

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	)	
	)	
Data Caps in Consumer Broadband Plans	)	WC Docket No. 23-199
	)	

**COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

November 14, 2024

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In the Notice of Inquiry, the Commission seeks comment on usage-based pricing models for broadband service and the impact of such pricing on consumers and competition.¹ As NCTA explains in these comments, and as demonstrated in the attached report from Drs. Debra J. Aron and Steven S. Wildman,² along with other recent economic studies, usage-based pricing is beneficial to consumers and promotes network investment. Indeed, contrary to some of the assumptions in the Notice of Inquiry,³ setting prices based on the amount of usage is common across the economy, and prohibiting this accepted practice would only reduce choice for consumers and drive-up prices. Usage-based pricing is not a product of any market failure, but rather an example of healthy price competition and other differentiation in a highly competitive broadband marketplace. In any event, restricting usage-based pricing is plainly a form of rate regulation, including under the Commission’s own precedent, and the Commission lacks authority to regulate broadband rates. Accordingly, no further action is warranted.

¹ *Data Caps in Consumer Broadband Plans*, WC Docket No. 23-199, Notice of Inquiry, FCC 24-106, ¶ 2 (Oct. 15, 2024) (Notice of Inquiry or NOI).

² See Dr. Debra J. Aron & Dr. Steven S. Wildman, *The Economics of Usage-Based Pricing, Speed Tiers, and Overage Charges in the Pricing of Broadband Services* (Apr. 5, 2024) (Aron/Wildman Paper), attached to Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 23-320 (Apr. 18, 2024).

³ NOI ¶ 14.

I. INTRODUCTION

The Notice of Inquiry approaches usage-based pricing as if it were a practice unique to the broadband industry, but setting prices in proportion to usage is the default approach for a wide variety of goods and services across the U.S. economy. In the context of broadband services, consumers have the option to purchase either an unlimited plan or a usage-based plan in today's competitive broadband marketplace.⁴ The Notice of Inquiry equates such usage-based plans with "data caps," but in NCTA's experience, wireline broadband providers do not prevent customers from continued use of a service after a usage threshold is exceeded so there is no actual "cap." Instead customers can choose to use additional data over their allowance that they pay for in increments.⁵ And NCTA members offering usage-based plans also offer an option for unlimited data consumption.

As the Commission recognized years ago, usage-based pricing enhances end-user control by charging customers based on the data they actually use, without interfering with the consumer's ability to reach the Internet content of his or her choice.⁶ The Commission (on a bipartisan basis) has appropriately rejected calls to regulate usage-based pricing each time it has considered open Internet mandates.⁷ And, as NCTA recently demonstrated in the Open Internet

⁴ With an unlimited plan for fixed broadband, the consumer pays a fixed monthly charge regardless of the amount of data consumed. With a usage-based plan typical to NCTA members, the customer pays a fixed monthly charge for a specified data allowance (e.g., 1.2 TB) and, if that level of usage is exceeded, additional charges will apply but the speed of the connection is not reduced.

⁵ These comments accordingly use the term usage-based pricing, rather than "data caps," because it is a more accurate characterization of the marketplace practices at issue.

⁶ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905, 179541-42 ¶¶ 71-72 (2010) (2010 Open Internet Order).

⁷ See *id.* ¶ 72; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5668 ¶ 153 (2015) (observing that UBP should not be prohibited because it "may benefit consumers by offering them more choices over a greater range of service options"); *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order,

proceeding,⁸ and as we set forth in more detail below, there is not, and never has been, an economic or legal basis for Commission regulation of usage-based pricing.

From an economic perspective, as thoroughly detailed in the Aron/Wildman Report, usage-based pricing benefits consumers and increases incentives for network investment.⁹ Usage-based pricing allows providers to give consumers more options to select plans tailored to their needs. In particular, usage-based pricing offers a way to enable subscribers to spend less than they would if they chose an unlimited plan, and thereby attract customers who may not otherwise subscribe to broadband in the first place.¹⁰ Moreover, a provider's ability to increase the return on its investment by offering additional pricing plans enhances consumer welfare by increasing the incentive for providers to make network investments.¹¹ Because networks must be upgraded to ensure that they have the capacity to accommodate increased usage over time, usage-based pricing allows for the heaviest users to pay a larger share for usage of the network and lighter users to pay less.

