



**Comments of the James Madison Institute and other Free Market Organizations
Regarding The Federal Communications Commission Proposed Safeguarding and Securing the
Open Internet Order**

Introduction:

My name is Dr. Edward Longe, and I direct the Center for Technology and Innovation at the James Madison Institute (JMI). JMI is a 501 (c)(3) non-profit, nonpartisan think tank based in Tallahassee, Florida. We are grateful for the opportunity to respond to the Federal Communications Commission’s proposed Safeguarding and Securing the Open Internet Order. The James Madison Institute, and the undersigned organizations are deeply committed to advancing the principles of limited government and free markets. Because of these values, we must express alarm and concern about the FCC’s desire to return to net neutrality regulations at a time when internet service providers (ISPs) are delivering affordable and high-quality service to hundreds of millions of Americans. Disrupting this ecosystem risks cutting off millions of Americans from affordable internet access at a time when the Biden-Harris Administration has publicly stated their desire to close the digital divide and enable all Americans to access affordable internet.¹

Our comments center around the following points.

- I. The Safeguarding and Securing the Open Internet Order (SSOIO) is a solution in search of a problem.**
- II. The SSOIO could open ISPs to unprecedented federal regulation**
- III. The SSOIO will face legal uncertainty**
- IV. The FCC is already empowered to deal with foreign adversaries**
- V. The SSOIO could complicate efforts to close the digital divide**

In providing these comments, we hope to outline our concerns with the hope the FCC will take them into account before finalizing a rule that could negatively impact millions of Americans. We look forward to working with the FCC to develop policies that deliver affordable high-speed internet to every American.

¹ The White House, “Fact Sheet: Biden-Harris Administration Announces Over \$40 Billion to Connect Everyone in America to Affordable, Reliable, High-Speed Internet,” June 26, 2023. Available Online: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/>



I. The Safeguarding and Securing the Open Internet Order is a solution in search of a problem.

When Chair Rosenworcel announced that the FCC would move to institute the SSOIO, she noted that in the modern era, high-speed and affordable broadband is “essential infrastructure for modern life.”² In painting this picture, Chair Rosenworcel failed to acknowledge that today, internet access is not only more affordable than ever before, but it is also the fastest. In essence, the ecosystem that Chair Rosenworcel desires already exists.

Since the demise of the Open Internet Order (OIO), the predecessor to the SSOIO, America’s broadband networks have flourished. In October 2020, Chairman Ajit Pai announced that in the two years following the repeal of the 2015 Open Internet Order, “average download speeds for fixed broadband in the United States have doubled, increasing by over 99 percent.”³ These gains were not just evident in fixed broadband but also evident in mobile speeds, which rose by 15 percent.⁴ Since then, internet speeds have continued to increase to the point that compared to 2013, the internet is around eight times faster today.⁵ With these increased speeds, Americans can do more online, such as receive virtual healthcare, work remotely, or attend classes virtually.

As internet speeds increased, the average broadband price fell, providing more Americans with broadband access. In 2023, the cost of broadband fell over 18 percent compared to 2022.⁶ This decline follows a 15 percent decrease in 2022.⁷ Since 2015, prices have decreased by around 55 percent. With lower prices, more Americans could receive what used to be a luxury and enjoy the benefits of connectivity.⁸

² Remarks Of Chairwoman Jessica Rosenworcel at The National Press Club Washington, D.C., September 26, 2023. Available Online: <https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf>

³ Ajit Pai, “Halloween Treats,” Federal Communications Commission, October 5, 2020. Available Online: <https://www.fcc.gov/news-events/blog/2020/10/05/halloween-treats>

⁴ Isla McKetta, “U.S. Internet Speeds Increase 15.8% on Mobile and 19.6% on Fixed Broadband.” *Ookla Insights*, July 8, 2020. Available Online: <https://www.ookla.com/articles/announcing-us-market-report-q2-2020>

⁵ Median Country Speeds September 2023, <https://www.speedtest.net/global-index>

⁶ Arthur Menko, “2023 Broadband Pricing Index,” *USTelecom*, October 11, 2023. Available Online: <https://ustelecom.org/research/2023-bpi/#:~:text=The%202023%20Broadband%20Pricing%20Index,year%20in%20the%20price%20of>

⁷ Arthur Menko, “2022 Broadband Pricing Index,” *US Telecom*, June 29, 2022. Available Online: <https://www.ustelecom.org/research/2022-bpi/>

⁸ Op. Cit 6.



