**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Restoring Internet Freedom | ) | WC Docket No. 17-108 |

# REPLY COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

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## EXECUTIVE SUMMARY

Consistent with its prior-filed comments in this proceeding and Docket No. 14-28, NTCA urges the Commission to ensure that sufficient backstops exist to ensure the ability of operators of all kinds to interconnect and exchange data across networks and servers so that consumer interests and expectations with respect to broadband Internet access service (BIAS) can be fulfilled. The Commission should leverage its unique core competency and authority to ensure the seamless exchange of data across networks. An entirely unregulated Internet traffic exchange regime would threaten to undermine any work that the Commission undertakes in the universal service context and could run counter to the Congressional mandate for "reasonably comparable" services at "reasonably comparable" rates.

At the same time, and consistent with the NTCA's long-standing advocacy, NTCA submits that there is no need for the Commission to engage in heavy-handed regulation of retail offering of BIAS, and that it should instead defer to the Federal Trade Commission with respect to consumer protection considerations in the provision of retail services. The successful development of the retail BIAS market demonstrates that heavy-handed retail regulation is not necessary to promote marketplace development or consumer access to BIAS.

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**TO THE COMMISSION:**

## I. INTRODUCTION.

NTCA–The Rural Broadband Association (NTCA) hereby submits these reply comments in the above-captioned docket. Consistent with its prior-filed comments in this proceeding and Docket No. 14-28, NTCA urges the Commission to ensure that sufficient backstops exist to ensure the ability of operators of all kinds to interconnect and exchange data across networks and servers so that consumer interests and expectations with respect to broadband Internet access service (BIAS) can be fulfilled. At the same time, and consistent with the association's long-standing advocacy, NTCA submits that there is no need for the Commission to engage in heavy-handed regulation of retail offering of BIAS, and that it should instead defer to the Federal Trade Commission with respect to consumer protection considerations in the provision of retail services.

## II. THE COMMISSION SHOULD ADOPT A "LIGHT TOUCH" REGULATORY BACKSTOP IN THIS PROCEEDING TO GOVERN THE INTERCONNECTION MARKETPLACE AND THEREBY PRESERVE CONSUMER EXPECTATIONS AND UNIVERSAL SERVICE.

As NTCA noted in its initial comments, a light-touch regulatory framework to ensure the seamless transfer of data across networks and among providers of all kinds is the appropriate and

necessary end-state for this proceeding considering the dynamic and multi-sided nature of the online marketplace. While NTCA has noted previously that Title II could offer one means of implementing such a framework to address interconnection, such a framework need not be heavy-handed – and ultimately, because it would serve as just a light-touch backstop for matters of interconnection and data exchange, it need not even rely upon Title II to the extent that retail broadband Internet access is ultimately classified as an information service. Indeed, despite the assertions of some commenters, a framework to govern the exchange of Internet traffic need be *neither* an overly prescriptive and/or one-sided regime that fails to consider all the entities that can affect the consumer experience nor a lawless "wild-west" zone at the other extreme. Rather, this framework need only serve to ensure that disputes between various kinds of parties involved in exchanging data as requested by consumers (*e.g.*, ISPs, middle mile, backbone or transit providers, and edge providers) do not undermine consumer expectations and experience with respect to Internet access.

As background, NTCA has long advocated for a clearly defined regulatory framework that provides clear "rules of the road" but does not interfere *ex ante* with a dynamic and diverse online marketplace.[1] This position is based on the fact that small and/or rural ISPs possess little, if any, bargaining power in negotiating the terms of interconnection and data or content exchange with larger network operators (backbone and middle mile providers, among others),

[1] *See, e.g., Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, GN Docket No. 12-353 (filed Nov. 19, 2012) (discussing, in the context of the IP transition, the need for "clear rules of the road" that can and will govern the delivery of services to consumers, ensure seamless transmission and exchange of data between network operators, provide regulatory certainty, and promote core public policy principles such as universal service, competition, and consumer protection). *See also,* Comments of NTCA, GN Docket No. 13-5 (filed July 8, 2013); Comments of NTCA, *et al.*, GN Docket No. 13- 5, et al. (filed Oct. 26, 2015).

edge providers and CDNs. As a result, breakdowns in the exchange of data between rural ISPs and other entities in the Internet ecosystem can be extremely disruptive and harmful to rural America, driving up costs for rural consumers or even potentially causing a loss of service or access to content. While some may question whether a regulatory backstop is necessary to prevent such breakdowns from harming rural consumers, they need only witness rural consumers' long-standing frustration with call (in)completion problems that saw thousands of calls to rural America failing to reach their destination, to the detriment of public safety and universal service. That this problem has lingered for so long, despite a clear window into its cause and solution,[2] gives small and rural ISPs and their customers cause for concern when certain parties in this proceeding advocate for an utter vacuum with respect to oversight of the exchange of data between rural areas and the rest of the world. For rural operators and the consumers they serve, this is not a question of dueling competing interests; getting interconnection right is rather fundamental to promoting the notion of universal service in a broadband world.

