

Before the
Federal Trade Commission
Washington, DC 20580

In the Matter of)
)
Competition and Consumer Protection in)
The 21st Century: Competition and Consumer)
Protection Issues in Communication,)
Information, and Media Technology)
Networks)

COMMENTS OF NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE

August 20, 2018

Eric Null

Becky Chao

Sarah Morris

Josh Stager

New America’s Open Technology Institute

740 15th St NW Suite 900

Washington, D.C. 20005

Contents

I.	The broadband market lacks competition and is prone to consumer abuse	1
a.	The BIAS market has become more concentrated, and competition less robust, since the 2007 FTC report	1
b.	BIAS providers engage in many business practices that limit consumer choice.....	3
i.	BIAS providers have carved out monopoly status over millions of Americans.....	3
ii.	BIAS providers create high switching costs for consumers	4
iii.	BIAS providers broker anticompetitive deals with landlords of Multiple Tenant Environments.....	5
iv.	BIAS providers “digitally redline” service to low-income areas.....	5
c.	Local efforts to encourage broadband competition are often thwarted at the state and federal level.....	6
i.	Municipalities have been successful in building their own broadband networks, but these networks do not provide a comprehensive solution to the lack of broadband competition	6
ii.	State laws restrict or prohibit municipal broadband	7
iii.	Incumbent BIAS providers often oppose new municipal broadband ventures.....	10
II.	The FTC currently has authority over BIAS providers and should use its oversight role to vigorously pursue BIAS providers that violate Section 5.....	10
a.	While BIAS providers are classified as Title I information services at the FCC, the FTC has authority to enforce Section 5 against BIAS providers	11
b.	The FCC is the expert agency on communications networks and the FTC should work to reclassify BIAS back to Title II.....	12
c.	So long as BIAS providers remain classified under Title I and the BIAS market remains uncompetitive, the FTC should vigorously enforce Section 5 against BIAS providers	14
III.	Federal spectrum policies can foster a more competitive market for broadband internet .	14
IV.	Conclusion	15

- I. The broadband market lacks competition and is prone to consumer abuse
 - a. The BIAS market has become more concentrated, and competition less robust, since the 2007 FTC report

The broadband competition landscape has changed dramatically since the Federal Trade Commission's 2007 broadband connectivity and competition report.¹ In particular, facilities-based competition has not borne out as predicted.² That is because cable and fiber have become the clearly preferred facilities. Dial-up is no longer relevant, and DSL, satellite, and wireless all have technical problems that make them inferior to cable and fiber technologies, both of which easily meet the Federal Communications Commission's (FCC's) current high-speed broadband standard of 25/3 mbps. Therefore, cable and fiber are the most relevant facilities when analyzing BIAS competition.

Dial-up. Over the last decade, broadband has almost completely supplanted dial-up. The rate of dial-up adoption has slowed and only three percent of adults with internet access use dial-up.³ The FCC itself has found that dial-up services constituted only about 1% of overall household internet subscriptions.⁴ The two most likely reasons for consumers to choose a dial-up connection are lack of broadband options and cost.⁵ For these consumers, use of dial-up is less of a revealed preference and more of a reflection of the lack of affordable broadband options available in their markets.

Digital Subscriber Line (DSL) and satellite. DSL, while it can provide broadband speeds, is not as robust as cable and fiber. For one, DSL generally provides slower speeds and has higher latency than cable.⁶ Even though DSL is a dedicated line (rather than shared capacity like cable), speeds often decrease based on distance from the provider's central office. In rural areas, this speed decrease is particularly pronounced given the widespread nature of rural homes. Companies, however, are not upgrading DSL at scale, leaving consumers to switch to faster technologies.⁷

¹ Broadband Connectivity and Competition Policy Report, FTC (June 2007), <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> ("2007 Staff Report").

² *Id.* at 100-105, 66 n.294, & 114 n.544.

³ Benjamin Wormald, *Broadband vs. Dial-Up Adoption Over Time*, Pew (June 10, 2015), <http://www.pewinternet.org/chart/broadband-vs-dial-up-adoption-over-time>.

⁴ 2016 Broadband Progress Report at n.80, Federal Communications Commission, <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2016-broadband-progress-report>.

⁵ Joanna Brenner, *3% of Americans use dial-up at home*, Pew (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/3-of-americans-use-dial-up-at-home>.

⁶ DSL vs Cable vs Fiber: Comparing Internet Options, Broadband Now (July 16, 2018), <https://broadbandnow.com/guides/dsl-vs-cable-vs-fiber>.

⁷ Alan Weissberger, *Cable Companies/MSOs Continue to Dominate U.S. Broadband Access with 64% Market Share*, IEEE Communications Society Technology Blog, (May 23, 2018), <http://techblog.comsoc.org/2018/05/23/cable-companies-msos-continue-to-dominate-u-s-broadband-access>.

Satellite internet technology is slow and consumers experience significant lags in service.⁸ Satellite delivers low speeds, with download speeds from 1 to 25 Mbps and upload speeds from 1 to 4 Mbps. It suffers from reliability problems stemming from the distance that data needs to travel between satellites and devices. High latency also causes delays between connection points. Moreover, BIAS providers place data caps on satellite internet access because satellite bandwidth is a limited resource. Satellite is therefore not a true competitor in the broadband market, but it is often the best and only internet option for rural communities, where satellite's expansive reach is able to serve low density populations. Broadband over power lines, while once a promising source of competition, has since become extremely unpopular.⁹

Mobile broadband. Mobile broadband services are not in the same market as fixed broadband services. Fixed and mobile broadband are complementary services, not substitutes. Consistent with consumers' usage of the two services, the FCC has confirmed that fixed and mobile broadband serve distinct purposes with different capabilities.¹⁰ The use of mobile broadband is also constrained by many factors, including geography, data caps, and smaller screens and less user-friendly keyboards. While mobile broadband can be used on-the-go, lack of signal reliability means that the quality of service may vary wildly, resulting in lost productivity or miscommunication. Such quality of service variation interferes with bandwidth-intensive uses, including video conferencing applications used by telehealth, telework, and education platforms, full-screen HD video streaming, and online gaming.¹¹ Mobile connection strength is even weaker and more variable in rural areas, meaning it is clearly not a substitute for fixed broadband in rural areas.

