



Thomas A. Schatz  
President

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of )  
)  
Safeguarding and Securing the Open Internet ) WC Docket No. 23-320  
) FCC-23-83

Comments of  
Thomas A. Schatz  
President  
Citizens Against Government Waste

December 14, 2023

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization that was established in 1984 and is dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than one million members and supporters of CAGW, I offer the following comments regarding the Federal Communication Commission’s (FCC) proposed reimposition of net neutrality rules by reclassifying the internet as a telecommunications service under Title II of the Communications Act of 1934 through the Safeguarding and Securing the Open Internet (WC Docket No. 23-320) notice of proposed rulemaking (NPRM), which was adopted on October 19, 2023 in a partisan 3-2 vote.<sup>1</sup>

CAGW believes the adoption of the NPRM indicates that 1) the FCC thinks that once again imposing heavy-handed government restrictions on the internet is necessary; 2) the FCC is

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

not concerned about taxpayer resources being wasted to revise, revamp, overturn, and relitigate the issue of regulating the internet after the matter was settled in the October 1, 2019 decision in *Mozilla Corporation v. Federal Communications Commission* by the United States Court of Appeals for the District of Columbia Circuit, which upheld the FCC’s 2018 Restoring Internet Freedom Order;<sup>2</sup> 3) the FCC believes that Congress has given it the authority to undertake a rulemaking of such a sizable economic impact, particularly in light of the June 30, 2022, decision by the U.S. Supreme Court relating to major questions in *West Virginia v. EPA*,<sup>3</sup> or if a rulemaking of this economic magnitude be better resolved through the U.S. Congress by modernizing the Communications Act of 1934 and the Telecommunications Act of 1996 to accommodate next generation technologies that neither law was equipped to regulate; and 4) the FCC is not concerned about the impact this rulemaking would have on participation by the private sector to apply for grants through the National Telecommunications and Information Administration’s (NTIA) \$42.45 billion Broadband Equity Access and Deployment (BEAD) program.<sup>4</sup>

As the FCC has noted in its current order, the 2015 OIO “exercised its authority to interpret ambiguous language in the Act regarding the classification of broadband services, and classified broadband Internet access services, including Internet traffic exchange arrangements (or Internet interconnection arrangements), as telecommunications services under Title II of the Act.”<sup>5</sup>

CAGW has long maintained that the government control over the internet that was established through the OIO the FCC now proposes once again is little more than a solution in search of a problem.

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<sup>2</sup> United States Court of Appeals for the District of Columbia Circuit, *Mozilla Corporation v. the Federal Communications Commission*, 940 F. 3d 1 (D.C. Cir. 2019), [https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf).

<sup>3</sup> Supreme Court of the United States, *West Virginia et al. v. Environmental Protection Agency et al.* (*West Virginia v. EPA*), 597 U.S. \_\_\_\_ (2022), [https://www.supremecourt.gov/opinions/21pdf/20-1530\\_n758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf).

<sup>4</sup> National Telecommunications and Information Administration (NTIA), Broadband Equity Access and Deployment Program (BEAD), <https://broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program>.

<sup>5</sup> *Ibid.*, Safeguarding and Securing the Open Internet, p. 6.

Since 2005, there have been five federal cases relating to the classification and reclassification of the internet. They are *National Cable and Telecommunication Association v. BrandX Internet Services*;<sup>6</sup> *Comcast Corporation v. the Federal Communications Commission*;<sup>7</sup> *Verizon v. Federal Communications Commission*;<sup>8</sup> *U.S. Telecommunications Association v. the Federal Communications Commission*;<sup>9</sup> and *Mozilla Corporation v. the Federal Communications Commission*.<sup>10</sup> The high cost to taxpayers of litigation related to internet governance based on the party currently in control of the White House is an abysmal waste of taxpayer resources.

