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Proceeding(s):	23-320
Confirmation #:	2024011749565620
Submitted:	Jan 17, 2024 3:34:01 PM
Status:	RECEIVED
Name(s) of Filer(s)	WISPA – Broadband Without Boundaries
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Type of Filing	REPLY TO COMMENTS
File Number	
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Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF WISPA – *BROADBAND WITHOUT BOUNDARIES*

WISPA –
BROADBAND WITHOUT BOUNDARIES

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January 17, 2024

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Summary

The initial comments largely ignore the impact that Title II would have on smaller broadband providers, instead resorting to the same, tired, ideological arguments that parties have used with the Commission in the past. Only WISPA and a handful of other associations representing smaller broadband providers demonstrated, through member surveys, declarations and information on current market dynamics that adopting "one-size-fits-all" rules under Title II would impose significant and disproportionate burdens that would limit investment, dissuade participation in the BEAD program, and harm consumers that would gain the benefit of increased competitive choice and lower prices. Indeed, when combined with new regulations Congress required the Commission to adopt, the regulatory onslaught will simply be too much.

Much of the opposition to maintaining the existing regulatory regime comes from think tanks and others that have never operated a broadband network, raised investment capital or competed in a robust marketplace. Instead, they lump all broadband providers together, without any assessment of "gatekeeper" or market power – powers that smaller providers do not have. In fact, the record demonstrates that, for smaller providers, the market operates in a way that is entirely the reverse of the Commission's assumptions: large content providers have the power and leverage to deny content to smaller providers that lack market share. Commenters also fail to appreciate the cumulative effect of new, Congressionally mandated rules that are driving up compliance costs and exacerbating regulatory uncertainty.

The Commission should abandon this proceeding, as there is no identifiable consumer harm that must be addressed. But if the Commission proceeds with reclassifying broadband as a Title II service, the record provides ample support for the Commission to exercise further forbearance from certain of Title II's provisions, including Sections 201, 202, 208 and 214 of the

Communications Act of 1934, as amended. With respect to Section 214, the record clearly shows that the federal government has sufficient authority outside of Title II to address potential harms to national security. The Commission also should forbear from Section 254(d) and not use this proceeding to saddle broadband providers with universal service contributions at least until a full record can be developed that considers the impact on smaller providers. The Commission also should exempt smaller providers from any conduct rules it may adopt given the lack of market power that is the predicate for such regulation.

The Commission has other sources of authority to promote broadband-only providers with access to infrastructure. Adopting Title II obligations for the single benefit of access rights is unnecessary in light of the Commission's existing authority under Section 706 and other statutory provisions.

Although the Commission presumes that Title II will preempt state regulation, the record shows that a contrary result would be likely in many states. Comments from state governments make clear a present intent to apply their full range of existing, century-old telephone service standards to broadband on top of the Commission's Title II regime. Undoubtedly, this would lead to mass confusion and litigation on the extent to which states could use their existing common carrier authority to impose new and onerous state law requirements on broadband providers. Commenters seeking to open the door for state regulation that goes beyond Title II uniformly fail to discuss the impact of the increased federal and state regulatory burdens on smaller providers. A simple cost/benefit analysis would strongly indicate that the benefits of utility regulation are far outweighed by the costs of dealing with heavy-handed federal *and* state utility regulation of broadband.

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REPLY COMMENTS OF WISPA – *BROADBAND WITHOUT BOUNDARIES*

WISPA – *Broadband Without Boundaries* ("WISPA"), pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[1] hereby replies to certain of the initial comments filed in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[2]

Predictably, the vast majority of comments fail to go into much, if any, detail about the adverse impacts of Title II on smaller providers, and instead just repeat the binary tropes of whether broadband internet access service is or is not a telecommunications service that should or should not be regulated under Title II of the Communications Act of 1934, as amended ("Act"). Save for discussion on the application of the "major questions" doctrine and changes in the broadband marketplace, commenters add very little new material to their shopworn arguments that proponents and opponents of utility-style regulation have trotted out in earlier Commission proceedings. They simply lump together all broadband providers without making any distinction among their size, market power and competitive posture. And this is hardly surprising, as the vast majority of commenters favoring classifying broadband internet access service as a Title II common carrier service have never run any kind of network, broadband or

[1] *See* 47 C.F.R. §§ 1.415 and 1.419.

[2] *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320, FCC 23-83 (rel. Oct. 20, 2023) ("*NPRM*").

telephone, and have never had to actually grapple with the requirements and costs of being regulated as a common carrier. They fail to make specific cost/benefit arguments because they are entirely unfamiliar with the costs of complying with broad utility-style regulatory regimes.

Other than comments submitted by WISPA and other representatives of smaller broadband providers, the record is largely devoid of any meaningful discussion on the burdens a Title II regulatory regime will impose on smaller broadband providers that lack market power, face increased competition and simply do not have the financial and human resources to operate in a strict Title II environment, especially when considering the multitude of new regulatory obligations Congress has placed on broadband providers in the past few years. The Commission cannot whistle past the graveyard and expect that "one-size-fits-all" rules, not mandated by Congress, will be an easy lift for smaller providers.

In its initial Comments, WISPA provided data from Commission reports and a member survey showing that the current marketplace dynamics do not support heavy-handed utility-style regulation.[3] WISPA also explained that, if the Commission proceeds with implementing utility-style regulation anyway, it should forbear from additional specific Title II statutory provisions, exempt smaller providers from certain conduct rules, adopt a definition of *per se* reasonable network management, and streamline enforcement.[4] Only then will the full weight of the *NPRM*'s proposals be blunted sufficiently to avoid serious negative impacts to thousands of smaller providers and the millions of consumers they serve. But, of course, the Commission can easily avoid such a regulatory scheme by abandoning this proceeding altogether.