To be sure, wireless technology has improved. For example, wireless can now provide enough bandwidth to support video streams. However, mobile broadband does not allow for the same capability to process high levels of data—fixed connections allow multiple simultaneous users to take advantage of a single high-speed connection, unlike mobile.

Cable and fiber. Cable and fiber are superior to other kinds of broadband technologies. Both are capable of providing high speeds: cable speeds are typically in the 10-500/5-50 mbps range, and fiber speeds are typically in the 250-1,000 mbps range), and fiber is capable of providing symmetrical download and upload speeds, even gigabit.¹² These technologies do not suffer from decreased quality based on distance from a hub or office. While cable subscribers in particular areas share capacity (rather than having access to dedicated capacity), congestion, and therefore slower connections at peak times of day, has not been shown to be a problem.¹³

⁸ Satellite Internet Providers, Broadband Now, <https://broadbandnow.com/Satellite-Providers>.

⁹ Kari Bode, 2008: *The Year Broadband Over Powerline Died*, DSLReports (Oct. 16, 2008), <https://www.dslreports.com/shownews/2008-The-Year-Broadband-Over-Powerline-Died-98477>.

¹⁰ 2018 Broadband Deployment Report at ¶ 18, <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>.

¹¹ 2016 Broadband Progress Report, 31 FCC Rcd 699, ¶ 41 (Jan. 28, 2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf.

¹² DSL vs Cable vs Fiber: Comparing Internet Options, Broadband Now (July 16, 2018), <https://broadbandnow.com/guides/dsl-vs-cable-vs-fiber>.

¹³ Mike Masnick, *Cable Industry Finally Admits that Data Caps Have Nothing To Do with Congestion*, TechDirt (Jan. 23, 2013), <https://www.techdirt.com/articles/20130118/17425221736/cable-industry-finally-admits-that-data->

b. BIAS providers engage in many business practices that limit consumer choice

In addition to the structural and technical reasons described above, BIAS provider business practices contribute to the lack of competition. These business practices include choosing not to compete against each other, erecting country's major prohibitive switching costs for consumers, brokering anticompetitive deals with multiple tenant environments, and "tier flattening" tactics that exploit consumers' lack of choice.

i. BIAS providers have carved out monopoly status over millions of Americans

The largest fixed broadband providers face very little competition in most of the United States. The FCC's Internet Access Services Report, although limited due to its reliance on industry-reported data that tends to overcount availability,¹⁴ details the anticompetitive state of the market. Thirty percent of developed census blocks have only one provider for fixed high-speed broadband (using the FCC's definition of 25/3 mbps), and 13 percent of developed census blocks have no provider.¹⁵ Only 26 percent of developed census blocks have three or more providers for fixed high-speed broadband, according to FCC data.¹⁶ Nearly half of the U.S. population has access to at most one wireline broadband provider offering high-speed broadband speeds.¹⁷ In other words, nearly half of the U.S. population has *no* competition for broadband internet access. To make matters worse, a recent report showed that Comcast is the sole provider for 30 million Americans, Charter for 38 million Americans, CenturyLink for 1 million Americans, AT&T for 745,000 Americans, and Verizon for 185,000 Americans.¹⁸

The fact that BIAS providers have achieved monopoly status over millions of Americans suggests deliberate anticompetitive conduct. According to the Center for Public Integrity, BIAS providers "appear to carve up territory to avoid competing with more than one other provider."¹⁹ Moreover, BIAS providers appear to invest the minimum required for Connect America Fund money in areas where they do not face competition, while focusing more investment in areas

caps-have-nothing-to-do-with-congestion.shtml; Jon Brodtkin, ISPs Tell Government that Congestion is "Not a Problem," Impose Data Caps Anyway, *Ars Technica* (July 29, 2014), <https://arstechnica.com/information-technology/2014/07/isps-tell-government-that-congestion-is-not-a-problem-impose-data-caps-anyway>.

¹⁴ See, e.g., Eric Null, *Why Can't the U.S. Government Make a Decent Broadband Map?*, *Slate* (Mar. 28, 2018), <https://slate.com/technology/2018/03/why-cant-the-u-s-government-make-a-decent-map-of-broadband-access.html>.

¹⁵ Internet Access Services Report at Figure 4, Federal Communications Commission (Feb. 2018), <https://docs.fcc.gov/public/attachments/DOC-349074A1.pdf>.

¹⁶ *Id.*

¹⁷ Restoring Internet Freedom Order at ¶¶125-26, Federal Communications Commission (Dec. 2017), <https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf>.

¹⁸ Profiles of Monopoly: Big Cable and Telecom at 3, Inst. for Local Self-Reliance (July 2018), <https://ilsr.org/wp-content/uploads/2018/07/profiles-of-monopoly-2018.pdf>.

¹⁹ Allan Holmes & Chris Zubak-Skees, *U.S. Internet users pay more and have fewer choices than Europeans*, Center for Public Integrity (April 1, 2015), <https://www.publicintegrity.org/2015/04/01/16998/us-internet-users-pay-more-and-have-fewer-choices-europeans>.

where they *do* face competition.²⁰ This practice consolidates the market in rural areas and other parts of the country that lack competition, while strengthening ISPs' grip on urban areas.