Finally, not only are concerns about the impact of usage-based pricing unwarranted, but a Commission decision to ban or restrict these pricing practices would constitute blatant rate regulation as the agency would be directly regulating ISP rate structures. The Commission is barred from engaging in broadband rate regulation regardless of the ongoing dispute about the classification of broadband internet access service (BIAS). BIAS is currently regulated as a Title

33 FCC Rcd. 311, 453 ¶ 249 & n.896 (2018) (rescinding the Internet Conduct Standard in light of the uncertainty it created for “innovative service offerings or different pricing plans that benefit consumers,” including UBP plans).

⁸ See generally Aron/Wildman Report; Reply Comments of NCTA – The Internet & Television Association, WC Docket No. 23-320 (Jan. 17, 2024).

⁹ Aron/Wildman Report at 31.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9, app. B.

I information service,¹² and none of the statutory provisions identified in the Notice of Inquiry gives the Commission authority to regulate the rates of information services.¹³ Moreover, even if the U.S. Court of Appeals for the Sixth Circuit were to permit the Commission’s Open Internet Order to take effect, the Commission has specifically forbore from rate regulation of BIAS.¹⁴

II. USAGE-BASED PRICING PROVIDES SIGNIFICANT CONSUMER BENEFITS AND PROMOTES COMPETITION

A. Usage-Based Pricing Expands Consumer Options

Usage-based pricing is a widely accepted pricing model used not only for communications services, but also for the sale of many other categories of goods and services.¹⁵ Such consumption-based pricing equitably and efficiently ensures that consumers who use goods or services the most pay more than those that do not. Indeed, in the communications context, the notion that requiring very heavy users of a service to pay more than light users has long been determined to be a reasonable pricing structure.¹⁶ It would be economically unsound to prohibit broadband providers from engaging in usage-based pricing in the absence of any harm caused by such practices.

¹² *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52 (May 7, 2024) (2024 Open Internet Order), *stayed pending appeal In re: MCP No. 185 et al.*, No 24-700, Order (6th Cir. Aug. 1, 2024).

¹³ NOI ¶¶ 45-46.

¹⁴ *See* 2024 Open Internet Order ¶ 386; *see also* Statement of Chairwoman Jessica Rosenworcel (“This is not about rate regulation – no way, no how.”).

¹⁵ Aron/Wildman Report at 4 (noting, among other examples of differentiated price structures, that “[s]ome theme parks offer tickets that allow unlimited use of the rides while others charge little or nothing for entry and sell tickets by the ride” and that “[s]ome gyms charge only an annual fee for unlimited use of the facilities; others charge by the visit and/or charge extra for classes or other special amenities offered”).

¹⁶ *See, e.g.*, 2010 Open Internet Order ¶ 72 (“[P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks.”).

The Aron/Wildman Report confirms that usage-based pricing plans bring substantial consumer benefits.¹⁷ Among other things, usage-based pricing enhances competition and expands consumers' access to broadband by enabling providers to offer innovative plans at lower monthly rates.¹⁸ As the Report notes, "in the absence of UBP low usage customers would be faced with the choice of either taking a more expensive plan than they are willing to purchase or forgoing broadband entirely."¹⁹ Thus, "[t]otal net consumer welfare is clearly higher in these situations when UBP is allowed than when it is not."²⁰ Any ban or other restrictions on usage-based pricing could have a particular impact on light Internet users, who may conclude that unlimited plans are unaffordable.²¹

The Notice of Inquiry also asks whether usage-based pricing is harmful because it limits the ability of consumers to use online services.²² There is no such impact. These plans invariably include data thresholds that are well above the average usage figures cited in the Notice of

¹⁷ Aron/Wildman Report at 2-3, 7-10.

¹⁸ See *id.* at 2 (explaining that "UBP makes it financially feasible or financially desirable to offer service plans attractive to consumers with lower willingness-to-pay for broadband service who otherwise would not be served").

¹⁹ *Id.* at 3. As the Aron/Wildman Report explains, low usage or low demand customers "are more accurately thought of as low willingness to pay customers, which could correlate to low-income customers, all else equal." *Id.* at 48.

²⁰ *Id.* at 3.

²¹ See Eric Fruits, Kristian Stout, & Geoffrey A. Manne, *The Economics of Broadband Data Caps and Usage-Based Pricing*, Int'l Center for L. & Econ. 18 (Oct. 23, 2024), <https://laweconcenter.org/resources/the-economics-of-broadband-data-caps-and-usage-based-pricing/>, ("Usage-based pricing can promote economic efficiency by aligning costs with consumer-usage patterns. Under flat-rate pricing, all consumers pay the same amount regardless of usage, potentially leading to overuse by heavy users and cross-subsidization by light users. In contrast, usage-based pricing allows for more granular pricing that better reflects individual consumption patterns.") (Fruits/Stout/Manne Paper).

