The American Consumer Institute
Center for Citizen Research

Before the
Federal Communication Commission
Washington DC, 20554

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

Comments of the American Consumer Institute

The American Consumer Institute ("ACI") is a nonprofit 501(c)(3) education and research organization. Its mission is to identify, analyze, and protect the interests of consumers in legislative and rulemaking proceedings in information technology, health care, insurance, and other matters. ACI hereby submits its comments to the Federal Communication Commission ("FCC") with respect to its Notice of Proposed Rulemaking in the above-captioned proceeding.

For years, commentators have debated the merits of usage limits—commonly known as *usage-based pricing.*[1] Usage-based pricing is simply a way for businesses to offer consumers more choices and enable them to pay a price that closely approximates what they use, thereby not overcharging consumers who use less while ensuring that limited capacity meets demand. As it pertains to broadband services, however, some allege that usage-based pricing is unfair because it may risk limiting consumer access to the internet. We will show that this is not the case.

[1] Michael Weinber, "The question at the core of the caps debate," *The Hill*, January 4, 2024, https://thehill.com/blogs/congress-blog/technology/138492-the-question-at-the-core-of-the-data-caps-debate/; and Daniel Lyons, "The Impact of Data Caps and Other Forms of Usage-Based Pricing for Broadband Access," Mercatus Center, October 9, 2012, https://www.mercatus.org/research/working-papers/impact-data-caps-and-other-forms-usage-based-pricing-broadband-access.

Usage-based pricing is a very common business practice. Many businesses provide consumers with a menu of pricing plans that allow consumers to choose the quantity that they want to purchase at a corresponding price. This sort of versioning, market segmentation, and price differentiation are very common selling practices that are widely discussed and taught in a host of university textbooks and available in many professional business reports. This business practice, also referred to as *second-degree price discrimination*, is also sometimes thought of as being necessary for firms that have high sunk or fixed costs, according to Nobel Laureate William Baumol:

> "Of course, it has long been recognized that firms will sometimes be forced to adopt discriminatory prices to survive. Particularly in the presence of heavy sunk or fixed costs, it is clear that uniform prices set at any level (and, notably, if they are set equal to marginal costs) will not permit the enterprise to recoup its invested outlays."[2]

Beyond firms with high fixed costs, providing a menu of pricing plans for consumers has also been widely observed across a variety of products and services, markets, and industries, including even those industries not necessarily considered to have extensive economies of scale, as Professor James Dana noted:

> "Casual observation suggests that price discrimination is common in many industries that appear to be extremely competitive ... firms in the airline, car rental, moving, hotel and restaurant businesses practice common types of price discrimination, and much evidence suggests that high-valuation consumers pay higher average prices than low-valuation consumers. Yet these markets are not characterized by unusually high entry costs, economies of scale, product differentiation, or market concentration."[3]

In general, the debate on the consumer benefits of usage-based pricing has been settled in the economic literature because providing customers with the ability to choose pricing plans

[2] William Baumol, *Regulation Misled by Misread Theory*, AEI-Brookings Joint Center, Washington, DC, September 22, 2006, p. 5.

[3] James D. Dana "Advance-Purchase Discounts and Price Discrimination in Competitive Markets," *Journal of Political Economy*, Vol. 106, 1998, pp. 395-422.

maximizes consumer welfare, compared to "all-you-can-eat" pricing plans.[4] The fact is, consumers have different elasticities of demand and income, as reflected by different personal needs, tastes, quality, sensitivity to seasonality and trends, disposable income, and other factors – all of which influence their willingness to pay.

Because consumers have distinct preferences, public policies that force uniform prices for private goods and services are likely to cause some consumers to pay too much for what they use and charge other consumers too little. Usage-based pricing is a solution to overcome this inequity. Additionally, ending usage-based pricing will force low-usage consumers to effectively subsidize bandwidth hogs, a phenomenon that is a well-documented problem for broadband services.[5]

Local exchange telephone services are frequently offered to low-income consumers as "measured" services and "economy" plans. These metered pricing options are available as part of the Lifeline program which is regulated by the states and the FCC, and they are used to provide low-income consumers with critical telecommunications connectivity at lower prices. Without metered services, low-income consumers would pay more whether they use more or not.

Therefore, policies that force all-you-can-eat broadband pricing plan would undermine market forces and interfere with broadband providers' ability to seek out more efficient equilibrium solutions that would lead to reductions in consumer welfare. To this point, economists have noted that usage-based pricing practices can approximate a "Ramsey

[4] Michael E. Levine, "Price Discrimination without Market Power," *Yale Journal on Regulation*, vol. 19:1, winter 2002; (2) Einer Elhauge, "Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power," *Yale Law Journal*, v. 12, 2003; Hal Varian, "Price Discrimination," *Handbook of Industrial Organization*, v. 1, (Richard Schmalansee and R. Willig eds.) North Holland, 1989; William Baumol, *Regulation Misled by Misread Theory*, AEI-Brookings Joint Center, Washington, DC, September 22, 2006, p. 5.; Carl Shapiro and Hal Varian, Information Rules: A Strategic Guide to the Network Economy, Harvard Press, chapter 3, 1998; and Yongmin Chen and Marius Schwartz, "Differential Pricing When Costs Differ: A Welfare Analysis," *Rand Journal of Economics*, April 23, 2025.

