

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

Safeguarding and Securing the Open Internet

WC Docket No. 23-320

**COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION  
(CCIA)**

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Dated: December 14, 2023

## SUMMARY

The Commission’s proposed action in this docket is in large part uncontroversial: re-adopt rules, primarily under Title II, that ensure that the end users of mass market, Broadband Internet Access Service (“BIAS”) can obtain, from any source, whatever lawful content they choose, and can likewise upload and transmit lawful content to any Internet destination of their choice. The proposal is to return to the *status quo ante* that survived exacting judicial review but was needlessly put asunder by the previous Administration.

Two very thorough appellate opinions from the *U.S. Telecom* case have made it clear that Title II is the appropriate legal authority upon which these rules safely can rest.<sup>1</sup> Internet transmission paths are simply interconnected network facilities that carry bit streams of information – they supply “telecommunications” and should be treated as such. The authority in Section 706, however, which was enacted to encourage the deployment of broadband facilities, is not sufficient authority to ensure the unfettered and nondiscriminatory provisioning of BIAS for “creating without permission, building community beyond geography, organizing without physical constraints, consuming content you want when you want it, and cultivating ideas not just around the corner but around the world.”<sup>2</sup>

Rules prohibiting blocking, throttling, paid prioritization, and unreasonable conduct must be reinstated to preserve open access to the Internet. BIAS providers should not be permitted to block,

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<sup>1</sup> Title II authority should be buttressed, as the Commission proposes, with Title III authority in order to ensure that fixed and mobile wireless BIAS receives the same safeguards as wireline BIAS. NPRM ¶ 204.

<sup>2</sup> Remarks of Chairwoman Jessica Rosenworcel to The National Press Club (Sept. 26, 2023), <https://www.fcc.gov/document/fcc-chairwoman-rosenworcels-net-neutrality-remarks>.

or even to treat unfavorably, the content, applications, services, websites, or other online offerings that end users choose to access. The appropriate focus has been and must remain consumers; as Commissioner Starks has stated, the Commission should adopt “a framework that puts users in charge of what they do online—and not the companies they pay for a connection.”<sup>3</sup> This freedom to roam is the essence and purpose of the Internet, as is its utterly necessary function of enabling a free marketplace of ideas. Reinstating the rules adopted in 2015 will “ensure that access to the Internet remains open, so that all viewpoints—including ones with which I disagree—are heard, without discrimination.”<sup>4</sup>

In keeping with the Commission’s goal of restoring the court-affirmed 2015 legal framework, the definition and scope of “Broadband Internet Access Service” should not be amended or enlarged. Mass-market, retail, high-speed transmission service, regardless of its underlying facilities and technology, remains the set of products that warrant the protections to be re-adopted in this proceeding.

CCIA likewise supports the Commission’s proposed reinstatement of (1) the prohibitions on blocking and throttling of lawful content, (2) the prohibition on paid prioritization, and (3) the broader “general conduct rule.” Discriminatory treatment as between similarly situated end users violates the Communications Act of 1934, 47 U.S.C. § 201, and practices that unreasonably advantage certain end users over others are as discriminatory in the BIAS context as they have been for legacy telecommunications services for almost 100 years. A presumption of unlawfulness should

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<sup>3</sup> Statement of Commissioner Geoffrey Starks (Oct. 20, 2023), <https://www.fcc.gov/document/fcc-start-proceeding-reestablishing-open-internet-protections/starks-statement-0>.

<sup>4</sup> Statement of Commissioner Anna Gomez (Oct. 20, 2023), <https://www.fcc.gov/document/fcc-start-proceeding-reestablishing-open-internet-protections/gomez-statement-0>.

apply to demonstrated instances of such conduct, subject to an evidentiary showing that “reasonable network management” as proposed in the Notice of Proposed Rulemaking justifies a particular action that a BIAS provider might take to preserve network integrity.

Finally, the existing Transparency Rule, 47 C.F.R. § 8.1, is a helpful tool for educating consumers about the BIAS to which they subscribe. It warrants no expansion or enhancement. On its own, however, the Transparency Rule can do little to prevent the abuses that the proposed Open Internet rules are designed to address.