[3] Comments of WISPA, WC Docket No. 23-320 (filed Dec. 14, 2023) ("WISPA Comments").

[4] *Id.*

Discussion

I. THE RECORD DEMONSTRATES THAT SMALLER PROVIDERS LACK MARKET POWER TO ENGAGE IN HARMFUL CONDUCT AND THUS SHOULD NOT BE SUBJECT TO HEAVY-HANDED UTILITY-STYLE REGULATION

A number of commenters argue that the Commission should reclassify broadband internet access service under Title II.[5] But these Comments all suffer from the same flaw – they ignore marketplace realities, lump together all broadband providers and rely on the false assertion that only Title II can "correct" some perceived (but unarticulated) consumer harm. These comments simply ignore documented facts demonstrating that small providers lack the market power to engage in harmful conduct and that imposing Title II burdens will drastically worsen their ability to compete, invest, innovate, and deploy broadband service, especially in smaller communities that larger providers have avoided.

By contrast, associations representing thousands of smaller providers offered specific data showing that smaller broadband providers lack the market power upon which the

[5] *See, e.g.*, Comments of Mozilla, WC Docket No. 23-320 (filed Dec. 14, 2023), at 3 ("Mozilla Comments") ("We also have consistently supported the view that rules grounded in Title II authority and oversight are the best path forward to create lasting certainty for users of the internet and for ISPs");; Comments of INCOMPAS, WC Docket No. 23-320 (filed Dec. 14, 2023), at 18 ("INCOMPAS Comments") ("Reclassification of BIAS as a Title II service will help ensure that BIAS-only providers can exercise their rights to deploy broadband infrastructure and the protections afforded by Title II in the Act to enable more competition in the BIAS marketplace—which is necessary given that consumers do not have sufficient choice of providers at home."); Joint Comments of the National Association of State Utility Consumer Advocates and the Connecticut Office of State Broadband within the Connecticut Office of Consumer Counsel, WC Docket No. 23-320 (filed Dec. 14, 2023), at 14 ("State Utility Consumer Advocates and Connecticut Office of State Broadband Comments") ("The State Consumer Advocates support the *NPRM*'s proposed return to the classification of BIAS as telecommunications service subject to Title II of the Act, buttressed with the proposed provider conduct rules."); Comments of National Digital Inclusion Alliance and Common Sense, WC Docket No. 23-320 (filed Dec. 14, 2023), at 5 ("NDIA and Common Sense support the Commission's proposal to reclassify BIAS as a Title II service to support consumer access to broadband through USF, protect consumers from discriminatory practices, and promote broadband access and affordability."); Comments of Free Press, WC Docket No. 23-320 (filed Dec. 14, 2023), at 43 ("Free Press Comments") ("Congress clearly intended for the Commission to apply its light-touch Title II obligations to all telecom services, regardless of how competitive the market is.") (footnote omitted).

Commission relies in proposing a Title II regulatory regime. WISPA included in its Comments survey results showing that, although more than 60 percent of respondents reported having five or fewer employees and nearly two-thirds of its operator members have 2,000 or fewer customers,[6] they are facing competition in their local markets from a larger number of companies.[7] ACA Connects, supported by declarations from its members, agreed with WISPA that "[s]maller [broadband providers] plainly lack market power or any ability to distort the marketplace through anticompetitive conduct. Our Members typically face competition from multiple sources, and generally from much larger providers."[8] NTCA noted that "small rural ISPs . . . lack the market power or bargaining strength to demand concessions of larger platforms or even to negotiate on 'even terms' with respect to questions such as caching server placement, direct interconnection, or other operational matters that affect costs of delivering content to end users."[9] USTelecom identified the defect of the *NPRM* concisely and clearly: "Eschewing a factual analysis based on over two decades of real marketplace experience, the *NPRM* instead theoretically speculates that each ISP, no matter how small, possesses 'gatekeeper' power over the entities seeking access to its end users."[10]

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[6] WISPA Comments at 6.

[7] *See id.* at 12 ("More than 42 percent of survey respondents now face competition from four or more fixed broadband providers, and some report competing with as many as 10.").

[8] Comments of ACA Connects, WC Docket No. 23-320 (filed Dec. 14, 2023), at 53 ("ACA Connects Comments").

[9] Comments of NTCA – The Broadband Association, WC Docket No. 23-320 (filed Dec. 14, 2023), at 7 ("NTCA Comments"). *See also* Comments of the California Attorney General, WC Docket No. 23-320 (filed Dec. 14, 2023), at 4 ("CAG Comments") ("Small, regional ISPs generally do not have the market power necessary to engage in discriminatory or anti-competitive practices. As the CEO of Cruzio, a small, local California ISP, explained when defending SB 822, 'it is highly unlikely that if we asked a content distribution network or edge provider to pay us to reach our 9,000 customers that they would pay any attention at all.'") (citation omitted).