²² NOI ¶¶ 19-20.

Inquiry.²³ The data allowances provided by NCTA members vastly exceed most users' monthly data consumption²⁴—particularly as ISPs have consistently increased data thresholds in response to evolving market demand and usage patterns²⁵—and unlimited plans are generally available for subscribers who regularly use more than the data threshold.²⁶

In the absence of any identified harm, the choice whether to select an unlimited plan or a usage-based plan should be left to consumers, not dictated by the government. As noted above, the Commission has consistently recognized the benefits of usage-based pricing and rejected proposals to prohibit or restrict such plans, and there is no basis to abandon that settled policy.

²³ *Id.* ¶ 19. To put these numbers into perspective, a household with a 1.2 TB data threshold would be able to stream up to 40 hours of standard definition video every single day during a 30-day month before hitting the threshold. If the streaming was in high definition, over 13 hours of video could be streamed daily with a 1.2 TB data threshold. *See* Aron/Wildman Report at 11.

²⁴ In the plans offered by NCTA's members that are usage-based, the most common data amount included is 1.2 TB. Data from OpenVault covering the second quarter of 2024 shows that, on average, monthly data usage was 585.8 GB. *See* OpenVault, *OV Broadband Insights OVBI* at 3 (2Q 2024) (OVBI 2Q24 Report), <https://openvault.com/resources/ovbi/>. Median total usage for the second quarter of 2024 was 382.6 GB, which means less than half of all users used barely over a third of 1 TB. *See id.* Also, OpenVault data from 2023 shows that only 15.6% of users on flat-rate plans used more than 1 TB of data per month and only 2.9% of users used more than 2 TB of data per month. *See* OpenVault, *OV Broadband Insights Report (OVBI)* at 7 (2Q 2023) (OVBI 2Q23 Broadband Insights Report), https://openvault.com/wp-content/uploads/2023/07/OVBI_2Q23_Report_v4_FINAL.pdf. The percentages for users on usage-based plans was very similar; only 15.7% exceeded 1 TB per month and 2.7% exceeded 2 TB a month. *See id.*

²⁵ According to the Urban Rate Survey, in 2014, the weighted median usage allowance among plans with such allowances was 250 GB while in 2023 the weighted median allowance was 1.23 TB. *See* Wireline Competition Bureau Announces Posting of Broadband Data From Urban Rates Survey and Seeks Comment on Calculation of Reasonable Comparability Benchmark for Broadband Services, WC Docket No. 10-90, Public Notice, 29 FCC Rcd. 7992, 7994 (Wireline Comp. Bur. 2014); Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2024 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, WC Docket No. 10-90, 38 FCC Rcd. 11966, 11968-69 (Wireline Comp. Bur. 2023).

²⁶ *See* Aron/Wildman Report at 3, 10-13.

B. Usage-Based Pricing Promotes Competition and Network Investment

The Notice of Inquiry solicits comment on the impact of usage-based pricing on broadband competition and deployment.²⁷ The ability to offer such plans unquestionably has a positive impact on deployment and competition.

The Aron/Wildman Report finds that “UBP with data allowances offers additional value that can induce ISPs to build a high-speed network that would not otherwise be built if the ISP can differentiate its pricing by speed alone”—and consumers stand to reap the benefits of these enhanced and more widely deployed broadband services.²⁸ Drs. Aron and Wildman demonstrate in detail how “the opportunity to offer UBP encourages investment” in broadband deployment and service enhancements.²⁹ “[T]he option to use UBP can open up opportunities to invest in networks and network extensions and improvements that otherwise could not profitably be undertaken,” given that such options can make broadband service plans more attractive to a wider array of consumers, and allow providers attract customers that would not normally subscribe to broadband plans.³⁰

Usage-based pricing also reflects the highly competitive environment as providers seek to distinguish their offers from their competitors’. As described in the Aron/Wildman Report, “[a] company’s pricing structure is a dimension of competition that reflects its creativity and insight into its market.”³¹ For that reason, “[l]imiting the pricing structures that a company can offer will

²⁷ NOI ¶ 42-44.