With prices decreasing and speeds increasing, there is ample evidence that the broadband market is healthy and does not need further regulations. Notably, the fact that broadband internet is healthy suggests that net neutrality rules are a solution in search of a problem.

II. The Safeguarding and Securing the Open Internet Order will open ISPs to unprecedented federal regulation that could dampen investment

The FCC has traditionally classified ISPs as Title I Information Services. In statute, Title I providers are those that offer a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁹ Under the Title I classification, ISPs are subject to a light-touch regulatory environment that incentivizes investment and deployment to potentially less profitable areas.

The benefits of Title I classification were apparent after the FCC rescinded the Open Internet Order in 2018. In the years following the repeal and the creation of a more favorable regulatory environment, private broadband investment increased significantly. In 2017, ISPs reported investing around \$76 billion in their networks. By 2022, after the repeal of OIO regulations, that figure skyrocketed to over \$102 billion.¹⁰ Because of this investment, broadband reaches more Americans than ever before, providing them access to better quality internet and a more resilient service.

However, the SSOIO would reclassify ISPs as Title II common carriers, subjecting them to utility-style regulation. Under this new classification, the FCC could force ISPs to provide service in unprofitable areas and subject them to rate regulation. These rules represent an unprecedented federal intervention into a functioning market, and they risk increasing operational costs for ISPs while limiting their ability to generate revenue, which is reinvested into their networks to improve performance and expand reach. The consequences of such intervention will ultimately leave Americans facing poorer overall service and undoing the substantial price declines and speed increases they have experienced over the last five years.

⁹ 47 U.S. Code § 153

¹⁰ U.S. Telecom, “2022 Broadband CAPEX Report,” September 8, 2023. Available Online:<https://www.ustelecom.org/research/2022-broadband-capex/#:~:text=America's%20broadband%20industry%20invested%20a,high%2Dspeed%20connectivity%20for%20all.>



III. The Safeguarding and Securing the Open Internet Order will face legal uncertainty

In June 2022, the Supreme Court of the United States (SCOTUS) decided *West Virginia vs. Environmental Protection Agency (EPA)* along the major questions doctrine. While *West Virginia vs. EPA* primarily concerned carbon emissions under the Clean Air Act, the decision held major consequences for how regulatory agencies, such as the FCC, operate. Under the major questions doctrine, SCOTUS ruled that agencies must establish clear congressional intent before imposing new rules, “particularly in matters where the agency's new policy or rule will have a significant impact on the economy or national policy and springs from an enlargement of an agency’s power or growth in a new area of regulation.”¹¹ Classifying ISPs as Title II carriers would not only have a significant impact on the economy, given the economic impact of these companies but combined with the considerable expansion of federal power of Title II regulation, it seems highly likely that SSOIO would qualify as a major question and subject to its doctrine.

Unfortunately for the FCC, imposing Title II regulations on ISPs was not explicitly authorized by either the 1934 Communications Act or the 1996 Telecommunications Act. As noted by Donald B. Verrilli, Jr. and Ian Heath Gershengorn, two Solicitor Generals under President Obama, noted “neither the Communications Act nor the 1996 Telecommunications Act unambiguously authorizes the Commission to take such a step.”¹² Had Congress wished to grant the FCC the authority to regulate ISPs as common carriers, it would have passed a separate law with explicit authorization or amended previous statutes.