[10] Comments of USTelecom, WC Docket No. 23-320 (filed Dec. 14, 2023), at 48 ("USTelecom Comments") (citation omitted). *See also* Comments of WTA – Advocates for Rural Broadband, WC Docket No. 23-320 (filed Dec. 14, 2023), at 6 ("WTA Comments"). Though it supports Title II

More broadly, the U.S. Chamber of Commerce observed that:

> Evidenced by the periods where the Commission has attempted a Title II approach for broadband services, heavy-handed regulation decreases investment while increasing uncertainty and compliance costs for providers. Imposing these burdens on the broadband marketplace would yet again cause these undesirable outcomes, which are not only problematic but carry other negative consequences such as a disproportionate impact on small rural providers and subscribers.[11]

Similarly, the 100,000-member Small Business & Entrepreneurship Council reiterated arguments from its 2014 comments, asserting that "innovation, entrepreneurs and small business win 'under the continuation of a light regulatory touch' and that the FCC should stand down from its proposed 'open internet' proposal."[12]

These affirmations – from four of the largest trade associations representing smaller broadband providers and national organizations representing small businesses generally – cannot be squared with Free Press' unsupported claim that "ISPs do not deny that they have market power, at least not to the investment community. It's something they're proud of . . . ."[13] Any argument that "[a]bsent net neutrality protections, ISPs can become gatekeepers . . . [and] may choose to serve their own social and political as well as economic objectives . . . ."[14] has no

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classification with "limits" and "safe harbors," WTA agrees that "RLEC ISPs are too small in size and resources to serve as effective 'gatekeepers' to control or limit the access of their relatively small subscriber bases to edge provider applications, services and devices, and reciprocally to control or limit edge provider access to their small customer bases.".

[11] Comments of the U.S. Chamber of Commerce, WC Docket No. 23-320 (filed Dec. 14, 2023), at 15 ("U.S. Chamber Comments"). *See also id.* at 17-18 ("The costs imposed by Title II regulation place a 'disproportionate and unfair burden on small broadband providers,' who 'lack the resources to implement business plans that anticipate all of the potential pitfalls inherent in comprehensive common carrier regulation.'") (citation omitted).

[12] Comments of the Small Business & Entrepreneurship Council, WC Docket No. 23-320 (filed Dec. 14, 2023), at 4.

[13] Free Press Comments at 43. Free Press attempts to include smaller providers in its support for Title II, but does so rather clumsily by using the phrase "large and small" providers and then proffering examples of "small" providers that have 400,000 subscribers. *See id.* at 130 n.261.

[14] Comments of the Electronic Frontier Foundation, WC Docket No. 23-320 (filed Dec. 14, 2023), at 11.

application when it comes to smaller providers that must compete with a larger number of broadband providers, many of which have exponentially larger financial resources.

Notably, Free Press makes mutually exclusive claims about ISPs. On one hand, it alleges that "ISPs large and small are rational economic actors, and the conditions by which they maximize profits may change over time."[15] On the other hand, only one page later, Free Press states that any ISP "could choose to block certain content and that action might be popular with the majority of its customers, but still frustrate certain customers' ability to use their internet connection to connect and communicate freely."[16] Free Press makes no attempt to explain why any "rational economic actor" would devalue its service in a competitive market by engaging in anti-consumer behavior, much less tackle whether smaller providers *could* do so even if they wanted. And even if a small provider were to block certain traffic, it would need to disclose that practice under the Commission's transparency rule and be subject to enforcement for failing to disclose its network management practices.[17] Free Press's narrative is contradictory on its face and simply waves away inconvenient facts.

To be sure, smaller providers lack the power to restrict access to internet content. Here, the words of the Ad Hoc Telecom Users Committee are instructive: "Small start-ups, companies

[15] Free Press Comments at 72.

[16] *Id.* at 73 n.174.

[17] The American Civil Liberties Union, County of Santa Clara, California, and Public Knowledge cite announcements by a single, small Idaho ISP that it would block access to certain cites. *See* Comments of the American Civil Liberties Union, WC Docket No. 23-320 (filed Dec. 14, 2023), at 5-6 ("ACLU Comments"); Comments of the County of Santa Clara, California, WC Docket No. 23-320 (filed Dec. 14, 2023), at 22; Comments of Public Knowledge, WC Docket No. 23-320 (filed Dec. 14, 2023), at 6 ("Public Knowledge Comments"). However, there is no evidence that the ISP actually blocked access or had market power that prevented dissatisfied consumers from subscribing to a competitor's service. Instead of citing a single example over years of history in an attempt to support a regulatory outcome, these commenters could have contacted the Federal Trade Commission and the Commission to initiate enforcement inquiries against the provider.

with little funding or name recognition, and those in the process of building their customer base—the types of entities that have benefitted so mightily from internet freedom—would have little recourse or leverage against ISPs whose customers were insufficiently numerous or vocal in demanding access to their content."[18] If that is true, then it must also be true that small ISPs lacking gatekeeper or market power would have little recourse or leverage against content providers that exercise their market power to deny or restrict smaller providers from accessing and distributing their content.

Certain organizations purportedly committed to bridging the digital divide totally ignore the impact that Title II would have on the Broadband Equity, Access, and Deployment ("BEAD") program that will invest $42.45 billion of taxpayer funds towards ubiquitous broadband deployment of at least 100/20 Mbps to every location in the country. Any discussion of the broader impact on national policy is missing from their myopic view that Title II somehow solves some unstated, hypothetical problem. By contrast, associations representing broadband providers – those that will be applying for BEAD subgrantee awards, investing their own funds and building out broadband service to unserved and underserved locations – discussed how the "negative impacts of Title II regulation on broadband investment would be particularly detrimental to the BEAD program, which will rely on significant amounts of private capital to achieve its ambitious broadband deployment goals."[19] NCTA explained that the costs of Title II compliance coupled with the BEAD program's requirement of at least 25 percent matching funds could have alarming effects:

[18] Comments of the Ad Hoc Telecom Users Committee, WC Docket No. 23-320 (filed Dec. 14, 2023), at 20.