[5] Steve Pociask, "Helping the 'Haves' at the expense of the 'Have-Nots?' -- Bandwidth Hogs would Benefit from Proposed Internet Regulations," American Consumer Institute, August 10, 2007, available at https://www.theamericanconsumer.org/2007/08/helping-the-haves-at-the-expense-of-the-have-nots/; and Steve Pociask, "Tragedy of the Commons – Part II," American Consumer Institute, April 3, 2008, available at https://www.theamericanconsumer.org/2008/04/tragedy-of-the-commons-part-ii/.

optimum" and satisfy "the second-best welfare attributes of revenue constrained economic welfare."[6]

In summarizing the consumer welfare impacts of uniform "all-you-can-eat" internet prices compared to offering consumers a choice of pricing plans, Professor Larry Darby, a former FCC Chief economist and Wireline Bureau Chief, wrote:

> The consensus among mainstream economists is that price discrimination is not only compatible with effective competition and economic welfare maximization, but that it may be the only sustainable structure of prices for capital intensive, high sunk cost, low marginal cost undertakings. Banning natural pricing practices will suppress investment and consumer choice.[7]

Usage-based pricing is simply a way for broadband providers to provide consumers with more choices while ensuring that limited network capacity is not exhausted. To summarize the literature, prohibiting or restraining broadband providers from offering pricing plans with data caps would likely reduce consumer welfare.

The consequences for consumers are clear – government intervention that limits usage-based pricing would be disastrous for consumers, and lead to *de facto* rate regulation – something the FCC has routinely suggested it would not do.[8] The piece argues that such regulation would undermine the important role that price differentiation plays in honoring consumer choice. It is simply not in the public's interest. Our recent op-ed finds similar conclusions.[9]

The American Consumer Institute believes the economic literature makes valuable contributions to this proceeding, and respectfully asks that the FCC carefully consider these

---

[6] William Baumol, p. 3.
[7] Larry F. Darby, "FAQs about Price Discrimination and Consumer Welfare," ConsumerGram, American Consumer Institute, August 19, 2000.
[8] Todd Shields, "FCC Chair Rosenworcel Says 'No' to Broadband Rate Regulation," Bloomberg, November 29, 2024, https://news.bloomberglaw.com/tech-and-telecom-law/fcc-chair-rosenworcel-says-no-to-broadband-rate-regulation; and Eric Fruits and Geoffrey A. Manne, "Quack Attack: De Facto Rate Regulation in Telecommunications," March 30, 2023, https://laweconcenter.org/resources/quack-attack-de-facto-rate-regulation-in-telecommunications/.
[9] Nate Scherer, "Broadband Investigation Opens a Gateway to the Danger Zone," *DC Journal*, November 5, 2024, *https://dcjournal.com/broadband-investigation-opens-a-gateway-to-the-danger-zone*.

sources. It is also important for the FCC to proceed cautiously with its exploration of the use of data caps, which, if imposed, would reduce consumer welfare and raise prices for some, particularly lower-income consumers.

Professor Baumol warns that regulations should not be "misused" to impose market restraints in the name of the "public's interest" and provides further economic evidence of the clear consumer welfare benefits that result from market segmentation and price discrimination, compared to government-mandated uniform pricing:

> In conclusion, it should be noted that the markets imposition of discriminatory pricing in a wide range of circumstances is not necessarily to be deplored. It has long been known, following Edgeworth (1925a, 1925b) and Pigou (1938), that discriminatory prices can enhance output and increase economic welfare. Recently, Hausman and Mackie-Mason (1988) and Varian (1996), among others, have provided some elegant and powerful results that confirm this observation. And the distributive consequences also (at least sometimes) appear commendable on their face. Low "lifeline rates" that provide electricity and telephone service to impecunious customers, cheaper airfares and theater tickets for students, and a variety of other such arrangements may contribute to the net incomes of the supplier firms, but they can also be accepted as a social benefit that uniform pricing might otherwise preclude.[10]

Based on this fitting guidance, the American Consumer Institute respectfully asks the FCC to carefully consider the valuable contributions the economic literature provides in this rulemaking. In our view, it is important for the FCC to proceed cautiously with its exploration of the use of data caps and avoid a path toward rate regulation.[11] Such an outcome would be disastrous not only for the broadband market but also for consumers.

Respectfully submitted,

Steve Pociask
President/CEO
American Consumer Institute
Center for Citizen Research
4350 N. Fairfax Drive, Suite #725
Arlington, VA 22203

[10] Baumol, pp. 31-32.
[11] Eric Fruits and Geoffrey A. Manne.