AT&T and Verizon also take advantage of their monopoly status through a method the National Digital Inclusion Alliance calls "tier flattening." In areas where AT&T and Verizon face no competition, they charge DSL customers the same price they charge customers who receive fiber speeds up to 100/100 Megabits per second.²¹ This practice, a result of companies purposefully avoiding each other and facing zero competition in certain areas, harms both consumers and the broader market.

ii. BIAS providers create high switching costs for consumers

In the few areas where BIAS providers do compete against each other, consumers face substantial switching costs that make it difficult to change providers. These costs include a search cost, an uncertainty cost, a compatibility cost, and contractual costs.²² Key to these costs is the fact that a consumer might already be locked in by a restrictive contract with their current provider, with no way out regardless of the service they are receiving. Additionally, even if consumers *can* find a way out of their contract, they might not be able to comparison shop between competing plans because BIAS providers often provide opaque and misleading information about pricing, speeds, and data allowances. The FCC attempted to address this problem with the 2015 Open Internet Order's transparency requirements and the 2016 Broadband Nutrition Label, but those initiatives have since been repealed.²³

In Minnesota, Frontier created early termination fees that applied to long term customers who wanted to switch to a newly-created fiber-optic network by a nearby cooperative.²⁴ Frontier used these fees to disrupt market competition, abusing the market power it had accrued previously as an incumbent monopolist. Its goal was undoubtedly to send a message to other small ISPs in the region that they should not try to compete with Frontier.

²⁰ Profiles of Monopoly Report, at 2 ("Despite the Connect America Fund, the large providers have rarely invested in next-generation services in areas where they do not face competition... Large firms appear to invest in modern networks solely where they face competition and provide the minimum allowable under subsidy programs elsewhere.").

²¹ Tier Flattening: AT&T and Verizon Home Customers Pay a High Price for Slow Internet at 3, National Digital Inclusion Alliance (July 31, 2018), <http://www.digitalinclusion.org/wp-content/uploads/2018/07/NDIA-Tier-Flattening-July-2018.pdf>.

²² Robert Kenny & Aileen Dennis, Consumer Lock--In for Fixed Broadband at 17-30, Communications Chambers, (Sep. 5, 2013), <http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf>.

²³ The Broadband Nutrition Label included providers' pricing, data allowance, and performance metrics. See Micah Singleton, *FCC Introduces Broadband Labels Inspired by Nutrition Facts*, Verge (Apr. 4, 2016); Declaratory Ruling, Report and Order, and Order, Federal Communications Commission, WC Docket No. 17-108, ¶231 (Dec. 2017) ("We eliminate the consumer broadband label safe harbor for form and format of disclosures adopted in the Title II Order. Adopting the label could require some ISPs to expend substantial resources to tailor their disclosures to fit the format.").

²⁴ Minnesota Public Utilities Commission E-Filing, Docket No. P-522, 405/C-13-941, (Feb. 19, 2014), <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPop&documentId={4A6E8FBF-E0A7-4936-A226-49B1F000A30E}&documentTitle=20142-96599-01>.

iii. BIAS providers broker anticompetitive deals with landlords of Multiple Tenant Environments

Many BIAS providers take the extreme step of brokering deals with landlords of apartment complexes and other multiple tenant environments (MTEs) that prevent any other broadband provider from offering service to tenants. These landlord-sanctioned monopolies severely limit competition, even in urban areas that otherwise have access to multiple providers.²⁵ The FCC seemingly acknowledged this problem in a recent Notice that asked for comment on the effects of state and local regulatory barriers, exclusive marketing and bulk billing arrangements, revenue sharing agreements, and exclusive wiring arrangements affect competition and deployment in MTEs.²⁶

Revenue sharing agreements between landlords and fixed broadband providers are especially pernicious, as the provider pays the landlord a “kickback” for each resident who subscribes to their service. These arrangements, which shut out competition even without an exclusivity contract, create an expectation that landlords can use their tenants’ broadband service as an additional revenue stream. As a result, competing BIAS providers that are unable or unwilling to participate in revenue sharing schemes are denied access to those MTEs.²⁷ Competing providers often report that developers and landlords demand revenue sharing agreements. These schemes are so pervasive that a cottage industry of intermediaries has emerged just to market the deals to developers and real estate investors.²⁸ The FTC should be investigating these practices to prevent BIAS providers’ continued manipulation of the MTE market.

iv. BIAS providers “digitally redline” service to low-income areas

When fixed broadband providers deploy next-generation and improved home internet service, they often purposefully ignore low-income communities. This practice, which amounts to “digital redlining,” is highlighted in a recent report that detailed how AT&T systematically discriminated against lower-income neighborhoods in Cleveland over the past ten years. As AT&T upgraded service to more affluent neighbors, these communities were left behind with antiquated, slow networks.²⁹ This practice demonstrates that the lack of competition in the

²⁵ INCOMPAS Ex Parte, WT Docket No. 16-138 (Feb. 13, 2017); Interview by Chris Mitchell, Community Broadband Bits Podcast, with Charles Barr, President, Webpass, and Lauren Saine, Policy Advisor, Webpass (Apr. 12, 2016) (discussing non-contractual practices between MTE owners and providers that, according to Mr. Barr, “basically creat[e] exclusive agreements physically”), <https://muninetworks.org/content/transcript-community-broadband-bits-episode-197>.

²⁶ Notice of Inquiry, GN Docket No. 17-142, ¶¶11-15 (June 1, 2017).

