



January 24, 2024

VIA ECFS

Wireline Competition Bureau
Federal Communications Commission
45 L Street, N.E.
Washington, DC 20554

Re: Ex Parte Letter, WC 23-320, Safeguarding and Securing the Open Internet

To the Wireline Competition Bureau:

The Computer & Communications Industry Association (“CCIA”)¹ submits this letter² pursuant to Rule 1.1206(b)(2), 47 C.F.R. § 1.1206(b)(2), to address a few, discrete issues relevant to the Notice of Proposed Rulemaking (“NPRM”)³ in this docket.

1. This Proceeding Is an Inappropriate Forum to Discuss Network Usages Fees.

Though it hesitates to distract the Commission’s attention from its core mission in this docket – “to return BIAS to its classification as a telecommunications service under Title II of the Act” (NPRM ¶ 16) – CCIA feels compelled to address an issue introduced by the European Telecommunications Network Operators’ Association (“ETNO”) in its attempt to bring to the United States an initiative twice rejected by European regulators: Network Usage Fees.⁴

In 2011, ETNO urged the International Telecommunications Union (“ITU”) to mandate the “Sending Party Network Pays” (“SPNP”) model for Internet traffic. The Body of European Regulators and Electronic Communications (“BEREC”) lodged its vehement disagreement, stating that “ETNO’s proposed end-to-end SPNP approach to data transmission is totally antagonistic to the decentralised efficient routing approach to data transmission of the internet. The connection-oriented nature of end-to-end SPNP, with its focus on charging based on the actual volumes or value of the traffic, would represent a dramatic change from the existing charging framework operating on the internet.”⁵ The ITU declined to adopt SPNP.

In early 2023, the European Commission, spurred by pro-incumbent-telco parties including ETNO, launched a consultation on “the electronic communications sector,” which included exploration of which entities should “fairly contribute” to investing in network facilities that

¹ CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion annually in research and development, and contribute trillions of dollars in productivity to the global economy. For more information, please go to www.ccianet.org.

² CCIA timely submitted [Comments](#) in this docket on December 14, 2023.

³ 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).

⁴ ETNO note on the FCC NPR “Protecting and Promoting the Open Internet” at 6 (Dec. 14, 2023).

⁵ BoR (12) 120 rev.1, “BEREC’s [Comments](#) on the ETNO Proposal for ITU/WCIT or Similar Initiatives Along These Lines” at 3 (Nov. 14, 2012).

support broadband service.⁶ Again BEREC opposed the notion of shifting network investment costs onto third parties, stating that “[a] mandatory financial contribution from [Content and Application Providers] to [Internet Service Providers] may have a number of impacts on competition,” including that “the termination monopoly of the ISPs is reinforced, therefore increasing the bargaining power for ISPs.”⁷ The European Commission allowed its May 24, 2023, decision deadline to lapse without issuing any recommendation or decision.

ETNO now attempts to insert this mandatory-payments issue into the FCC’s effort to reinstate its light-touch, baseline Open Internet rules that will prohibit blocking, throttling, paid prioritization, and unreasonable conduct. Leaving aside the fundamental problem that the Commission lacks authority to adopt ETNO’s proposal,⁸ this proceeding is an inappropriate forum for that discussion.

Though a few commenters have addressed the issue to some degree,⁹ the question of forcing non-telecommunications service providers to remit funds to cover telcos’ network investment is not meaningfully open for public comment¹⁰ here.¹¹ The issue raises complex questions, including the anticompetitive potential of Network Usage Fees domestically, the effect of such fees on the ongoing operation of the Universal Service Fund, and the potential trade implications of imposing Network Usage Fees on U.S. entities to the exclusion of competitors from other nations, particularly China, that would gain significant advantage by virtue of such asymmetric levies. These questions cannot be given, in this proceeding, the thorough examination and consideration that they deserve.

It is telling, however, that European telcos are urging the FCC to adopt Network Usage Fees in the context of this proceeding. ETNO’s request is itself evidentiary support that network

⁶ European Commission, “The future of the electronic communications sector and its infrastructure,” Consultation (Feb. 23, 2023), <https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure>.

⁷ BEREC Response to the European Commission’s Exploratory Consultation, [Annex](#) to Section 4 of the BEREC Response, at 7-8 (May 19, 2023).

⁸ WC Docket No. 21-476, Report on the Future of the Universal Service Fund, FCC 22-67, Report ¶ 111 (Aug. 15, 2022).

⁹ Comments of Public Knowledge at 82-87 (Dec. 14, 2023) (criticizing “[a]ccess fees” as “charges levied (or proposed to be levied) against edge providers, transit networks, and other players in the internet ecosystem simply to access the BIAS provider’s customer base”); *see also* Comments of Free Press at 133-136 (Dec. 14, 2023) (explaining how the 2015 *Open Internet Order* resulted in BIAS providers’ entering into voluntary agreements with content providers and ceasing their demands for “access charges” from those providers).

¹⁰ 5 U.S.C. § 553(b)(3); *see also* *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (“... the notice requirement of the [Administrative Procedure Act] does not simply erect arbitrary hoops through which federal agencies must jump without reason.”) (reversing 2001 order on payphone compensation for failure to provide adequate notice of proposed rule).

