



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

Reply Comments of the American Consumer Institute

Introduction

The American Consumer Institute hereby submits reply comments in response to the Federal Communications Commission (“FCC”) Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹

The American Consumer Institute is an independent 501c3 education and research organization. Its mission is to identify, analyze, and protect the interests of consumers in selected legislative and rulemaking proceedings in information technology, health care, insurance, and other matters.

The FCC’s NPRM is Premature and Unnecessary

In December, we submitted comprehensive comments to the FCC’s NPRM, which proposes the imposition of additional net neutrality regulations and seeks to reclassify broadband services from a Title I service to a Title II service.² In our comments, we detailed how reclassifying broadband service as a telecommunications service under Title II of the Communications Act would represent a radical departure from the light-touch approach to the

¹ In the Matter of Safeguarding and Securing the Open Internet,” Federal Communications Commission, Notice of Proposed Rulemaking, WC Docket No. 23-320, October 19, 2023, <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

² “Comments of the American Consumer Institute,” Federal Communications Commission, GN Docket No. 23-320, regarding the FCC’s Notice of Proposed Rulemaking, “In the Matter of Safeguarding and Securing the Open Internet,” December 11, 2023, <https://www.theamericanconsumer.org/wp-content/uploads/2023/12/Net-Neutrality-ACI.pdf>.

internet that has successfully guided the country over the years. More importantly, we explained why this departure is not only unjustified, but would produce significant unintended consequences for investment, deployment, and access within the broadband marketplace, and would significantly raise consumer broadband prices.

Such regulations have already been tried once before. In 2015, the FCC proposed its Open Internet Order (OIO), which established net neutrality regulations over the internet.³ Like the current proposal, the OIO sought to crack down on practices that the FCC believed were anticompetitive and harmful to consumers. Yet, the Order proved unnecessary and led to devastating consequences for the broadband market, including a steep decline in infrastructure investment.

As we commented in December, the decline in investment is consistent with research on the subject, which has found that strict net neutrality regulations would harm consumer welfare by discouraging network investment and innovation, reducing quality options, and raising consumer prices. As cited in our comments, evidence of this harm can also be seen internationally such as in Europe’s slow transition to 5G and overall market performance relative to the U.S.

Now, the FCC has again decided to resurrect this same regulatory regime, arguing it needs Title II authority to “safeguard the open Internet,” protect consumers, and defend national security.⁴ However, as we explained in our comments, the internet is not broken, and the FCC has provided no evidence that it is. Indeed, the FCC appears to be acting in anticipation of a potential problem that may never arise.

Moreover, the FCC has taken no action to conduct a serious rigorous cost and benefits analysis of its proposal. Nor has it presented any evidence that contradicts the fact that the broadband market is already a dynamic and competitive place that does not require additional government intervention.

No Market Failure: Analysis of Market Conduct, Structure, and Performance

Our comments reviewed the broadband market’s structure, conduct, and industry performance – including elements of competition, investment, industry profits, and consumer prices. In short, we found zero evidence of a market failure or any other related shortcoming.⁵

³ “In the Matter of Protecting and Promoting the Open Internet,” Federal Communications Commission, Notice of Proposed Rulemaking, GN Docket No. 14-28, March 12, 2015, <https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf>.

⁴ “In the Matter of Safeguarding and Securing the Open Internet,” Federal Communications Commission, Notice of Proposed Rulemaking, WC Docket No. 23-320, October 19, 2023, <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

⁵ The points to follow were expressed and detailed in “Comments of the American Consumer Institute,” Federal Communications Commission, GN Docket No. 23-320, regarding the FCC’s Notice of Proposed Rulemaking, “In the

In the FCC’s justification of these regulations, it did not provide any empirical evidence that contradicts our findings, nor did proponents of these regulations in their comments.

Specifically, in our comments, we found that market structure does not determine conduct or performance and there is effective competition in the market. Unlike examples of market power and market failure, we demonstrated that internet speeds continue to improve, broadband prices continue to decrease, the rate of network investment is substantial, and the industry can be characterized as having comparatively low profits.⁶ In short, there is no identifiable market failure that would justify a regulatory remedy and, more importantly, the FCC offers no empirical evidence to the contrary.

The FCC should take careful note of each of these findings before imposing top-down regulations on the broadband market. A failure to do so could threaten the impressive gains made over the years. The result would be to unnecessarily reduce network service quality, undermine investment, and harm consumer welfare.