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The Computer & Communications Industry Association (“CCIA”) files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released October 20, 2023, in this docket.<sup>5</sup> CCIA supports the Commission’s proposed return to applying minimal, but necessary, consumer protections to Broadband Internet Access Service (“BIAS”) pursuant to the clear authority Congress granted in Title II of the Communications Act of 1934. These rules are narrowly drawn, supported by record evidence, and already survived exacting appellate challenge that included *en banc* review. Further, the Commission rightly proposes to forebear from a great number of Title II provisions, and their implementing rules, which are not necessary to the public interest and/or on their face do not apply to BIAS.

## **I. BROADBAND INTERNET ACCESS SERVICE FALLS SQUARELY UNDER TITLE II.**

The Commission’s decision in 2015 to classify BIAS as a Title II service was well reasoned and twice upheld by the D.C. Circuit.<sup>6</sup> That classification should be reinstated. *See* NPRM ¶ 16.

### **A. Broadband Internet Access Service Is a Standalone Transmission Service.**

To begin, CCIA agrees that the Commission should retain its current definition of BIAS.<sup>7</sup>

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<sup>5</sup> WC Docket No. 23-320, *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, FCC 23-83 (rel. Oct. 20, 2023), published at 88 Fed. Reg. 76048 (Nov. 3, 2023).

<sup>6</sup> WC Docket No. 14-28, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, 30 FCC Rcd. 5601 (2015) (the “*2015 Open Internet Order*”), *aff’d*, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (“*U.S. Telecom*”), *reh’g denied*, 855 F.3d 381 (D.C. Cir. 2017).

<sup>7</sup> “[M]ass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service,” as well as “any service that the Commission finds to be providing a functional equivalent of the service described [in the definition] or that is used to evade the protections set forth” in part 8 of the Commission’s rules.

Of particular import is the criterion that the service be “mass-market retail service,” which is the earmark of common carriage: holding oneself out as serving all requesting parties. This choice to serve the retail mass market is what imbues a service provider with the obligation to provide service in a reasonable and nondiscriminatory manner under the Communications Act of 1934.<sup>8</sup>

Any Internet-bound and Internet-based transmissions occurring along the “call path” of BIAS, including BIAS Internet traffic exchanges (NPRM ¶ 10), should be included in the set of services protected by the proposed rules. Retaining this definition and understanding of BIAS would be, like almost every other aspect of the Commission’s proposal, simply a return to the *2015 Open Internet Order* framework. CCIA does not support, therefore, relying on the reclassification of BIAS as a means to “enhance the Commission’s authority to ... combat[] illegal robocalls and robotexts.” NPRM ¶ 45. The services over which this bad behavior occurs – “OTT messaging services” (*id.*) – are information services that cannot be regulated under Title II. BIAS rules thus cannot be grafted onto these services in order to catch robocallers and robotexters.

Telecommunications is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information.”<sup>9</sup> Thus, telecommunications is the process by which information (voice or data) is simply carried from

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NPRM ¶ 59.

<sup>8</sup> CCIA agrees that, “[c]onsistent with the *2015 Open Internet Order* and *RIF Order*,” the definition of BIAS should “exclude[] enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, and special access services.” NPRM ¶ 60. CCIA also agrees that 5G networks are “types of services best viewed as enterprise services excluded from the definition of broadband Internet access service[.]” *Id.* ¶ 63.

<sup>9</sup> 47 U.S.C. § 153(50); *see also* 47 U.S.C. § 153(53) (defining “telecommunication service” as “the offering of telecommunications for a fee directly to the public”).

one end user to another.<sup>10</sup> When telecommunications service is offered by a common carrier, Title II requires that the data sent by one end user to another is not unfairly delayed, distorted, or blocked by the companies that own the transmission facilities over which the data travels; such conduct is unjust, unreasonable, and unlawfully discriminatory. Application of Title II ensures that all telecommunications service providers treat the data flowing over their network in a consistent, even-handed, and competitively neutral manner.