²⁸ Aron/Wildman Report at 9; *see also id.*, app. B.

²⁹ Aron/Wildman Report at 2; *see also id.* at 24-29.

³⁰ *Id.*; *see also* Fruits/Stout/Manne Paper at 18 (“By enabling ISPs to recover more of their investment costs from heavy users, while potentially offering lower-priced plans to light users, usage-based pricing could drive increased broadband deployment and adoption as well as fostering a more robust, innovative internet ecosystem.”).

³¹ Aron/Wildman Report at 4.

necessarily affect the products and product characteristics a firm chooses to offer, resulting in a cascade of unintended and, most likely, undesirable consequences.”³²

Similarly, there is no basis for any suggestion that providers are using usage-based pricing to create artificial scarcity that might limit the attractiveness of streaming services and other online applications. As Drs. Aron and Wildman explain, “[r]ather than creating scarcity, ISPs have increased upload and download speeds by many multiples, and the typical broadband subscriber has access to more data than is technically required to support high levels of video and other usage.”³³ The Report also explains in detail that, contrary to the suggestion that usage-based pricing is used to “impede data usage in order to thwart over-the-top (‘OTT’) services,” such OTT services have thrived and multiplied while usage-based pricing options have been available, and broadband providers “have demonstrably embraced broadband as an opportunity best realized when the OTT services that utilize it flourish.”³⁴ By the same token, there is no evidence that usage thresholds in today’s marketplace are inefficiently low or that overage charges are inefficiently high. The Aron/Wildman Report shows that such claims rest on “assumptions about ISP pricing strategies demonstrably at odds with those we observe in actual broadband markets.”³⁵ Indeed, the market, not the government, can best determine which pricing model serves consumers most effectively. And there is no question that the broadband

³² *Id.* at 5.

³³ *Id.* at 2.

³⁴ *Id.* at 2; *see also id.* at 14-24. Moreover, while OTT streaming services have thrived, there has been a corresponding decline in traditional cable subscriptions, further confirming that cable operators are not using usage-based pricing to affect how consumers choose to purchase video services. Indeed, cable operators now offer and promote a wide variety of third-party OTT streaming options as part of their cable video offerings. *See Communications Marketplace Report et al.*, GN Docket No. 22-203, Report, 37 FCC Rcd. 15514, 15654-55 (2022) (showing MVPDs have lost millions of subscribers in recent years).

³⁵ *Id.* at 3.

marketplace is more competitive than it has ever been with consumers enjoying multiple home connectivity options.³⁶

C. A Provider's Willingness to Suspend Usage-Based Pricing During a National Emergency Is Not Evidence That Usage-Based Pricing is an Unnecessary or Unreasonable Pricing Model

As the Commission recognized in the Notice of Inquiry, many fixed broadband providers temporarily refrained from enforcing or imposing usage-based pricing during the COVID-19 pandemic.³⁷ Because of the extraordinary circumstances of the pandemic and with so many people working and learning from home, broadband traffic during the pandemic surged between 30% and 50% across mobile and fixed networks.³⁸ Recognizing this national emergency, cable and other providers paused data plans and took many other steps to ensure Americans stayed connected to the Internet.³⁹

The Notice of Inquiry suggests that the ability of providers to offer unlimited service in this context means that usage-based pricing may be unnecessary.⁴⁰ But a provider's temporary response to an unprecedented global crisis that produced a sharp, once-in-a-lifetime, spike in broadband usage does not change the fundamental economics of usage-based pricing as described in the Aron/Wildman Report.⁴¹ Providers were able to suspend usage-based pricing

³⁶ See NCTA 706 NOI Comments at 2-6.

³⁷ NOI ¶ 26.

³⁸ Mark Beech, *COVID-19 Pushes Up Internet Use 70% And Streaming More Than 12%, First Figures Reveal*, Forbes (Mar. 26, 2020), <https://www.forbes.com/sites/markbeech/2020/03/25/covid-19-pushes-up-internet-use-70-streaming-more-than-12-first-figures-reveal/>.

³⁹ Press Release, Comcast Corp., *Comcast Announces Comprehensive Covid-19 Response to Help Keep Americans Connected to the* (Mar. 13, 2020), <https://corporate.comcast.com/press/releases/covid-19>.

⁴⁰ NOI ¶ 26.

⁴¹ Aron/Wildman Report at 3.

temporarily during the pandemic, recognizing that this was an extraordinary circumstance and that eventually schools and workplaces would reopen.