With that as background, the Commission should recognize that the two primary competing lines of argument with respect to "interconnection" both breeze past very real

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[2] *Ex Parte* letter from NTCA, et al., to Marlene H. Dortch, Secretary, FCC (filed Mar. 11, 2011) (discussing the growing problem of calls not completing to rural areas all across the nation and noting that the root cause is based on how originating carriers choose to set up the signaling and routing of their calls); *Developing a Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*: *Declaratory Ruling*, Docket Nos. -92,07-135, DA 12-154 (rel. Feb. 6, 2012), ¶ 12 (stating that it "is an unjust and unreasonable practice in violation of section 201 of the Act for a carrier that knows or should know that it is providing degraded service to certain areas to fail to correct the problem or to fail to ensure that intermediate providers, least-cost routers, or other entities acting for or employed by the carrier are performing adequately."). Despite the fact that both rural carriers and the Commission identified the source of such call completion problems as far back as 2011, the problems continue.

concerns that threaten the concept of universal service in rural America. On one side, some argue for the imposition of strict interconnection duties on last-mile or retail ISPs; these parties, however, miss the mark in their one-sided, laser-like focus on the "ISP as gatekeeper" view of the exchange of Internet traffic.[3] This specific argument is often cited as a justification for one-sided, non-reciprocal interconnection duties that promote "competition" for the sake of the competitors alone and ignore the reality of all interconnection disputes and "facts on the ground" that truly affect the public interest and the consumers they claim to seek to protect. These parties fail in particular to acknowledge that ISPs are but one, often very small side of broader interconnection relationships; middle mile, backbone, transit providers, as well as CDNs and other edge providers also hold leverage (often greater than smaller rural ISPs) in the context of interconnecting and exchanging data and content. Indeed, one need only look at the 2014 Viacom/Cable One dispute[4] to recognize that a myopic focus only on large, nationwide ISPs would be a disservice to the very pro-consumer ends that certain parties claim to represent.

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[3] *See* Comments of Level 3, WC Docket No. 17-108 (filed Jul. 17, 2017), p. 3 ("It is well established that the largest consumer ISPs, which serve many millions of residential subscribers, have the incentive and ability to abuse their gatekeeper power by restricting interconnection capacity to force interconnecting parties, whether content providers or other ISPs, to pay unjustifiable tolls."). Public Knowledge and Common Cause, WC Docket No. 17-108 (filed Jul. 17, 2017), p. 73 ("ISPs possess gatekeeper, or bottleneck, power due to their unique position in the network"); *See also,* Comments of the Computer & Communications Industry Association ("CCIA"), WC Docket No. 17-108 (filed Jul. 17, 2017), pp. 8-11; Comments of Level 3, WC Docket No. 17-108 (filed Jul. 17, 2017), p. 3; Comments of the Attorneys General of Illinois, California, Hawaii, Iowa, Maine, Maryland, Massachusetts, Mississippi, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, WC Docket No. 17-108 (filed Jul. 17, 2017), pp. 19-21; Comments of the Open Technology Institute at New America, WC Docket No. 17-108 (filed Jul. 17, 2017), pp. 10-14.

[4] *Ex parte* letter from the American Cable Association to Marlene H. Dortch, Secretary, FCC (filed May 6, 2014) (discussing Viacom's denial of "access to its websites by broadband Internet subscribers served by smaller cable broadband providers…in retaliation for ACA members refusing to sign cable programming renewal contracts seeking exorbitant fee increases for Viacom networks with low ratings and minimal viewer interest"); See also, "Viacom v. Cable

Indeed, parties pushing for one-way interconnection duties imposed only on ISPs fail to understand that small rural ISPs lack the market power to act as "gatekeepers," and these parties in doing so risk doing a disservice to the consumer interests they purport to represent. Simply put, a rural ISP with 5,000 customers is highly likely to come out on the losing end of a dispute with a large online content provider that can very easily absorb the loss of a few thousand "eyeballs." Rural ISPs are also likely to come out on the losing end of a dispute with a middle mile provider that determines that a small, rural ISP is too small and remote to deal with absent unreasonable fees that will be absorbed by the small provider's small customer base.[5] Put another way, universal service depends upon the existence of a reasonable interconnection regime and regulatory backstop.