[19] Comments of NCTA – The Internet and Television Association, WC Docket No. 23-320 (filed Dec. 14, 2023), at 85-86 ("NCTA Comments").

> By chilling ISPs' investment in broadband networks and reducing the amount of private capital available for matches, Title II reclassification would result in higher per-location federal outlays, potentially depleting the BEAD program's funding before its objectives have been achieved. The uncertainty that would arise from reclassification could even deter broadband providers from participating in the BEAD program altogether.[20]

WISPA agrees. In its Comments, WISPA stated that "[i]mposing Title II regulation on broadband providers will . . . increase the cost of the [BEAD] program and make it harder for these taxpayer dollars to achieve the bipartisan goal of universal broadband."[21] Reciting the myriad of obligations the BEAD program entails, WISPA noted that "[s]maller providers that may have reviewed compliance costs for participating in the BEAD program and decided they were manageable will have to reassess that decision if Title II regulations are re-imposed."[22]

In sum, Title II will be bad news for smaller broadband providers. Their interests – both with respect to the Commission's regulatory approach and broader broadband funding goals – cannot be ignored, as so many commenters choose to do.

II. IF THE COMMISSION IMPOSES TITLE II RULES, IT SHOULD RELIEVE SMALL PROVIDERS OF BURDENSOME REGULATIONS

[20] *Id.* at 86 (citation omitted).

[21] WISPA Comments at 24.

[22] *Id.* at 25. *See also* Comments of the R Street Institute, WC Docket No. 23-320 (filed Dec. 14, 2023), at 7 ("BEAD, combined with affordability programs like the Universal Service Fund Programs and Affordable Connectivity Program, provides an once-in-a-lifetime chance to help connect those on the wrong side of the digital divide. However, between the Digital Discrimination Proceeding and Title II classification, these harmful efforts will likely deter providers from participating in these critical programs, preventing communities from reaping the benefits of high-speed, low-cost, competitive broadband products.").

A. The Commission Should Exempt Smaller Providers From The New Rules

In its Comments, and consistent with the Regulatory Flexibility Act[23] and Commission practice,[24] WISPA asked the Commission to exempt smaller providers from any rules it may adopt in this proceeding.[25] WISPA explained that "[t]he proposed rules would burden small businesses with new obligations that are outside the scope of what smaller providers can be expected to handle with their limited resources and limited staff, and especially in light of the absence of any identifiable harm they have caused or would cause to internet openness."[26] ACA Connects added that "many of our Members lack in-house legal staff and will need to retain outside counsel to understand their responsibilities and determine how best to comply not only when the rules take effect but also as their broadband service evolves and Commission guidance regarding the applicable rules emerges on a case-by-case basis."[27] NRECA's member survey "revealed that most have fewer than one (1) full-time equivalent employee assigned to manage regulatory compliance issues. Many small BIAS providers do not have sufficient staff or in-house expertise to manage an extensive new set of regulatory obligations."[28]

In addition to WISPA, Home Telephone Company, a rural local exchange carrier based in South Carolina, similarly supports rules "founded on the four pillars that have received bi-partisan Commission support. Rules related to no blocking, no throttling, and no paid

[23] Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

[24] *See* WISPA Comments at 73-78.

[25] *See id.* at 78, 80.

[26] *Id.* at 78.

[27] ACA Connects Comments at 48-49.

[28] Comments of the National Rural Electric Cooperative Association (NRECA) in Response to Notice of Proposed Rulemaking and Initial Regulatory Flexibility Analysis, WC Docket No. 23-320 (filed Dec. 14, 2023), at 5 ("NRECA Comments").

prioritization with exemptions and modifications for smaller providers should all be adopted."[29] NRECA also urges the Commission "to exempt small entities from all but the most essential BIAS regulatory obligations."[30] And although it does not specifically support exemptions, NTCA agrees that "narrowly tailored regulatory backstops are appropriate to ensure the ability of small ISPs to access critical facilities."[31]

B. The Commission Should Broaden Its Proposed Forbearance

1. Sections 201, 202, 208 and 214

WISPA agrees with ACA Connects – one of the few other commenters in this proceeding to address the concerns of smaller providers – that the Commission should forbear from applying Sections 201, 202 and 208 to such providers.[32] As ACA Connects observes, "[s]maller BSPs – and their customers – would be disproportionately harmed by any across-the-board application of the Title II provisions and associated regulations from which the Commission proposes not to forbear, even though such providers lack any semblance of market power that could justify application of these provisions."[33] Together, the ACA Connects and WISPA comments provide ample evidence that application of these requirements to smaller providers will do more harm than good.

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[29] Comments of Home Telephone Company, Inc., WC Docket No. 23-320 (filed Dec. 14, 2023), at 15.

[30] NRECA Comments at 4. NRECA specifically asks that the Commission exempt smaller providers from network outage reporting requirements that it may impose. *See id.* at 7. WISPA does not agree with NRECA's proposal to define a size threshold of 100,000 broadband customers for a broadband provider to be considered a "small" provider. *See also* Comments of Interisle Consulting Group, WC Docket No. 23-320 (filed Dec. 14, 2023), at 6 ("Interisle Comments").

[31] NTCA Comments at 16.

[32] ACA Connects Comments at 45.

[33] *Id.* at 48.

