Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Safeguarding and Securing the Open Internet	**)** **)**	**Docket No. 23-320**

REPLY COMMENTS OF

NTCA–THE RURAL BROADBAND ASSOCIATION

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EXECUTIVE SUMMARY

The end-user market for broadband internet access services (BIAS) is healthy and regulatory intervention in that space would be at best unnecessary, and at worst inefficient and disruptive. Small providers, especially, would suffer potential burdens and risks should reclassification be imposed. At the same time, the fulfillment of consumer needs and demands typically involves not only the "last mile" internet service provider (ISP) but also edge providers and other intermediaries such as transit and backbone transmission operators. Recognizing the respective power of those entities with respect to other stakeholders in the ecosystem, light-touch, narrowly tailored measures to serve as regulatory backstop should ensure continuing evolution and advancement in the marketplace. Finally, universal connectivity is necessary to fulfill public policy goals supported by internet access. Accordingly, the Commission should not forbear from Section 254(d) as part of any reclassification of BIAS. To the contrary, including BIAS would further the mission of universal service by stabilizing the contribution mechanism and providing greater assurance of availability and affordability for millions of Americans.

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To the Commission:

I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA) hereby submits these Reply Comments in the above-captioned proceeding. In Initial Comments, NTCA explained that the end-user market for broadband internet access services (BIAS) is healthy and that regulatory intervention in that space would be at best unnecessary and at worst inefficient and disruptive. At the same time, NTCA also explained that the fulfillment of consumer needs and demands typically involves not only the "last mile" internet service provider (ISP) but also edge providers and other intermediaries such as transit and backbone transmission operators. Recognizing the respective power of those entities with respect to other stakeholders in the ecosystem, NTCA recommended light-touch, narrowly tailored measures to serve as regulatory backstop to ensure continuing evolution and advancement in the marketplace. Finally, NTCA emphasized the need to ensure universal connectivity and the role of BIAS in fulfilling those goals. In these Reply Comments, NTCA reiterates those principles and offers additional context, illustrating the potential burdens and risks to small ISPs should reclassification be imposed, as well as the need to ensure seamless internet traffic exchange. Surgical measures to ensure unburdened exchange are necessary to enable consumer choice of content, including applications and services.

Consumer principles are also served by ensuring that the Commission not forbear from Section 254(d) as part of any reclassification of BIAS.

II. DISCUSSION

A. RECLASSIFICATION THREATENS SUBSTANTIAL BURDENS FOR SMALL PROVIDERS.

In initial comments, NTCA demonstrated that the market for retail end-user BIAS is operating efficiently and in a manner that continues to generate substantial user benefits. Therefore, there is no need for regulatory intervention that would disrupt the efficiencies of current market. As noted by WISPA, "There is no evidence that smaller providers construct technical barriers to reaching end users, and it would be contrary to acceptable business practices for them to restrict access."[1] And, as noted by many commenters, imposition of unnecessary regulations would moreover generate additional costs that would be especially damaging to smaller ISPs. Such an outcome would be inapposite to the warnings issued by Commissioner Gomez, who cautioned, "We must be cognizant of potential effects on Internet Service Providers, especially smaller Internet Service Providers. . . . We must make sure that net neutrality rules do not place an undue burden on these smaller providers . . . ."[2]

As a general principle, regulatory interventions cause costs. The Congressional Research Service (CRS) observes that most Federal agencies are required to "design regulations in a cost-effective manner and ensure that the benefits of their regulations justify the costs."[3] This

[1] Comments of WISPA at 16.

[2] *Safeguard and Securing the Open Internet: Notice of Proposed Rulemaking,* Docket No. 23-320, FCC 23-83, at Statement of Commissioner Anna Gomez (2023) (NPRM).