Rather than continuing down that path, the FCC should ask Congress to amend the Communications Act of 1934 and the Telecommunications Act of 1996 to modernize the law and create certainty not only for providers but also for the hundreds of millions of Americans who are connected to broadband nationwide. This recommendation was made by FCC Commissioner Nathan Simington during the House Energy and Commerce Subcommittee on Communications and Technology hearing on November 30, 2023, when he stated, “I implore Congress to pass legislation to create an updated legislative framework for the modern internet ecosystem that would end the continued whipsawing of industry over the Title II fight and create clear rules of the road for all companies in the internet ecosystem – from e-commerce and social media platforms to network operators alike.”<sup>11</sup>

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<sup>6</sup> Supreme Court of the United States, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), <https://supreme.justia.com/cases/federal/us/545/967/>.

<sup>7</sup> United States Court of Appeals for the District of Columbia Circuit, *Comcast Corporation v. Federal Communications Commission and the United States of America*, 600 F.3d 642 (D.C. Cir. 2010), [https://www.cadc.uscourts.gov/internet/opinions.nsf/EA10373FA9C20DEA85257807005BD63F/\\$file/08-1291-1238302.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/EA10373FA9C20DEA85257807005BD63F/$file/08-1291-1238302.pdf).

<sup>8</sup> United States Court of Appeals for the District of Columbia Circuit, *Verizon v. FCC, et al.*, 740 F.3d 623 (D.C. Cir. 2014), [https://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

<sup>9</sup> United States Court of Appeals for the District of Columbia Circuit, *United States Telecom Association, et al., v. Federal Communications Commission and the United States of America*, 825 F.3d 674 (D.C. Cir. 2016), [https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/\\$file/15-1063-1619173.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf).

<sup>10</sup> *Mozilla Corporation v. the Federal Communications Commission*.

<sup>11</sup> FCC, “Testimony of Nathan Simington, Commissioner, Federal Communications Commission, Before the Subcommittee on Communications and Technology of the United States House of Representatives, Committee on Energy and Commerce,” Energy and Commerce Committee, U.S. House of Representatives, November 30, 2023, [https://d1dth6e84htgma.cloudfront.net/11\\_30\\_23\\_Simington\\_Testimony\\_47b8c3d053.pdf](https://d1dth6e84htgma.cloudfront.net/11_30_23_Simington_Testimony_47b8c3d053.pdf).

The public internet has come a long way from its infancy in 1996, when it was first opened for public use. When President Clinton signed the Telecommunications Act of 1996, which was the first major overhaul of the Communications Act in more than 60 years, on February 8, 1996, he stated that the law would “help connect every classroom in America to the information superhighway by the end of the decade. It will protect consumers by regulating the remaining monopolies for a time and by providing a roadmap for deregulation in the future.”<sup>12</sup> The 1996 Act classified the internet as an information service. In 1997, the Clinton administration issued its Framework for Global Electronic Commerce. The five principles were to let the private sector lead, avoid undue restrictions by the government on electronic commerce, limit government intervention when necessary to be minimal and predictable, acknowledge the unique qualities of the internet, and facilitate global electronic commerce over the internet.<sup>13</sup> This established the parameters of light-touch regulations for the internet.

These principles were expanded upon and updated in 2004 by then-FCC Chairman Michael Powell. His four principles to “encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet , consumers are entitled to access the lawful Internet content of their choice ... consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement ... consumers are entitled to connect their choice of legal devices that do not harm the network ... consumers are entitled to competition among network providers, application and service providers, and content providers.”<sup>14</sup> The FCC unanimously endorsed these four reasonable principles when it adopted the Internet Policy Statement in 2005.<sup>15</sup> These principles helped to expand broadband access and kept the light-touch regulations envisioned by President Clinton in place.

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<sup>12</sup> President William J. Clinton, “Statement on Signing the Telecommunications Act of 1996,” February 8, 1996, <https://www.presidency.ucsb.edu/documents/statement-signing-the-telecommunications-act-1996>.

