Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

COMMENTS OF 5G AMERICAS

5G Americas, the wireless industry trade association serving as the voice for 5G and beyond in the Americas, submits these comments in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-referenced proceeding. Currently chaired by T-Mobile US, 5G Americas has a broad membership of leading telecom service providers and manufacturers. Our mission is to advocate for and foster the advancement of 5G and beyond throughout the ecosystem's networks, services, applications, and connected devices in the Americas.[1] 5G Americas is a Market Representation Partner of 3GPP and represents our region in the 5G MOU annual event to share information globally on the progress in 5G deployment.

[1] 5G Americas Board of Governor members include Airspan, AT&T, Cable & Wireless Communications, Ciena, Cisco, Crown Castle, Ericsson, Liberty Latin America, Mavenir, Nokia, Qualcomm Incorporated, Rogers Communications, Samsung, T-Mobile US, Inc., Telefónica, VMware and WOM.

Introduction

The *Notice* seeks comment on the Commission's proposal to reinstate the 2015 rules classifying and regulating broadband internet access. 5G Americas agrees with the Commission's goals for the internet. Now a crucial platform for how Americans live their lives, including at work and school, internet access drives both our economic productivity and most of our communications. 5G Americas believes in delivering open internet access for all. We understand that the Commission's proposed rules are intended to achieve that goal. Unfortunately, some of the proposed rules may have unforeseen consequences that undermine that goal. The proposed rules may cause significant ambiguity in what network technologies and business models are permissible. Rather than reinstating the 2015 rules, the whole policy dialogue on Net Neutrality should be refreshed to consider the actual state-of-play of current technologies and business arrangements that are being used by providers to meet the increasing demand by both consumers and enterprise for internet access, and the services that rely on that access. That refresh would better serve the public than a reinstatement of seven-year-old rules that no longer reflect the state of technology and market.

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I. Utility-Style Regulation of Internet Access Risks U.S. Technological Leadership

As much as 5G Americas shares the Commission's goals of open internet access for all, it cautions that the proposed rules will likely decrease the industry investment that has enabled the U.S. to be *the* leader in internet-based innovation over the last two decades. Investment in U.S. access infrastructure since the 2015 rules were reconsidered has outpaced other areas with Net Neutrality rules, such as Europe. As the European Internal Market and Industry Commissioner said earlier this year, Europe is falling behind other regions and needs to invest massively in its telecom networks to achieve its digital goals.[2] "The market capitalization of the EU telcos consistently falls behind that of the United States. It is better to be a telco in the U.S. than in Europe," the Commissioner stated.[3] "In terms of 5G deployment, the EU lags behind other regions of the world. Just for some figures, 5G population coverage is 95% in the U.S. versus 72% in the EU. Adjusted for GDP, 5G investment in the EU is lower than in other regions of the world," the Commissioner added.[4]

No examples exist of sustained investment and innovation in sectors where service provision is managed by the government. Per federal data, prices for utility-regulated services like electricity, water, and gas have been increasing over two times as fast as the prices for internet offerings. Government involvement in rate regulation tends to create a rate floor that discourages operators from competing on price. More stringent oversight of broadband offerings

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[2] *See* Foo Yun Chee, *EU's Breton cites telcos' investment gap for Big Tech network fee push*, Reuters (Jun. 6, 2023), https://www reuters.com/business/media-telecom/eus-breton-cites-telcos-investment-gap-big-tech-network-fee-push-2023-06-06/#:~:text=%22In%20terms%20of%205G%20deployment,the%20world%2C%22%20he%20said.

[3] *Id.*

[4] *Id.*

– even if initially the Commission forbears from rate regulation but involves itself on other terms of service – will stifle innovation, which the U.S. cannot afford, if the U.S. is to lead globally.

The U.S. enjoys a very competitive market for broadband relative to other countries, which the imposition of *ex ante* regulation would make less competitive. The percentage of Americans with access to two or more high-speed, fixed internet service providers has increased by about 30% since the 2015 rules were reconsidered — up from 229 million in 2017 to approximately 295 million in 2022.

Wireless technological innovation, with the market leveraging the additional mid-band spectrum the Commission made available, has resulted in mobile operators offering fixed wireless access ("FWA") services, which provide consumers with additional competitive choice for broadband access. The number of Americans that can now choose fixed, high-speed, or 5G for home broadband as an alternative to fiber or other wired connections has grown exponentially from effectively zero in 2017. 5G FWA now covers more than 94 million U.S. homes and businesses, mirroring global trends as well.[5] FWA has been a major 5G success story and accounted for 90% of net broadband additions in 2022. Based on global Ookla data, the U.S. now has one of the highest average fixed broadband download speeds in the world. Yet, because of our competitive market, these innovative ways to offer open internet services to U.S. consumers has not resulted in increased prices.