[3] Carey, Maeve P., "Cost-Benefit Analysis in Federal Agency Rulemaking," Congressional Research Service, at 1 (Mar. 8, 2022).

imperative is rooted in Executive Order 12866[4] and provides sound basis for the concerns of small BIAS providers as the Commission contemplates significant regulatory intervention. The uncertainty surrounding certain of the proposals causes concern. By way of example, the Commission sought comment in the instant NPRM on "possible modifications or additions to update the transparency rule"[5] which manifest themselves in the broadband label rules.[6] But incredibly, these rules are *not yet even effective*. Broadband label rules will become effective for large ISPs (defined as those with 100,000 or more customer accounts) on April 10, 2024, and for smaller providers on October 10, 2024. And yet the instant proceeding seems to contemplate modifying yet-to-be-effective rules. Considerations in the instant proceeding to potentially amend the not-yet-effective transparency rules recalls concerns voiced by industry in response to the *Further Notice of Proposed Rulemaking* in the transparency docket, which was issued before the initial rules they sought to supplement were effective. Particularly for small providers, the prospect of (a) preparing to comply with new rules that will become effective next October while (b) monitoring pending proposals in the relevant transparency docket, and overlaid by (c) contingency planning for potential further amendments in a separate proceeding portends significant economic and administrative burdens. The Commission itself noted the potential for disproportionate burdens on small providers, noting that they are "less likely to have in-house attorneys and compliance departments . . . ."[7]

[4] "Regulatory Planning and Review," Executive Order 12866, 58 Fed. Reg. 190 (Oct. 4, 1993).

[5] NPRM at para. 168.

[6] *See, Empowering Broadband Consumers Through Transparency: Report and Order and Further Notice of Proposed Rulemaking,* FCC Docket No. 22-2 (2022) (Broadband Labels Order).

[7] Broadband Labels Order at para. 118 (2022).

Even non-ISP commenters warn against imposing "huge costs and uncertainty onto providers looking to build out their networks, particularly small ones . . . ."[8] In just the broadband labels matter alone, smaller providers anticipate costs associated creating labels; testing to confirm accurate speed and latency data on the labels; disability requirements; labels for specialized E-rate and Rural Health Care bids; and the possibility of embedding labels into their service orders via their billing software. All of these will add regulatory compliance costs. And yet, as noted by ACA Connects, the NPRM concludes without significant analysis that "the burden for small and other entities to comply with the reclassification and rules will be minimal, as they will be entering into a regulatory framework with which they are already and recently familiar."[9]

Broadband labels are but one example. As WISPA notes, the NPRM speculates that Section 218 may provide bases for "`more comprehensive cyber incident reporting,' implying a possible future rulemaking proceeding proposing to impose additional reporting obligations on broadband providers."[10] But firms that engage in the development, deployment, management, and security of broadband networks (and associated consumer-facing needs) are intimately familiar with many layers of engagement necessary to comply with even seemingly broad-brush requirements. The potential impact on smaller providers must be considered. As demonstrated in initial comments, as small providers, NTCA members do not hold market positions that would enable them to engage in discriminatory practices. Not only would reclassification of end-user services be unnecessary, but it would moreover impose costs that are entirely disproportionate to

[8] Comments of Information Technology & Innovation Foundation at 6.

[9] Comments of ACA at 44, quoting NPRM at 130 (Initial Regulatory Flexibility Act at para. 70).

[10] Comments of WISPA at 28 (internal citation omitted).

any benefit that might be envisioned. As noted by WISPA, "it is undoubtedly the case that Title II regulation will impose additional costs on broadband providers in the form of legal fees to outside counsel, time spent complying with reporting requirements, and implementation of internal compliance and monitoring programs."[11] This echoes a theme presented by NTCA in numerous proceedings, specifically, that resources devoted to regulatory compliance are resources that cannot be directed to network deployment. As National policy favors rapid advancement of broadband networks, the willful redirection of funds and staff away from network improvements *where there is no market-based justification* for regulatory intervention raises the bar to demonstrate whether those regulatory processes are, in fact, necessary.

Of additional note is the Commission's expectation to invoke Section 222 to address broadband providers. But Congress was clear when it barred the Commission from applying Section 222 to broadband.[12] Since its enactment in 1996, Congress has invoked the Congressional Review Act (CRA) only 20 times. The limited use of this action further demonstrates how far afield the Commission's broadband privacy efforts reached in 2016.[13] NRECA submits that privacy rules should be addressed in a separate proceeding.[14] However, and as noted by the U.S. Chamber of Commerce, the Commission is barred by Congress from adopting new privacy regulations that are "substantially the same" as those that were

[11] Comments of WISPA at 27.