The Commission merely asks that BIAS be provided in a reasonable and nondiscriminatory manner. Title II is the correct basis for that request; it authorizes the Commission to require that two-way telecommunications paths to and from the Internet are properly provisioned. These Internet transmission paths are functionally no different from the end user's perspective than paths that carry plain old telephone traffic. They also are functionally no different, from the online entrepreneur's perspective, from networks upon which end users rely to access today's social media websites, online applications, and streaming services. The technology might be new – TCP/IP rather than analog, but the functionality – transmission of content from point A to point B – is the same.

CCIA urges the Commission to again reject the worn-out rhetoric that protecting end users' ability to access the Internet constitutes "regulating the Internet." That facile hyperbole no longer has any credibility. The "Internet", broadly speaking, is composed of interconnected networks and bit streams. It is comprised of bare transmission facilities, sophisticated servers, software, and applications. Further, the re-proposed definition of BIAS identifies it as "the capability to *transmit data*," Draft Rule 8.2(a). Simply stated, BIAS are transmission services that enable access to the Internet, but BIAS is not "the Internet." The reinstated rules will deal with the *transmission services*.

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<sup>10</sup> The content of bit streams is outside the realm of Title II.



They therefore cannot reasonably be characterized as regulations for the entire set of hardware, software, applications, and computers that together create the “Internet”.

The Commission should likewise be undeterred by the relatively recent adoption of the “major questions doctrine” as a purported bar to the action proposed here. This notion was first applied in the context of Open Internet rules in 2017, when then-Judge Kavanaugh referred to a “major rules doctrine” in his dissent from the D.C. Circuit’s refusal to overturn its affirmance of the *2015 Open Internet Order*. *U.S. Telecom v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). This “rule”, he explained, applies to “agency decisions of vast ‘economic and political significance.’” *Id.* (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). A more complete analysis, however, requires consideration of whether the challenged agency action is “unprecedented”, differs significantly from the way that the agency “had always” regulated a particular service, and effects a “fundamental revision” of the agency’s enabling statute. *West Virginia v. EPA*, 142 S. Ct. 2587, 2611 (2022). Here, the issue of whether and how high-speed Internet access service is regulated is not new, nor is the Commission’s proposed action “unprecedented” or different than what it has adopted in the past. The Open Internet issue is more than 20 years old; we are long past the point that the “major questions doctrine” could topple the proposed return to the *2015 Open Internet Order* framework that already has been twice affirmed.

A blatant inconsistency mars the arguments of those who still oppose legal safeguards for an Open Internet: if they want little or no oversight for Internet access connections or network interconnection and refuse to be deemed common carriers, then they must relinquish all the government-bestowed benefits that presently are afforded to common carriers. BIAS providers must, then, forego exemptions from statutes such as the Digital Millennium Copyright Act,<sup>11</sup> the

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A service provider shall not be liable for monetary relief, or, except

Communications Decency Act,<sup>12</sup> and the Telephone Consumer Privacy Act that punishes unwanted faxes and text messages.<sup>13</sup> And they should no longer be eligible for Universal Service Fund money for broadband facilities, made possible by Section 254 of the Act.

Broadband Internet access is an essential element of American commerce, civic engagement, and education. *See* NPRM ¶¶ 17-20. It brings the doctor’s office and the classroom into American

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as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . . .

17 U.S.C. § 512(a). This “transitory communications” exemption applies, however, only where “the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider.” *Id.* § 512(a)(2). If BIAS providers now assert that they do more than merely transmit – that they also must select what is transmitted – then BIAS providers no longer are eligible for this DMCA exemption.

<sup>12</sup> No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(2); *see also id.* § 230(f)(2) (defining “interactive computer services”) . BIAS providers successfully have invoked the “interactive computer services” exemption to avoid liability under the CDA. *Doe v. GTE Corp.*, 347 F.3d 655, 657-58 (7th Cir. 2003). Section 230(c) survived the partial *vacatur* order issued in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>13</sup> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . .

