

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

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

**REPLY COMMENTS
OF
PUBLIC KNOWLEDGE
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA
BENTON INSTITUTE FOR BROADBAND & SOCIETY
NATIONAL CONSUMER LAW CENTER ON BEHALF OF ITS LOW-INCOME CLIENTS**

I. Introduction

The Commission has taken an important step in understanding the impact of data caps on consumers and competition in the broadband sector by initiating this Notice of Inquiry.¹ As commenters have begun to develop the record, there is clear evidence demonstrating that Americans are using more and more data in an increasingly connected world. With this trend, it is important for the Commission to ensure that it actually meets its goals of understanding the consumer impact of data caps. Likewise, it is important for the Commission to determine how data caps impact small businesses' data usage and further understand the effect that data caps have on how businesses interact with and offer services to consumers. To do so, the Commission should further its inquiry to build a better record that adequately reflects why broadband data caps exist, and whether they are truly economically justified, despite industry's standing commitment to make broadband better and more affordable for every American.

¹ *Data Caps in Consumer Broadband Plans*, Notice of Inquiry, WC Docket No. 23-199, FCC 24-106 (rel. Oct. 15, 2024), available at <https://docs.fcc.gov/public/attachments/FCC-24-106A1.pdf> ("Notice of Inquiry").

II. The record demonstrates that data caps harm consumers, but remains limited and should be further developed through a more robust, targeted inquiry.

The record clearly demonstrates the negative impact that data caps have on consumer households, shows that data caps serve no technical purpose, and that they do not have a positive impact on competition. ISP commenters fail to provide reliable information to demonstrate otherwise.² For all of the following, more development is needed through further inquiry.

A. The record demonstrates that consumers are harmed by data caps.

Commenters have clearly demonstrated how fees and overage charges, unclear information about data caps, and throttling or caps in the midst of public crises such as natural disasters negatively affect consumers, especially consumers in the lowest income brackets.³ Several commenters, along with numerous public and consumer interest organizations recognize the dangers of data caps and support their ban.⁴ Consumer Reports provides a compelling description of how consumers can be surprised by overage fees as they approach a data cap due to running mundane updates of their applications and that data caps can cause consumers to be reluctant to adopt new, more data intensive technologies to stay connected in an increasingly data-heavy world.⁵ Fear of such fees may also discourage users from downloading necessary security patches or system upgrades. This endangers not merely those who delay or decline to download upgrades for fear of overage charge, but also anyone who uses these network-connected devices.

² An objective of the Commission's Inquiry is to learn about data caps and their effect from those providers who actually implement data caps, and it should be noted that, while ISP trade associations have added to the record, not one broadband provider provided comments with the kind of information that would be most useful to this inquiry.

³ Comments of Public Knowledge, the Open Technology Institute at New America, Benton Institute for Broadband & Society, and National Consumer Law Center at 6-9.

⁴ Communications Workers of America (CWA), CWA and Consumer Advocacy Groups Urge Broadband CEOs to Lift Data Caps and Waive Fees (Mar. 16, 2020), <https://cwa-union.org/news/releases/cwa-and-consumer-advocacy-groups-urge-broadband-ceos-lift-data-caps-and-waive-fees>.

⁵ Comments of Consumer Reports at 3-5.

Faced with this dilemma, consumers are forced to make the choice of moving into a more expensive tier or risk overage fees.⁶ Usage based billing serves little economic purpose and can even have the effect of subjecting lower income users to an inequitable burden that would discourage innovative and beneficial broadband usage.⁷ A report from a business research publication in the record finds that unlimited data, as opposed to data caps, can have a game-changing impact on increasing data consumption for disadvantaged households to connect them to critical services, such as accessing education.⁸

Several studies show that data caps are harmful to all consumers, but most disproportionately affect low-income households. As compared to high-income internet users, lower income users tend to “place more emphasis on affordability, mobility, and data caps; they place less on reliability and speed.”⁹ Many low-income households have no choice but to be limited by data caps because lower priced plan tiers, the only ones they can afford, are typically capped. These populations are forced to choose when and how to use limited data resources, which creates a data balancing act that has “devastating consequences to a household’s health, economic mobility, access to information, and government services.”¹⁰ As the Commission has recognized and commenters highlighted, low-income consumers often rely only on mobile data to access the internet.¹¹ Mobile data caps have an even greater “effect on smartphone dependent

⁶ Comments of Free Press at 23.