At the other end of the spectrum, certain parties advocate for an utter vacuum with respect to oversight of interconnection, with arguments that at bottom boil down to the assertion that "both sides [in interconnection negotiations] are fully capable of ensuring that their needs are met and negotiating fair and reasonable terms and conditions."[6] These parties fail as well to understand that imbalances of power and leverage in the online marketplace can preclude establishing such "fair and reasonable terms and conditions." Ultimately, if the call completion

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One: A Foreshadowing of Things to Come in the Battle for the Open Web?," Battelle Media (May 7, 2014), available at: http://battellemedia.com/ archives/2014 /05/viacom-v-cable-one-a-foreshadowing-of-things-to-come-in-the-battle-for-the-open-web.php.

[5] In responses to NTCA's 2016 Broadband/Internet Availability Survey, most NTCA members reported having only two options for middle mile providers. The member responses to this survey were not included in the final survey report but are on file with the author. NTCA 2016 Broadband/Internet Availability Survey Report, July 2017, available at: https://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2016ntcabroadbandsurveyreport.pdf

[6] Comments of NCTA, WC Docket No. 17-108 (filed Jul. 17, 2017), p. 48.

debacle is seen properly as a "canary in the coal mine," complete abdication of oversight with respect to interconnection and data exchange could result in chaos for small, rural ISPs, to the detriment of their consumers. As these providers are forced by their lack of market power to absorb ever-increasing middle-mile, backbone, or CDN interconnection costs, those costs will be passed onto end-user consumers. Policymakers considering a wholly unregulated Internet traffic exchange marketplace must consider how such costs can be recovered from end-users and the implications of those costs in terms of rural consumers' access to "reasonably comparable" rates as called by statute. In this regard, NTCA's opposition to an unregulated Internet traffic exchange marketplace should not be seen as a competitive pushback against larger ISPs or edge providers. Rather, a recognition of the fact that a breakdown in the seamless exchange of Internet traffic can have a profoundly negative affect on rural consumers – and unlike in the retail marketplace where the Federal Trade Commission (FTC) may be well equipped as matter of jurisdiction and competency to address concerns with respect to consumer protection, there is quite clearly and simply no other logical or appropriate "cop on the beat" with respect to interconnection and the exchange of data among and across networks than this Commission.

It is for this reason – the preservation and advancement of universal service – that NTCA has long supported a limited and targeted regulatory backstop to ensure that a breakdown in interconnection and data exchange in the Internet ecosystem does not threaten the concept of universal service for rural consumers. This is not (or at least should not be) a question of "picking sides" in the marketplace. That the Commission determined in 2015 to use Title II not as the foundation for a backstop, but instead as a lever to take a heavy-handed approach to Open Internet provisions, should not be the impetus for the agency to now swing the pendulum so far in the other direction as to abdicate responsibility altogether and ignore its unique core

competency in ensuring the seamless exchange of data across networks. As noted above, an entirely unregulated Internet traffic exchange regime would threaten to undermine any work that the Commission undertakes in the universal service context and could run counter to the Congressional mandate for "reasonably comparable" services at "reasonably comparable" rates.

Thus, in sharp contrast to the one-sided and heavy-handed approach adopted by the Commission in 2015 regarding interconnection issues, the agency should pivot to a "light-touch" approach that places all operators in the Internet traffic exchange marketplace on a "level playing field." Similar to the even-handed approach embraced by the *Browser Act*,[7] the framework that emerges here should look to establish one set of rules for the entire Internet ecosystem and thereby provide proper incentives to interconnect and exchange data. This should be backed by some capability for the Commission to step in if needed to correct for unreasonable and or discriminatory behavior that threatens to disrupt consumers' expectations. More specifically, the Commission need not create *ex ante* rules for the rates, terms, and conditions of Internet interconnection and traffic exchange; rather the framework should simply be an assistive regulatory intervention available and invoked only should arrangements break down among parties and cause concern for consumers.