47 U.S.C. § 227(b)(1)(B).

homes. It is as fundamental to our society today as the telephone was to generations past. So much so that Congress has appropriated billions of dollars for broadband deployment in statutes including the Infrastructure, Investment and Jobs Act of 2021 and the American Rescue Plan of 2021. So much so that in 2011 the FCC expanded Universal Service to cover the deployment of broadband Internet access facilities, recognizing that broadband is the future of communications services.<sup>14</sup>

With broadband being thus treated as a public good warranting government-supplied and government-supervised funding, it should be treated as critical infrastructure.<sup>15</sup> Now that the United States has invested so deeply in ensuring the broadest possible reach for high-speed Internet connectivity, the manner in which that connectivity is supplied must be subject to nondiscriminatory protections. Stated differently, common-carriage funding support for broadband must come with core common-carriage obligations fundamental to protecting access to a robust, open, and fair Internet.

The “telecommunications” classification does not mean, however, that the entirety of Title II must be imposed, ceaselessly, on BIAS. Section 10 forbearance is now a well-used tool for ensuring that telecommunications companies are not subject to regulatory requirements that have no reasonable application to their service. NPRM ¶¶ 194, 202-203. Section 10 also ensures that the regulations that do reasonably apply to a particular service are not kept in place past the time of their

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<sup>14</sup> WC Docket Nos. 10-90, *et al.*, *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 ¶¶ 3-8 (rel. Nov. 18, 2011), *aff’d Direct Communc’ns Cedar Valley, LLC v. FCC*, Case No. 11-9900 (10th Cir. May 23, 2014).

<sup>15</sup> President Obama referred to the “systems and assets” comprising the nation’s interconnected data network as “critical infrastructure.” Executive Order No. 13636, *Improving Critical Infrastructure Cybersecurity*, 78 Fed. Reg. 11739 (Feb. 19, 2013); *see also* President’s Council of Advisors on Science and Technology, Report to the President: Immediate Opportunities for Strengthening the Nation’s Cybersecurity at 5, 7 (Nov. 2013), [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_cybersecurity\\_nov-2013](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_cybersecurity_nov-2013).

necessity or efficacy. In this way, Title II is quite an elegant solution for preserving access to an open Internet and many issues are readily resolved.

**B. The Commission Should Not Expand the Set of Services Classified as BIAS.**

The Commission should not expand the definition of BIAS<sup>16</sup> to cover services beyond those identified in the *2015 Open Internet Order*. The extant definition appropriately covers retail service that connects end users to the Internet content and locations of their choice, which is a service for which end users deserve a certain amount of Commission protection and which is appropriately technology-neutral. Services that do not fall within the definition need not be subject to the same degree of oversight.

The NPRM first asks whether BIAS excludes “virtual private network (VPN) services, web hosting services, and/or data storage services[.]” NPRM ¶ 67. The answer is yes, because VPNs do not provide merely “the capability to transmit data to and receive data from” the Internet. NPRM ¶ 59. Like all other enhanced/information services, VPNs are not “telecommunications” but instead *use* telecommunications. VPNs “offer[] ... a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via* telecommunications[.]” 47 U.S.C. § 153(24) (definition of “information service”) (emphasis added). VPN providers do not offer “transmission” but instead rely on transmission provided by others and

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<sup>16</sup> BIAS is

a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

then “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a) (definition of “enhanced service”).

The NPRM also asks whether BIAS now should include “content delivery networks (CDNs) and Internet backbone services, including transit arrangements.” On this point, the *2015 Open Internet Order* stated that:

[BIAS] does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services. The Commission has historically distinguished these services from “mass market” services and, as explained in the *2014 Open Internet NPRM*, they “do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.” We do not disturb that finding here.

*2015 Open Internet Order* ¶ 340. The same restraint is warranted in this phase of Open Internet inquiry.

**C. Section 706 Cannot Serve as the Sole Foundation for Preserving Access to an Open Internet.**

The NPRM asks whether Section 706 should again be considered as a basis of statutory authority for re-adopting the 2015 rules. NPRM ¶ 195. At best it is an additive, and by no means sufficient, basis.

The purpose of Section 706, 47 U.S.C. § 1302, is to “encourage” deployment of broadband telecommunications capacity.<sup>17</sup> CCIA will not belabor the point that the D.C. Circuit twice rejected

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<sup>17</sup> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by

the FCC’s arguments that this largely hortatory instruction authorizes oversight of the manner in which BIAS providers operate their broadband transmission facilities.<sup>18</sup> Section 706 is about fostering infrastructure investment, and the Commission has never been able successfully to translate that benign mandate into the authority required to demand the nondiscriminatory operation of facilities once they are deployed.