²⁷ Comments of INCOMPAS, GN Docket No. 17-142, at 9-10 (July 24, 2017).

²⁸ Susan Crawford, “The New Payola: Deals Landlords Cut With Internet Providers,” *Wired* (June 27, 2016) (“Webpass is a competitive ISP working to provide gigabit access in San Francisco, San Diego, and three other markets. Its president, Charles Barr, is deeply frustrated: “Tenants want us, but we can’t get in,” he says. “The market for Internet access doesn’t work, because there aren’t a lot of choices for people.”).

²⁹ Bill Callahan, *AT&T’s Digital Redlining Of Cleveland*, National Digital Inclusion Alliance (Mar. 10, 2017), <https://www.digitalinclusion.org/blog/2017/03/10/atts-digital-redlining-of-cleveland> (“Specifically, AT&T has

broadband market reduces incentives for BIAS providers to maintain quality service and contributes to growing inequality in the United States.

- c. Local efforts to encourage broadband competition are often thwarted at the state and federal level

Governments can play a supportive or hindering role in the broadband market. First, municipalities have continued to experiment with broadband networks, many of which have been successful. But they are not a comprehensive, scale-able solution to the lack of broadband competition. Second, many municipalities have difficulty because multiple states have laws that prevent the creation of community networks, which help incumbent providers consolidate market power and weaken competition. And third, incumbent BIAS providers fight these networks by spending potentially millions of dollars on politicians, lobbying, and ad campaigns to defeat these measures.

- i. Municipalities have been successful in building their own broadband networks, but these networks do not provide a comprehensive solution to the lack of broadband competition

Some communities that are unserved or underserved by private BIAS providers have invested in their own, locally-grown networks to bring broadband to their residents and businesses. These municipal networks are often faster and cheaper than the service offered by incumbent providers in large cities.³⁰

According to the Institute for Local Self-Reliance, hundreds of U.S. localities provide some form of municipal broadband.³¹ Chattanooga, Tennessee is the largest and most well-known example. The city's municipal power company, EPB, borrowed about \$220 million to build its smart grid and fiber optic network.³² The investment has paid off, as the University of Tennessee at Chattanooga's Department of Finance estimates that EPB's smart grid and fiber optic network has led to at least 2,800 jobs and an extra \$865.3 million in the local economy between 2011 and 2015.³³ The network has generated revenues well in excess of operating costs

chosen not to extend its "Fiber To the Node" VDSL infrastructure – which is now the standard for most Cuyahoga County suburbs and other urban AT&T markets throughout the U.S. – to the majority of Cleveland Census blocks, including the overwhelming majority of blocks with individual poverty rates above 35%").

³⁰ David Talbot, Kira Hessekiel, and Danielle Kehl, *Community-Owned Fiber Networks: Value Leaders in America*, Berkman Klein Center for Internet & Society at Harvard University (Jan. 10, 2018), <https://cyber.harvard.edu/publications/2018/01/communityfiber>.

³¹ *Municipal FTTH Networks*, Muni Networks, (Jan. 1, 2017), <https://muninetworks.org/content/municipal-ftth-networks>.

³² Dave Flessner, *EPB Fiber Optics Gives Chattanooga a Boost*, Times Free Press (Sept. 16, 2015). Note that while the network did receive a Department of Energy grant for smart grid investments, those funds were used for telecommunications needs on the electric side, not the triple-play telecommunications side of the business.

³³ *Id.*

and debt, and will soon add its 100,000th customer to the network, out of a total market potential of approximately 170,000 premises.³⁴

Lafayette, Louisiana offers another example of a successful municipal broadband network. The community voted in 2005 to approve the build-out of a FTTH network through the publicly-owned Lafayette Utilities System (LUS), despite opposition from local broadband service providers.³⁵ In just a year-and-a-half, the program brought in more than 1,000 new jobs with salaries averaging \$60,000 through three new businesses that established themselves in the city because of the strong economic development incentives associated with the fiber system.³⁶ LUS Fiber also delivered greater value and opportunities for connectivity to schools and libraries. By mid-2008, schools in the Lafayette Parish School System were able to access 100 Mbps speeds for \$390/month, saving the community significant tax dollars while allowing students to leverage the internet for educational purposes.³⁷ The very prospect of entry by LUS Fiber in Lafayette led Cox Communications, the private regional provider in Lafayette, to stop raising its rates between 2004 to 2007—as it had done six times in four years prior to Lafayette’s endeavor into municipal broadband.³⁸

Both Chattanooga and Lafayette have operated for nearly 10 years, generating far more benefits than costs. Neither is at risk of failing to pay its debts or operating costs. However, several other networks have even longer track records of success. Cedar Falls Utilities in Iowa has operated a municipal broadband network for longer than 20 years and recently upgraded from its original HFC network to full Fiber-to-the-Home. It has the vast majority of subscribers in the market. In Utah, Spanish Fork has operated for the previous 16 years and is generating revenue surpluses that support the general fund. Spanish Fork provides competition to Comcast and CenturyLink while Cedar Falls provides competition to CenturyLink and Mediacom.

ii. State laws restrict or prohibit municipal broadband

Despite these success stories, about 20 states have passed anti-municipal broadband laws.³⁹ These laws can be broadly categorized as follows: (1) bureaucratic barriers, (2)

³⁴ *Chattanooga Subs Continue to Increase as Smart Grid Saves*, Muni Networks (July 20, 2018)

<https://muninetworks.org/content/chattanooga-sub-continue-increase-smart-grid-saves>.

³⁵ *Community-Based Broadband Solutions: The Benefits of Competition and Choice for Community Development and Highspeed Internet Access at 15*, Executive Office of the President (Jan. 2015),

https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf.