Finally, as NTCA noted in initial comments, if the Commission finds that retail broadband Internet access should not be a telecommunications service, Section 706 still can offer a solid foundation upon which to create such a framework. Section 706 grants the Commission

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[7] Balancing the Rights Of Web Surfers Equally and Responsibly Act of 2017, H.R. 2520, 115the Cong. (2017). *See, also,* Press Release, Communications and Technology Subcommittee Chairman Marsha Blackburn, "Blackburn Introduces Bill to Protect Online Privacy" (May 19, 2017) (stating that the Browser Act "creates a level and fair privacy playing field by bringing all entities that collect and sell the personal data of individuals under the same rules.").

the authority to regulate broadband providers to the extent that such regulatory provisions are distinct from traditional common carrier regulation. A "regulatory backstop" as proposed herein would be consistent with the *Verizon* court's suggestion that "considerable flexibility" in establishing and maintaining relationships with customers is a distinguishing characteristic from common carrier regulation.[8] Indeed, the framework proposed herein would enable the marketplace to operate unencumbered by strict *ex ante* rules but would also enable a regulator to step in should a failure in negotiations threaten to undermine important public interest goals. This framework, unlike the heavy-handed approach that emerged from the 2015 Open Internet Order, would not focus on the carrier-customer (or potential customer) relationship but would instead be based on whether actions that lead to a dispute among parties seeking to exchange Internet traffic will have an adverse impact upon broadband deployment in contravention of Section 706.

## III. IMPOSITION OF HEAVY-HANDED OBLIGATIONS ON RETAIL BROADBAND INTERNET ACCESS SERVICES IS UNNECESSARY.

In contrast to interconnection arrangements discussed above – where this Commission is clearly and unmistakably in the best position to help resolve disputes and disagreements between operators of all kinds as they arise and affect consumers – there is insufficient evidence that, regardless of service classification, this Commission needs, or is well positioned, to regulate the provision of retail broadband Internet access service (or "consumer BIAS"). The FTC, by contrast, is well-versed in matters related to the consumer services marketplace and could protect consumer interests with respect to broadband just as it does for many other consumer products

[8] *Verizon v. FCC*, 740 F.3d 623, 657 (D.C. Cir. 2014) (finding that the 2010 Open Internet Order failed to build into the Commission's rules the "considerable flexibility" found in the agency's data roaming rules upheld by the same court in 2012) (internal citations omitted).

and services. Accordingly, NTCA submits that the record demonstrates three critical points to support the Commission proposal to refrain from substantial regulatory oversight of consumer BIAS regardless of ultimate classification of the service:

1. Until 2015, retail BIAS (as opposed to BIAS at the transmission layer) was never subject to Title II regulation or significant Commission oversight. Instead, FTC oversight during this period was sufficient to achieve consumer protection goals and promote the public interest.

2. Consumer BIAS providers are not uniquely positioned to control the consumer experience in the internet market; rather, the most significant and sizeable app and edge providers have a demonstrably higher market value and power to exert influence upon the market than most ISPs.

3. The removal of Commission oversight in the retail broadband marketplace would not leave that market unregulated or consumer experience unprotected – it would simply *return* oversight to the Nation's chief consumer protection agency, the FTC, where it resided until 2015.

Accordingly, and as set forth below, regardless of where the Commission settles on service classification, NTCA urges the Commission to refrain from imposing significant, heavy-handed requirements on the consumer BIAS marketplace.

### A. THERE IS INSUFFICIENT EVIDENCE OF CONSUMER HARM.

Prior to 2015, the Commission never governed *retail* BIAS offerings in a common carrier manner. Rather, regulation of broadband pursuant to Title II only ever applied to underlying *wholesale transmission* services and not (and never) to consumer BIAS.[9] The successful

[9] *See, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (Docket No. 02-33); Universal Service Obligations of Broadband Providers (Docket No. 02-33); Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (Docket No. 01-337); Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements (Docket Nos. 92-50, 98-10); Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises (Docket No. 04-242);*

development of the retail BIAS market nonetheless demonstrates that – in contrast to the interconnection regime where reasonable oversight of this Commission via a "regulatory backstop" is warranted and necessary for reasons discussed above and in prior comments – heavy-handed retail regulation is not necessary to promote marketplace development or consumer access to BIAS.[10]

A growing body of case law demonstrates that the FTC is fully capable of governing this consumer market, just as the agency does in so many other consumer product and service markets. These decisions offer evolving guidance to the marketplace. The success of this approach is evident from the financial prowess of the industry and consumer zeal to adopt its new technologies. While this Commission possesses unique core competency in examining and resolving questions related to interconnection and data exchange between operators that it must not abdicate in this proceeding, the FTC oversaw the *retail* broadband internet market in its

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*Consumer Protection in the Broadband Era (Docket No. 05-271): Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005); *see, also, GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148: Memorandum Opinion and Order*, Docket No. 98-79, 13 FCC Rcd 22466 (1998).