The Commission nonetheless seems to suggest that Section 706 is the appropriate source of authority for the rules it seeks to adopt. NPRM ¶¶ 196-199. Section 706(b) requires a finding of insufficient deployment as a necessary predicate for “tak[ing] immediate action to accelerate deployment.”<sup>19</sup> That predicate requires a fact-intensive review of the nation’s broadband facilities,

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utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 1302(a). “Encourage” in Section 706 means that:

... the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

*Id.* § 1302(b).

<sup>18</sup> *Verizon 2014*, 740 F.3d at 649-51 (“Given the Commission’s still-binding decision to classify broadband providers not as providers of ‘telecommunications services’ but instead as providers of ‘information services,’” the Court of Appeals held that “[w]e think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.”); *Comcast*, 600 F.3d at 659 (“Because the Commission has never questioned, let alone overruled, that understanding of Section 706, and because agencies “may not ... depart from a prior policy *sub silentio*,” the Commission remains bound by its earlier conclusion that Section 706 grants no regulatory authority.” (internal citation omitted)).

<sup>19</sup> 47 U.S.C. § 1302(b).

with the attendant analysis of “the disparity between metropolitan areas and rural development.”<sup>20</sup> It would take years for the FCC to satisfy the “inquiry” requirement of Section 706(b), and only upon completion of that task, with a finding of insufficient deployment, could the FCC begin to devise its “immediate action to accelerate deployment.”

Reliance on Section 706 could create an overload on Commission resources, along with tremendous delay and a prolonged regulatory vacuum in which BIAS providers can act to disadvantage end users without penalty. And, as the *Verizon 2014* and *Comcast* decisions taught us, rules based substantially on Section 706 will not survive appeal. CCIA thus urges the Commission to invoke Title II as the bulwark of Congressional authority for reinstating the 2015 rules.

## **II. THE COMMISSION SHOULD REINSTATE THE PROHIBITIONS ON BLOCKING, THROTTLING, PAID PRIORITIZATION, AND UNREASONABLE CONDUCT.**

The Commission should re-adopt the 2015 prohibitions on blocking, throttling, paid prioritization, and unreasonable conduct. NPRM ¶¶ 151-168.<sup>21</sup> BIAS providers must be prohibited from impeding, in any way and to any degree, the transmission of traffic to and from lawful Internet websites, services, and applications that are retrieved or uploaded by their end users. The Transparency Rule, which CCIA agrees should be enhanced in the ways suggested in the NPRM, is helpful but cannot be a replacement or a proxy for rules that aim directly at the manner in which BIAS is provisioned. Talking about high-quality service will not ensure high-quality service; the

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<sup>20</sup> NPRM ¶ 144.

<sup>21</sup> The Commission wishes to prevent a patchwork of open internet protections made of “disparate requirements that vary state-to-state.” NPRM ¶ 3. Thus, as it did in 2015, the Commission should “announce [its] firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme” it adopts. *2015 Open Internet Order* ¶ 433. Preemption of inconsistent state laws will advance the Commission’s overarching goal of uniform, nationwide standards that provide regulatory certainty for all affected stakeholders.

Commission should also actively monitor the adequacy of mass market Internet access connections as BIAS providers actually provision them.

**A. Blocking and Throttling Lawful Internet Content Should Be Deemed a Presumptive Violation of Section 201 Absent an Order from a Tribunal of Competent Jurisdiction.**

The Commission should re-adopt the prohibition on blocking, NPRM ¶¶ 151-53, and throttling, *id.* ¶¶ 154, of lawful Internet content. As owners of the transmission facilities that comprise a good proportion of the path on which end users' desired content must pass, BIAS providers plainly have the ability to block those transmissions and to do so in a targeted, precise manner. With so much at stake for the U.S. economy – particularly in education – an *ex ante* rule making clear that blocking of lawful Internet content will not be tolerated is a necessary protection that does no more than apply Section 201 to high-speed Internet communications.

