

The Heritage Foundation  
214 Massachusetts Ave NE  
Washington, DC 20002

December 14, 2023

The Honorable Jessica Rosenworcel  
Chairwoman  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Dear Chairwoman Rosenworcel,

The Heritage Foundation respectfully submits a public comment describing flaws it identified in the notice of proposed rulemaking “Safeguarding and Securing the Open Internet,” adopted October 19, 2023. We request answers to our comment and questions wherein no later than the reply due date, January 17, 2024.

The “Safeguarding and Securing the Open Internet” proposed rule reestablishes broad regulatory authority over internet service providers and broadband internet access. We say “reestablishes” because this rule mirrors the FCC’s Open Internet Order from 2015 that was overturned in 2017. Congress amended the Communications Act of 1934 through the Telecommunications Act of 1996 and established two distinct classifications of service. Title I gave the FCC limited regulatory authority over information service providers and Title II maintained the FCC’s more robust regulatory authority over common carriers. Congress has not amended this portion of the Communications Act since, and except for the brief time during the Obama-era rule, the FCC regulated internet service under Title I, which facilitated innovation and growth. Despite these facts, the FCC for the second time, unlawfully determined it has the authority to reclassify broadband as a telecommunications service under Title II. The FCC failed to demonstrate the necessary legal authority in section V subsection G of the current proposed rule.

If the FCC finalizes the proposed rule, the agency will regulate the internet as a public utility and undoubtedly be subject to litigation. Courts adhere to the “major questions” doctrine when issuing decisions on congressional authority. The “major questions” doctrine maintains that an agency may not decide a policy question of the first importance affecting a broad span of society or the economy without a clear congressional delegation of authority to make that decision. Two former solicitor generals from President Obama’s administration as well as current congressional lawmakers agree this re-regulation would not pass the test in court.<sup>1</sup> The “major questions” doctrine precludes the agency’s re-regulation of broadband internet from Title I to Title II.

The Heritage Foundation is also concerned that this rule will creep into the FCC regulating broadband rates, another area the FCC lacks the authority to do. Given the FCC’s willingness to overreach its regulatory authority for this proposed rulemaking, it is reasonable to be concerned it will do so again. As congressional lawmakers have pointed out, the proposed rulemaking does not forebear from *ex-post*

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<sup>1</sup> Donald B. Verrilli, Jr. and Ian Heath Gershengorn, Title II “*Net Neutrality*” *Broadband Rules Would Breach Major Questions Doctrine*, (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

House of Representatives Committee on Energy and Commerce, Letter to the Honorable Jessica Rosenworcel, (Oct. 17, 2023), “[The Net Neutrality Debate was Settled When the Internet Didn’t Break](https://www.house.gov/committees/energy-commerce/record/2023/10/17/202310170001)” ([house.gov](https://www.house.gov)).

U.S. Senator John Thune et al, Letter to the Honorable Jessica Rosenworcel, (Oct. 5, 2023), <https://www.thune.senate.gov/public/?cache/files/>.

rate regulation. Such overreach would undermine the competitive marketplace that exists and establish state-run internet service.

The FCC demonstrates arbitrariness in its rulemaking. Given that broadband internet speed and competition has increased, access has expanded, and prices have lowered since the 2017 repeal of the Open Internet Order, there is no clear reason or justification for proposing or finalizing this regulation.<sup>2</sup> The FCC disregarded this evidence and has failed to identify a problem that needs solving. What is more likely, is that the issuance of this rule was due to political reasons. This rule was initiated during the Obama Administration, the Trump Administration repealed it, and now the Biden Administration wants it back. It is even more concerning if the justification is so that the FCC can expand its regulatory reach and rulemaking power as previously mentioned.

The FCC has failed to show how the proposed rule would achieve its objective to prohibit internet service providers from blocking, throttling, or engaging in paid or affiliated prioritization arrangements.<sup>3</sup> The proposal has not sufficiently demonstrated how or when this has taken place and instead cites a case that describes what could happen hypothetically.<sup>4</sup> As Commission Carr has stated, internet service providers have not engaged in that conduct for reasons that have nothing to do with Title II.<sup>5</sup>

Lastly, the FCC failed to demonstrate that the benefits of the proposed rule outweigh or even justify the cost of issuing the rule and complying with it. This regulatory ping pong is wasteful and an abuse of government resources. The agency instead turned the onus on commenters, inviting them to do the work for it and submit economic analyses that weigh the costs and benefits of adopting the rule.<sup>6</sup>

Please answer the following questions no later than January 17, 2024:

- Has Congress given the FCC explicit authority to regulate internet service under Title II of the Communications and Telecommunications Acts? Please explain.
- How does this proposed rulemaking pass the “major questions” doctrine?
- Do you agree that the FCC does not have the statutory authority to regulate broadband rates? If not, please explain.
- Will you use or expand this rule or write a new rule in order to regulate broadband rates?
- Was there an increase in blocking, throttling, or engaging in paid prioritization since the 2015 Open Internet Order was repealed in 2017? If yes, please provide evidence.
- Have you completed your own economic analysis that weighs the costs and benefits of adopting the rule? If so, what were the results? If not, please explain.

Respectfully,  
The Heritage Foundation

*by:*

/s/ Annie Chestnut

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<sup>2</sup> Dissenting Statement of Commissioner Brendan Carr, [FCC-23-83A3.pdf](#).

<sup>3</sup> See section V of the proposed rule, [FCC-23-83A1.pdf](#).

<sup>4</sup> See section V, subsection A paragraph 120.

<sup>5</sup> Dissenting Statement of Commissioner Brendan Carr.

<sup>6</sup> See section V, subsection A, paragraph 117.