[10] In prior comments, NTCA distinguished between the transport and transmission components of the network and the services offered atop such capacity. This approach was consistent with prior Commission rulings that permitted wireline providers to offer the transmission component of BIAS as common carriers on a permissive basis. This position, however, was limited to the underlying, targeted application of Title II "*specifically and only with respect to transport and transmission capacity . . .*" *Protecting and Promoting the Open Internet: Comments of NTCA–The Rural Broadband Association*, Docket No. 14-28 (Jul. 18, 2014) (emphasis in original). As raised in the NPRM and noted in NTCA's initial comments, if the Commission decides to reclassify broadband as a Title I service, it should expressly preserve the ability of operators to offer on a voluntary basis the transmission component of BIAS as common carriers. *See, Restoring Internet Freedom: Notice of Proposed Rulemaking,* Docket No. 17-108, FCC 17-60 (2017), at para. 65. *See, also, Restoring Internet Freedom: Comments of NTCA–The Rural Broadband Association*, Docket No. 17-108, at 6, 7, 17-19 (filed Jul. 17, 2017). This is necessary to enable the proper working of cost recovery measures for interstate services, and critical to avoid disrupting universal service mechanisms as designed by the Commission.

infancy, early development, and explosive growth over more than two decades. As the Acting Chair of the FTC makes clear, "between 2007 and the FCC's 2015 Order, *no pervasive marketplace problem emerged."*[11]

### B. EDGE AND APP PROVIDERS ARE POWERFUL FORCES IN THE INTERNET ECOSPHERE.

NTCA has explained previously that the consumer BIAS marketplace is inhabited by many actors. In its comments on broadband privacy regulation, NTCA affirmed that there is scant reason and much potential harm in governing only one segment of the broadband marketplace differently from the others.[12] Verizon, as well, champions the need for consistent, uniform regulation.[13] And, in developing a conclusion that is consistent with this NTCA position, the FTC presents a comprehensive cast of broadband market actors to illuminate this point:

> As a matter of consistency, it makes little sense to exclude only BIAS providers from the FTC's privacy and data security jurisdiction, which covers virtually all other entities in the Internet ecosystem, including some of the largest and most powerful companies using consumer data. Indeed, the FTC has actively applied its authority across the Internet, including bringing action against social media companies, Original Equipment Manufacturers, operating systems, software providers, content providers, app developers, IoT companies and ad networks. It has issued specific guidance to app stores, app developers, ad networks, and others.[14]

And, yet, some proponents of net neutrality regulations propose that only ISPs and the retail BIAS services they offer be segregated for separate, disparate heavy-handed treatment that

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11 Olhaussen at 6 (emphasis added).

12 *See, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services: Comments of NTCA–The Rural Broadband Association,* Docket No. 16-106, at 5-10 (May 27, 2016).

13 Verizon at 21, 22.

14 FTC Staff at 18.

would both likely fail to enhance consumer welfare while at the same setting the stage for customer confusion. Speaking in the first instance to the issue of broadband privacy, for example, former Commission Chairman Wheeler stated that consumers deserve "a uniform expectation of privacy."[15] The same approach befits all aspects of consumer BIAS usage: a single approach to govern relationships across the market, from edge and app providers to service providers, will assist consumers as they navigate services and offerings. As the FTC concludes, "having one agency with jurisdiction over these entities would ensure consistent standards and consistent application of such standards."[16]

An oft-used term among some parties is "gatekeeper," referring to those actors in the broadband marketplace who allegedly have ability and incentive to affect the market adversely, thereby justifying regulatory intervention. For example, the Open Technology Institute at New America avers, "BIAS providers exert great leverage in the internet ecosystem," arguing that BIAS providers can provide "fast" and "slower" lanes.[17] The consumer experience, however, would more likely be affected by larger entities that may exert influence over BIAS providers. As USTelecom notes, edge providers such as Google, Amazon and Facebook are valued approximately 265 percent higher than AT&T, Verizon, and Comcast, combined.[18] Frontier notes "the market capitalization of Google's two outstanding classes of shares (GOOG and

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15 Hearing before the U.S. House of Representatives Subcommittee on Communications and Technology, "Oversight of the Federal Communications Commission," Preliminary Transcript at 141 (Nov. 17, 2015). Chairman Wheeler explained the Commission "will not be regulating the edge providers differently" from Internet service providers (ISPs).

