killed 8 people, the company was convicted of 5 felony counts of knowingly failing to inspect and test its gas lines for potential dangers.[22] The company also paid a $70 million settlement to the city.[23]

In 2018, PG&E's aging electrical plant caused the Camp Wildfire that devastated the town of Paradise. PG&E pled guilty to 84 counts of manslaughter after PG&E equipment on a nearly 100-year-old transmission tower broke, causing a power line to fall and spark.[24] In

[21] Sarah Fowler, *A Water System So Broken That One Pipe Leaks 5 Million Gallons a Day*, N.Y. TIMES (Mar. 22, 2023), https://www.nytimes.com/2023/03/22/us/jackson-mississippi-water-crisis.html.

[22] Bob Egelco, *PG&E Convicted of Obstructing Blast Probe, Breaking Safety Laws*, SFGATE (Aug. 10, 2016), https://www.sfgate.com/crime/article/PG-E-convicted-of-obstruction-pipeline-safety-9132493.php.

[23] *CEO Says San Bruno Explosion Could Cost PG&E $1 Billion*, CBS BAY AREA (Aug. 30, 2012), https://www.cbsnews.com/sanfrancisco/news/ceo-says-san-bruno-explosion-could-cost-pge-1-billion/.

[24] *PG&E Pleads Guilty to 84 Counts of Manslaughter in Fire that Devastated Paradise, California*, CBS NEWS (June 16, 2020), https://www.cbsnews.com/news/pg-e-pleads-guilty-manslaughter-paradise-california-fire-84-counts/.

addition to the criminal charges, the associated liability led PG&E to file bankruptcy.[25] PG&E is not the only electric utility to be involved in wildfires.[26]

While not every utility has this record, it is clear that real world experience with utilities provides compelling evidence that utility-style regulation does not equate to resilient networks or good consumer experiences. Broadband should not be "on par" with water and have a 75-year-old plant that frequently fails. Instead, the Commission should recognize that broadband networks have been thriving because they are resilient high technology networks that rely on investment and innovation to produce an enviable consumer experience. Broadband is essential and that is why its quality should not be jeopardized with utility-style regulation.

B) European Utility-Style Regulation Demonstrates its Failings.

The issues with utility-style regulation cross the Atlantic. Indeed, the Commission is proposing the type of regulation that has been in place in Europe for years, and the evidence is clear that European-style regulation would harm the American consumer experience with lower speeds, less deployment, and lower adoption rates.[27]

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[25] Lily Jamali, *Survivors Stuck in Limbo as PG&E Fire Victim Trust Pays Out $50 Million in Fees*, KQED (May 6, 2021), https://www.kqed.org/news/11872328/survivors-stuck-in-limbo-as-pge-fire-victim-trust-pays-out-50-million-in-fees.

[26] Colleen Slevin, *Insurance Companies Sue Energy Corporation After It was Blamed for Helping Start Colorado Wildfire*, AP NEWS (July 11, 2023), https://apnews.com/article/colorado-wildfire-xcel-energy-lawsuit-insurance-34cf1af48f88ea0e3c72c687f3f6311f.

[27] Statement of Commission Brandon Carr, Following Europe's Approach to Internet Regulation – With Its Sweeping Government Controls – Would Be a Serious Mistake, as COVID 19 Showed (Oct. 4, 2023), https://docs.fcc.gov/public/attachments/DOC-397479A1.pdf.

According to the Speedtest Global Index, fixed broadband networks in the United States outperform every European country on speed.[28] A 2020 USTelecom study showed the United States leading Europe in deploying high-speed Internet infrastructure and in consumer adoption.[29] For fixed broadband, the US is ahead of Europe with 25 percent more households covered at greater than 100mbps and 11 percent more households covered at greater than 30mbps. The study also revealed that there was two times more facility-based competition in the United States than in European Union countries.

As for adoption, the USTelecom study shows the United States leading at any speed. At higher speeds, 55 percent of connected US households subscribed at 100mbps and above whereas 34 percent of connected subscribers in the EU subscribed at 100mbps and above.[30]

In addition to stronger deployment and adoption, the United States has not suffered from the well-documented throttling that was imposed in Europe during the pandemic to ensure that the Internet didn't "break."[31] It is not fast, open, and fair for consumers to have traffic from their favorite streaming provider throttled at the request of government officials because broadband networks struggle with capacity limitations.

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[28] *Speedtest Global Index*, SPEEDTEST (Oct. 2023), https://www.speedtest.net/global-index.

[29] USTELECOM US-EU BROADBAND TRENDS, *supra* note 8, at 1-4, 6-10.

[30] *Id.* at 9.

[31] Adrian Kingsley-Hughes, *European Union to Netflix: Help Stop the Internet from Breaking*, ZDNET (Mar. 19, 2020), https://www.zdnet.com/home-and-office/networking/european-union-to-netflix-help-stop-the-internet-from-breaking/.