³⁶ Transcript: *Community Broadband Bits Episode 144*, Muni Networks (Apr. 10, 2015),

<https://muninetworks.org/content/transcript-community-broadband-bits-episode-144>.

³⁷ *Community-Based Broadband Solutions: The Benefits of Competition and Choice for Community Development and Highspeed Internet Access at 15*, Executive Office of the President (Jan. 2015),

https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf.

³⁸ *Id.* at 16.

³⁹ *Baller Stokes & Lide, State Restrictions on Community Broadband Services or Other Public Communications Initiatives* (Jan. 11, 2018), <https://www.baller.com/2018/01/state-restrictions-on-community-broadband-services-or-other-public-communications-initiatives>; *Municipal Broadband is Roadblocked or Outlawed in 20 States*,

prohibition on the direct sale of broadband by the local government, (3) prohibitive referendum requirements, (4) limiting the service area of a municipal network through population caps or territory limits, (5) excessive taxation on municipal services.⁴⁰ These anti-municipal broadband laws delay, inflate the costs of, or even preclude municipal broadband, which then prevent consumers from realizing the competitive benefits of these networks.

Bureaucratic barriers. Michigan’s state laws require local governments to request bids and receive fewer than three qualified bids before any local network operation can proceed.⁴¹ North Carolina’s state laws were found by the FCC to limit competition by creating impossible requirements for new networks to meet and preventing existing networks from expanding.⁴² The state actually forced a municipal network serving an entire community to leave the market if a private provider began offering service, explicitly preventing competition.⁴³ Similarly, Virginia prohibits municipal networks from providing subsidized service and undercutting incumbent providers on pricing, something we ordinarily expect market competition to do for the benefit of those purchasing services.⁴⁴ Wisconsin also has minimum pricing requirements and prohibits subsidized services.⁴⁵

Prohibition on direct sales. Other states prohibit the direct sales of municipal broadband in some way.⁴⁶ Arkansas only allows municipalities that operate electric utilities to provide communication services, but they are not allowed to provide “basic local exchange service”—meaning traditional phone services.⁴⁷ Missouri prohibits municipal networks from selling or leasing any telecom service to private providers, with narrow exceptions for services used for educational, emergency, and healthcare purposes as well as municipal networks that provide internet services only to local residences.⁴⁸ This restriction has limited investment by cities that believed a successful business model would involve also offering television and/or telephone service. Telephone service is particularly important for any network seeking small business customers. Washington prohibits public utility districts from offering all telecommunication

Broadband Now (April 3, 2018) (“Broadband Now Report”), <https://broadbandnow.com/report/municipal-broadband-roadblocks>.

⁴⁰ See *supra*, Broadband Now Report.

⁴¹ Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, Ars Technica (Feb. 12, 2014), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states>.

⁴² FCC Releases Order Preempting TN & NC Municipal Broadband Restrictions, Federal Communications Commission (Mar. 12, 2015), <https://www.fcc.gov/document/fcc-releases-order-preempting-tn-nc-municipal-broadband-restrictions>.

⁴³ Lisa Gonzalez, *Suddenlink Plans Pinetops Deployment, Greenlight Must Go*, Muni Networks (Jan. 30, 2018), <https://muninetworks.org/content/suddenlink-plans-pinetops-deployment-greenlight-must-go>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Supra* Broadband Now Report.

⁴⁷ Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, Ars Technica (Feb. 12, 2014), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states>.

⁴⁸ *Id.*; see also *supra* Broadband Now Report.

services directly to customers, but it permits wholesale models under certain conditions, including nondiscriminatory rates and terms.⁴⁹

Referendum requirements. Alabama and Louisiana require voters to approve a ballot referendum before localities can operate a municipal network.⁵⁰ In Colorado, communities must vote on referenda before pursuing any local networks, unless an incumbent provider has rejected a request to provide specific broadband services in an area.⁵¹ In Minnesota, municipalities must secure approval from a super-majority, or 65 percent, of voters before offering local exchange services and are prohibited from building broadband-only networks in competition with the private sector.⁵²

Service caps. Nevada has a strict population cap on the service area of a municipal broadband network. Municipalities with over 25,000 residents and counties with over 50,000 residents cannot provide telecommunications services.⁵³ This anti-municipal broadband approach especially impacts dense low-income urban neighborhoods that stand to benefit from municipal networks.⁵⁴ It also prevents smaller cities from utilizing smart grid setups that can drive innovation.⁵⁵

Punitive taxes. Florida imposes a special *ad valorem* tax on municipal telecommunication services.⁵⁶ In addition, municipal broadband projects are subject to a profitability requirement—projects are required to recoup investment within four years—that makes it difficult to approve capital-intensive projects.⁵⁷

Utah offers a case study in how anti-municipal laws harm broadband subscribers as well as the market more generally. Utah was an early state in passing legislation to limit local authority to build broadband networks.⁵⁸ Spanish Fork built its network prior to the law taking effect and was subsequently grandfathered in, allowing it to use the retail model it favored. Provo also preferred that model, but was later limited by state law to using a wholesale-only model that had many more pitfalls than most realized at that time. Spanish Fork, unencumbered by state law, has gone on to tremendous success, whereas Provo later sold its network to Google for \$1 after a series of financial problems that are directly attributable to the state law that limited

⁴⁹ *Supra* Broadband Now Report.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Baller Stokes & Lide, *State Restrictions on Community Broadband Services or Other Public Communications Initiatives* (Jan. 11, 2018), <https://www.baller.com/2018/01/state-restrictions-on-community-broadband-services-or-other-public-communications-initiatives>.

⁵³ *Id.*

⁵⁴ *Supra* Broadband Now Report.