<sup>13</sup> National Archives, Historical Material from the Administration of President William J. Clinton, “The Framework for Global Electronic Commerce,” The White House, July 1, 1997, <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html>.

<sup>14</sup> FCC, “Principles for encouraging an Open Internet,” CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52, FCC 05-151, Adopted August 5, 2005, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-05-151A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf).

<sup>15</sup> FCC, “Inquiry concerning high-speed access to the internet over cable and other facilities; internet over cable declaratory ruling,” GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-010, 95-20, CS Docket No. 02-52, Policy Statement, Adopted March 14, 2002, <https://www.fcc.gov/document/inquiry-concerning-high-speed-access-internet-over-cable-and-other-1>.

In 2010, despite the success of the FCC’s Internet Policy Statement, then-FCC Chairman Julius Genachowski proposed classifying broadband internet access service (BIAS) providers as common carriers under Title II of the Communications Act of 1934, in the matter of Preserving the Open Internet Broadband Industry Practices Report and Order, which was adopted on December 21, 2010.<sup>16</sup> The proposal was debated during a June 24, 2010 Senate Commerce Committee hearing on the Universal Service Fund, with Sen. John Ensign (R-Nev.) suggesting that “classifying broadband under Title II would work against the goal of universal deployment by discouraging investment” and “the areas that will suffer are not Los Angeles or New York, but the rural and high-cost areas that the Universal Service Fund is trying to reach.”<sup>17</sup>

When the Report and Order on Preserving the Open Internet was approved by the FCC on December 10, 2010, Title II reclassification of broadband was not included. The decision was based on Section 706 of the Telecommunications Act of 1996, which provides for advanced communications services to be promoted by the FCC. The final order, published in the *Federal Register* on September 23, 2011, stated in footnote 136 that, “The open Internet rules that we adopt in this Order do not regulate Internet applications, much less impose Title II (*i.e.*, common carrier) regulation on such applications.”<sup>18</sup>

On January 14, 2014, the United States Court of Appeals for the District of Columbia Circuit in *Verizon v. FCC, et al.*, decided that, while the FCC has some authority to regulate broadband services under Section 706 of the Communications Act, the agency overstepped its bounds when it subjected ISPs as Title II common carriers through its anti-discrimination and anti-blocking rules.<sup>19</sup>

On November 10, 2014, President Barack Obama decided to take a somewhat unusual approach by intervening in the regulatory activity of an independent agency by stating, “I am asking the FCC to reclassify Internet service under a law known as Title II under the law known

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<sup>16</sup> FCC, “Preserving the Open Internet Broadband Industry Practices, Report and Order,” Adopted December 21, 2010, GN Docket No. 09-191; WC Docket No. 07-52, <https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf>.

<sup>17</sup> John Eggerton, “USF Senate Hearing Goes Down Title II Track,” *MultiChannel News*, June 24, 2010, <https://www.nexttv.com/news/usf-senate-hearing-goes-down-title-ii-track-266126>.

<sup>18</sup> FCC, 47 CFR Parts 0 and 8, (GN Docket No. 09-191; WC Docket No. 07-52; FCC 10-201), Preserving the Open Internet, *Federal Register*, September 23, 2011, <https://www.govinfo.gov/content/pkg/FR-2011-09-23/pdf/2011-24259.pdf>.

<sup>19</sup> United States Court of Appeals for the District of Columbia Circuit, *Verizon v. FCC*.

as the Telecommunications Act.”<sup>20</sup> On February 26, 2015, the FCC acquiesced to the president’s demand, and voted in favor of the Open Internet Order (OIO) on a 3-2 party-line vote to reclassify the internet as a telecommunications/telephone service under Title II of the Communications Act of 1934.<sup>21</sup>

