Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY OF THE DIGITAL PROGRESS INSTITUTE

In the initial round of comments, the Digital Progress Institute explained how the market for broadband Internet access is not broken, how the proposed justifications for reclassification are hollow, that even if the Communications Act were ambiguous (it is not) the Commission could not reclassify broadband Internet access service as proposed, and that Congress is the only forum to address the full stack of threats to Internet openness, competition, and security.

One fatal flaw the Institute identified in its initial comments is that, despite this being the ninth time the Commission has considered the classification of Internet access services, the *2023 Open Internet Notice* does not fully grapple with the text and structure of the Communications Act of 1934, as amended by the by the Telecommunications Act of 1996,[1] and consequently the *Notice* does not wrestle with all of the necessary implications of its proposals.[2] A review of the

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

[2] *See, e.g.*, Digital Progress Institute Comments at 10, 16, 17, 21.

comments shows that, similarly, proponents of reclassification have not actually thought through reclassification.[3] Even worse, sometimes proponents contradict themselves without realizing it.[4]

Consider section 230 of the Communications Act. As the Digital Progress Institute explained in its opening comments, Internet service providers are clearly "interactive computer services" under that section, which terms all such services as "information services."[5] In turn, that clear congressional classification means that Internet service providers cannot be "held liable" for "restrict[ing] access to or availability of any material" that the provider consider to be objectionable.[6] That means any net neutrality rule on blocking or throttling access is unenforceable.

What is more, opponents of the Commission's rulemaking point out that section 230 makes clear that Congress did *not* intend to authorize the Commission to regulate broadband Internet access services. The Advanced Communications Law & Policy Institute of New York Law School explain that section 230 "made clear that [Congress] intended for the Internet to remain 'unfettered by' regulation at the state and federal levels."[7] CTIA points out that section 230 contains a finding that the Internet "'flourished' with 'a minimum of government

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[3] *See, e.g.*, Free Press Comments at 60 (eliding the impact of the Congressional Review Act on potential FCC privacy rules); EPIC Comments at 15-18 (same); Public Knowledge Comments at 56 (recognizing the problem of congressional disapproval but nonetheless vaguely asserting that reclassification would let the FCC "protect consumer information"); *see also, e.g.*, Santa Clara Comments at 2 (claiming reclassification would "enable[] the Commission to 'use all of its capabilities to address threats to national security and public safety'" but failing to identify anywhere in its comments a single tool that would actually protect national security and public safety).

[4] *Compare* Santa Clara Comments at 25 (arguing that Internet service providers should not prioritize or zero-rate public-safety-related governmental communications), *with id.* at 23 (complaining that an Internet service provider did not prioritize or zero rate Santa Clara's own communications in 2018 when it exceeded its data cap).

[5] 47 U.S.C. § 230(f)(2) (defining an "interactive computer service" as "any information service . . . that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet . . . .").

[6] 47 U.S.C. § 230(c)(2).

[7] ACLP Comments at 15 (quoting 47 U.S.C. § 230(b)(2)); *see also* Digital Progress Institute Comments at 17 n.70 (similar); CEI Comments at 2 (similar); ADTRAN Comments at 1 (similar).

regulation.'"[8] The U.S. Chamber of Commerce points out that section 230(f)(2) defines Internet access service as an information service—and that section 231(e) specifically says the term "Internet access service" "does not include telecommunications services."[9]

In contrast, proponents of reclassification largely pretend that section 230 does not exist. Public Knowledge, for example, mentions the section in passing in arguing that the "purpose of broadband is to connect users *to* the [I]nternet and 'interactive computer services [that] offer a []forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity'"[10]—conveniently ignoring the provisions that actually mention Internet access or explain that Internet access services *are* some of the interactive computer services that Congress mentions. But give them credit, neither Free Press nor the Open Technology Institute nor INCOMPAS acknowledged that section 230 was in the statute at all.

Or consider section 706 of the Communications Act, known as the Presidential War Powers provision. The Institute identified the war powers in that section as the one clear national security change that reclassification would bring about: Reclassification would bring Internet service providers within the ambit of this section and thus give the President the authority to shut down the Internet in the United States in wartime. To be fair, this authority would likely not come to fruition until 2025 given the timeline for making any rulemaking effective. So perhaps we should have been more clear that it will likely only give the *next* President authority to shut down the Internet in wartime.

[8] CTIA Comments at 58 (quoting 47 U.S.C. § 230(a)(4)).

