March 14, 2024

Ms. Marlene H. Dortch
Secretary Federal Communications Commission
45 L St. NE
Washington, DC 20554

Re: Safeguarding and Securing the Open Internet, WC Docket No. 23-320

Dear Ms. Dortch:

The Computer & Communications Industry Association ("CCIA") and INCOMPAS support the Commission's tentative conclusion to restore the 2015 Open Internet Order's approach and continue to closely monitor the development of non-BIAS data services, but encourage the Commission to make a number of important clarifications to ensure that the "exception" for non-BIAS data services does not swallow the Open Internet protections, and to provide clear guidance that will foster innovation for the benefit of consumers. CCIA and INCOMPAS support the non-BIAS regulatory framework proposed in the recent *Written Ex Parte* filed by the Open Technology Institute at New America, Public Knowledge, Professor Barbara van Schewick and Professor Scott Jordan.[1] Specifically, consistent with that filing, CCIA and INCOMPAS urge the Commission to clarify the following two issues:

1. How technologies such as network slicing may be used to provide innovative offers **as part of BIAS that are consistent with the Open Internet rules**; and

2. **When the non-BIAS data services exception to the Open Internet rules applies.**

These clarifications would ensure that BIAS providers can use technologies such as network slicing to provide innovative services that benefit consumers – but without harming innovation, competition, and user choice or breaking the virtuous cycle.[2]

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[1] *See* Written Ex Parte of Open Technology Institute at New America, Public Knowledge, Professor Barbara van Schewick and Professor Scott Jordan ("Joint Written Ex Parte") (fil. March 11, 2024), at 4-9.

[2] CCIA and INCOMPAS also agree with the position taken in the Joint Written Ex Parte on the clarification of how the Commission should determine when BIAS providers' facilities-based

Issue 1: The Commission should clarify how technologies such as network slicing may be used to provide innovative offers as part of BIAS consistent with the Open Internet rules.

The Commission should clarify that BIAS providers may provide innovative offers **as part of BIAS** that enable customers to choose different Quality of Service levels for the applications or classes of applications of their choice if all of the following protections are met:

(1) **Application-agnostic:** The different types of service are equally available to all applications and classes of applications (e.g., through open technical standards), and the BIAS provider does not discriminate in the provision of the different types of service on the basis of application or class of application (i.e., consistent with the no throttling rule).

(2) **End user-controlled:** The end user is able to choose whether, when, and for which application(s), to use which type of service, without limitation by the BIAS provider.

(3) **End user-paid:** If the BIAS provider charges for the use of the different types of service at all, the BIAS provider charges only the BIAS subscriber for the use of the different types of service (i.e., consistent with the rule against paid prioritization).

(4) **Protecting and improving the quality of the "best effort" Internet (i.e. the default BIAS service Internet traffic receives under a BIAS plan when end users do not select a different level of service):** The introduction of the additional types of service does not significantly degrade the performance of the default BIAS service available at that time; and the capacity and performance of the default BIAS service continue to improve over time.

Issue 2: The Commission should clarify the framework for non-BIAS data services.

To provide certainty around the offering of non-BIAS data services, consistent with the Open Internet framework and protections, the Commission should:

(1) restore the general 2015 framework for non-BIAS data services;

(2) clarify how it will determine whether non-BIAS data services that use technologies such as network slicing are used inappropriately to circumvent the Open Internet protections;

VoIP and IPTV offerings do not evade the Open Internet protections. *See* Joint Written Ex Parte, at 8-9.

(3) clarify its previous requirement that non-BIAS data services may not harm the open Internet by negatively affecting the capacity for, and the performance of, BIAS; and,

(4) expressly retain oversight over any non-BIAS data services.

First, the FCC should restore the general 2015 framework for non-BIAS data services. Like the 2010 Open Internet Order, the 2015 Open Internet Order generally allowed BIAS providers to offer such other services, but only if the service:

1. is not a broadband internet access service as defined in the first sentence of the BIAS definition ("regular BIAS") or a functional equivalent of regular BIAS;

2. does not have the purpose or effect of **evading the Open Internet protections**; and

3. does not harm the open Internet by negatively affecting the capacity available for, and the performance of, BIAS, either dynamically or over time.

Second, the FCC then needs to clarify how it will determine whether non-BIAS data services that use technologies such as network slicing evade the Open Internet protections. The FCC should clarify that providing a different type of service to support an application or class of applications **does not qualify as a <u>non-BIAS data service</u> (or as part of a non-BIAS data service) <u>unless</u>**:

1. the particular type of application requires a specific level of quality of service, which is **objectively necessary** for the specific type of application,

2. that **cannot be met over a well-provisioned broadband Internet access service** in compliance with the Open Internet protections (including via the type of application-agnostic, user-controlled, and user-paid Quality of Service described above in Issue I).

To ensure the FCC and other stakeholders can assess whether these requirements are met, the BIAS provider must be able to transparently disclose, on an ex post basis, upon request of the Commission, objective, technical evidence that clearly demonstrates:

1. the **specific level of Quality of Service objectively required** by the specific type of application (e.g., video conferencing); and

2. **objective technical evidence** showing that these Quality of Service requirements cannot be met by a well-provisioned BIAS service.

If subscribers of other broadband Internet access services use the particular type of application over their broadband Internet access service, that is dispositive evidence that the Quality of Service requirements of this type of application can be met over a broadband Internet access service.

Third, the FCC should clarify its previous requirement that non-BIAS data services may not harm the open Internet by negatively affecting the capacity for, and the performance of, BIAS. In light of technical developments since 2015, the FCC should clarify its corresponding guidance as follows. Any non-BIAS data service:

1. **may only minimally affect the performance of BIAS**, including during times of congestion; and

2. **may not constrict or slow the growth of the capacity** available for, and the performance of, BIAS over time.

Lastly, the FCC should expressly retain oversight over any non-BIAS data services. The FCC should expressly retain oversight over any non-BIAS data services: (1) to assess any new non-BIAS data services against the protections above and to enforce these protections, if necessary; (2) to ensure that any non-BIAS data services do not undermine the open Internet in other ways; and (3) to monitor any concerns regarding how non-BIAS data services might be offered (e.g., a BIAS provider offering non-BIAS data services only to its own service or only to select third-party services in a discriminatory or anti-competitive manner).

The Commission should reinstate its prior guidance from the 2010 and 2015 Open Internet Orders:

1. "We will closely monitor the development and use of non-BIAS data services and have authority to intervene if these services are utilized in a manner that harms the open Internet."[3]

2. "If the Commission determines that [non-BIAS data] service offerings are undermining investment, innovation, competition, and end-user benefits, we will … take appropriate action."[4]

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[3] 2015 Open Internet Order, at para. 213.

[4] *Id.* at para. 210.

3. The Commission will "monitor the potential for anticompetitive or otherwise harmful effects from [permissible] specialized services, including from any arrangements a broadband provider may seek to enter into with third parties to offer such services."[5]

4. The Commission does not take any position in this proceeding on how to classify, under the Communications Act, any permissible non-BIAS data services and the IP-based services that support them.[6]

In sum, by restoring the 2015 approach to non-BIAS data services as proposed in the NPRM, with the clarifications suggested above, the FCC can ensure that it strikes the right balance in providing greater certainty around the use of innovative new technologies like network slicing while protecting the fundamental net neutrality principles that have allowed the open Internet to evolve and flourish for decades.

Respectfully submitted,

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[5] 2010 Open Internet Order, at para. 114.

[6] *See, e.g.*, 2010 Open Internet Order, at para. 113, n.345.

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