Section 706 of the Telecommunications Act is the closest Congress came to providing clear intent, but the language only states that the FCC is to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹³ As the *Congressional Research Service* notes, “a key question is whether Section 706 is an affirmative grant of regulatory authority, or whether it is merely exhorting the FCC to use its existing authority under the Communications Act to encourage broadband deployment.”¹⁴

¹¹ *West Virginia v. EPA*, 597 U. S. ____ (2022); Jaclyn Lopez, “The Major Questions Doctrine Post-West Virginia V. EPA,” January 3, 2023. Available

Online:https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/january-february-2023/the-major-questions-doctrine/

¹² “Donald B. Verrilli, Jr. and Ian Heath Gershengorn, *Title II “Net Neutrality” Broadband Rules Would Breach Major Questions Doctrine*,” September 20, 2023. Available Online: <https://aboutblaw.com/bazq>

¹³ 47 U.S.C. § 208.

¹⁴ Congressional Research Service, “Net Neutrality Law: An Overview,” October 18, 2022. Available Online: <https://crsreports.congress.gov/product/pdf/R/R46973>



Without this clear congressional intent, the likelihood that a conservative-leaning Supreme Court upholds the SSOIO seems remote.

IV. The FCC is Already Empowered to Deal With Foreign Adversaries

When Chairwoman Rosenworcel announced her plan to reimpose Title II regulations on ISPs, she warned that without increased powers to regulate broadband providers, the FCC could not effectively deal with foreign adversaries “who may wish to do us harm.”¹⁵ Rosenworcel’s interpretation, however, does not align with the current statutes. Presently, *47 CFR § 63.21* grants the FCC “the right to review a carrier’s authorization” and, if necessary, revokes a carrier’s operating authority. The statute makes no reference to Title II regulation, meaning it is likely not a prerequisite for revoking the operating licenses of nefarious actors.

Further supporting this interpretation is that the FCC has exercised its authority to revoke carriers’ authority to operate in the United States without Title II powers. In 2021, for example, the FCC removed China Telecom’s 214 Operating Authority without the powers associated with Title II regulation.¹⁶ Before the FCC rescinded China Telecom’s authority, they provided a range of telecommunications services in the United States, including broadband. Similarly, in 2022, the FCC revoked the operating authorization of China Unicom.¹⁷ In both instances, the FCC revoked both operating licenses because of ties to the Chinese Communist Party, which raised “significant national security and law enforcement risks by providing opportunities” for the “Chinese government to access, store, disrupt, and/or misroute U.S. communications, which in turn allow them to engage in espionage and other harmful activities against the United States.”¹⁸

¹⁵ Remarks Of Chairwoman Jessica Rosenworcel at The National Press Club Washington, D.C., September 26, 2023. Available Online: <https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf>

¹⁶ “FCC Revokes And Terminates China Telecom America’s Authority To Provide Telecom Services In America,” *Federal Communications Commission*, October 26, 2021. Available Online: <https://docs.fcc.gov/public/attachments/DOC-376902A1.pdf>

¹⁷ “FCC Revokes China Unicom Americas’ Authority To Provide Telecom Services In America” *Federal Communications Commission*, January 27, 2022. Available Online: <https://docs.fcc.gov/public/attachments/DOC-379680A1.pdf>

¹⁸ “FCC Revokes And Terminates China Telecom America’s Authority To Provide Telecom Services In America,” *Federal Communications Commission*, October 26, 2021. Available Online: <https://docs.fcc.gov/public/attachments/DOC-376902A1.pdf>



These two examples illustrate that the FCC is empowered to protect America's telecommunications networks from foreign adversaries even without Title II powers and does not require further regulatory authority.

Conclusion

The James Madison Institute and the undersigned organizations greatly appreciate the opportunity to comment on the Commission's proposed Safeguarding and Securing the Open Internet Order. While we share the FCC's desire to ensure that the internet remains open, we believe that expanding the federal government's power could disrupt a healthy market that has delivered high-quality broadband services at affordable prices. We are also skeptical that the agency's proposed rules would survive a legal challenge and of the agency's claim that it does not possess the necessary authority to remove hostile actors.

We look forward to working with the Commission in the coming months to craft rules that help expand internet access.

Respectfully Submitted,

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With assistance from:
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