The OIO gave the FCC jurisdiction over certain privacy rules that had previously been under the Federal Trade Commission (FTC). Then-FCC Chairman Ajit Pai and former Acting FTC Chairman Maureen Ohlhausen issued a joint statement on March 1, 2017, that jurisdiction over privacy and data security related to broadband providers should go back to the FTC, and that every actor “in the online space should be subject to the same rules, enforced by the same agency.” They added, “The federal government shouldn’t favor one set of companies over another ... we will work together to establish a technology-neutral privacy framework for the online world. Such a uniform approach is in the best interests of consumers and has a long track record of success.”<sup>22</sup>

The privacy issue pales in comparison to the impact of Title II on capital expenditures for broadband deployment. A May 2017 analysis by Phoenix Center for Advanced Legal and Economic Public Policy Studies (Phoenix Center) Chief Economist Dr. George Ford found that while service providers continued to invest in new networks, investments in broadband deployment were reduced by \$150 to \$200 billion over the five-year period between 2011 and 2015 when the White House under President Obama pushed the FCC to adopt Title II rules.<sup>23</sup>

An updated December 2023 Phoenix Center analysis by Dr. Ford found that, “[T]he persistent prospect of Title II policy reduced investment by approximately 10%, on average, between 2011 and 2020, about \$8.1 billion annually, with a total loss of investment over a ten-year period of about \$81.5 billion. This reduced investment negatively impacts jobs in the

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<sup>20</sup> Sean Buckley, “President Obama throws support behind the FCC’s Title II broadband reclassification option,” *Fierce Telecom*, November 10, 2014, <https://www.fiercetelecom.com/telecom/president-obama-throws-support-behind-fcc-s-title-ii-broadband-reclassification-option>.

<sup>21</sup> FCC, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 15-24, February 26, 2015, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

<sup>22</sup> Federal Trade Commission, “Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans’ Online Privacy,” March 1, 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc>.

<sup>23</sup> Dr. George S. Ford, “Net Neutrality, Reclassification and Investment: A Further Analysis,” *Perspectives*, Phoenix Center for Advanced Legal & Economic Public Policy Studies (“Phoenix Center”), May 16, 2017, p. 1, <https://www.phoenix-center.org/perspectives/Perspective17-03Final.pdf>.

information sector and the broad economy, and indeed it appears there is an annual loss to the nation of about 81,500 information sector and 195,600 total jobs, reducing labor compensation by about \$18.5 billion annually, ceteris paribus, with many of those jobs being union jobs. The loss to Gross Domestic Product ('GDP') is estimated to be \$145 billion annually, or \$1.45 trillion over ten years.”<sup>24</sup>

So-called net neutrality does not create a level playing field for internet access, nor does it resolve imaginary problems of lack of high speeds, access to services, censorship, or any other reason given lately for the imposition of government control over the internet. Instead, it creates an opportunity for the agency to conduct rate-setting, heavy-handed government regulations, and the imposition of common carrier restrictions on the most vibrant sector of the U.S. economy. Reversing course again on internet freedom will create even more uncertainty for internet providers, reduce investment, and harm innovation.

According to a June 25, 2020 Government Accountability Office (GAO) report, between 2009 and 2017, private “industry made capital investments of about \$795 billion, including investments in broadband infrastructure,” and “Federal investments totaled about \$47.3 billion to target broadband infrastructure for rural areas over the same time.”<sup>25</sup> The Information Technology & Innovation Foundation (ITIF) found that looking “to whether investment is up or down after the 2015 Open Internet Order and only control for the three-most obvious external factors, financial filings shows broadband investment went down roughly 2-3 percent after the Open Internet Order, consistent with industry’s own findings.”<sup>26</sup>

In 2017, the FCC adopted the Restoring Internet Freedom Order (RIFO).<sup>27</sup> This order determined that BIAS providers offer information services under Title I of the Communications Act of 1934. The order was then upheld in *Mozilla v. The Federal Communications*

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<sup>24</sup> Dr. George S. Ford, “Investment in the Virtuous Circle: Theory and Empirics,” *Phoenix Center Policy Paper No. 62*, Phoenix Center, December 2023, pp. 6-7, <https://phoenix-center.org/pcpp/PCPP62Final.pdf>.