¹¹ The NPRM raises the somewhat different point that “[w]e also propose to make clear that the no-blocking rule would prohibit ISPs from charging edge providers a fee to avoid having the edge providers’ content, service, or application blocked from reaching the broadband provider’s end-user customers.” NPRM ¶ 152; *see also id.* ¶ 152 (regarding the no-throttling rule). CCIA supports including this express statement within the rules prohibiting blocking, throttling, and unreasonable conduct. *See* CCIA Comments at 11-12, 13-14.

owners are well aware of their singular access to Internet users and are prepared to leverage that access into financial gain. The Commission should consider ETNO's request only in the context of the further support it lends for the intended reinstatement of the 2015 Open Internet protections.

2. The Commission Should Include Points of Internet Traffic Exchange in the Definition of BIAS.

ETNO's call for usage fees also supports the Commission's tentative decision to include "arrangements for the exchange of Internet traffic" in the definition of BIAS. NPRM ¶ 66. As stated above, demands for usage fees are attempts to leverage monopolistic access to end users; monopolistic access can be closed off as easily as it can be left open. ETNO's Comments seem to presage their intent to use points of interconnection as the fulcrum for extracting payment.¹²

In its Comments (p.2), CCIA supported the Commission's proposal to include traffic exchange in the definition of BIAS: "Any Internet-bound and Internet-based transmissions occurring along the 'call path' of BIAS, including BIAS Internet traffic exchanges, should be included in the set of services protected by the proposed rules."¹³ As the Commission notes, "arrangements for the exchange of Internet traffic by an edge provider or an intermediary with the ISP's network" can and do "provide the 'capability to transmit data to and receive data from all or substantially all internet endpoints ... and enable the operation of the communications service.'" NPRM ¶ 66 (citing 2015 *Open Internet Order* ¶ 194 n.482). Indeed, in 2015, the FCC recognized the ability of BIAS providers to use points of interconnection to negatively affect end users' Internet access. 2015 *Open Internet Order* ¶¶ 199-201.¹⁴

Having reviewed and considered ETNO's suggestion and similar statements from other parties,¹⁵ CCIA reiterates its support for including "Internet peering, traffic exchange" and points of interconnection in the definition of BIAS.

3. The Proposed Exclusion of Non-BIAS Data Services from Open Internet Rules Should Not Be Easily or Broadly Adopted.

In the NPRM, the Commission proposed to continue excluding "non-BIAS data services (formerly 'specialized services') from the scope of [BIAS]." NPRM ¶ 64. CCIA did not quarrel with that proposal, but wishes here to emphasize that this exclusion should not be easily attained or broadly applied. "The focus has been and must remain consumers," CCIA

¹² ETNO Comments at 6-7 (noting that peering and interconnection are outside the reach of open internet protections in Europe and the UK).

¹³ Similarly, Lumen seeks "a limited federal oversight role relating to Internet traffic exchange involving large BIAS providers." Comments of Lumen at 2 (Dec. 14, 2023).

¹⁴ 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), *aff'd*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017).

¹⁵ USTelecom states that "Internet traffic exchange is ... a well-functioning marketplace," but portends that "the Commission's proposal has the potential to distort that marketplace." Comments of USTelecom and Opposition to Petitions for Reconsideration at 94 (Dec. 14, 2023).



Comments at ii, and so the rules should be presumed to apply to high-speed, retail transmission services carrying end user Internet traffic, *id.* at 7-8.

The question of which high-speed Internet access services are BIAS must not be decided by self-labeling,¹⁶ an exercise that invites self-serving sophistry and wordplay.¹⁷ CCIA thus urges the Commission to state that “non-BIAS data services” are those which could not be provisioned via BIAS services as defined in Draft Rule 8.2.

Further, “network slicing” should not be granted a *per se* exemption from the rules.¹⁸ Where a particular service demonstrably fails the core criteria of BIAS – mass market, retail, by wire or radiospectrum, with capability to reach all or substantially all Internet endpoints – then it **might be eligible** for the “non-BIAS data service” exclusion. Because of the import and demonstrable need for the Open Internet protections being considered in this proceeding, they should apply unless it is shown that a particular service would not be the sole means of Internet access for any set of consumers and is not described as, to borrow T-Mobile’s term, “general-purpose broadband.”¹⁹

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CCIA again thanks the Commission for its proposal to return to the minimal, but necessary Open Internet protections adopted in 2015. Please let us know if we may provide further information regarding any of the points raised here or in our initial Comments.

Sincerely,

Stephanie A. Joyce
Chief of Staff and Senior Vice President
Computer & Communications Industry Association

Cc: Ramesh Nagarajan, Chief Legal Advisor to Chairwoman Rosenworcel
Lauren Garry, Legal Advisor to Commissioner Carr
Justin Faulb, Chief of Staff and Legal Advisor to Commissioner Starks for Wireline and National Security
Marco Peraza, Wireline Advisor to Commissioner Simington
Hayley Steffen, Acting Legal Advisor to Commissioner Gomez for Wireline and Space
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¹⁶ Public Knowledge Comments at 67 (“non-BIAS’ service cannot simply be a relabelled form of BIAS”).

¹⁷ Comments of T-Mobile USA, Inc. at 39-40 (Dec. 14, 2023) (decrying “the costly and time-consuming exercise of divining a wireless network operator’s ‘primary’ intent in deploying a specialized service”); ETNO Comments at 3-4 (specialized services are “a ‘compliance grey zone’”).

¹⁸ T-Mobile Comments at 39 (raising question “whether network operators can use techniques like network slicing to support different services on the same network”).

¹⁹ *Id.*