One of the few commenters to argue in favor of applying these kinds of provisions appears to not be aware of contemporaneous developments in broadband regulation. The Lawyers' Committee for Civil Rights Under Law argues at length that application of Section 202, regardless of the size of the provider, is necessary to prevent and eliminate discrimination.[34] However, these comments provide no analysis of what enforcement of Section 202 will add to the already broad enforcement powers the Commission has recently established in its Digital Discrimination proceeding.[35] As with many other commenters favoring reclassification, the Lawyers' Committee asserts a need for such reclassification, but fails to acknowledge that its laudatory goals of preventing discrimination are already being met without reclassification, as a result of direct Congressional authorization.

With regard to Section 214, organizations representing a broad swath of broadband providers and investors agree with WISPA that the Commission must forbear from applying Section 214 as contemplated by the *NPRM*, citing the costs to operators and the chilling effect on investment.[36] These comments substantiate WISPA's explanation that applying Section 214 will result in significant burdens, particularly on smaller providers but also on the Commission's current process for reviewing transfers of control.[37]

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[34] Comments of Lawyers' Committee for Civil Rights Under Law, WC Docket No. 23-320 (filed Dec. 14, 2023), at 11-14 ("Lawyers' Committee Comments")

[35] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination,* Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC 23-100 (rel. Nov. 20, 2023). *See also* Lawyers' Committee Comments at 12 n. 70. Oddly, the Lawyers' Committee does cite the Digital Discrimination proceeding for how the Section 202 standard might be applied, but fails to address the obvious overlap and, thus, need for enforcement of Section 202 as applied to broadband networks.

[36] ACA Connects Comments at 52; INCOMPAS Comments at 53; Ad Hoc Broadband, Carrier and Investor Coalition Comments, WC Docket No. 23-320 (filed Dec. 14, 2023), at 5-6 ("Ad Hoc Coalition Comments"); Information Technology Industry Council Comments, WC Docket No. 23-320 (filed Dec. 14, 2023), at 4 ("ITI Comments"); Interisle Comments at 6; USTelecom Comments at 100-103.

[37] *See* WISPA Comments at 63-69; *see also* INCOMPAS Comments at 33

WISPA believes Lumen provides a well-reasoned and simple approach to Section 214, should the Commission decide to apply Title II. As Lumen states,

> If . . . the Commission nevertheless decides that national security concerns prevent it from forbearing from section 214 as it did in 2015, it should limit its application to what is necessary to achieve those national security objectives. At most, the Commission should retain the authority to revoke a provider's authority to provide BIAS when necessary to protect national security. The Commission should not . . . impose regulatory burdens on providers' decisions to deploy, initiate or terminate service, or to accept investment in or merge or sell a BIAS business. . . . [T]he Commission should refrain from requiring BIAS providers, for the first time, to seek approval to provide service, even if it wishes to consider such a change in the future. For similar reasons, the Commission should forbear from requiring approval to assign or transfer control of any authorization for BIAS.[38]

This concern over the potentially significant impact of Section 214 is reflected in other comments as well, leading those commenters, including Free Press, to propose that the Commission at least forbear from applying Section 214 until it can conduct a full proceeding on the potential effects.[39] As the Ad Hoc Broadband, Carrier and Investor Coalition states, the *NPRM* is "inadequate" to fully explore these issues, and "the Commission should issue a further notice that further refines its proposals before adopting final rules that impose new licensing requirements or other national security restrictions on BIAS providers."[40]

While WISPA continues to believe that the best approach would be to forbear from applying Section 214 as described in its Comments,[41] WISPA also believes that if the Commission does have national security concerns warranting some application of Section 214, it

[38] Comments of Lumen, WC Docket No. 23-320 (filed Dec. 14, 2023), at 26-28 ("Lumen Comments").

[39] *See* Free Press Comments at 68; ITI Comments at 4.

[40] Ad Hoc Coalition Comments at 10.

[41] WISPA Comments at 63-69.

should, at the very least, defer a decision on the matter until the record on the impacts of Section 214, particularly on smaller providers, can be fully explored in a subsequent proceeding.

2. Section 254(d)

A number of commenters insist that the Commission should not forbear from applying Section 254, and so require broadband providers to make universal service contributions.[42] While WISPA agrees that, regardless of what happens in this proceeding, universal service contributions mechanisms must be overhauled, WISPA strongly disagrees that the Commission must or should immediately apply Section 254 if it decides to reclassify broadband as a Title II service. In the abstract, anyone can argue that it is important to rationalize universal service going forward, and commenters have done so in this proceeding with scarcely any consideration of the practical consequences of doing so. In reality, immediately applying the contribution obligations on thousands of providers who have never collected it for these services will pose insurmountable challenges to them, the Commission and USAC, and effectively add a new federal sales tax for broadband services to millions and millions of households and small businesses. It is no exaggeration to say that such a decision would result in complete chaos when United States policy should be encouraging broadband deployment and adoption.