III. THE COMMISSION’S COMPILATION OF UNVERIFIED COMPLAINTS DOES NOT CONSTITUTE MEANINGFUL EVIDENCE THAT REGULATION IS WARRANTED

Along with the Notice of Inquiry, the Commission released a 621-page document containing hundreds of emails allegedly complaining about various aspects of usage-based pricing.⁴² Because the emails have not been investigated and providers were not afforded the ability to respond to them individually, this document presents an extremely misleading portrait of usage-based pricing. As an initial matter, many of the alleged complaints are directed to providers that do not offer usage-based pricing plans. And in many of the unverified complaints that address usage-based pricing specifically, the consumers recognize that they have a choice to pay less money for a plan that includes a data threshold or pay more money for a plan that includes unlimited data. It is not particularly surprising that consumers would prefer to pay the lower price of a usage-based pricing plan and receive the higher level of service in an unlimited plan, just as consumers would prefer the price of many goods and services they buy to be cheaper, particularly in a period of high inflation.⁴³ But depriving providers of the ability to offer a variety of pricing structures, including options that have lower prices, simply makes no sense.⁴⁴

⁴² FCC, *What People Are Saying About Data Caps* (rel. Oct. 15, 2024) (Unverified Complaints), <https://www.fcc.gov/sites/default/files/Data-Cap-Complaints-Redacted.pdf>.

⁴³ See, e.g., NPR, *Why You’re Seeing Scary-High Chocolate Candy Prices This Halloween* (Oct. 29, 2023), <https://www.npr.org/2024/10/28/g-s1-30544/chocolate-candy-prices-halloween>; Chain Store Age, *Survey: Consumers to hunt for holiday value amid inflation concerns* (Oct. 2, 2024), <https://chainstoreage.com/survey-consumers-hunt-holiday-value-amid-inflation-concerns> (“88% say inflation is currently affecting or will affect their spending decisions.”).

⁴⁴ As the Commission itself has acknowledged, broadband prices have increased at less than the rate of inflation and less than the prices of other goods and services for well over a decade. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 22-270, FCC-24-27, at 55 ¶ 95 (2024) (Section 706

In addition, while every service or product will engender some complaints, the vast majority of customers generally are quite satisfied with their broadband service; the fact that the Commission appears to have garnered a little over 600 complaints out of the more than 115 million fixed broadband connections in the United States, and that isn't even counting mobile broadband connections, suggests that any Commission concerns about usage-based pricing are misplaced. It's likely that many consumers know they will never be close to exceeding the relevant threshold and appreciate the ability to purchase a less expensive plan, and some of these customers undoubtedly would be unhappy, and might even drop service, if their rates increased because providers were no longer permitted to offer that pricing option.

IV. THE COMMISSION DOES NOT HAVE LEGAL AUTHORITY TO REGULATE USAGE-BASED PRICING

The Notice of Inquiry requests comment on potential legal authority to promulgate rules regarding usage-based pricing.⁴⁵ Specifically, the Commission solicits comment on whether section 257 of the Communications Act of 1934, as amended, or whether section 706 of the Telecommunications Act of 1996 would provide sufficient authority to take potential actions to address usage-based pricing.⁴⁶ The Commission further seeks comment on its ability to use various sections of Title II of the Act, including sections 201, 202, and 251 as authority to support regulating usage-based pricing.⁴⁷

The Commission does not have statutory authority to prohibit providers from offering

Report). Indeed, since January 2010, internet service prices have increased 13%, while overall prices have increased 46%. *See* NCTA, Broadband Affordability: A Look at the Data (Oct. 15, 2024), <https://www.ncta.com/whats-new/broadband-affordability-a-look-at-the-data>.

⁴⁵ NOI ¶¶ 45-48.

⁴⁶ *Id.* ¶ 45.