[12] Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Federal Communications Commission relating to "Protecting the Privacy of Customers of Broadband and Other Telecommunications Services," Pub. L. No. 115-22, 131 Stat. 88 (2017).

[13] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services: Report and Order,* Docket No. 16-106, FCC 16-148 (2016). *See, also, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services: Comments of NTCA–The Rural Broadband Association,* Docket No. 16-106 (May 27, 2016).

[14] Comments of NRECA at 8.

promulgated in the 2016 broadband privacy proceeding. Accordingly, the scope of what the Commission can impose in a Title II regime seems limited. And, if in fact BIAS *is* reclassified as a Title II service and the Commission does *not* forbear from applying privacy regulations, the prospect of a regulatory "no man's land" emerges because the Federal Trade Commission (FTC) has no jurisdiction over common carriers.[15] In contrast, the current status (where privacy is effectively managed by the FTC) is reasonable and effective. An introduction to a Columbia Law Review article is instructive:

> . . . in practice, FTC privacy jurisprudence has become the broadest and most influential regulating force on information privacy in the United States – more than nearly any privacy statue or any common law tort. . . . the FTC's privacy jurisprudence is functionally equivalent to a body of common law . . . a common view of the FTC's privacy jurisprudence is that it is thin, merely focusing on enforcing privacy promises. In contrast, a deeper look at the principles that emerge from FTC privacy 'common law' demonstrates the FTC's privacy jurisprudence is quite thick. The FTC has codified certain norms and best practices and has developed some baseline privacy protections. . . .[16]

Indeed, a substantial and growing library of administrative and judicial decisions paints a comprehensive portrait of the FTC's ability to address privacy in an electronic world.[17]

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[15] 15 U.S.C. § 45(a)(1), (2).

[16] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Columbia Law Review 583 (2011).

[17] *See, i.e., Federal Trade Commission v. Wyndham Worldwide Corp.,* 799 F.3d 236 (3d Cir. 2015) (finding lax cybersecurity constituted unfair business practice); *Federal Trade Commission, et. al., v. Vizio, et. al.,* Case 2:17cv-00758 (Dist. N.J. 2017) (settlement following collection of smart TV user data without consent); *I/M/O Goal Financial, LLC,* FTC Docket No. C-4216 (2008) (finding violations of customer information and consumer financial information rules (Gramm-Leach-Bliley) as well as 15 U.S.C. § 45 *et seq.*); *I/M/O Guidance Software, Inc.,* FTC Docket No. C-4187 (2007) (finding liability for maintaining sensitive in information in clear readable text; not adequately assessing vulnerability of network and applications; not implementing readily-available defenses; failure to employ sufficient methods to detect breaches; *I/M/O Levono, Inc.,* Federal Trade Commission, Docket No. C-4636 (2018) (concerning laptops with pre-loaded "man in the middle" software that accessed user information without adequate notice); *I/M/O TaxSlayer, LLC,* Federal Trade Commission, Docket No. C-4626 (2017) (failure to adequately safeguard clients' financial information).

The U.S. Chamber of Commerce, as well, warns against the impact of regulatory overhaul on small businesses, explaining that "heavy-handed regulation decreases investment while increasing uncertainty and compliance costs," and notes other "negative consequences such as a disproportionate impact on small rural providers and subscribers."[18] Other commenters observe this risk, too, predicting "[a]dditional regulatory burdens would also fall harder on small providers than on large ones, thus harming competition and potentially harming rural service."[19] Reclassification would implicate many requirements that would bear disproportionate burden on small providers, including network outage reporting requirements[20] and obligations that could arise when serving public safety agencies. Interisle Consulting Group explains, "It would be burdensome for all small ISPs to be required to provide services at a level that public safety agencies might prefer. Instead, such service level agreements are best left to private contracts, not broad Title II carriage regulations."[21] It is important to note, as well, that many customer experience issues are entirely unrelated to regulatory classification. As noted by a rural provider,

[18] Comments of U.S. Chamber of Commerce at 15.