Even the most vociferous opponent of this proceeding would not advocate that service providers can simply block a transmission of data on the Internet. The Commission's concerns that BIAS providers have both the means and the incentive to impede such transmissions have been borne out in record evidence and were fully credited by the *Verizon* court.<sup>22</sup> The Commission's tentative conclusion that it must adopt a replacement No-Blocking rule therefore is correct.

It bears emphasis that the No-Blocking and No-Throttling rules should protect "lawful content." *E.g.*, NPRM ¶¶ 151, 154. New rules that re-adopt these protections should be no broader

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Furthermore, the Commission established that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not, as the Commission put it, "merely theoretical." In support of its conclusion that broadband providers could and would act to limit Internet openness, the Commission pointed to four prior instances in which they had done just that.

*Verizon 2014*, 740 F.3d at 648 (internal citation omitted).



than their 2015 predecessors and must not become a vehicle for circumventing laws that prohibit certain forms of obscene and dangerous content or shield content protected by intellectual property laws. Express and consistent references to “lawful content” should be replicated in the forthcoming rules, such that they will not apply in the face of an order issued by a court, agency, or other tribunal of competent jurisdiction requiring the cessation of particular transmissions.

For these reasons, the Commission should re-adopt the prohibition on blocking Internet content absent an order identifying particular content as unlawful and requiring that it be blocked from online dissemination.

**B. Paid Prioritization Should Be Prohibited Under Section 201 as a Form of Unlawful Discrimination.**

The Commission should also re-adopt the prohibition on paid prioritization. NPRM ¶¶ 158-63. Traffic prioritization should be deemed presumptively unlawful under 47 U.S.C. § 201. Prioritization is quite different from tiered pricing: it ensures that certain bit streams are handled faster and with less latency than other bit streams. It means that the BIAS provider is positioned to decide, either for financial consideration garnered apart from subscriber fees or to favor its own applications and content, which bit stream “wins”.

This conduct disadvantages subscribers who, as customers paying the required subscription fee, are situated exactly the same as other paying subscribers. Such conduct is textbook discrimination; it is not the indifferent carriage of “information of the user’s choosing.”<sup>23</sup> BIAS providers must not have the unilateral discretion to prioritize content – or, most importantly, sell the prioritization of content – in an open Internet.

Allowing BIAS providers to convey priority to particular content means that all other content

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<sup>23</sup> 47 U.S.C. § 153(43).

delivery is relatively degraded. Moreover, allowing priority agreements *is itself discrimination*, and not of the type that the Communications Act will tolerate. To decide which data of an end user's choosing will come faster and more intact is to dictate that end user's choice in the first instance. But other end users who happen to seek online content only from providers that signed priority deals will not lose their freedom of choice in this way. The Commission would not permit that result for any other communications service. Accordingly, the proposed reinstatement of an express prohibition on paid prioritization should be adopted.

**C. The Proposed “General Conduct Rule” Prohibiting Unreasonable Interference with and Impedance of End-User BIAS Traffic Is Appropriate.**

The Commission seeks to adopt a rule of general application that prohibits unreasonable interference with end-user BIAS traffic and any conduct that disadvantages an end user's Internet access. NPRM ¶¶ 164-68. Like the rules just discussed above, this “general conduct rule” would reinstate the protection adopted in the *2015 Open Internet Order*.<sup>24</sup>

CCIA supports this proposed rule as a narrow but necessary addition to the blocking, throttling, and paid prioritization rules. It is unreasonable to demand that the Commission predict every type of BIAS provider conduct that could hinder an end user's Internet access; a rule codifying the general protection of BIAS transmissions puts both end users and BIAS providers on notice that unreasonable conduct that interferes with a transmission, even if the conduct does not fall neatly into one of the three identified categories, will not be permitted. This “general conduct rule” is flexible enough to fill an appreciable gap in the protections afforded in the other granular rules but sufficiently precise to give fair notice to BIAS providers of what they may not do.

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<sup>24</sup> The Commission believes that its proposal “mirror[s] that adopted in the *2015 Open Internet Order*, [which] provides sufficient guidance to ISPs for purpose of compliance, a conclusion affirmed by the D.C. Circuit.” NPRM ¶ 167 (citing *U.S. Telecom*, 825 F.3d at 734-39).