⁷ *Id.* at 32, fn. 56.

⁸ Karthik Babu Nattamai Kannan, et. al, *Can Improvements to Mobile Internet Service Help Reduce Digital Inequality? An Empirical Analysis of Education and Overall Data Consumption*, Georgia Tech Scheller College of Business Research Paper No. 4173558, SMU Cox School of Business Research Paper No. 22-25 (May 09, 2024). “We show that disadvantaged households experience larger increases in overall and education data consumption after gaining access to unlimited mobile data compared with advantaged households.” *Id.*

⁹ S. Derek Turner, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption*, Freepress (Dec. 2016) at 95.

¹⁰ Comments of City of Portland at 5.

¹¹ Comments of Public Knowledge, the Open Technology Institute at New America, Benton Institute for Broadband & Society, and National Consumer Law Center at 6. *See also* Notice of Inquiry at ¶ 24.

subscribers, which include 25% of Hispanic users, 17% of Black users, and 12% of white users.”¹² Media reports have also highlighted this anecdotally such as through the story of Gloria Simmons, a woman who has lived in a small town in Georgia for over 50 years, who highlights the prohibitive cost barriers she faces: “[A]s a retiree on a fixed income, it’s too expensive... if she goes over her data usage, it’s \$10 for each additional 50 gigabytes of data. If it increases, she says she’ll cancel the service, despite its convenience.”¹³

Data caps negatively impact small businesses too, affecting their data usage, the service plans they select, and the prices they pay to be connected. Data caps can cause a business to pay more for essential access to the internet, thereby cutting into its profits. The record should be further developed to highlight the impact that data caps have on small businesses, because, in this light, data caps appear to stymie business growth as well as consumer welfare.

Additionally, it is relevant for the Commission to determine whether data caps drive up the costs for businesses and government entities (like schools, local and state governments, and medical providers) that rely on the internet for communications with consumers. Data caps cause consumers to limit their internet use, thus limiting efficient exchanges of information between consumers and business, government entities, crucial community services, and more. Businesses and government entities communicating with consumers who are most sensitive to higher prices triggered by data caps will likely experience higher costs because they will have to rely on more expensive forms of communicating including using snail mail and telephone calls instead of more efficient emails and websites.

¹² *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN 22-69, Comments of Lawyers’ Committee for Civil Rights Under Law (Feb. 21, 2023).

¹³ Aallyah Wright, *How Black Rural Americans Navigate Internet Issues*, Capital B News (Dec. 20, 2023), <https://capitalbnews.org/rural-internet-divide-communities/>.

Data caps have a tremendous impact on consumers and businesses throughout the country, and in an America that is spending tens of billions of dollars on expanding high-speed internet access to *all* Americans, data caps should not be the deciding factor on who is connected and who remains left behind.

B. The record demonstrates that data caps serve no technical purpose and have no compelling economic justification.

Commenters have shown that data caps are not a technical necessity to reduce network traffic but are rather an economic tool to drive profits.¹⁴ As networks continue to be upgraded, ISPs have little incentive other than employing data caps as a profit-boosting mechanism as networks will have ample capacity for data transmissions.¹⁵ Additionally, the argument that providers use data caps to prevent “congestion on their networks at peak hours” has been debunked by research analysts and in ISP’s own statements.¹⁶ Usage based pricing just does not do enough to respond to congestion.¹⁷ Justifications for data caps as a cost-recovery mechanism, instead of a profit-booster, are simply not legitimate as ISPs are capable of recovering costs and making a profit just by using unlimited data plans.¹⁸

In addition, data caps are not necessary based on economically justifications. Prices for services or goods are generally based on the cost of providing the services or goods: it costs twice as much to buy two gallons of gasoline as it does for one gallon. Similarly, the price for more electricity goes up when more kilowatt hours are needed (although the costs per unit may decrease). However, using data over the internet is a matter of capacity, rather than usage of each

¹⁴ Comments of Public Knowledge, the Open Technology Institute at New America, Benton Institute for Broadband & Society, and National Consumer Law Center at 2, 9-10.

¹⁵ Comments of Free Press at 30.

¹⁶ Comments of Consumer Reports at 8.

¹⁷ Comments of Free Press at 33.