Title II Regulations Would, Without Any Doubt, Increase Consumer Broadband Prices

In an effort to reimpose net neutrality regulations, the FCC is considering the reclassification of broadband services from an “information service” to a “telecommunications service.” However, reclassifying broadband services as a regulated telecommunications service would come at a major cost to consumers, and eventually guarantee higher prices for broadband users.

An article originally published in TechPolicyDaily explains that net neutrality regulations will unquestionably raise consumer prices because state and local tax provisions currently allow higher tax rates on telecommunications services compared to information services.⁷ This includes taxes on public utilities and telecommunications plants and equipment that are taxed at higher rates than other businesses. It also includes taxes on gross receipts, which are applied to telecommunications services, the inclusion of a broader tax base through the inclusion of “mixed use” plant and equipment, and the inclusion of intangible investments which may include the current market value of wireless spectrum won at auctions.

In most cases, no state or local regulations need to be passed for these taxes to take effect, since some laws are designed to apply to public utilities and telecommunications

Matter of Safeguarding and Securing the Open Internet,” December 11, 2023, <https://www.theamericanconsumer.org/wp-content/uploads/2023/12/Net-Neutrality-ACI.pdf>.

⁶ Ibid. Please see our December 11, 2023 comments for a complete explanation, data, and sourced references.

⁷ Steve Pociask, “Reclassifying Broadband Means Higher Prices,” *AEIdeas*, American Enterprise Institute, November 21, 2014, <https://www.aei.org/technology-and-innovation/telecommunications/reclassifying-broadband-means-higher-prices/>.

services, which are Title II regulations. So, by reclassifying broadband as Title II, these taxes apply.

As a result, net neutrality regulations that reclassify broadband services will unquestionably increase taxes on broadband services, which will raise consumer prices and chill network and technological investment. This is not speculation; this is a fact.

The article concludes: “If the goal of Congress and the FCC is to improve broadband affordability, adoption, access and network investment, as well as increase consumer welfare, reclassifying broadband services does the exact opposite.”⁸ Indeed, if the FCC reclassifies broadband services, Congress and the FCC would have woefully failed to meet its goal for a nationwide broadband plan.

Other Consequences of Title II Regulations

Title II regulations could also undermine customizable network functionality, specifically spectrum slicing, by requiring providers to treat all internet data across their networks equally.⁹ Network slicing allows network operators to create virtual networks with “functionality specific to the service or customer over a common network.” However, the success of these networks depends on operators’ having the freedom to customize them to the unique needs of users. Top-down regulations like those proposed by the FCC could limit that freedom and stifle future innovation.

In our comments, we further outline why Title II regulations are not necessary for the FCC to perform other important responsibilities such as advancing national security and protecting public safety. The FCC already possesses broad power to protect American consumers and networks from cyber-attacks and it wields it frequently to shut down carriers deemed to be security threats. More importantly, as stated in our comments, Congress has already appointed other “Executive branch agencies with national security expertise” to take on this role.

Our comments also discuss why it would be a grave misstep for the FCC to develop a national standard based on 1930s government controls that were originally designed for the telephone market. Today’s broadband market is vastly more competitive than the telephone market of nearly a century ago and the FCC already has the authority it needs to order a preemption of state rules that encroach on its jurisdiction. Neither the federal government nor states should be in the business of imposing new regulations on a service that is increasingly global and not limited to the confines of state geography.

⁸ Ibid.

⁹ As previously noted, a fuller explanation, data, and sourced citations are in our December 11, 2023 comments.

Summary

Having considered these facts, it is the American Consumer Institute's firm belief that the FCC's proposal is premature. The FCC does not adequately identify a problem that needs fixing, nor does it account for the robust body of academic research that has found that strict net neutrality regulations negatively impact consumer welfare. In addition, the reclassification of broadband services from a Title I to Title II service will unequivocally lead to higher consumer prices, which will impact demand and lead to consumer welfare losses. This outcome undermines the very goals that Congress, and the FCC, have set for closing the digital divide.

We strongly urge the FCC to reconsider its proposal to impose utility-style regulations on the broadband market. We ask the FCC to pause this NPRM, collect empirical evidence to support a rationale for regulatory intervention, and conduct a thorough cost and benefit analysis to back its claims that these regulations are needed to remedy market failure. Without such support, we recommend that the FCC reject this NPRM.

Respectfully submitted,

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