To that end, the NPRM seeks comment on whether there are other steps the Commission should take to ensure that BIAS providers understand the types of conduct and practices that might be prohibited by the proposed rules, including, for example, zero rating and sponsored data practices. NPRM ¶ 167.

CCIA is not aware of any specific practices over the past eight years that would warrant a departure from the case-by-case approach adopted in the *2015 Open Internet Order*. CCIA thus strongly supports re-adoption of that approach. That is, zero rating and sponsored data practices will be reviewed on a case-by-case basis that considers the totality of the circumstances.<sup>25</sup> As the Commission correctly noted in 2015, zero-rating arrangements can benefit consumers in a range of ways – most importantly, by helping consumers access data that might otherwise be unavailable to them under their data subscription cap (*e.g.*, data-heavy content) or cause them to exceed their data cap, thus imposing additional costs on their broadband subscription. Zero-rating practices also can help consumers experience the full range of innovative and diverse content available on an open Internet, expanding opportunities for online work, learning, healthcare, and civic and social engagement. For these reasons, CCIA urges the Commission to continue the pro-consumer balanced approach adopted by the Commission in 2015, which provides regulatory certainty and flexibility but maintains case-by-case review as a backstop.

**D. Transparency Requirements Are Useful But Insufficient in Themselves for Ensuring the Reasonable Provisioning of BIAS.**

The Commission has proposed to restore the Transparency Rule, 47 C.F.R. § 8.1, to its

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<sup>25</sup> *2015 Open Internet Order* ¶ 152 (“[W]e will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary.”)

enhanced terms as adopted in the *2015 Open Internet Order*. NPRM ¶ 173. These terms include disclosures about price, network performance, privacy rights, and network practices. *Id.* As it has done with the proposed reinstatement of the rules already discussed herein, CCIA supports this proposed return to the *status quo ante*.

The Commission's Transparency Rule is of course a beneficial additive tool for helping consumers understand the level of service to which they are entitled. The rule also will serve as one standard for reviewing whether a BIAS provider has impaired an end user's Internet access. Absent robust enforcement, however, this enhanced rule would not prevent consumer confusion as to the service to which they are entitled. And obligating BIAS providers only to maintain whatever service commitments they disclose would be of little use in protecting consumers or ensuring a robust Internet.

For these reasons, CCIA finds the Transparency Rule a useful but in itself an insufficient means of preserving access to an open Internet. The clear prohibitions discussed above, applied broadly to BIAS on a technology-neutral basis and with few exemptions, are absolutely necessary as the primary regulatory tools for this purpose.

### **III. THE COMMISSION SHOULD FORBEAR FROM ALL TITLE II REQUIREMENTS AND STANDARDS THAT ARE NOT NECESSARY TO THE COMMISSION'S MANDATE AND HAVE NO REASONABLE APPLICATION TO BIAS.**

CCIA agrees that the Commission, in keeping with the framework adopted in the *2015 Open Internet Order*, should forbear from any Title II provision and related rule that is not required to "enable [it] to fulfill its responsibility under the Act to protect national security and public safety

when executing its other statutory obligations” NPRM ¶ 98.<sup>26</sup> The Commission should also forbear from any rule or statutory provision that on its face does not have reasonable application to BIAS.

In this proceeding, the Commission is acting on its own motion. NPRM ¶¶ 1, 16. As such, it may “conduct [its] forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act [(APA)], without the burden of proof requirements that section 10(c) petitioners face.”<sup>27</sup>

The most obvious provisions that the Commission should forbear from applying are:

- Sections 201 and 202 to the extent that they would authorize adoption of rate regulations for BIAS;
- Sections 215 through 221 in full;
- Sections 224 through 226 in full; and
- Section 228 in full.

Again, this use of forbearance simply re-adopts the decisions in the *2015 Open Internet Order*. NPRM ¶¶ 105-106.

One of the Commission’s stated aims for re-instating Open Internet rules is “to protect consumers’ privacy and data security.” NPRM ¶ 40. The core privacy and data security protections placed within the Commission’s authority are in Section 222, which establishes restrictions as to Customer Proprietary Network Information (“CPNI”). But Section 222 does not map cleanly to BIAS and thus requires clarification of how the Commission intends to apply those privacy protections.