[19] Comments of Interisle Consulting Group at 4, 6.

[20] *See,* NPRM at para. 39, suggesting that small ISPs could be subject to the same requirements that apply to high-capacity backbone networks.

[21] Comments of Interisle Consulting Group at 7. This issue is implicated in the oft-cited breakdown of emergency services in Santa Clara, California, during the 2018 Mendocino wildfires. *See,* Remarks of Chairwoman Jessica Rosenworcel, The National Press Club, Washington, DC, at 4 (Sep. 26, 2023) ("The record before the court demonstrated that when firefighters in Santa Clara, California were responding to wildfires they discovered that the wireless connectivity on one of their command vehicles was being throttled. As a result of Title II repeal, the FCC lacked the authority to intervene.") (https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf) (visited Jan. 17, 2024). However, in the first instance, the service purchased by Santa Clara was not a Title II service, and therefore was unaffected by the Restoring Internet Freedom Order. Moreover, any throttling that occurred was consistent with the $37.99 monthly plan the local fire department had purchased; the plan allowed the slowing of data once a monthly consumption threshold had been reached. While Verizon subsequently acknowledged that in this instance it did not adhere to a general corporate practice to lift restrictions in emergencies, the events that transpired were not related to the regulatory classification of the purchased service. *See,* Jay Brodkin, "Verizon Throttled Fire Department's 'Unlimited' Data During Calif. Wildfire," ARS Technica (Aug. 21, 2018) (https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/) (visited Jan. 17, 2024).

> One other matter that can dramatically impact the performance of a customer's internet connection is the age of the modem, computer, or other device that they are using the internet. Our support center staff have run into countless issues with customers who perceive problems with their internet speed or connectivity, thinking it is the service we are providing, when it is due to the customer trying to use a ten-year old piece of technology that cannot handle the faster speeds we are delivering.

National Rural Electric Cooperative Association (NRECA) also highlighted the challenges small BIAS providers would face.[22] NRECA also highlights a potential definitional obstacle if the Commission moves forward with its initial definition of a "small business." Specifically, under the Commission's Initial Regulatory Flexibility Analysis (IRFA), a small business would be defined as one with 1,500 or fewer employees. However, the IRFA itself notes that definition could include the majority of BIAS providers, thereby calling into question whether, in fact, the Commission would be create any meaningful exemptions for "small businesses," including very small businesses like NTCA members, who average 35 employees. There are numerous bases upon which to establish exemptions for small providers. WISPA notes current exemptions and other allowances from rules including certain equal employment opportunity (EEO) obligations; Commercial Advertisement Loudness Mitigation (CALM) rules; compliance deadlines for non-nationwide Commercial Mobile Radio Service (CMRS) providers; Cable Act requirements; and broadband label requirements.[23]

The BIAS end-user market is operating effectively and is not in need of regulatory intervention. Regulatory imprints would, axiomatically, create costs that would be borne with disproportionate impacts on small BIAS providers.

[22] Comments of National Rural Electric Cooperative Association (NRECA) at 3, 4.

[23] Comments of WISPA at 75-78.

B. SEAMLESS INTERNET TRAFFIC EXCHANGE, NECESSARY FOR AN OPEN INTERNET AND TO ENABLE CONSUMER CHOICE OF CONTENT, APPLICATIONS AND SERVICES, REQUIRES A LIMITED REGULATORY BACKSTOP THAT ACCOUNTS FOR THE MULTIPLE PARTIES WHO CAN UNDERMINE THESE IMPORTANT OBJECTIVES.