⁵⁵ *Id.*

⁵⁶ Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, *Ars Technica* (Feb. 12, 2014), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states>; *see also supra* Broadband Now Report.

⁵⁷ *Id.*

⁵⁸ Brendan Greeley and Alison Fitzgerald, *Pssst...Wanna Buy A Law?*, *Bloomberg Businessweek* (Dec. 1, 2011), <http://www.bloomberg.com/bw/magazine/pssst-wanna-buy-a-law-12012011.html>.

Provo's authority to choose its business model.⁵⁹ Nonetheless, opponents of municipal broadband regularly point to Provo as a reason that states should limit local authority, rather than recognizing that state laws interfering with local decision-making are the larger problem.

iii. Incumbent BIAS providers often oppose new municipal broadband ventures

Many municipal networks have a difficult time during the planning stage of the network because private BIAS providers oppose new competition in the form of municipal broadband networks.⁶⁰ A recent story from Fort Collins, CO shows just how far incumbent providers are willing to go to block competitors in otherwise underserved areas. While the city ended up winning the fight, CenturyLink and Comcast spent nearly \$1 million to fight a ballot initiative that allowed the city to provide direct retail broadband to its residents.⁶¹ That was the most spent on any single state referendum at that time. Other cities have not fared so well. For instance, Batavia, Illinois lost a fight with incumbent providers in 2004 when the private BIAS providers start distributing fliers with inflammatory and misleading information.⁶² OTI supports municipal broadband efforts, but those efforts are unlikely to discipline private BIAS providers on a nationwide level, particularly given the power disparities evidenced above.

II. The FTC currently has authority over BIAS providers and should use its oversight role to vigorously pursue BIAS providers that violate Section 5

As the law currently stands, the FTC has authority over BIAS providers given the FCC's classification of broadband internet access service (BIAS) as a Title I "information service." The FTC should vigorously pursue cases against BIAS providers that violate Section 5 given how uncompetitive the BIAS market is. However, the FTC is not the right agency to police the conduct of BIAS providers—particularly with respect to net neutrality and privacy violations. That role should belong to the FCC.

⁵⁹ Christopher Mitchell, *How Lobbyists in Utah Put Taxpayer Dollars at Risk to Protect Cable Monopolies*, Muni Networks (Nov. 11, 2015), <http://www.muninetworks.org/content/how-lobbyists-utah-put-taxpayer-dollars-risk-protect-cable-monopolies>.

⁶⁰ See, e.g., Allan Holmes, *How Big Telecom Smothers City-Run Broadband*, Center for Public Integrity, (Aug. 28, 2014), <https://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband>; Jason Koebler, *Six Ways Big Telecom Tries to Kill Community Broadband*, Vice Motherboard (July 29, 2014), https://motherboard.vice.com/en_us/article/z4mzxw/six-ways-big-telecom-tries-to-kill-community-broadband.

⁶¹ Eric Null, *Fort Collins Community Overcomes Long Odds, Wins Municipal Broadband Vote*, New America (June 28, 2018), <https://www.newamerica.org/oti/blog/fort-collins-community-overcomes-long-odds-wins-municipal-broadband-vote>.

⁶² Jason Koebler, *Comcast Used This 'Spooky' Propaganda to Kill Off a Local Internet Competitor*, Vice Motherboard, (July 28, 2014), https://motherboard.vice.com/en_us/article/kbz75e/the-fliers-full-of-lies-comcast-used-to-kill-off-a-local-internet-competitor.

- a. While BIAS providers are classified as Title I information services at the FCC, the FTC has authority to enforce Section 5 against BIAS providers

The FTC currently has authority to enforce the FTC Act against BIAS providers. The FTC has authority over interstate commerce, and its primary charge under Section 5 of the FTC Act is to prevent both 1) unfair methods of competition and 2) unfair and deceptive acts or practices.⁶³ Section 5 includes the common carrier exemption.⁶⁴ The 9th Circuit (en banc) held that the exemption is activity-based, meaning when common carriers are acting in their capacity as a common carrier (such as a telephone company providing phone service), those actions are outside the scope of Section 5, in part because the FCC is the relevant oversight agency. When common carriers act outside of their common carrier role, such as in advertising, the FTC retains authority over these actions.⁶⁵

With respect to BIAS, a threshold question regarding FTC authority is whether the service is classified as a Title I information service (non-common carriage) or a Title II telecommunications service (common carriage) under the Communications Act. Between the mid-2000s and 2015, the FCC incrementally classified most broadband technologies as Title I information services, placing them within the FTC's jurisdiction. It was generally accepted that the FTC had authority over those Title I BIAS services during that time.⁶⁶

In 2015, the FCC correctly classified BIAS as a Title II telecommunications service, removing BIAS from the FTC's authority and into the FCC's Title II authority. As explained in numerous FCC proceedings and upheld by the DC Circuit, Title II classification is the most appropriate classification because BIAS best fits the definition of "telecommunications" carrier in the statute.⁶⁷ Consumers expect that their BIAS provider will deliver the content of their choosing without altering the content. And that service is no longer intertwined with other services like email and Usenets, which was part of the logic for the Supreme Court to uphold the FCC's prior classification decisions in *Brand X*.⁶⁸

Unfortunately, the FCC voted to revert BIAS back to Title I classification in its 2017 repeal of its strong net neutrality protections. This misguided decision, which occurred over the objections of a diverse group of legislators, companies, and consumers, took effect on June 11, 2018.⁶⁹ Since then, the FTC has had authority to enforce Section 5 against BIAS providers.

⁶³ 15 USC §45(a); 2007 Staff Report, *supra*, at 38.

