

April 9, 2024

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: WC Docket No. 23-320, *Safeguarding and Securing the Open Internet*

Dear Ms. Dortch:

On Friday, April 5, 2024, Heather Franklin, Yanni Chen, and I of Free Press met by video conference with Hayley Steffen, Legal Advisor for Wireline and Space issues to Commissioner Gomez. The Free Press representatives raised several topics during the meeting, as detailed below, covering chiefly the same matters detailed in other recent meetings¹ with Commissioners and staff regarding the above-captioned proceeding. We recounted explanations and analyses in our December 2023 initial comments² and January 2024 reply comments³ in this docket, and also highlighted issues raised by other parties in the intervening months.

First, we summarized Free Press’s and other commenters’ definitive explanations of the propriety of a Title II telecommunications service classification for modern broadband internet access service (“BIAS”). As Free Press has explained in painstaking detail—in this docket, and in the Commission’s prior proceedings on this same issue in 2010, 2015 and 2017—broadband perfectly fits the legal definition of a telecommunications service that Congress crafted in its forward-looking overhaul of the Communications Act in 1996. Broadband is a service offered to the public to carry their data between the points of their choosing without altering that data.

Our initial comments dealt extensively with the DNS and caching arguments⁴ raised by ISPs and their trade associations, in their unavailing claims that these functionalities make BIAS offerings that internet users rightly perceive as telecommunications services into information services instead.

¹ See, e.g., Free Press Notification of *Ex Parte* Meeting with Commissioner Starks, WC Docket No. 23-320 (filed Apr. 1, 2024).

² Comments of Free Press, WC Docket No. 23-320 (filed Dec. 14, 2023) (“Free Press Comments”).

³ Reply Comments of Free Press, WC Docket No. 23-320 (filed Jan. 17, 2024).

⁴ See, e.g., Free Press Comments at 24–31; see also *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking, FCC 23-83, ¶¶ 71–75 (rel. Oct. 20, 2023) (“2023 NPRM”) (correctly proposing to classify BIAS as a telecom service, and finding that DNS and caching do not change that conclusion but can fit within the telecommunications system management exception to the definition of “information service”).

With regard to preemption, Free Press reiterated its support for the Commission’s proposal to proceed incrementally on any such questions,⁵ as the NPRM proposed.⁶ Under such a careful incremental approach, the Commission should not conclude categorically that state laws would conflict with any proposed federal protections. We noted that compliance with both federal and state laws would be possible; and that harmonious state laws and regulatory regimes would not serve as an obstacle to fulfillment of the Commission’s objectives and the protection of internet users. For these reasons, the Commission should not conclude that federal protections must form a “ceiling” for these protections.⁷

And with the release of the draft order⁸ in this proceeding the day before our meeting with Ms. Steffen, Free Press was able to express preliminary support for that approach as proposed to be adopted in that item. The draft order “decline[s] requests to categorically preempt all state or local regulation affecting broadband in the absence of any specific determination that such regulation interferes with [the Commission’s] exercise of federal regulatory authority,”⁹ and rightly finds that state laws (including California’s strong statutory open internet protections) are generally compatible with the draft order.¹⁰

Next, we reiterated that Free Press analysis of internet service providers’ own financial data and statements to shareholders demonstrates conclusively that the Commission’s classification of broadband has no impact on deployment or investment. No amount of misleading and false narratives pushed by broadband trade associations can change this patently obvious fact. We summarized in brief Free Press’s April 1 investment analysis *ex parte* submission¹¹ further detailing ISPs’ investment patterns and behaviors during the various periods when Title II was restored in 2015, repealed by the vote in 2017, then promised anew by this administration and in this proceeding.

As Free Press detailed in that recent *ex parte* and in our initial comments in this docket, deployment of next-generation services accelerated in both rural and urban areas following the FCC’s 2015 vote to reclassify, and actually declined after the Pai FCC’s 2017 repeal – though the classification decisions did not cause any such decreases or increases. In our filings, we documented numerous statements from ISPs to investors, revealing that the natural and cyclical changes in the pace of their deployment and the amount of their investment had absolutely nothing to do with FCC policy—either prior to the FCC’s 2015 vote, after it, or after the Pai repeal. We also noted how ISPs’ investment plans have not changed following the Commission’s announcement of its proposal to restore Title II and the open internet rules now.

⁵ See Free Press Comments at 70.

⁶ See 2023 NPRM ¶ 96.

⁷ *Id.* ¶ 97.

⁸ *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-320, 17-108, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC-CIRC-2404-01 (rel. Apr. 4, 2024) (“2024 Draft Order”).

⁹ *Id.* ¶ 267.

¹⁰ See *id.* ¶¶ 269–271.

¹¹ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from S. Derek Turner *et al.*, Free Press, WC Docket No. 23-320 (filed Apr. 1, 2024).

On the topic of forbearance, Free Press expressed our general agreement with the forbearance decisions made in the 2015 *Open Internet Order*, and the similar ones proposed in the NPRM and in the draft order in the current docket. That includes our strong support for the proposal to forbear for now from Section 254(d).¹²

In response to questions about the notion of waiver instead of forbearance from this section’s contribution requirements, we expressed no definitive view on this complex legal question. We did highlight for Ms. Steffen, however, our grave concern that broadening the base to include BIAS (without further work and protections) would significantly shift the USF contribution burden away from businesses and towards individuals and families—with as much as \$4 billion annual wealth transfer from consumers to giant corporations.¹³ This regressive shift would disproportionately harm low-income households. It also would result in tremendous monthly price increases for households subscribing to BIAS and other telecommunications services—of anywhere from \$2 up to nearly \$18 per month—especially if the Commission were to undertake efforts to increase the size of its affordability support program in order to approach the enrollment numbers and dollar amounts of the Affordable Connectivity Program.¹⁴

Finally, Free Press made reference to certain aspects of the proposed open internet rules themselves, and to the potential for helpful clarifications of the final rules proposed in this docket.¹⁵ We discussed briefly the “no-throttling” rule proposed in the NPRM, that same Notice’s reasonable network management definition, and its descriptions of the Commission’s authority under a Title II framework over non-BIAS data services and over interconnection or traffic exchange agreements. In each case, we suggested that the Commission further clarify what its proposed bright-line rules and general conduct standard already make clear: broadband providers may not use these service definitions, exemptions, or other unreasonably discriminatory practices and conduct to evade the protections afforded to internet users by the Commission’s proposed classification of BIAS and its proposed open internet rules.

Respectfully submitted,

Matthew F. Wood
Vice President of Policy
Free Press
mwood@freepress.net

¹² See Free Press Comments at 66–67 (quoting 2023 NPRM ¶ 105, which proposed “to forbear in part from the first sentence in section 254(d) and our associated rules ‘insofar as they would immediately require new universal service contributions associated with’ BIAS”); see also 2024 Draft Order ¶ 359.

¹³ Comments of Free Press, WC Docket No. 21-476, at 31–35 (filed Feb. 17, 2022).

¹⁴ See Letter from Jessica Rosenworcel, Chairwoman, Federal Communications Commission, to Hon. Ben Ray Luján, at 3 (Jan. 12, 2024), <https://docs.fcc.gov/public/attachments/DOC-400113A1.pdf>.

¹⁵ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Matthew F. Wood, Free Press, WC Docket No. 23-320 (filed Mar. 29, 2024).