To the extent the Commission is concerned about activity by various parties in the broadband ecosystem that could frustrate the objectives of an "open internet," such concerns are more likely implicated in the context of how various providers and platforms interact with one another in that ecosystem than in the ways that ISPs deliver retail BIAS services to end users. For these reasons, if any regulatory intervention is warranted, NTCA highlighted in its comments the much greater need for a light-touch regulatory "backstop" to ensure the seamless transfer of data across networks and among providers of all kinds.[24] Unfortunately, the NPRM proceeds from the misplaced notion that the Internet ecosystem is a bilateral construct, with retail ISPs on one side and Content/Edge Providers (C/Eps) on the other – and that only the former possess the ability to disadvantage the latter and frustrate consumer expectations in the process. Yet as NTCA noted, multiple types of entities beyond these parties – middle mile providers, transit providers, backbone providers, and content distribution networks (CDNs) – play a role in the consumer experience. Specifically, each possess the ability to hinder or stop altogether the seamless exchange of traffic that is critical to consumers' access to the content, applications, and services of their choice and thus ultimately to achieving open internet objectives.

Despite the unmistakable diversity of the providers and platforms of which the broadband ecosystem is composed, a few parties attempt to divert attention away from these other critical players in endorsing the NPRM's singular focus on retail last-mile ISPs.[25] As one example,

[24] Comments of NTCA–The Rural Broadband Association at 10-16.

[25] Comments of INCOMPAS at 38-48; Comments of Akamai Technologies Inc. (Akamai), at 4-10; Comments of Computer & Communications Industry Association (CCIA) at 8.

INCOMPAS overlooks the comprehensive nature of this ecosystem in stating that, "[u]nlike BIAS, they do not offer service to all endpoints of the internet."[26] CCIA makes a similar argument.[27] But what use are transit or middle mile services, or CDNs or backbone operators, in enabling internet access if they block content or hinder the routing of data pursuant to their own incentives? To the contrary, a breakdown between any of these providers and ISPs – including the former engaging in conduct antithetical to an open internet including a refusal to engage in reasonable traffic exchange with the latter – can prevent consumers' access to "all endpoints of the Internet" that they may want. For rural carriers, this concern is exacerbated where these smaller providers typically do *not* also own and operate these other networks and thus depend upon these other entities for rural consumers' access "to all endpoints of the Internet."

Indeed, it is telling that Akamai devotes significant discussion to urging the Commission to avoid regulating CDNs even as it devotes signification discussion to these players' "critical role in the Internet ecosystem."[28] Akamai cannot have it both ways by claiming these entities are critical to an open internet but then urging the Commission to absolve them of any responsibility for their role in ensuring that goal is achieved. While Akamai provides a lengthy and technical discussion of how CDNs fall outside the definition of BIAS, this is beside the point – the real concern presumably should be whether any given entity has the capability to inhibit the consumer experience and thus frustrate the goals of an open internet. Indeed, with respect to CDNs as well as other content and edge platforms generally, addressing this potential for

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[26] Comments of INCOMPAS at 46.

[27] Comments of CCIA at 8 (*citing Protecting and Promoting the Open Internet: Report and Order on Remand, Declaratory Ruling, and Order,* GN Docket No. 14-28, FCC 15-24, at para. 340 (2015)).

[28] Comments of Akamai at 2, 3.

consumer harm would seem to fall within the Congressional direction to the Commission found in Section 706(b) of the Telecommunications Act of 1996. Specifically, that provision expressly empowers the Commission "to take steps to accelerate broadband deployment if and when it determines that such deployment is not reasonable and timely."[29] Accordingly, instead of overlooking the "unseen" connections that are just as critical to "ensuring that consumers can obtain and use the content, applications and devices they want"[30] that these various content and edge platforms and CDNs represent, the Commission should exercise its available authority to ensure that the objectives of an open internet will not be frustrated at *any* link in the chain.

As NTCA noted in initial comments, the innovation highlighted by the NPRM will accrue to consumers only if every player in the ecosystem exchanges traffic in a seamless manner, and if remedies are available when they do not. This, in turn requires a regulatory construct that looks beyond a simple two-sided market that also looks only to the retail layer for regulation and aims instead at ensuring the seamless *transport and transmission* of data across *all* networks, platforms, and CDNs that play a role in consumers' experience. This approach would aim its focus where disputes between the multiple parties that play a role in the ecosystem could undermine consumers' needs and Open Internet objectives. At the same time, a simple "backstop" that prohibits conduct in the interconnection and exchange of data and content that undermines broadband deployment and effective consumer use of such services should suffice in establishing proper incentives and promoting these objectives. Such a framework would enable the Commission to step in and resolve disputes or disagreements that may arise between

[29] 47 U.S.C. § 706(b).

