



October 19, 2023

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

Re: Legal Authority for the Safeguarding and Securing the Open Internet (WC Docket No. 23-320)

Dear Chairwoman Rosenworcel:

The U.S. Chamber of Commerce (“Chamber”) writes regarding your intent to initiate a rulemaking on the above proceeding (“NPRM”) to reclassify broadband under Title II of the Communications Act of 1934.¹ The Chamber cautions that recent judicial decisions indicate that the Commission’s proposed Title II reclassification of broadband would exceed its statutory and constitutional authority.

Since the 2015 Open Internet Order and the 2017 Restoring Internet Freedom Order, the United States Supreme Court has substantially clarified how agencies should approach questions about the scope of their authority, particularly when dealing with vague statutory language. In *West Virginia v. Environmental Protection Agency*, the Court affirmed that federal agencies can act only within their constitutional and statutory authority and the “Major Questions Doctrine” requires a clear grant of authority to a federal agency for promulgating certain regulations.² This doctrine was reinforced by the Supreme Court’s decision in *Biden v. Nebraska*,³ which struck down the Department of Education’s student loan forgiveness program.

Lower courts have recognized the importance of this doctrine for understanding agency authority. For example, this September, the Eastern District of Texas ruled that the Consumer Financial Protection Bureau (“CFPB”) exceeded its statutory authority in its updates to its Supervision and Examination Manual for financial institutions.⁴ In part, the court invoked the Major Questions Doctrine in

¹ In the Matter of Safeguarding and Securing the Open Internet, Notice of Proposed Rulemaking, WC Docket No. 23-320 (rel. Sep. 28, 2023) (“NPRM”).

² *West Virginia v. Environmental Protection Agency*, 142 U.S. 2587, 2608-09 (2022).

³ *Biden v. Nebraska*, 600 U.S. __, __ (2023) (slip op. at 21).

⁴ *Chamber of Commerce v. Consumer Financial Protection Bureau*, Case 6:22-cv-00381, slip op. (E.D. Tex. Sept. 8, 2023).

determining that the CFPB's updates to the Manual presented a question of major economic and political significance, one implicating the balance of federal and state powers.

The Commission's pursuit of an NPRM to reclassify broadband under Title II likely implicates the Major Questions Doctrine due to the NPRM's far-reaching scope, impact on the Internet economy, and political history. Reclassification would grant the Commission significantly expanded authority to pursue a bevy of policy objectives related to broadband internet.⁵ Key experts and policymakers have already recognized that the Major Questions Doctrine is a major impediment to the Commission proceeding under a Title II framework for broadband. Two former Obama Administration Solicitors General have elaborated on this point.⁶ Their view was echoed by a recent letter from forty-one Senators noting that the Commission lacks sufficient authority to reclassify broadband.⁷

The Chamber recognizes and appreciates that the Commission posed a question to commenters in the NPRM about the Major Questions Doctrine. But how that doctrine applies is a fundamental question that will dictate whether the proposed rule, in its current form, is even possible. Most of the proposed requirements rest on a legal foundation established by reclassification. Consequently, the Chamber is concerned that the Commission lacks clear authority from Congress to reclassify broadband under Title II.

The Chamber appreciates the consideration of this letter and our concern on the ability of the Commission to legally pursue Title II reclassification. If you have any questions, please reach out to Matt Furlow, Policy Director, at mfurlow@uschamber.com.

Sincerely,



Jordan Crenshaw
Senior Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce

⁵ NPRM at 13.

⁶ Donald B. Verrilli, Jr. & Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine* (Sept. 20, 2023), <https://aboutblaw.com/bazq>.

⁷ Letter Opposing Biden FCC's Internet Takeover, U.S. Senate, 118th Cong. (2023).