The facts show that utility regulation did not improve the European consumer's broadband experience, particularly when it mattered most. The Commission should not expect utility-style regulation to improve the consumer's broadband experience in this country either.

IV. FORBEARANCE IS INSUFFICIENT.

A) Forbearance Creates Uncertainty.

Title II contains numerous detailed and onerous regulatory powers that enable the Commission to regulate almost every aspect of a carrier's business. These regulatory powers include rate regulation and other regulations that were written for the circuit switched networks of telephone common carriers, making Title II an ill fit for today's modern broadband networks.[32] Recognizing this fundamental inapplicability, the Commission proposes to use its forbearance power to embrace the "substantial" forbearance contained in the 2015 *Open Internet Order*.[33] This approach of classifying ISPs as Title II common carriers, while at the same time recognizing the need to forbear from numerous Title II obligations, demonstrates how such classification would shoe-horn ISPs into a regulatory framework in which they do not belong.

Chair Rosenworcel attempted to ease concerns regarding rate regulation when announcing this rulemaking by saying "They say this is a stalking horse for rate regulation. Nope. No how, no way."[34] However, forbearance is insufficient because forbearance is not foreclosure. Once Title II authority is in place, this Commission or a future Commission can

[32] 47 U.S.C. Part I – Common Carrier Regulation.

[33] NPRM ¶ 97; *see also* 2015 *Open Internet Order*, 30 FCC Rcd. at 5804, ¶ 433 ("*Open Internet Order*").

[34] *Remarks of Chairwoman Jessica Rosenworcel*, The National Press Club, Washington, D.C., September 26, 2023.

discontinue forbearance and impose rate regulation or any other Title II obligation. This ongoing threat will be a permanent regulatory overhang creating a constant state of uncertainty that will make ISPs hesitate before investing and innovating.

The fundamental issue is the application of Title II and its heavy-handed authority. Forbearance that can be revoked at any time is simply not a viable solution; the solution is to refrain from applying Title II and to allow the current light touch approach to continue.

B) The Unjust or Unreasonable Standards are Rate Regulation.

While the Commission asserts that forbearance can assuage concerns regarding investment-chilling burdens such as rate regulation, the Commission is affirmatively applying Sections 201 and 202 of the Communications Act.[35] The text of these sections illustrates the insufficiency of forbearance and the regulatory power the Commission will retain:

Section 201(b) provides:

> All *charges*, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such *charge*, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful…[36]

Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in *charges*, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or

[35] NPRM ¶ 104.

[36] 47 U.S.C. § 201(b) (emphasis added). Section 201(b) has exceptions to the just and reasonable standard, including "[t]hat nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation…", illustrating the dated nature of the statute and its inapplicability to broadband.

> to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.[37]

These sections of Title II illustrate that the forbearance over rate regulation is illusory because by their own terms they provide the Commission with the power to determine whether rates (i.e., charges) are unjust or unreasonable. Section 201(b) applies to "all" charges and declares that any unjust or unreasonable charge is unlawful. Similarly, Section 202(b) provides that any charges that unjustly or unreasonably discriminate are unlawful. In each case it is the Commission who will determine whether unjust or unreasonable conduct is occurring.

These provisions give the Commission wide latitude regarding rates, demonstrating a clear pitfall with forbearance. Despite assurances of "no how, no way" to rate regulation, the law the Commission proposes to apply provides ample authority to regulate broadband rates, forbearance notwithstanding.

The NPRM attempts to explain this away by drawing a distinction between *ex ante* and *ex post* regulation:

> We believe that Commission *ex ante* rate regulation is unnecessary because the tailored approach we adopt here will enable the Commission to promote broadband deployment and competition, and because we will be able to rely on sections 201 and 202 to address issues on an *ex post* basis. While we do not propose to forbear from sections 201 and 202 of the Act, we "do not and cannot envision adopting new *ex ante* rate regulation" of BIAS, and we therefore propose to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of *ex ante* rate regulations for BIAS.[38]

[37] 47 U.S.C. § 202(a) (emphasis added).

[38] NPRM ¶ 104.

This distinction will be cold comfort to ISPs. While ISPs may not be prohibited in advance from a rate or promotion, they will live with the risk that the Commission retains the power to determine whether a rate or promotion is unjust or unreasonable or amounts to unjust or unreasonable discrimination at any time after it has been implemented, creating a permanent state of uncertainty.

Whether rate regulation takes the form of prescriptive *ex ante* rules or after the fact *ex post* determinations, it is rate regulation regardless. This unnecessary regulatory overreach will deter ISPs from developing offerings with different pricing options that are attractive to consumers and will lead to less consumer choice. In the end, it is consumers who will suffer.

V. BRIGHT LINE RULES ARE UNNEEDED.

As in 2015, the Commission draws bright line rules barring blocking, throttling, and paid prioritization.[39] The Commission believes "it is paramount that consumers be able to use their BIAS [broadband Internet access service] connections without degradation due to blocking, throttling, paid prioritization, or other harmful conduct."[40] It is unclear, however, why the Commission feels compelled to establish these bright line rules. ISPs already have indicated that they do not engage in blocking, throttling, or paid prioritization, and there is no evidence that beyond reasonable network management practices (such as for network security) such conduct is occurring.[41]

[39] NPRM ¶ 114.

