Before The
FEDERAL COMMUNICATIONS COMMISSION
45 L Street, N.E.
Washington, D.C. 20554

In the Matter of:	)	
	)	**WC Docket No. 23-320**
Safeguarding and Securing the	)	**FCC 23-83**
Open Internet	)	**FR ID 179272**
	)	

CENTER FOR INDIVIDUAL FREEDOM COMMENT OPPOSING PROPOSED RULE "SAFEGUARDING AND SECURING THE OPEN INTERNET"

December 14, 2023

I. Introduction

The Center for Individual Freedom (hereinafter "CFIF") is a non-profit, non-partisan organization with over 300,000 grassroots supporters and activists across the United States. CFIF was established in 1998 for the purpose of safeguarding and advancing Constitutional rights, including First Amendment rights, as well as ensuring continued American innovation, prosperity, leadership, entrepreneurship and worldwide technological preeminence.

As a central part of that mission, CFIF advocates public policies that advance internet, technological and broadband development most freely, effectively and efficiently. On that basis, CFIF respectfully submits the following Comment in opposition to the Federal Communications Commission (hereinafter "FCC") Proposed Rule entitled "Safeguarding and Securing the Open Internet."[1]

The legal and practical effect of the FCC's proposal would undermine, rather than safeguard or secure, the open internet. Additionally, as this Comment will set forth, it will violate the First Amendment under longstanding United States Supreme Court precedent. On that basis CFIF respectfully urges the FCC to reconsider and reject this flawed proposal.

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[1] https://www.federalregister.gov/documents/2023/11/03/2023-23630/safeguarding-and-securing-the-open-internet

II. Discussion

1. The Proposed Rule Fails as a Matter of Objective Market Realities

In the first two decades following passage of the Telecommunications Act of 1996, under bipartisan Congressional leadership and across differing presidential administrations and FCC chairs, the internet grew and flourished through a pro-growth, light-touch regulatory strategy that encouraged private investment and innovation by treating broadband internet access service as an "information service" under Title I of the Federal Communications Act.

New industries developed from the wellspring of that wise and restrained regulatory approach. The internet went mobile, and it became a hub of social, cultural and economic activity far beyond what anyone could have predicted during its early days. Streaming music and video services have fundamentally changed how Americans find and enjoy entertainment. Education, employment and government services have all moved online.

The 2015 decision to reverse two decades of "light touch" regulation and impose stifling "Title II" utility regulation on internet service put that legacy of technological revolution and innovation at risk. Classifying the internet as a Title II "telecommunications service" opened the door for intrusive and inefficient government regulation of pricing, service and virtually all aspects of network operations - transferring responsibility from the internet away from the private-sector, instead placing it in bureaucrats' hands.

The negative consequences of that unwise FCC reversal were immediate and costly. For the first time in history outside of an economic recession, private broadband investment actually declined, including a wireless capital investment decline of $5.6 billion in the first year of the new excessive regulatory approach, approximately 20% overall.[2] Those lost investments could have gone to lay new fiber, connect new communities, close the digital divide, innovate new products and upgrade and enhance service for everyone online. Instead, those dollars sat fallow, as broadband companies navigated the strictures and regulatory overhang of Title II.

When that rule was rescinded in 2017, returning internet service to the light-touch approach that had prevailed since the 1990s with such success, investment reaccelerated and U.S. internet speeds increased nearly 40% in the first year following repeal.[3] And fortunately so. Amid the 2020 Covid pandemic, when many expected internet service to deteriorate as employment and education migrated instantly online, U.S. broadband speeds actually *increased* by 91%.[4] In contrast, European nations pursuing the more regulatory internet service approach struggled to accommodate sudden consumer demand.[5]

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[2] https://docs.fcc.gov/public/attachments/DOC-344948A2.pdf; https://www.designworldonline.com/has-title-ii-regulation-stifled-wireless-investment-heres-what-the-number-say/

[3] https://www.vox.com/2018/12/12/18134899/internet-broafband-faster-ookla

[4] https://fairinternetreport.com/research/usa-vs-europe-internet-speed-analysis

[5] https://www.theguardian.com/media/2020/mar/19/netflix-to-slow-europe-transmissions-to-avoid-broadband-overload

We cannot repeat the demonstrable failures of recent experience through the current Proposed Rule. We need more investment, more innovation, more high-paying network jobs, and cannot invite the risk that private sector investment that fueled the growth and success of the internet be deterred due to regulatory overreach.

2. The Proposed Rule Violates the United States Supreme Court's "Major Questions" Doctrine

In addition to those objective market measures meriting rejection, the Proposed Rule faces nearly certain judicial rejection because it violates the United States Supreme Court's "Major Questions" doctrine. That's the view of none other than Obama Administration Solicitors General Donald Verrilli and Ian Gershengorn:[6]

> *The U.S. Supreme Court has made crystal clear, as recently as this June when it struck down President Joe Biden's student loan forgiveness program, that it will invalidate federal agency regulations on matters of major economic and political significance – what the court refers to as "major questions" – unless Congress has given the agency specific, unambiguous authority to regulate on the subject. … In the last two years alone, the court has used the doctrine to strike down the CDC's eviction moratorium, OSHA's workplace vaccine mandate, and the EPA's clean power initiative, as well as the Biden student loan plan. The message from the court is clear.*
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> *As we explain in a white paper published today, any effort by the commission to subject broadband internet access service to traditional common carriage regulation can't survive the "major questions" buzzsaw.*

3. The Proposed Rule Violates the First Amendment to the United States Constitution

Finally, and most critically for purposes of this Comment, the Proposed Rule suffers a separate fatal infirmity: It violates the First Amendment to the United States Constitution, as it impermissibly infringes upon affected internet service providers' operational and editorial discretion.