Accordingly, and as with Section 214 discussed above, any decision to so significantly expand universal service obligations, and to apply them to smaller broadband providers, should only be made in the context of a larger proceeding that allows a full examination of the serious legal, financial and operational questions. Such a significant step should *not* be taken at the insistence of a few parties with little practical experience with the administration of universal

[42] *See, e.g.,* ACLU Comments at 15; Comments of the California Public Utilities Commission, WC Docket No. 23-320 (filed Dec. 14, 2023), at 13 "(CPUC Comments"); INCOMPAS Comments at 53; WTA Comments at 8-10.

service. WISPA agrees fully with the *NPRM* and NRECA that, if the Commission does apply Title II to broadband service, "[i]n light of the significant and ongoing policy debate surrounding Universal Service contribution methodologies, the Commission should forbear from imposing any new contribution requirements on BIAS providers until the record can be more fully developed in a separate proceeding."[43]

C. The Commission Should Afford Additional Relief to Smaller Providers

In addition to exemptions from the Commission's rules and additional forbearance, WISPA agrees with ACA Connects that the Commission should delay application of the rules for smaller providers until at least one year following the effective date and any court review.[44] Such a deferral would be consistent with the time period the Commission is affording to smaller providers in complying with the new broadband label rules.[45]

III. TITLE II IS UNNECESSARY TO ACHIEVE NATIONAL SECURITY, CYBERSECURITY AND PRIVACY OBJECTIVES

Public Knowledge provides one of the very few explicit statements in support of imposing Title II for national security reasons, asserting that "reclassification is essential to protect safety and national security."[46] But Public Knowledge fails to identify *why* the Commission must now have the power to revoke Section 214 authority in light of existing federal agency oversight over information and communications networks. Rather, Public Knowledge simply assumes it is necessary for the Commission to do so, and discusses how that

[43] NRECA Comments at 11-12; *NPRM* at 55 (¶ 104).

[44] ACA Connects Comments at 45.

[45] *See Empowering Broadband Consumers Through Transparency*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 22-2, FCC 22-86 (rel. Nov. 17, 2022), at 38 (¶ 118); 47 C.F.R. § 8.1(a)(7).

[46] Public Knowledge Comments at 62.

power should be exercised.[47] The record to date is bereft of identifying any significant national security gaps that the Commission itself would need to plug, much less gaps that require the imposition of public utility regulation. Instead, Public Knowledge's discussion of the matter makes painfully obvious that Title II regulation is unnecessary to protect national security, and this kind of justification is a *post hoc* rationalization of the decision to apply Title II – a citation of alleged benefits that are not actually motivating the decision.

WISPA agrees with the many more commenters that showed Title II regulation is not necessary to protect national security.[48] As CTIA states, Congress "can and does act to address 'gaps' in Commission authority," as when Congress enacted CALEA.[49] CTIA also points out that the Committee on Foreign Investment in the United States reviewed 22 transactions involving telecommunications companies,[50] and as WISPA points out the Department of Commerce's Information and Communications Technology and Services Program provides additional broad oversight of foreign acquisitions of information and communications services companies.[51] As USTelecom states, and contrary to the impression created by the *NPRM*, the Commission is not "the only knight who guards" the wall of national security.[52]

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[47] *Id.* at 62-65.

[48] *See* Comments of American Consumer Institute, WC Docket No. 23-320 (filed Dec. 14, 2023), at 21-23; Comments of Center for Regulatory Freedom (CPAC Foundation), WC Docket No. 23-320 (filed Dec. 14, 2023), at 9 ("CRF Comments"); Comments of The Foundation for American Innovation, China Tech Threat, WC Docket No. 23-320 (filed Dec. 14, 2023), at 12 ("FAI/CTT Comments"); Comments of Information Technology and Innovation Foundation, WC Docket No. 23-320 (filed Dec. 14, 2023), at 8; ITI Comments at 3; Interisle Comments at 6; NCTA Comments at 73-79; Comments of Taxpayers Protection Alliance (TPA), WC Docket No. 23-320 (filed Dec. 14, 2023), at 4-5; U.S. Chamber Comments at 28-32; USTelecom Comments at 74-75; Comments of Verizon, WC Docket No. 23-320 (filed Dec. 14, 2023), at 11-15 ("Verizon Comments").

[49] Comments of CTIA, WC Docket No. 23-320 (filed Dec. 14, 2023), at 32 ("CTIA Comments").

[50] *Id.* at 33;

[51] WISPA Comments at 92.

[52] USTelecom Comments at 74.

Is it really necessary for the Commission, a third federal government body, to also have the right to review foreign acquisitions, especially in light of the power the Commission has already exerted over national security threats to broadband networks? The Foundation for American Innovation and China Tech Threat ("FAI/CTT") accurately points out that the Commission's existing equipment authorization authority gives it broad power to restrict the kinds of technology placed in broadband networks,[53] and, among numerous other powers, the Commission has been granted specific power by Congress to restrict universal service subsidies provided to broadband networks. As Verizon states, the Commission's existing authority "is sufficient to advance national security and public safety concerns that implicate America's communications networks. The Commission's efforts to address these concerns while broadband has been classified as an information service illustrate this fact."[54]

The weight of the comments in the record show plainly that the *NPRM*'s use of national security as not just a justification but a *mandate* for applying Title II is the worst kind of performative policymaking – a vast expansion of regulatory power that will not serve to increase national security.[55] The absence of any independent calls from government for the Commission to apply Title II regulation is telling. WISPA agrees with FAI/CTT's conclusion that

> Congress is deeply engaged in strengthening national security by reviewing and updating its laws. It is through such processes that it explicitly empowers agencies to perform certain functions. . . . Congress has not contemplated classifying broadband under Title II during any of these processes. These Congressional committees do not describe America's defense as failing because the FCC has not

[53] FAI/CTT Comments at 17.

[54] Verizon Comments at 11.