⁶⁴ *Id.* (Section 5 applies to interstate commerce except "common carriers subject to the Acts to regulate commerce.").

⁶⁵ *FTC v. AT&T Mobility*, No. 15-16585, https://www.ftc.gov/system/files/documents/cases/att_enbanc_5-16585.pdf.

⁶⁶ 2007 Staff Report at 38.

⁶⁷ Comments of New America's Open Technology Institute, FCC Dkt. 17-108, (July 17, 2017), https://na-production.s3.amazonaws.com/documents/OTI_NN_COMMENTS_JULY17_FINAL.pdf.

⁶⁸ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁶⁹ Since then, that decision has been subject to a bipartisan CRA vote in the Senate. The discharge petition in the House of Representatives is also bipartisan.

- b. The FCC is the expert agency on communications networks and the FTC should work to reclassify BIAS back to Title II

OTI understands and appreciates that the FTC had authority over many forms of BIAS between the mid-2000s and 2015. However, relying on the FTC exclusively to police all BIAS provider practices is suboptimal for a variety of reasons.

First, there is the question of whether the FTC has the capacity to serve this role. FTC Commissioner Maureen Ohlhausen, in her role as Acting Chairman last year, argued that the FTC is a small agency with limited resources.⁷⁰ While the FTC has requested more appropriations for years, it has mostly been met with silence from Congress, or even worse, attempts to undermine the agency's ability to do its work.⁷¹ In that regard, removing BIAS from the FTC's purview should have made it easier for the agency to accomplish its mission as it relates to overall interstate and online commerce.

Second, while the FTC has significant consumer protection expertise, it is not the expert agency on network technologies and the issues they present. The FCC, on the other hand, is the primary agency with expertise, personnel, and authority to protect consumers against networked communications companies such as BIAS providers. Its core mission is to regulate wired and radio communications to ensure universal access to a nondiscriminatory network.⁷² The FCC has decades of experience enacting and enforcing rules, and protecting consumers of wired and radio communications platforms. But with its December 2017 vote, it abdicated that role and returned authority to the much smaller, much more limited FTC.

OTI disagrees with the FTC's 2012 report that stated BIAS providers were simply another platform provider not necessitating different treatment.⁷³ There are reasons to treat BIAS providers and edge providers differently under the law.⁷⁴ The online (edge) marketplace is relatively competitive, and consumers can choose from a variety of providers offering the same or similar services. For instance, consumers who highly value their privacy can use DuckDuckGo instead of Google as a search engine. With a robust, competitive market for many services online, competition between firms serves as the first line of defense against anti-consumer behavior, as consumers can respond to this behavior by switching to another competitor. It is then at least more reasonable to rely on the FTC to prevent deceptive practices *ex post*. The market for BIAS providers, however, is much more concentrated (as discussed above), which leads to greater risks of market failure. Customers are unlikely to be able to vote

⁷⁰ The Communicators with Maureen Ohlhausen, C-SPAN (March 18, 2017), https://archive.org/details/CSPAN_20170318_223000_Communicators_with_Maureen_Ohlhausen/start/900/end/960.

⁷¹ Kathleen Watson, *The Federal Trade Commission Doesn't Need Congress' "Disruption,"* New America (Aug. 18, 2016), <https://www.newamerica.org/oti/blog/federal-trade-commission-doesnt-need-congress-disruption>.

⁷² See 47 USC §§151, 201, 202.

⁷³ Protecting Consumer Privacy in an Era of Rapid Change at v, Federal Trade Commission (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>

⁷⁴ See generally Comments of Open Technology Institute at 3-11, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC Dkt. 16-106, <https://ecfsapi.fcc.gov/file/60002081381.pdf>.

with their feet and switch BIAS providers, even if the BIAS provider is transparent about its bad behavior. The risks are especially significant because BIAS providers are the on-ramp for the entire internet allowing all Americans to access the plethora of online services that exist. On the other hand, edge providers control only their sites and apps. Thus, preventing deception and unfairness through *ex post* enforcement alone is likely not sufficient to protect consumers in the BIAS market; an *ex ante* approach is merited instead.

Specifically with regard to privacy, BIAS providers have a nearly-comprehensive view into what their customers see and do online. They can track customers across the entirety of the internet, and even have some information about customers visiting encrypted websites.⁷⁵ Edge providers, however, are less able to know this information. Some sites can use cookies, widgets, beacons, and other technologies to track users once they leave the edge provider's website, but that type of tracking is still nowhere near as comprehensive as a BIAS provider's tracking. And consumers have many more options to protect against edge provider privacy invasions than those of their BIAS provider.⁷⁶ BIAS providers' ability to view consumers' every move online gives strong reasons to impose higher privacy obligations on BIAS providers than those imposed on edge providers.

Third, the FTC lacks robust rulemaking authority to prevent problematic practices before they occur. BIAS providers have engaged in discriminatory behavior even while the FCC had net neutrality rules on the books since 2005.⁷⁷ And the incentives for an infrastructure owner to favor its own services at the expense of others is obvious.⁷⁸ Instead of granting monopolistic BIAS providers maximum flexibility to experiment with practices that harm consumers, there should be rules to prevent certain behavior that we *know* is problematic. Unfortunately, the FTC's ability to prevent those harms by enacting rules is limited.