<sup>25</sup> Government Accountability Office (GAO), “Broadband: Observations on Past and Ongoing Efforts to Expand Access and Improve Mapping Data,” GAO-20-535, June 25, 2020, <https://www.gao.gov/assets/gao-20-535.pdf>.

<sup>26</sup> Doug Brake, “What Financial Data Shows About the Impact of Title II on ISP Investment,” Information Technology & Innovation Foundation, June 2, 2017, <https://itif.org/publications/2017/06/02/what-financial-data-shows-about-impact-title-ii/>.

<sup>27</sup> FCC, “In the Matter of Restoring Internet Freedom,” Adopted December 17, 2017, [https://docs.fcc.gov/public/attachments/FCC-17-166A1\\_Rcd.pdf](https://docs.fcc.gov/public/attachments/FCC-17-166A1_Rcd.pdf).

*Commission.* Following the adoption of RIFO broadband deployment increased, and new technologies providing faster and more reliable speeds were developed that enhanced network speed and reliability. These innovations also enabled new technologies to evolve that allowed the use not only of cable and fiber to provision broadband, but also mobile wireless, fixed wireless, and satellite, increasing competition in an already competitive space.

The NPRM ignores all of these advancements by stating, “But even as our society has reconfigured itself to do so much online, our institutions have fallen behind. There is currently no expert agency ensuring that the Internet is fast, open, and fair. Since the birth of the modern Internet in the 1990s, the Commission had played that role, but the Commission abdicated that responsibility in 2018, just as the Internet was becoming more vital than ever.”<sup>28</sup> These claims are flawed. The RIFO maintained transparency over the conduct of BIAS providers, enabled investments that provided faster speeds at a lower cost, and promoted the deployment of broadband services across the country, including areas that were previously without service. Under Title II, these investments will take longer and be more costly by requiring a top-down government permission system for deployment.

The FCC’s Safeguarding the Open Internet Order disregards the significant economic impact that Title II regulations previously had on investments. As noted by Phoenix Center President Lawrence J. Spiwak, “in its current *NPRM*, the FCC claims that ‘the Commission’s conclusions in the [RIFO] that ISP investment is closely tied to the classification of BIAS were unsubstantiated.’ (NPRM at ¶57). This is cognitive bias at its best. The Commission ignores, out of nothing more than convenience, legitimate, peer-reviewed research substantiating the argument. Moreover, there is not a single credible study – i.e., one that meets basic professional standards – demonstrating otherwise. Instead, all of the studies purporting to show no investment effects are plagued by severely flawed empirical methods; and some simply make up data.”<sup>29</sup>

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<sup>28</sup> *Ibid.*, Securing and Safeguarding the Open Internet, p. 2.

<sup>29</sup> Lawrence J. Spiwak, “The FCC Returns to the Law and Economics Free Zone,” The Federalist Society, November 20, 2023, <https://fedsoc.org/commentary/fedsoc-blog/the-fcc-returns-to-the-law-and-economics-free-zone>.



Since the FCC repealed net neutrality, broadband investments increased, and the networks were resilient in managing the flow of traffic, even during peak usage periods, like during the initial stages of the coronavirus pandemic.

When much of the country came to a near standstill, with businesses, schools, and events closed, canceled, or moved online, technology and telecommunications companies across the nation worked alongside the FCC to make sure business, families, and students could stay connected. Network operators saw a large increase in traffic as tens of millions more people telecommuted and used videoconferencing applications to communicate with colleagues, reach out to family and friends, and teach classes online.<sup>30</sup> Even networks in rural areas of the country held up during the surge in new activity.<sup>31</sup> The internet thrived during the pandemic because of the light-touch regulatory regime under the RIFO that allowed major investments in infrastructure by the private sector to be made and enabled as many Americans as possible to be connected.