The Commission has existing tools to respond to disruption in service or harmful conduct. The Commission already requires outage reports from services that are not considered

[5] *See* 5G Americas, *5G Use Cases* at 9 (November 2023), https://www.5gamericas.org/wp-content/uploads/2023/11/5G-Use-Cases.pdf.

common carriers under its current rules, like non-interconnected Voice over Internet Protocol. Moreover, the Commission has adopted broad requirements on providers of equipment, including substantial fines on radio transceivers that cause harmful interference to other spectrum users, all without regulating equipment manufacturers under Title II. Without first finding broadband access providers to be common carriers, the Commission has applied the requirements to cooperate with lawful surveillance warrants to ISPs under the Communications Assistance for Law Enforcement Act (CALEA). These measures demonstrate that the Commission need not adopt *ex ante* regulation of broadband access.

II. The Full Promise of 5G may be Threatened if the Proposed Rules are Adopted

Network slicing is very important to the future of 5G. As with each generation of network technology, deployment of 5G infrastructure requires new capital expenditures. The U.S. mobile industry has invested $100's of billions in world-leading networks with the expectation of offering network slicing as one of its network and service capabilities. Additional 5G and 5G-Advanced deployment could be jeopardized by creating regulatory uncertainty for more promising use cases. Network slicing is a non-BIAS application that enables value and provides improved network performance and increased security.[6] Network slicing can promote Open RAN and traditional RAN use cases. The Commission has recognized the value Open RAN deployments can have, both in terms of supporting American software innovators and in improving security by virtue of having additional choices among trusted vendors.

[6] *See* 5G Americas, *Commercializing 5G Network Slicing* (July 2022) at 13-14, https://www.5gamericas.org/commercializing-5g-network-slicing/

Operators in many competing nations have already deployed network slicing – for instance, some competing nations in Asia have over 20,000 private networks in place today, many benefiting from network slicing. The U.S. cannot afford to fall behind other countries in innovation in 5G and 5G-Advanced.

III. Any Order Should Clarify Network Slicing is Consistent with Open Internet Principles

Innovative new use cases may be stifled by overly rigid and prescriptive net neutrality rules. While 5G Americas opposes the proposed new rules, any Order the Commission adopts in this proceeding should clarify that innovations included in the 5G standard, like network slicing for enterprise and consumer applications, are consistent with the FCC's net neutrality rules. Absence of regulatory certainty can suppress investment in new technology.

It is important to distinguish services enabled by new mobile technologies such as mobile edge computing, network slicing, and real-time services like remote surgery optimized for specific quality-of-service requirements from broad-based consumer BIAS.

Two of the use cases for which 5G was developed – massive IoT and ultra-reliable latency – are aimed at digitalization of physical industries. In such instances (think manufacturing, delivery logistics, healthcare, autonomous vehicles), enterprise customers will need differentiated networks to ensure security, reliability, and safety. In fact, there are significant updates to business models and technologies that the authors of the 2015 rules could not have envisioned. The Commission must consider how best to support current technologies' deployment in the marketplace, in order to maintain the U.S. lead in internet innovation.

Therefore, 5G Americas believes that new mobile technologies like network slicing are consistent with open Internet principles and t the Commission should recognize that in its Order.

IV. Reinstatement of 2015 Rules are not Needed

Blocking and throttling prohibitions are not needed, because internet business models require delivering the lawful content consumers want, at the speeds they expect. There have been no instances of mobile broadband providers engaging in discriminatory conduct since the 2017 RIF Order. This is because the internet ecosystem is dramatically different from when Title II regulation was first discussed in the early 2000's. Today it is widely understood that content providers have more market power than ISPs. Reimposition of the 2015 rules is a proposal in search of a problem that doesn't exist in the vastly differentiated marketplace of today.

In addition, the existing transparency rule is sufficient to protect against unlikely discriminatory conduct, making the general conduct rule, as well as the blocking and throttling prohibitions, unnecessary. It is notable that the *Notice of Proposed Rulemaking* makes no attempt to argue that since the 2017 RIF Order broadband providers have engaged in anticompetitive or non-transparent conduct that would justify regulating the entire industry as common carriers subject to *ex ante* oversight.

V. Proposed "Waiver" Process for Paid Prioritization would be Resource-Intensive

In the *Notice,* the Commission proposes to adopt the following definition of "paid prioritization" and a rule banning such arrangements:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization."Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or*

other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

The Commission is appropriately concerned about anti-competitive ISP behavior, through unjust or unreasonable exercise of a market power, such as an ISP favoring its own edge services or that of an affiliate over third-party edge service providers.[7] 5G Americas agrees that the internet and its users are best served by an open, competitive edge services market. But the rules should be targeted toward real market harms.

The Commission asks whether the language of the proposed rule makes clear the scope of this proposed prohibition.[8] The 2015 definition is not focused on unjust or unreasonable anticompetitive behavior but could be interpreted to apply to competitive services mobile operators offer to customers. Any new rule suggesting certain business practices already extant in the market will be prohibited will cause disruption and lost revenue. We urge the Commission to avoid adopting any rule, including its definitions, that is not appropriately targeted against anticompetitive behavior.

Although the Commission has proposed to allow broadband providers to seek waivers of service offerings considered paid prioritization under the Commission's proposed rules, waivers would cause delays in rolling out services that benefit consumers and would waste limited Commission resources. The waiver process would also waste industry resources since the *Notice* states that the Commission wants few waivers to be approved in any event.