[9] U.S. Chamber of Commerce Comments at 43-45 (quoting 47 U.S.C. §§ 230(f)(2), 231(e)).

[10] Public Knowledge Comments at 29 (quoting 47 U.S.C. § 230(a)).

Again to its credit, Public Knowledge is the sole other commenter to recognize the relevance of this section to the Commission's rulemaking.[11] Public Knowledge seems to recognize the breadth of that provision and that it would authorize the President to shut down the Internet (or "take control of 'any station of facility' of communication by wire or wireless . . . ISPs")—and yet seems to welcome that outcome.

To be frank, the Institute finds that posture confusing. Why would any organization that purports to support a free and open Internet want to hand the keys to a single individual who can, without any congressional sign off or oversight, "take control" of any part of the Internet he or she chooses and shut it down? That, in the eyes of the Institute, would be a true threat to democracy and impossible to reconcile with Congress's own expressed views in the Telecommunications Act of 1996.

Or consider section 3(51) of the Communications Act. That provision defines the term "telecommunications carrier" but also includes an important limitation on Commission authority: "A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."[12] In other words, a carrier may only be regulated for telecommunications that are offered "directly to the public" and "for a fee."[13]

That's a real problem for the Commission's proposal to regulate Internet exchange traffic—a service not offered to the public and often (in the case of peering) offered without a

[11] Public Knowledge Comments at 65 (discussing "Section 605" but properly citing 47 U.S.C. § 606, which is the codification of section 706 of the Communications Act of 1934, as amended). One other commenter mentions the section but suggests it is not relevant to the analysis with little explanation. Comments of Harold Furchtgott-Roth, Kirk R. Arner, and Washington Legal Foundation at 10.

[12] 47 U.S.C. § 3(51).

[13] 47 U.S.C. § 3(53) (defining "telecommunications service").

fee. And that's a problem the *2023 Open Internet Notice* fails to even recognize, let alone grapple with.[14] (To be fair, the Commission appears misled by the *Verizon* court, which made the same fallacy by finding that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers'"[15]—a statement that would be true only if Internet service providers assessed access charges on edge providers, which they do not.)

Instead, the *2023 Open Internet Notice* tries to regulate Internet traffic exchange not by classifying it as a telecommunications service (an impossibility—and one not even proposed) but by arguing that it is a "derivative" component of broadband Internet access.[16] But if that were true, then the limits of section 3(51) would be meaningless—and the Commission would have unfettered authority to regulate every single aspect of an Internet service provider including its labor practices, financing, environmental practices, and a host of other non-statutory "derivative" aspects of the business. That's ridiculous, and hardly concordant with the intentions of the Congress that stated that interactive computer services (like broadband Internet access service) should be "unfettered by Federal or State regulation."[17]

Given how undeveloped the record is on these issues, the Commission should—at the least—issue a Further Notice of Proposed Rulemaking before reclassifying broadband Internet access to ensure that the Commissioners make a decision based on a fulsome record. Rather than continue down this path, the Institute recommends the Commission stand down and maintain the bipartisan consensus that held that Internet access services were information services—a position

[14] The *2023 Open Internet Notice* acknowledges that limitation only once in explaining why it cannot reach the private-carriage services of China Telecom, China Unicom, Pacific Networks, and ComNet under current law. *2023 Open Internet Notice* at para. 27 & n.98. But it then ignores that reclassification would also fail to reach these operators because they do not offer broadband Internet access service.

[15] *Verizon v. FCC*, 740 F.3d 623, 653 (D.C. Cir. 2014).

[16] *2023 Open Internet Notice* at para. 66.

[17] 47 U.S.C. § 230(b)(2).

the government has maintained since the dawn of the Internet in the 1990s through 2015 and again from 2017 to the present.

Better yet, the Commission should end this rulemaking and seek legislation from Congress to address the full stack of threats to Internet openness, competition, and security. Only Congress can create a net neutrality framework that applies to the full stack so that whether a company offers Internet access, provides cloud storage and processing, hosts an app-store, or manages an operating system, it cannot block or throttle the lawful content you want to access. Only Congress can crack open the app stores and operating systems and ad-tech market so that every "edge provider" can have a fair shake against Big Tech. And only Congress can expand the Commission's authority enough to address private-carriage actors like China Telecom Americas, China Unicom, Pacific Networks, and ComNet that continue to operate in the United States.

The Commission is ill-equipped to shepherd in the promise of a truly open, competitive, and secure Internet given its legal constraints. Congress will need to step in.

Respectfully submitted,

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