Similarly, antitrust law is too narrow in scope to handle most nondiscrimination issues, including paid prioritization and problematic zero-rating schemes, as nondiscrimination obligations in general do not stem from antitrust laws.⁷⁹ Further, antitrust litigation takes a long time and has many high procedural hurdles.⁸⁰ In general, relying on *ex post* enforcement from

⁷⁵ *Id.*

⁷⁶ Protecting yourself from your BIAS provider is difficult and provides limited protection. VPNs are expensive and not always fool-proof. Encryption is not something a user controls. The add-on HTTPS Everywhere is helpful but does not provide full protection. See Laura Moy, *Think You Can Protect Your Privacy from Internet Providers Without FCC rules? Good Luck*, Daily Dot (Mar. 28, 2017), <https://www.dailydot.com/layer8/congress-kill-isp-privacy-protections>. There are many more options for protecting your privacy from edge providers. See *66 Ways to Protect Your Privacy Right Now*, Consumer Reports (Feb. 21, 2017), <https://www.consumerreports.org/privacy/66-ways-to-protect-your-privacy-right-now>.

⁷⁷ See Testimony of Sarah Morris & Eric Null at 6-10, Connecticut General Assembly (Mar. 8, 2018), https://na-production.s3.amazonaws.com/documents/Morris_Null_Net_Neutrality_Testimony_Connecticut_.pdf.

⁷⁸ Open Internet Order, Federal Communications Commission, ¶¶78-85 (Mar. 12, 2015), <https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf>.

⁷⁹ See Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About* (2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.

⁸⁰ *Id.* at 3.

the FTC would largely enable BIAS providers to get away with problematic and discriminatory practices due to the limitations of FTC authority.⁸¹

For these reasons, the FTC should urge the FCC to classify BIAS back to Title II, where it properly belongs, giving the FCC the ability to protect consumers best.

- c. So long as BIAS providers remain classified under Title I and the BIAS market remains uncompetitive, the FTC should vigorously enforce Section 5 against BIAS providers

Given the competitive landscape for BIAS providers, the FTC should vigorously enforce its prohibition of unfair and deceptive practices. For instance, the unfairness prohibition can be more vigorously enforced against BIAS providers. The three elements of unfairness are that the practice (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition. All three elements can be interpreted in light of the lack of BIAS provider competition. Consumers are more likely to be injured by a particular practice if there is no competitive pressure for that practice to change. Moreover, in an uncompetitive market, consumers are much less likely to be able to avoid the provider's practices. And last, harmful BIAS provider behavior is very unlikely to provide countervailing benefits to consumer or competition in a market without other competitors.

For these reasons, the FTC should vigorously enforce Section 5 in the BIAS market. It should also use this opportunity to clarify the definitions of deceptive and unfairness in the context of the uncompetitive BIAS market.

III. Federal spectrum policies can foster a more competitive market for broadband internet

As FTC staff noted in its 2007 report on Broadband Connectivity and Competition Policy, federal spectrum policies regulating spectrum availability play a role in the availability and price of wireless internet services.⁸² OTI has been an active participant in the FCC's regulatory proceedings on spectrum-related matters. We have supported the FCC's efforts to encourage the deployment of broadband services through spectrum sharing frameworks, such as the Citizens Broadband Radio Service (CBRS) rules adopted by the Commission in 2016.⁸³

The CBRS 3.5 GHz band will enable a diverse set of users and use cases to use targeted bands of spectrum to bring broadband connectivity to areas in need, particularly rural communities. These users and use cases include rural Wireless ISPs (WISPs), utilities, enterprise

⁸¹ Reply Comments of New America's Open Technology Institute, FCC Dkt. 17-108, (Aug. 30, 2017), <https://ecfsapi.fcc.gov/file/10831271439118/OTI%20Final%20NN%20Reply%20Comments%20TO%20FILE.pdf>, at 26-31.

⁸² 2007 FTC Staff Report, at 110.

⁸³ See Comments of New America's Open Technology Institute, FCC Dkt. 17-199, (Sep. 21, 2017) ("OTI Section 706 Comments"), <https://ecfsapi.fcc.gov/file/10921256530521/OTI%20FCC%20Section%20706%20Comments.pdf> at 20-22.

broadband providers, private LTE networks (including neutral hosts networks in high-traffic venues), government agencies, schools, and libraries.⁸⁴ OTI has called on the FCC to expedite its implementation of the CBRS framework, and to maintain Priority Access License areas that are within the size and budget of WISPs and other small and rural ISPs.⁸⁵

OTI has also urged the FCC to authorize a new licensed, point-to-multipoint (P2MP) fixed wireless service in the 3700 - 4200 MHz spectrum band.⁸⁶ This spectrum band is used primarily by fixed satellite services—which primarily serves rural communities—but have been underutilized. It has the potential to accelerate the deployment of very high-capacity fixed wireless broadband services where consumers lack broadband options and where FTTH deployments are not cost-effective.

IV. Conclusion

The FTC currently has the authority to enforce Section 5 against BIAS providers, but ultimately it is not the right agency to police BIAS provider behavior. Given that the FCC controls whether BIAS is classified as a common carrier, the FTC should ensure that while it has enforcement authority over BIAS providers it vigorously enforces that law. In enforcing Section 5, it should take into account the lack of competition in the BIAS market. Without competitive pressure to discipline BIAS providers, the FTC is one of the few agencies to protect consumers against harmful behavior. It should not take that responsibility lightly.

⁸⁴ Reply Comments of OTI and Public Knowledge at 2, FCC GN Docket No. 12-354; Letter From Center for Rural Strategies, American Library Association, National Hispanic Media Coalition, R Street Institute, Next Century Cities, Schools, Health & Libraries Broadband (SHLB) Coalition, Open Technology Institute at New America, Public Knowledge, Engine, Common Cause, Institute for Local Self Reliance, Benton Foundation, Gigabit Libraries Network, and X-Lab, GN Docket No. 12-354 (June 19, 2017).

⁸⁵ OTI Section 706 Comments at 21.

⁸⁶ *Id.*