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<sup>26</sup> The Commission should emphasize in the forthcoming order that concerns regarding national security and public safety will accord closely with established statutes and administrative rules as well as the guidance of other expert federal agencies.

<sup>27</sup> NPRM ¶ 101 (quoting *2015 Open Internet Order* ¶ 438).

CPNI is:

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

47 U.S.C. § 222(h)(1).

No one could reasonably dispute that information revealing the “technical configuration” and “quantity” of BIAS, as well as the URLs an end user visits and the lawful content they view, should be protected from disclosure absent court compulsion. There are aspects of BIAS, however, that have no true analog in traditional telephony, such as metadata, or are outside the bounds of what Section 222 governs, such as the actual content an end user views. The Commission should be clear in the extent to which Section 222 will apply to BIAS, choosing only the “information” that is a clear analog to the non-BIAS telecommunications service information that the Commission is charged with protecting.

**IV. THE “REASONABLE NETWORK MANAGEMENT” STANDARD SHOULD ENSURE THAT ONLY WELL-SUPPORTED *NETWORK*, RATHER THAN *COMMERCIAL*, REASONS CAN JUSTIFY EXCEPTIONS TO THE REINSTATED RULES.**

The NPRM proposes to reinstate the “reasonable network management” exception as a business justification or presumption in favor of conduct that otherwise would be unreasonable. NPRM ¶¶ 154-57. CCIA supports this proposal.

Although the definition of BIAS should be technologically neutral, there nonetheless might be rare circumstances in which a particular service cannot reasonably be held to the same standard

or reviewed under the same rubric as other services. Recognizing this fact does not endorse discriminatory treatment of end users, because it is rooted in technical reality. The “reasonable network management” exception thus should be applied only when evidence demonstrates that a temporary impedance of end-user traffic was the product of a demonstrated “glitch”, or was necessary to preserve network integrity, and not a self-serving business decision.

CCIA has never disputed that BIAS operators must be permitted to protect their networks from misuse, congestion, and structural harm.<sup>28</sup> Further, CCIA agrees that BIAS providers should have a means to rebut, or justify, allegations of unlawful traffic manipulation. In brief, BIAS providers should be able to protect and promote legitimate network management practices.

CCIA has cautioned the Commission, however, not to establish a “reasonable network management” standard that would authorize service providers to act as “gatekeepers of contested speech”<sup>29</sup> or could be used as “a subterfuge by which the desired net neutrality protections will be eviscerated.”<sup>30</sup> The “reasonable network management” standard therefore must be tailored carefully, because it will act as a complete defense to any allegations of network malfeasance. It must be fair to *both* BIAS providers *and* end users.

Now, it is inescapably true that “reasonable” network management may vary somewhat from technology to technology and platform to platform. CCIA agrees that the Commission should account for real, quantifiable differences between types and methods of BIAS provisioning.

The key, then, to prescribing a “reasonable network management” standard that is limited but workable is to emphasize the requirement that the conduct serve a “legitimate” purpose. The

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<sup>28</sup> *E.g.*, GN Docket No. 09-191, Comments of CCIA at 10-12 (Jan. 14, 2010).

<sup>29</sup> *Id.* at 22.

<sup>30</sup> *Id.* at 11.

definition of “legitimate” is that which is required to protect BIAS network integrity, in whatever tangible form that network is built. CCIA therefore supports the standard proposed in the NPRM:

*Reasonable network management* means a network management practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.<sup>31</sup>

CCIA asks, however, that the Commission make clear that this “reasonable network management” standard will not allow a BIAS provider to impose its own *commercial preferences or ownership affiliations* with respect to data sources or content in the guise of making network engineering decisions. Anticompetitive leveraging is not “legitimate network management.” Unless this standard is expressly focused on the structural integrity and safety of BIAS provider networks, it will become a bludgeon with which service providers beat down legitimate complaints about unreasonable traffic manipulation.

## CONCLUSION

The Commission should return to the judicially affirmed, Title II-based BIAS rules prohibiting blocking, throttling, paid prioritization, and unreasonable conduct.

Dated: December 14, 2023

Respectfully submitted,

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<sup>31</sup> Draft Rule 8.2(a)(4) (emphasis in original).



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