¹⁸ *Id.* at 33-36.

unit. Charging a flat price for access to the capacity works perfectly well in other nations;¹⁹ there does not seem to be a sufficient justification to treat data differently in the United States.

Because there is no technical need for data caps, they are not economically justified.

C. The record indicates that data caps have a negative impact on competition.

Finally, commenters have shown that data caps are anticompetitive, and that ISPs and wireless carriers can more effectively, and in practice really do, compete on several other fronts.²⁰ For wireline providers, given that data caps are not necessary on a technical basis, data caps drive consumers to decide to pay more for uncapped plans or be victims of overage fees. Providers, by using data caps to make their profits, are less inclined to compete in general, and especially on price terms for unlimited data plans. For wireless carriers, although the use case for data caps especially for small and rural carriers is more compelling, innovations in technology will eliminate any need for data caps, which will just serve as a tool across the board to boost profits. The Commission should further develop the record to better understand, seeking information from ISPs specifically, how data caps and competition intersect, if at all.

III. Commenters treat this Notice of Inquiry as a Notice of Proposed Rulemaking and have failed to adequately build the record in response to the purpose of the Commission's proceeding.

Several commenters, most of which oppose regulation of data caps, summarily ask the Commission to end its inquiry based on an incorrect argument that the Commission does not have statutory authority to impose a rule regulating data caps.²¹ These commenters fail to appreciate the purpose of a Notice of Inquiry. The Commission may issue a notice of inquiry, as

¹⁹ See e.g. Comments of Irregularators.

²⁰ Comments of Public Knowledge, the Open Technology Institute at New America, Benton Institute for Broadband & Society, and National Consumer Law Center at 11.

²¹ See Comments of TechFreedom, US Chamber of Commerce, ACA Connects, American Consumer Institute, and CTIA.

it has here, and these inquiries “do not result in the adoption of rules.”²² As such, the Commission issued this Notice of Inquiry to “explore the use of data caps. . . to better understand the current state of data caps and whether data caps cause harm to competition or consumers’ ability to access broadband Internet services.”²³ The Commission’s goal through this inquiry is clearly stated:

In furtherance of our goal of ensuring consumers have meaningful access to BIAS, we inquire about the current state of data caps—for both fixed and mobile broadband Internet service—and how they may impact consumers and competition. We seek to better understand why the use of data caps continues to persist despite increased broadband needs of consumers and providers’ demonstrated technical ability to offer unlimited data plans. We first seek comment on current trends in consumer data usage. We next seek comment on the impact of data caps on consumers, consumers’ experience with data caps, and how consumers are informed about data caps on service offerings. We then look at the impact of data caps on competition. Lastly, we ask about our legal authority to take action regarding data caps.²⁴

As Chairwoman Rosenworcel stated, “Our goal here is to understand what these caps look like now.”²⁵ Similarly, although he expressed concern that it was a step down a path toward rate regulation, dissenting Commissioner Simington correctly noted that this proceeding is “only a notice of inquiry.”²⁶ Commenters sidestep this fact and offer several arguments related to the Commission’s ability to make a rule while simultaneously failing to provide robust data for the record to help inform the Commission in order to serve the public interest by better understanding data caps through this inquiry. This inquiry should be continued, as the record needs to be further developed including thorough responses from ISPs and wireless carriers with

²² 47 CFR 1.430.

²³ Notice of Inquiry at ¶ 2.

²⁴ *Id.* at ¶ 14.

²⁵ See Notice of Inquiry, *Statement of Chairwoman Jessica Rosenworcel*.

²⁶ See Notice of Inquiry, *Dissenting Statement of Commissioner Nathan Simington*.

up-to-date and relevant information on data cap usages and purposes alongside their impact on profitability and the bottom line.

IV. The Commission has legal authority to proceed with its Notice of Inquiry and further has authority to address harmful data caps.