⁴⁷ *Id.*

usage-based pricing to their customers or to regulate the terms of such offers. Because attempting to constrain a provider's ability to use usage-based pricing would directly interfere with its rate structure, such regulation would constitute rate regulation pursuant to both Commission and court precedent.⁴⁸ In the first instance, the Sixth Circuit's stay of the Commission's recent 2024 Open Internet Order makes clear that the statutory prohibition on common carrier regulation of information services currently applies to BIAS.⁴⁹ Because rate regulation is an "utterly central" component of classic common carrier regulation, BIAS may not be subject to rate regulation.⁵⁰

Even if the Sixth Circuit ultimately upholds the Commission's 2024 Open Internet Order and BIAS is reclassified as a Title II telecommunications service, the Commission still would lack authority to regulate providers' ability to offer usage-based pricing. In the 2024 Open Internet Order, the Commission granted forbearance from rate regulation of BIAS on both an ex ante and ex post basis. Regulating usage-based pricing would necessarily constitute regulating ISPs' rate structures, which the Commission and the courts have clearly stated is rate

⁴⁸ See, e.g., *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd. 10861 ¶¶ 12-13, 18-19 (1999) (disavowing an earlier ruling that "calling party pays" arrangements are merely "billing practice[s]" that states may regulate as "other terms and conditions," and holding that regulation of such practices constitutes regulation of commercial mobile radio service rates); *Sw. Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 19898 ¶ 20 (1999) (holding that a carrier's practice of rounding up customer calls to the nearest whole-minute increment was part of its "rate structure[,]," and that a state regulation forbidding this practice was preempted by statutory provision barring rate regulation); *Windstream Neb., Inc.*, 2011 WL 13359491 at *6 (proration requires providers to change their rates from a monthly rate to a daily rate and therefore constitutes rate regulation).

⁴⁹ See *supra* note 12.

⁵⁰ *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230-32 (1994). Moreover, sections 616(a) and 628 of the Communications Act fail to provide the Commission authority to regulate the rates of MVPDs. Section 616(a) allows the Commission to regulate a MVPD in order to prevent a cable operator from engaging in certain unreasonable practices, such as requiring a financial interest in a program as a condition for carriage, and section 628 allows for regulation to prohibit unfair methods of competition or unreasonable discrimination. 47 USC §§ 536(a), 548. Neither statute authorizes rate regulation.

regulation,⁵¹ and thus would require authority the Commission has expressly disclaimed.

The Commission also has not made the case that section 257 or section 706 provides the Commission with authority to impose restrictions on usage-based pricing. Indeed, in *Verizon v. FCC*, the D.C. Circuit held that “[e]ven though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not, as it recognizes, utilize that power . . . to regulate broadband providers as common carriers.”⁵² Similarly, in *Mozilla v. FCC*, the D.C. Circuit upheld the use of section 257 as statutory authority only for the transparency rule, to enable the Commission to obtain and analyze information for its reports to Congress.⁵³ The court’s analysis does not support using section 257 for a different—and much broader—regulatory purpose.

Finally, any Commission action limiting providers’ ability to offer usage-based pricing likely would be found arbitrary and capricious upon judicial review. Usage-based pricing is a widely accepted pricing model for goods and services, and the Commission has historically approved of the use of usage-based pricing as beneficial to consumers.⁵⁴ Requiring the heaviest users of a service to pay for their increased use has long been considered a reasonable method of

⁵¹ See, e.g., *Time Warner Entertainment Co., LP v. FCC*, 56 F.3d 151, 191 (finding that the Cable Act’s uniform rate structure requirements in 47 USC 543(d) “is clearly a form of rate regulation.”); see also *supra* note 50.

⁵² *Verizon v. FCC*, 740 F.3d 623, 649-50 (D.C. Cir. 2014).

⁵³ *Mozilla Corp. v. FCC*, 940 F.3d 1, 47-48 (D.C. Cir. 2019).

⁵⁴ See 2010 Open Internet Order ¶ 72 (2010). Even in the context of classifying broadband as a Title II service, the FCC has declined to prohibit UBB outright, noting that “[u]sage allowances may benefit consumers by offering them more choices over a greater range of service options.” *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5668 ¶ 153 (2015); see also 2024 Open Internet Order ¶ 542 (“[D]ata caps can also be deployed as a means to manage congestion or to offer lower-cost broadband consumers who use less bandwidth.”).

allocating costs between different users of a service.⁵⁵ Any regulatory requirement that precludes such offers would not be reasonable or lawful.

V. CONCLUSION

As it has found in previous inquiries, the Commission once again should find that the ability of broadband providers to offer usage-based pricing plans benefits consumers and promotes competition. The competitive marketplace is best positioned to yield efficient broadband pricing and service differentiation. And even if the Commission were to prefer different rate structures and offerings, it lacks authority to regulate UBP to achieve that outcome. Accordingly, no further action in this proceeding is warranted.

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⁵⁵ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 12460 ¶ 30 (1997) (“[T]raditionally, shared facilities are priced on a usage-sensitive basis We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities.”).