In Europe, where networks built or owned by governments and strict mandates on service providers are prevalent, the impact on the internet during the pandemic was dramatically different from the United States. This distinction became clear quickly after most of the world shut down on or before March 12, 2020. Within a week, the European Union ordered internet edge providers like Netflix and YouTube and gaming programs such as Twitch to pull back their high-definition services.<sup>32</sup> Other providers, including Amazon Prime, Apple TV, Disney Plus, and Google, were forced to reduce their bandwidth in Europe to mitigate the increased strain on the networks.<sup>33</sup>

In further contrast to European regulatory bodies, the FCC took several steps to enhance the viability of the nation's telecommunications infrastructure during those unprecedented times.

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<sup>30</sup> Samara Lynn and Catherine Thorbecke, "Will coronavirus break the Internet? Here's what the experts say," ABC News, March 26, 2020, <https://abcnews.go.com/Technology/coronavirus-break-internet-experts/story?id=69675556>.

<sup>31</sup> Jon Brodtkin, "Pandemic hasn't crushed broadband networks – even rural areas are doing OK," *ars Technica*, April 8, 2020, <https://arstechnica.com/information-technology/2020/04/pandemic-hasnt-crushed-broadband-networks-even-rural-areas-are-doing-ok/>.

<sup>32</sup> Nic Fildes and Hannah Murphy, "EU warns of broadband strain as millions work from home," *Financial Times*, March 19, 2020, <https://www.ft.com/content/b4ab03db-de1f-4f98-bcc2-b09007427e1b>.

<sup>33</sup> Wendy Lee, "Disney+ will reduce its impact on Europe's internet, as streamers adjust to the coronavirus," *Los Angeles Times*, March 21, 2020, <https://www.latimes.com/entertainment-arts/business/story/2020-03-21/disney-plus-coronavirus-streaming-europe-internet>.

Former FCC Chairman Pai spearheaded the effort at the commission to have providers sign a pledge to “Keep Americans Connected.” The pledge was signed by more than 800 companies and associations. It required them to waive late fees, not disconnect residential or small business customers impacted by the pandemic and provide free access to their Wi-Fi hotspots.<sup>34</sup> Many providers gave two months of free service to new low-income customers, and increased capacity and speeds.

In 2021, Congress enacted the Infrastructure Investment and Jobs Act, which included \$42.45 billion for the BEAD program. Every state is participating, and they are filing Volume I and Volume II of their funding applications that detail the parameters around participating in the program. On June 16, 2023, NTIA announced that it had awarded \$930 million for middle-mile broadband funding to 35 projects across 350 counties in 35 states, including Alaska, California, Kansas, Michigan, Nevada, New Mexico, and Puerto Rico.<sup>35</sup> This was shortly followed on June 26, 2023, by the state allocations for BEAD funding.<sup>36</sup>

The BEAD funding, along with money made available in the Coronavirus Aid, Relief, and Economic Security Act, the American Rescue Plan Act, and the Consolidated Appropriations Act of 2021, provide as much as \$800 billion, which is more than enough to deploy broadband to every single household in America that wishes to be connected to the internet.<sup>37</sup>

However, BEAD funding is unlikely to achieve its objectives under the provisions of the Security an Open Internet Order, especially when Title II is combined with the digital discrimination rules adopted in Implementing the Infrastructure Investment and Jobs Act:

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<sup>34</sup> FCC, “Keep Americans Connected Pledge,” March 13, 2020, to June 30, 2020, <https://www.fcc.gov/keep-americans-connected>.

<sup>35</sup> Drew Clark, “NTIA Awards Middle Mile to 35 Projects in 350 Counties with 12,000 Miles of Fiber,” *Broadband Breakfast*, June 16, 2023, <https://broadbandbreakfast.com/2023/06/ntia-awards-middle-mile-to-35-projects-in-350-counties-with-12000-miles-of-fiber/>.