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[7] *See, e.g.*, ¶144.

[8] *See* ¶159.

By casting doubt over how and what services can be offered, and the resulting hesitancy with which the industry will consider deploying new features envisioned by 3GPP Release 18, the economic benefits of 5G are at risk. Wireless broadband has become a much more integral part of our lives since 2015. Productivity enhancements, gains in consumer welfare, new jobs, and increased tax revenues are all at risk from regulating a competitive, innovative sector like mobile broadband as a monopoly utility.

Indeed, mobile wireless leadership from the United States is itself at risk. 5G and increasingly 6G standards-setting has been about network differentiation and virtualization. Mobile broadband standards-setting occurs in a global environment. If U.S. market participants cannot sell or deploy domestically the full suite of 5G products and services due to Open Internet rules, then the U.S. will cede ground globally to other nations and regions. Not fully deploying 5G at home would cause the U.S. and its trusted vendors to stop investing in 5G research and development, particularly around slicing and network virtualization. Without this research pipeline, the U.S. OEMs would cede international standards-setting leadership to our competitors, which are focused on deploying the full suite of 5G capability.

VI. The FCC's proposed classification is unlikely to survive long-term

The FCC's proposed classification is unlikely to survive legal challenge, in light of last year's "major questions" decision in *West Virginia v. Environmental Protection Agency*. As refined in that decision, the *major questions* doctrine provides that an agency needs a clear statement of congressional intent to delegate power to regulate a fundamental sector of the economy.[9] As the Court cautioned, "We typically greet assertions of extravagant statutory

[9] *See* WVA v. EPA, 597 U.S. 12, Section C (2022).

power over the national economy with skepticism."[10] The Commission relies on the 2016 upholding by the District of Columbia Circuit Court of Appeals of the 2015 decision to classify broadband access as a common carrier service under Title II.[11] But in dissent to his colleagues' denial of rehearing that 2016 D.C. Circuit decision, then-Judge Kavanaugh wrote that the 2015 Commission had exceeded its statutory authority under the developing *major questions* doctrine.[12] That 2016 D.C. Circuit decision was four years before the more recent Supreme Court decision in *West Virginia v. EPA*, the opinion in which now-Justice Kavanaugh joined. In the interim, there have been several bills in Congress offering differing views on how to regulate broadband access under Title I,[13] demonstrating that there is no congressional consensus that broadband access should be regulated under Title II. In light of recent Title I proposals, the Commission cannot claim that there is a clear congressional delegation, as *West Virginia v. EPA* requires, to regulate broadband access under Title II.

The Commission justifies its attempt to reimpose out-of-date rules but pointing to how critical the internet has become to the daily life of Americans, particularly since the pandemic. But the more the Commission attempts to justify sweeping new rules by the increased centrality of broadband access, the more it decreases the legitimacy of its proposals under Supreme Court precedent. As the *West Virginia v. EPA* Court held, agencies have only those powers given to

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[10] *Id*. at 19.

[11] U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

[12] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanagh, J., dissenting from denial of rehearing en banc).

[13] *See* Promoting Internet Freedom and Innovation Act of 2019, H.R. 1096, 116th Cong. (2019); Open Internet Act of 2019, H.R. 1006, 116th Cong. (2019); To Amend the Communications Act of 1934…,(H.R. 1101, 116th Cong. (2019), S. 2853, 115th Cong. (2018)); and Open Internet Preservation Act, H.R. 2136, 116th Cong. (2019).

them by Congress, and the Court presumes Congress intends to make major policy decisions itself, not leave them to the agencies. It is therefore highly likely that the proposed rules, if enacted, will ultimately be struck down by the courts.

Regardless of the legal fate of a Commission decision to reimpose the 2015 rules, a future Commission, with a majority of Commissioners from another political party, will likely reverse such rules. In the interim, providers of broadband access and their industry partners would have delayed further investments due to a lack of predictability of a long-term framework. Instead, providers would have spent resources opposing the rules that could be put to use upgrading their networks or offering new services to customers. It is not in the public interest to propose rules that will ultimately be overturned, and in the meanwhile, trigger the expenditure of precious resources by entities competing in a global market for technological leadership.

VII. Conclusion

5G Americas opposes the FCC's proposed Open Internet rules, which would classify internet access as a common carrier service. Such regulation is not only unnecessary but is detrimental to U.S. global leadership in 5G, 5G-Advanced, and future mobile broadband technologies. The open nature of internet access has become a market prerequisite in the quarter century since the Internet's commercialization. The market has naturally ensured open internet access, making government intervention counterproductive and needless. Regulatory constraints could stifle innovation, reduce consumer benefits, and lower tax revenue. Specifically, in the mobile broadband sector, these rules could hinder innovation, new features, specialized services, and the full potential of 5G, 5G-Advanced, and 6G technology advancements. Ultimately, such regulation puts at risk the well-documented economic gains that 5G brings, including enhanced productivity, new revenue streams, and job creation. Any Order the Commission adopts should

clarify that innovations included in the 5G standard, like network slicing for enterprise and consumer applications, are *non-BIAS* or *specialized services* outside the application of the Commission's proposed Open Internet rules.

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