The Commission has authority to continue with this preceding. First, the Commission has express authority to collect information on data caps and their effect on consumers under its Section 706 authority.²⁷ The Commission has recognized that data caps likely have an impact on the consumer and competition, as well-noted through the six hundred consumer comments submitted directly to the Commission.²⁸ This inquiry clearly falls under the Commission's Section 706 authority since data caps are tools that impact the availability of telecommunications to a large number of Americans through cutting off their access once a threshold limit is met. The Commission may also review data caps under Section 706 because data caps have an anticompetitive effect and impact the market by affecting competition and prices, as they are artificially imposed limits for boosting profits. In addition, because the record also demonstrates that data caps have a discriminatory effect on marginalized populations (based on income levels and race), the Commission may proceed with this inquiry in order to further promote equal access to broadband internet service.²⁹ Furthermore, the Commission has authority under § 257 to further assess data caps and their effects on consumers and the market.³⁰ Under § 218, the

²⁷ 47 U.S.C. § 1302(b) The Commission has express statutory authority to “initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans” to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” *Id.* Further, Section 706 itself even directs the Commission to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 (1996), codified at 47 U.S.C. § 1302.

²⁸ Federal Communications Commission, “*What People Are Saying About Data Caps*,” available at <https://www.fcc.gov/sites/default/files/Data-Cap-Complaints-Redacted.pdf>.

²⁹ 47 U.S.C. § 1754.

³⁰ Under these sources of statutory authority, the Commission has authority, in general, to assess competition, the marketplace, and availability in telecommunications markets. *See* 47 U.S.C § 257.

Commission has additional authority to develop this record to obtain “full and complete information” regarding data caps and their effects by assessing common carriers.³¹ And finally, under § 303, the Commission has authority to evaluate and make rules regarding particular licensed radio and wireless services.³² There is no doubt that the Commission has the authority to open this Notice of Inquiry. The Commission therefore should proceed with its inquiry.

Further, if the Commission determines it should regulate data caps after the completion of a thorough inquiry, the Commission has ample statutory authority under Title II to regulate data caps. And, for the time being, broadband internet service is classified as a telecommunications service under Title II, meaning that it can be regulated under 47 C.F.R. §§ 201 and 202.³³ These sections provide the Commission with ample rulemaking authority to regulate data caps as they are an unjustified, unreasonable business practice and unreasonably discriminate against low-income individuals.

In the event that the Commission turns back and decides to no longer classify broadband internet service under Title II, the Commission still has authority to regulate data caps.

Regulating data caps is not the same as rate regulation. Under § 257 the Commission has the authority to “identify[] and eliminat[e], by regulations pursuant to its authority. . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.”³⁴ Regulating data caps, contrary to

³¹ 47 U.S.C. § 218. (The Commission may inquire into the management of the business of all carriers subject to this chapter...) ”)

³² 47 U.S.C. § 303(b); *See also* § 303(g), (r) (Allowing the Commission to “generally encourage the larger and more effective use of radio in the public interest” and make additional rules related to radio stations).

³³ *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Declaratory Ruling, Report and Order, and Order on Reconsideration, FCC 24-52, (2024). Under Title II, unjust or unreasonable practices in connection with the provision of telecommunication services as well as practices that unreasonably discriminate, or subject any individual or class to any undue or unreasonable prejudice or disadvantage are prohibited. 47 U.S.C. §§ 201-02.

³⁴ 47 C.F.R. § 257.

several commenters' views, is not rate regulation but is rather the regulation of an anticompetitive market factor that detrimentally affects the consumer. Because data caps affect competition and the ability for new and small entities to enter and interact with the market, especially as some comments show,³⁵ the Commission has ample authority to regulate data caps since they impact the ability for small and competitive carriers to enter the market, even without Title II authority.

V. Conclusion

In conclusion, the undersigned again emphasize strong support for the Commission to move forward with its Notice of Inquiry to collect useful information on data caps and their effects on consumers. Evidence demonstrates that data caps are technically unnecessary, anti-competitive, and harmful to consumers, especially low-income consumers who can benefit from truly unlimited data the most. The Commission must continue its inquiry to develop the record even more so that the true impact of data caps can be realized.

**PUBLIC KNOWLEDGE
OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA
BENTON INSTITUTE FOR BROADBAND & SOCIETY
NATIONAL CONSUMER LAW CENTER ON BEHALF OF ITS LOW-INCOME CLIENTS**

/s/ Peter Gregory
Broadband Policy Fellow
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036

December 2, 2024

³⁵ Comments of Competitive Carriers Association (Data caps can be important for rural and competitive carriers in “areas with limited backhaul capabilities and for wireless carriers with limited spectrum resources providing an increasing level of broadband services to consumers”).