16 FTC Staff at 19.

17 Open Technology Institute at New America at 7 (OTI).

18 USTelecom at 18.

GOOGL) approach double the market capitalization" of AT&T, Comcast, CenturyLink, Charter, Frontier, Spring, T-Mobile, Verizon and Windstream.[19] Frontier illuminates, "Internet providers – especially smaller and mid-size ones – have little to no negotiating leverage compared to Internet giants on the edge."[20]

Incompas notes, "Since the beginning of 2015 alone, 42 OTT services have been launched in the United States, more than all the prior years from 2005 to 2014 combined." These include: SlingTV, Sony Vue, HBO NOW, Verizon Go90, Starz, Vudu Movies on US, DIRECTV NOW, YouTube TV, Hulu Live.[21] Frontier cites related data, reporting that Netflix and YouTube account for more than half of all fixed internet traffic in North America.[22] As Frontier observes, "these largest players frequently crowd-out other traffic and do not finance any of the infrastructure on which their services rely, particularly in the high-cost rural areas where smaller ISPs operate.[23]

### C. THE FEDERAL TRADE COMMISSION IS WELL EQUIPPED AND BEST POSITIONED TO PROMOTE A CONSISTENT AND COHERENT LEVEL OF CONSUMER PROTECTION IN THE RETAIL BIAS MARKETPLACE.

Should the Commission choose to reclassify BIAS as an information service, consumers will not be left stranded and unprotected. Instead, the *status quo ex ante* that prevailed prior to 2015 in terms of consumer protection would simply be restored, as once again, *retail* BIAS

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19 Frontier at 4.

20 Frontier at 7, internal citation omitted.

21 Incompas at 16, 17 (internal citation omitted).

22 Frontier at 8, internal citation omitted.

23 Frontier at 7.

services were never classified as telecommunications services; only the broadband transmission layer was ever so classified. The FTC hits the proverbial nail on the head: the removal of Commission regulations of retail BIAS would simply "restore the FTC's ability to protect broadband consumers under its general consumer protection and competition authority."[24]

The primary function of the FTC, to protect mass-market consumers, should not be ignored in this proceeding. As FTC staff notes, it has prosecuted hundreds of cases to protect the privacy and security of consumer information.[25] The FTC has not only the legal jurisdiction, but also the subject matter expertise. In 2007, the FTC issued a 167-page report that delved into both the technical and legal bases of the internet and how the law approaches it.[26] In its comments, the FTC describes numerous initiatives in which it has been involved and which address consumer protection in the broadband marketplace,[27] and outlines the basis of its legal jurisdiction.[28] The most salient response to those alarmed at the prospect of the Commission's proposed action is the FTC's clarification that the elimination of net neutrality rules will simply restore privacy and data security jurisdiction to the FTC. The FTC has invoked its jurisdiction to combat injury caused by "spam, child pornography, malware, and other harmful electronic content,"[29] and jurisdiction to address consumer BIAS matters should be restored to it. In short, while no agency

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24 FTC Staff at 2.

25 FTC Staff at 4.

26 Ohlhausen at 2, 3.

27 FTC Staff at 7-10.

28 *See,* FTC Staff at 23-29.

29 FTC Staff at 15.

or entity possesses the jurisdiction or expertise of this Commission when it comes to questions of network interconnection (and thus, the urgent need for effective Commission oversight in this regard), there is already a competent "cop on the beat" in the *retail* broadband marketplace with clear jurisdiction to handle issues as they arise there – just as there was prior to 2015.

## IV. CONCLUSION.

As demonstrated above, NTCA urges the Commission to ensure that sufficient backstops exist to ensure the ability of operators of all kinds to interconnect and exchange data across networks and servers so that consumer interests and expectations with respect to broadband Internet access service (BIAS) can be fulfilled. The Commission's invocation of its unique core competency in these regards will ensure the seamless exchange of data across networks. This will further fulfillment of universal service goals and the Congressional mandate for "reasonably comparable" services at "reasonably comparable" rates.

At the same time, NTCA submits that there is no need for the Commission to engage in heavy-handed regulation of retail offering of BIAS, and that it should instead defer to the FTC with respect to consumer protection considerations in the provision of retail services.

Respectfully submitted,


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