[40] *Id.* ¶ 116.

[41] *See* sources cited *supra* note 10.

This blanket use of regulatory authority simply goes too far. For example, while the Commission says it is banning paid prioritization to, in part, ensure edge provider innovation, it fails to recognize that there may be instances in which paid prioritization arrangements are advantageous to consumers.[42] In fact, paid prioritization offerings are common in the general marketplace in order to relieve congestion or serve a consumer need, just as TSA PreCheck and USPS Priority Mail do.

The heart of the problem is the Commission's application of a law written for circuit switched telephone networks that are fundamentally different from Internet networks. Unlike circuit switched telephone network traffic, Internet traffic consists of different packets that have different levels of susceptibility to congestion.[43]

Prioritization (paid or otherwise) can improve broadband performance because it is a way in which traffic can be differentiated, optimized, and more effectively delivered to consumers. A user loading an email or a webpage is unlikely to notice if some packets are dropped and resent (particularly if it happens in milliseconds). However, dropped packets may lead streaming video

[42] NPRM ¶ 131. The Commission defines paid prioritization as "*the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.*" *Id.* at ¶ 158.

[43] Daniel Lyons, *Paid Prioritization: Debunking the Myth of Fast and Slow Lanes*, AM. ENTER. INST.: AEIDEAS (April 2, 2018), https://www.aei.org/technology-and-innovation/telecommunications/paid-prioritization-debunking-the-myth-of-fast-and-slow-lanes/.

to buffer and harm the consumer experience.[44] Therefore, prioritization is not only logical but can be advantageous to the consumer.

A bright line prohibition is also unneeded because the market will impose rationality on prioritization practices. If an ISP engaging in paid prioritization provides an inferior consumer experience, its customers are empowered to take their business elsewhere because most consumers have multiple options in ISPs. This is exactly how the market functions throughout the economy.

The current successful broadband experience without bright line rules demonstrates that there is no need to impose these arbitrary restrictions on how technologists and engineers structure and manage networks. Further, the bright line rule banning paid prioritization presumes that paid prioritization is always harmful to consumers and thereby deprives the industry and consumers of opportunities for innovation and potentially advantageous outcomes.

VI. THE GENERAL CONDUCT RULE IS REGULATORY OVERREACH.

Consistent with the *Open Internet Order*, the Commission proposes to adopt a general conduct rule to ostensibly "prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers."[45] The goal of the rule is to provide the Commission with a tool to ensure that ISPs do not "find a technical or economic means to evade the bright line bans on blocking, throttling and paid prioritization arrangements to wield their gatekeeper power in a

[44] *Id.*; *see also* DOUG BRAKE, PAID PRIORITIZATION: WHY WE SHOULD STOP WORRYING AND ENJOY THE "FAST LANE" (Information Technology and Innovation Foundation, July 2018), https://www2.itif.org/2018-paid-prioritization.pdf.

[45] NPRM ¶ 163.

way that would compromise the open Internet."[46] The Commission sees it operating as a "catch-all backstop."[47]

> Tracking the language of the *Open Internet Order*, the rule provides:
>
> (1) Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage:
>
> (i) End users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) Edge providers' ability to make lawful content, applications, services, or devices available to end users.
>
> (2) Reasonable network management shall not be considered a violation of this rule.[48]

Catch-all backstop indeed. This broad, vague rule is backed by the Commission's enforcement power and will serve to chill innovation and sow confusion with technologists and engineers whose jobs are to continually seek new and innovative arrangements. With this rule, they will constantly be at risk of being required to defend reasonable network management practices as such. This creates a chilling effect in which the likely outcome is inertia rather than innovation.

Moreover, ISPs lack incentive to limit their customers' ability to access and use lawful content, applications, services, or devices of their choice. Such limitations would make a broadband offering obviously unappealing. For the same reason, ISPs lack incentive to interfere with edge providers making their own content, applications, services, or devices available. The real ISP incentive is to make lawful content, applications, services, or devices available to their

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[46] *Id.*

[47] *Id.*

[48] *Id.* at ¶ 164; 88 Fed. Reg. at 76,096 (to be codified at 47 C.F.R. § 8.2(e)).

customers as much as possible in order to provide a positive customer experience as much as possible. Yet the Commission is acting as though the ISP business model is to provide a limited and inferior customer experience; in reality, it is the opposite.

VII. CONCLUSION

CEI believes that the evidence from utility-style regulation in both the United States and Europe demonstrates that it will produce an inferior consumer broadband experience as compared to that under the current light touch regulatory approach. CEI respectfully submits that the Commission should prioritize free market principles, private investment, and innovation as the keys to the best consumer broadband experience and abandon the proposal to apply Title II common carrier regulation to broadband.

Respectfully submitted,

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