<sup>36</sup> “Biden-Harris Administration Announces State Allocations for \$42.45 Bill High-Speed Internet Grant Program as Part of Investing in America Agenda,” *BroadbandUSA*, June 26, 2023, <https://broadbandusa.ntia.doc.gov/news/latest-news/biden-harris-administration-announces-state-allocations-4245-billion-high-speed>.

<sup>37</sup> Deborah Collier, “Federal Funds for Broadband Must Not Be Wasted,” *Citizens Against Government Waste*, February 27, 2022, <https://www.cagw.org/thewastewatcher/federal-funds-broadband-must-not-be-wasted>.

Prevention and Elimination of Digital Discrimination Report and Order.<sup>38</sup> Senate Commerce Committee Republican members, led by Ranking Member Ted Cruz (R-Texas), in a letter to the FCC on November 10, 2023, are correct when they noted that the digital discrimination order will “create a crippling uncertainty for the U.S. broadband industry, chill broadband investment, and undermine Congress’s objective of promoting broadband access for all Americans.”<sup>39</sup> The combination of the two orders will leave millions of unserved communities across the country on the wrong side of the digital divide and likely waste billions of dollars.

In his updated analysis of the impact of reinstating Title II regulations, Dr. George Ford determined NPRM would have a more significant impact on the economy than the OIO, and the digital discrimination order would make that problem even more profound. He wrote, “the estimates in this PAPER understate the effects of the form of Title II regulation for (at least) two reasons. First, the Biden Administration’s proposed reclassification regime is more intrusive than the one the FCC adopted in the 2015 Open Internet Order, incorporating compliance with Section 214 of the Communications Act into the regulatory paradigm and foreboding prescriptive regulation in other areas, such as network resilience, cybersecurity and privacy. Second, the application of common carrier regulation is now joined with digital discrimination regulation. The Commission’s new Digital Discrimination rules are also a threat to economically rational investment decisions and discourage investment. Thus, application of common carrier regulation in the current environment may do more to deter investment than common carrier regulation alone. While the persistent threat and sporadic application of Title II regulation has had significant negative effects on investment and the economy, imposing these additional new regulations, as proposed in the 2023 NPRM and other regulatory schemes, are likely to cause investment to fall further below expectations.

In conclusion, the unnecessary re-classification of the internet as a Title II service, which will impose heavy-handed regulations on the internet and open the pathway to rate regulation on the internet, will substantially reduce broadband investments. It will reduce

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<sup>38</sup> FCC, “In the Matter of Implementing the Infrastructure and Jobs Act: Prevention and Elimination of Digital Discrimination,” GN Docket No. 22-69, Adopted November 15, 2023, <https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf>.

<sup>39</sup> United States Senate, “Letter to the Honorable Jessica Rosenworcel regarding the Draft Order on “Digital Discrimination,” November 10, 2023, <https://www.commerce.senate.gov/services/files/25A46EEF-7441-460C-9C23-2C9121A6BBDD>.

participation by the private sector in the BEAD program and undoubtedly result in more taxpayer dollars being spent litigating the various issues with this order.

Ultimately, it is the role of Congress, not the FCC, to determine how the internet should be regulated, and only through changing the law and codifying the intent of Congress can certainty surrounding internet regulation be achieved. Instead of continuing to pursue this proceeding, CAGW recommends that the FCC focuses on continuing the bipartisan work it has been undertaking the last three years by steering clear of controversial matters best left to the legislative branch of government. The FCC should improve its broadband mapping program; ensuring that funding issued through the Universal Service Funds or the Affordable Connectivity Program are not wasted or subject to fraud or abuse; set a spectrum pipeline in place so that once the agency's auction authority is renewed, it will be prepared for future auctions and allocations of spectrum and keep the United States at the forefront of global telecommunications; continue to reduce robocalls and robotexts; and follow Congress's statutory intent to ensure that those who do not have and want access to broadband in unserved and underserved communities across the country are finally connected.