[30] NPRM at para. 4.

networks and other operators while avoiding the imposition of substantial *ex ante* regulation on only select segments (or even just a single segment) of this broader ecosystem.

C. THE COMMISSION SHOULD NOT FORBEAR FROM SECTION 254(d) AS PART OF ANY RECLASSIFICATION OF BIAS.

In the NPRM, the Commission proposed to forbear from the first sentence of section 254(d) of the Act and associated rules "insofar as they would immediately require new universal service contributions associated with" BIAS.[31] As NTCA and many others highlighted in comments, however, forbearance from this provision of the Act would be harmful to the effectiveness, if not the ultimate viability, of the Commission's essential universal service initiatives. Moreover, the evolution of both time and relevant proceedings since 2015 renders even "temporary" forbearance impossible to justify given current circumstances.

NTCA noted, for example, that the *2015 Open Internet Order* justified forbearance as a temporary act of deferral based upon a 2012 further notice of proposed rulemaking in a 2006 proceeding to examine contribution reform, citing as well to a 2014 referral to the Federal-State Joint Board on Universal Service that might warrant "a short extension" to render a recommended decision for the Commission regarding comprehensive reform.[32] The Ad Hoc Users Telecom Group raised concerns similar to NTCA regarding this procedural posture, urging the Commission to avoid "blithely re-adopting" such forbearance "without providing any analysis or justification for its proposed approach in 2023 beyond simply referring to what it did in 2015."[33] INCOMPAS too echoed these points, asserting that changes from 2015 in the

[31] NPRM at para. 105.

[32] Comments of NTCA–The Rural Broadband Association at 30, 31.

[33] Comments of the Ad Hoc Telecom Users Committee at 32.

contribution factor, the contribution reform debate, and the procedural posture of the rulemaking and the Joint Board referral all demonstrate "why it no longer makes sense to forbear from section 254(d)."[34] AARP echoed these points, noting that the underlying conditions are different today than when the Commission adopted the temporary forbearing in 2023.[35]

The National Consumer Law Center *et al*. meanwhile rightly observed that "[t]he broadband affordability landscape has changed since 2015 and the need for enforcement of Section 254 under Title II is substantially more important than it was some eight years ago."[36] Such concerns were seconded by [NDIA]: "Exercise of this forbearance would limit the Commission's ability to support broadband availability and affordability through USF programs . . ."[37] Furthermore, like NTCA, Public Knowledge observed the growth in the contribution factor in recent years, driven not by growth in demand on the universal service fund but rather by supply that places an even greater burden on senior citizens and others that have not migrated to non-assessable services.[38]

The public interest here weighs against forbearance – and there is substantial consensus for the kind of contribution reform that would follow from reclassification. A broad coalition of more than 330 entities representing public interest groups, broadband service providers, anchor institutions, and consumers joined a "Call to Action" urging just the kind of reform that would be

[34] Comments of INCOMPAS at 54, 55.

[35] Comments of AARP at 16.

[36] Comments of the National Consumer Law Center, *et al.* at 4.

[37] Comments of the National Digital Inclusion Alliance (NDIA) and Common Sense (Common Sense) at 3.

[38] Comments of Public Knowledge, at 50. *See, also,* Comments of AARP at 16.

achieved if the Commission were not to forbear here.[39] While a small handful of commenters contend that failing to forbear from section 254(d) would present a "potential major upheaval" for consumers of broadband who would now see assessments on their bills,[40] it is worth noting yet again that the only serious or disciplined economic analysis of elasticity in the broadband marketplace conducted to date and submitted to the Commission has repeatedly confirmed that the relatively small charges that could appear on bills are unlikely to have any material impact on adoption or retention of broadband.[41] To the contrary, such changes would *further* the mission of universal service by stabilizing the contribution mechanism and providing greater assurance of availability and affordability for millions of Americans.