First, as a threshold matter, the Supreme Court established unequivocally that First Amendment protections apply to the modern market communications enterprises like cable television operators and internet service providers, just as they do to traditional media like newspapers or bookstores.

In the seminal cases *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), the Court affirmed the common-sense proposition that modern communications enterprises possess First Amendment rights

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[6] https://news.bloomberglaw.com/us-law-week/net-neutrality-rules-face-major-questions-buzzsaw-at-high-court

even where they transmit content rather than generate it. Determining what content to transmit, the Court held, necessarily involves an act of editorial discretion:

> *There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.*[7]

Similar to cable operators at the center of those cases, internet service providers obviously operate as more than mere transmission pipes. They possess discretion over which sites or content to include in their service. Indeed, many enterprises that offer cable television service now offer internet access over the same physical infrastructure.

Importantly, the fact that some internet providers allow all content to be transmitted equally does not forfeit the First Amendment right to exercise that discretion for either themselves at a later time or for other competitor providers. Just as a bookseller that retails all books seeking its services maintains the right to exercise future editorial discretion in excluding certain titles, so does an internet service provider regarding the content it carries. To the extent that the Proposed Rule limits that choice, it implicates the First Amendment.

It is also important to note that the cable operators of the *Turner Broadcasting* cases are not conceptually distinguishable from internet service providers on the basis that their capacity to carry channels is more fixed and limited than that of internet service providers. Editorial discretion is editorial discretion, and not dependent upon the size or capacity of the enterprise in question.

Accordingly, it is beyond logical dispute that internet service providers possess First Amendment rights to exercise discretion over what content to accept or decline under controlling Supreme Court precedent.

Consequently, the second analytical inquiry is whether the FCC can satisfy its constitutional burden of justifying the rules it seeks to impose against the First Amendment concerns of affected enterprises. Specifically, the FCC can only meet its obligation if:

> *"it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."*[8]

As the *Turner Broadcasting* decision makes clear, satisfying that level of legal scrutiny is no rote formality.

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7 *Turner Broadcasting*, 512. U.S. at 636.

8 *Id.* at 662.

Rather, sustaining the regulation in question requires "special characteristics." Specifically, the regulated entity must possess "bottleneck monopoly power." In *Turner Broadcasting*, the unique bottleneck power of 1990s cable operators justified the regulation at issue:

> *The must-carry provisions, as we have explained above, are justified by the* ***special characteristics*** *of the cable medium; the* ***bottleneck monopoly power*** *exercised by cable operators and the dangers this power poses to the viability of broadcast television. Appellants do not argue, nor does it appear, that other media – in particular, media that transmit video programming such as MMDS and SMATV – are subject to bottleneck monopoly control, or pose a demonstrable threat to the survival of broadcast television. (Emphasis added.)*[9]

In the case of cable television in the 1990s, the Court accepted in *Turner Broadcasting II* that they possessed the "special characteristics" of a "bottleneck monopoly" power:

> *As Congress noted, cable operators possess a local monopoly over cable households.* ***Only one percent of communities are served by more than one cable system.*** *Even in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers. Cable operators thus exercise "control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch.*[10] (Emphasis added.)

Moreover, in that case, a "special characteristic" existed in cable operators' inherent interest in exploiting the "bottleneck monopoly power" in question:

> *Cable systems also have more systemic reasons for seeking to disadvantage broadcast stations: Simply stated, cable has little interest in assisting, through carriage, a competing medium of communication. As one cable industry executive put it, "our job is to promote cable television, not broadcast television."*[11]

In the case of internet service providers, that "special circumstance" obviously doesn't exist. Whereas cable providers of the 1990s might have exercised their editorial discretion to exclude competitor broadcast television stations in their programming menus, internet service providers' editorial discretion would relate to content providers, not direct competing service providers offering infrastructure to carry content.

More fundamentally, internet service providers of today simply do not possess the sort of bottleneck monopoly power possessed by cable television operators at the time of the

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9 *Id.* at 661.

10 520 U.S. at 197.

11 *Id.* at 201.

Turner Broadcasting rulings. With regard to today's internet sector three decades since those decisions, the FCC cannot show the type of market dysfunction that characterized the cable television marketplace of that earlier era, when only one percent of communities were served by more than one cable option.

Quite the contrary, the FCC's own comprehensive "2022 Communications Marketplace Report" demonstrates the opposite.[12] Far from an internet service marketplace characterized by "bottleneck monopoly power" or dwindling consumer options, the report shows robust and continually improving consumer internet service alternatives, greater performance and increasing data usage.[13]

Accordingly, the Proposed Rule simply cannot satisfy the level of scrutiny demanded by applicable Supreme Court precedent. Absent the FCC establishing the "special characteristics" of "bottleneck monopoly power" in the internet service marketplace – in contrast to the far different cable television monopolies of the 1990s – the federal government via the FCC cannot infringe upon service providers' First Amendment discretion over whether and how to carry internet content.

III. Conclusion

The Proposed Rule fails as a matter of objective market realities, and it violates the First Amendment to the United States Constitution. On that basis CFIF urges its rejection.

Respectfully submitted,

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December 14, 2023

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12 https://docs.fcc.gov/public/attachments/FCC-22-103A1.pdf

13 https://www.fcc.gov/2022-communications-marketplace-report-quick-facts; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698393#