[55] *See* CRF Comments at 9 (quoting James Lewis, Senior Vice President, Center for Strategic and International Studies, as stating that "China and cybersecurity are the big justification for policy actions, and so everyone tries to apply them"); *see also China Mobile International (USA) Inc., Memorandum Opinion & Order,* 34 FCC Rcd 3361 (2019), Statement of Commissioner Jessica Rosenworcel ("Please don't get confused by the performative security associated with this decision.").

> asserted Title II on broadband. No general or security expert has testified under oath that regulating broadband under Title II will strengthen national security.[56]

The Commission should not ignore the weight of the evidence in the record that shows how the *NPRM* is an attempt by the Commission to arrogate for itself a function Congress has declined to give it, and which is already more than adequately met by its existing powers and other federal agencies.

IV. THE COMMISSION SHOULD RELY ON OTHER SOURCES OF AUTHORITY TO EXTEND POLE ATTACHMENT RIGHTS TO BROADBAND-ONLY PROVIDERS

The *NPRM* does not justify any harm to consumers or internet openness that requires new government regulations, much less the heavy hand of Title II. But if the Commission wants to make targeted changes to its rules, it has existing authority outside of Title II to do so. As ADTRAN points out, the appellate court in *Verizon v. FCC* acknowledged that the Commission could adopt open internet regulations "so long as any such regulations do not amount to common carrier regulation."[57] ADTRAN further notes that the Commission can rely on its Title I ancillary authority as well.[58] In this regard, Mozilla is either wrong in asserting that "the FCC may enact net neutrality rules *only* if it has classified BIAS as a telecommunications service,"[59] or its definition of "net neutrality" necessarily assumes heavy-handed regulation of broadband providers' conduct.

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[56] FAI/CTT Comments at 12.

[57] Comments of ADTRAN, Inc., WC Docket No. 23-320 (filed Dec. 14, 2023), at 34, *citing Verizon v. Federal Communications Commission*, 740 F.3d 623, 636-42 (D.C. Cir. 2014) ("*Verizon*").

[58] *See id.*

[59] Mozilla Comments at 3-4 (emphasis added).

As the *NPRM* states, Section 706(b) of the Telecommunications Act of 1996 may also be a source of authority.[60] Contrary to CCIA's view,[61] it would not "take years" for the Commission to determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[62] In fact, the Commission is required to make an annual assessment of broadband deployment and, if its determination is "negative," the Commission "*shall* take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[63] On November 1, 2023, the Commission adopted a Notice of Inquiry concerning broadband deployment.[64] If the Commission concludes that broadband is not being deployed to all Americans in a reasonable and timely manner, then Section 706(b) would require the Commission to take immediate action to accelerate deployment. That said, any regulations the Commission may adopt in this proceeding based on that negative assessment must *remove* barriers to infrastructure investment and *promote* competition, not create new obstacles. In that respect, the Commission must carefully consider whether its rules, especially as applied to smaller providers, can meet the statutory mandate.

As WISPA and others have argued, the conduct rules would not meet this requirement as they will create disincentives to investment and competition.[65] But the Commission can, as

[60] *NPRM* at 90 (¶ 195).

[61] CCIA Comments at 10.

[62] 47 U.S.C. § 1302(b).

[63] *Id.* (emphasis added).

[64] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Seventeenth Section 706 Report Notice of Inquiry, GN Docket No. 22-270, FCC 23-89 (rel. Nov. 1, 2023).

[65] *E.g.* WISPA Comments at 37; CTIA Comments at 97-98

WISPA has asserted, rely on Section 706(b) and its ancillary authority under Section 154 of the Act,[66] to extend pole attachment rights to broadband-only providers that are not currently subject to Section 224 of the Act.[67] Although CTIA contends that "this is not a significant issue" because "[t]he *2020 RIF Remand Order* found, based on a detailed record, that the vast majority of broadband subscribers are served by providers that offer commingled cable or telecommunications services over their facilities and those providers are already eligible for pole attachment rights pursuant to Section 224,"[68] access to infrastructure remains a very significant issue for WISPA's members that do not combine their broadband services with other services to obtain the benefits of Section 224. The full weight of Title II is not necessary, however, for the Commission to extend those rights in light of the other sources of authority the Commission can exercise.[69]

V. TITLE II RECLASSIFICATION WILL NOT PREEMPT STATE BROADBAND REGULATION

In its comments, WISPA shows that, contrary to the *NPRM*'s assumptions, state regulation of broadband thus far has not imposed any significant burden.[70] But moving to a Title II regime would, regardless of how broadly the Commission might try to preempt, compel states

[66] 47 U.S.C. § 154 (granting the Commission authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[67] *See* WISPA Comments at 94-96. In addition to Sections 706 and 154, WISPA also identified other statutory provisions as sources of authority for pole attachment rights for broadband-only providers. *See id.*

[68] CTIA Comments at 41 (citation omitted).

[69] *See* WISPA Partial Opposition to Petition for Reconsideration of INCOMPAS, WC Docket Nos. 17-108, 17-287 and 11-42 (filed Dec. 14, 2023).

[70] *See* WISPA Comments at 32-33; *see also* ACA Connects Comments at 19-20 (showing that there has been no proof of the contention that there has been widespread burdensome state regulation of broadband over the last several years).

to begin to regulate broadband, leading to "years of jurisdictional uncertainty and litigation, likely resulting in a more costly patchwork of state laws and regulations."[71] Comments from various state and local governments and think tanks supportive of a Title II approach show that this is precisely what will happen, substantiating WISPA's concerns.