It must also be noted that changes to the contribution mechanism as a result of reclassification would not be "self-effectuating." Section 254(d) became law on February 8, 1996, and the Commission did not implement a contribution mechanism pursuant to this statutory charge until May 7, 1997.[42] At that time, the Commission concluded that wireless providers were telecommunications carriers and thus subject to contribution obligations, but it deferred until 1998 a determination on how wireless providers were to contribute, and even then the Commission's action was an interim safe harbor.[43] Thus, the Commission need not forbear

[39] *See, Ex Parte* Letter from Carol Mattey, Principal, Mattey Consulting, LLC, to Marlene H. Dortch, Secretary, Commission, Docket Nos. 21-476 and 06-122 (filed Feb. 14, 2022).

[40] *See, e.g.*, Comments of Free Press, WC Docket No. 23-320 at 67.

[41] *See* NTCA-USF Study, Expert Report of Michael A. Williams, Ph.D. and Wei Zhao, Ph.D., Dec. 13, 2022; NTCA-USF Study, Expert Report of Michael A. Williams, Ph.D. and Wei Zhao, Ph.D., May 7, 2020.

[42] *Federal-State Joint Board on Universal Service: Report and Order,* Docket No. 96-45, FCC 97-157 (1997).

[43] *See, Federal-State Board on Universal Service: Memorandum Opinion and Order and Further Notice of Proposed Rulemaking,* Docket No. 96-45, FCC 98-278, paras. 13-15 (1998). The Commission established a permanent means of contribution for wireless providers in 2002. *See, Federal-State Board on Universal Service; 1998 Biennial Review-Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service: Report and Order,* Docket No. 96-45, FCC 02-329, at paras. 20-27 (2002).

under the theory that somehow providers would need to implement new billing processes and consumers would face the pass-through of new fees the day after a reclassification order. To the contrary, following any reclassification, the Commission would need to open (or complete) a rulemaking to implement the changes that follow from reclassification. During this time, the Commission would logically consider how and to what degree BIAS services should contribute in light of current contributors and the demands of the fund. While implementation remains pending, if some parties wish to argue for forbearance, they are free to file a petition to request as much and to put forward arguments that are currently lacking in the record as to why this allegedly meets the statutory requirements therefor. Careful and measured consideration of such issues and arguments in a separate proceeding devoted to such questions make far more sense than a rushed, half-baked grant of forbearance with no meaningful justification or explanation in the context of this much farther-reaching proceeding. By contrast, if the Commission were to grant forbearance now, not only is there scant support for that in the current record, but it then becomes unclear how and if the Commission could ever "un-ring that bell" notwithstanding a crisis in the structure of the current contribution mechanism that puts at risk the agency's ability to carry out its statutory mandates with respect to universal service.

For these reasons, the Commission should not forbear from section 254(d) if it reclassifies BIAS as a telecommunications service. Instead, the Commission should indicate in any reclassification order that it will initiate (or complete, as appropriate) a proceeding to implement section 254(d) in this context and further indicate that, if any party should desire forbearance from this requirement before it is implemented, that party is always capable of filing

a petition seeking such relief pursuant to section 10 of the Act that the Commission will then give all due consideration pursuant to those statutory standards in the due course of time.[44]

III. CONCLUSION

The end-user market for BIAS is healthy and regulatory intervention in that space would be at best unnecessary, and at worst inefficient and disruptive. Small providers, especially, would suffer potential burdens and risks should reclassification be imposed. At the same time, the fulfillment of consumer needs and demands typically involves not only the "last mile" internet service provider (ISP) but also edge providers and other intermediaries such as transit and backbone transmission operators. Recognizing the respective power of those entities with respect to other stakeholders in the ecosystem, light-touch, narrowly tailored measures to serve as regulatory backstop should ensure continuing evolution and advancement in the marketplace. Finally, universal connectivity is necessary to fulfilling public policy goals supported by internet access. Accordingly, the Commission should not forbear from Section 254(d) as part of any reclassification of BIAS. To the contrary, including BIAS would further the mission of universal service by stabilizing the contribution mechanism and providing greater assurance of availability and affordability for millions of Americans.

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[44] 47 U.S.C. § 160.