Comments from state regulators and a few associations state that the Commission's rules should be a floor, not a ceiling, thus showing an intent to enact or support more extensive regulation of broadband services by state governments.[72] The California Public Utilities Commission ("CPUC") helpfully provides a specific menu of the kinds of regulatory requirements states will apply under a Title II regime: "statewide quality of service standards including, but not limited to, standards such as network availability, call failure rate, call drop rate, installation and repair intervals, answering time and trouble ticket resolution, billing issues and automatic refunds, and outage reporting."[73] Joint comments of the National Association of State Utility Consumer Advocates and Connecticut state agencies provide a similar list of possible state regulations: "state limitations with respect to exercise of police power regulation of use of public rights-of-way, consumer protection, network reliability and restoration requirements, cybersecurity and data privacy coordination with other utilities under the guidance of state utility commissions, and reasonable consumer protection measures."[74]

[71] WISPA Comments at 31-35.

[72] ACLU Comments at 14; CAG Comments, WC Docket No. 23-320 (filed Dec. 14, 2023), at 1; CPUC Comments at 8; National Association of Regulatory Utility Commissioners, WC Docket No. 23-320 (filed Dec. 14, 2023), at 12; Pennsylvania Public Utility Commission, WC Docket No. 23-320 (filed Dec. 14, 2023), at 2 ("PAPUC Comments"); Public Knowledge Comments at 103.

[73] CPUC Comments at 27.

[74] State Utility Consumer Advocates and Connecticut Office of State Broadband Comments at 4.

In short, state governments commenting on the record of this proceeding demonstrate a present intent to apply their full range of existing, century-old telephone service standards to broadband, should the Commission proceed with applying Title II. None of these commenters make any argument as to why such measures would be justified, but they nevertheless clearly intend to move forward with implementing them. Moreover, state governments and Public Knowledge urge the Commission to avoid broad preemption so that states can apply regulatory requirements that go beyond any federal regime.[75] Of course, none of these commenters discusses the impact of the increased federal and state regulatory burdens on smaller providers.

Thus, while the *NPRM* seeks to justify a Title II approach on the basis that it would reduce federal/state regulatory conflicts, the record of this proceeding shows that exactly the opposite is true. Not only will states be compelled to begin subjecting broadband to antiquated telephone regulations, they want the Commission to lock in years of expensive litigation for broadband providers by insisting on case-by-case adjudication of the scope of federal preemption.[76] Title II regulation will invite a flood of state regulation, and will divert both private and government resources at exactly the time they are needed to expand broadband. Given the record so far, the Commission should be extremely wary of preemption arguments by state regulators that want to expand their reach into the broadband sphere, and of think tanks that have never operated a broadband network or had to use their own money to litigate preemption.

WISPA's comments show that, no matter how broadly the Commission tries to preempt states, Title II regulation will inevitably lead to federal/state conflicts and costly litigation.[77] But

[75] ACLU Comments at 14; CAG Comments at 1; PAPUC Comments at 2, 5-8; Public Knowledge Comments at 98.

[76] *See* PAPUC Comments at 8.

[77] WISPA Comments at 31-35.

if the Commission decides to proceed with Title II regulation anyway, then the Commission should heed the warnings of commenters that have shown the least damaging approach would be broad preemption, and not the inherently litigious approach of case-by-case preemption. As NRECA warns,

> what happens after the Commission opts to reclassify BIAS as "telecommunications service"? Can a state utility commission logically refuse an argument that it should do so as well? Could the state utility commission then require each ISP operating within the state to obtain a Certificate of Public Convenience and Necessity? Such outcomes seem undesirable, for myriad reasons, but are entirely possible in the absence of clear direction from the Commission.[78]

Accordingly, NRECA, while recognizing "the potential value of case-by-case adjudications," nevertheless believes "a broad preemption decision by the Commission would provide the necessary regulatory stability and predictability for the market."[79] As the U.S. Chamber of Commerce similarly states, "[w]ithout strong preemption protections, states would be free to engage in a race to regulate, in which providers would have to comply with whatever ended up being the most restrictive state regime."[80]

WISPA strongly agrees, and urges the Commission to adopt as broad a preemptive approach as possible, if it proceeds with reclassifying broadband as a Title II service. Doing so will not, unfortunately, eliminate the future cost of litigating inconsistent state requirements, but it will at least reduce those costs and result in the diversion of fewer resources.

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[78] NRECA Comments at 12.

[79] *Id.* at 13.

[80] U.S. Chamber Comments at 65; *see also* Lumen Comments at 30-31 ("The Commission should reaffirm . . . and declare that state regulation of BIAS, a jurisdictionally interstate and international service, is not permissible.").

Conclusion

Smaller providers have spoken loudly and clearly – Title II rules will add disproportionate costs and burdens to the costs and burdens already incrementally inflicted upon them through a steady stream of new regulations. They lack any market power that could possibly present any harm to consumers, but would themselves be most harmed in their ability to compete and to deploy broadband service to unserved and underserved communities. And with states already announcing their intent to pile their own regulations on top of federal Title II regulation, the consequences become even more dire.

The Commission should abandon this proceeding and focus on promoting ubiquitous broadband deployment by reducing regulatory burdens. But if the Commission nonetheless proceeds, then it must expand its forbearance, adopt broad exemptions for smaller providers, defer implementation of tis rules, and streamline enforcement. Only with a full suite of regulatory avoidance can smaller providers continue to contribute meaningfully to the broadband economy, raise investment and serve consumers in an increasingly competitive environment.

Respectfully submitted,

WISPA –
BROADBAND WITHOUT BOUNDARIES

January 17, 2024

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