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REPLY COMMENTS OF  
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Table of Contents

Executive Summary ........................................................................................................................................3

I. Public Safety ..................................................................................................................................................6
   A. BIAS is essential to public safety .....................................................................................................................6
   B. Title II Telecommunications Classification of BIAS is critical to the FCC’s fundamental mission to promote safety .........................................................................................................................7

II. The Commission’s Rules Should Set a National Floor, Not a Ceiling, and Confirm States’ Roles in Oversight of Businesses Providing BIAS .................................................................................................................9

III. Transparency ................................................................................................................................................11

IV. Zero Rating: There is Strong Support for Presumptively Prohibiting Two Inherently Harmful Practices, as California has Done ........................................................................................................................................16

V. Non-BIAS Data Services: The Record Supports a Requirement that Protects the Performance of BIAS and Does Not Create Back-Door Paid Prioritization ..................................................................................21

VI. Conclusion ....................................................................................................................................................27
Executive Summary

The Open Technology Institute at New America (“OTI”) welcomes the opportunity to provide additional reply comments on the Federal Communications Commission’s (the “Commission” or “FCC”) Notice of Proposed Rulemaking “In the Matter of Safeguarding and Securing the Open Internet,” in which the Commission proposes to re-establish its authority over broadband internet access service (“BIAS”) by classifying it as a telecommunications service under Title II of the Communications Act of 1934, as amended.¹

OTI’s reply comments are informed by its mission to ensure every community has equitable access to digital technology and its benefits, and promoting universal access to communications technologies that are both open and secure. OTI has engaged with the Commission and policymakers on this topic for over a decade, in several FCC dockets and in litigation, and brings that perspective to this proceeding.

Public Safety: With Americans increasingly relying on internet-based services and communications, reliable access to mass-market retail BIAS is critical to providing public safety services and communication for both government agencies and the public. Government agencies, first responders, emergency services, and public health officials use the web to monitor ongoing community issues and crises, disseminate information to the public via websites and social media channels, and coordinate emergency and disaster responses. As such, OTI supports the Commission’s proposal to reclassify BIAS as a Title II telecommunications service and reinstate conduct standards and rules originally established in the 2015 Open Internet Order. Doing so

would prevent ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements in order to fulfill the Commission’s fundamental mission to protect safety.²

**Preemption:** OTI urges the Commission to establish the proposed rules as a floor, rather than a ceiling, and only preempt state and local laws that would provide less protection for consumers than the Commission’s rules. Further, the Commission should empower states to build on the Commission’s protections and address additional harms, as California did in SB 822, and to enforce the Commission’s rules through the states’ own procedures, as the FCC already does for cramming/slamming complaints. The Commission should also confirm that reclassification does not limit the application of general consumer protection laws by either the states or other federal agencies. Finally, to the extent the Commission believes it necessary to reserve the authority to preempt conflicting state and local laws, it should exercise that authority on a case-by-case basis and only on a showing of clear evidence in support of preemption.

**Transparency:** OTI’s recommendations to the Commission to restore the more comprehensive 2015 version of the transparency rule, disclosure requirements of the 2015 Open Internet Order, and the accompanying 2016 Advisory Guidances, and enhancing broadband labels by requiring information regarding real-world cost and relevant performance characteristics like median download speeds and speed percentiles, is echoed in comments on the record. Research demonstrates that consumers want and benefit from increased transparency about their broadband service. Reinstating these transparency requirements can ensure that consumers have access to the most relevant facts about their service, can confirm that they are getting billed for what they were promised, and are empowered to challenge their provider if

their billing statements and experience of service don’t match what was advertised. Despite arguments from some companies and trade associations that these transparency requirements would impose excessive cost burdens, there is no additional incremental cost as broadband providers already measure these factors for other FCC programs.

**Zero-Rating:** OTI strongly supports restoring a general conduct standard that tracks the language of the *2015 Order* and urges the Commission to avoid future uncertainty by drawing clear lines that identify two discriminatory zero-rating practices that should be presumptively prohibited: (1) zero rating in exchange for commercial consideration or to advantage the ISP’s own affiliated content, application, service, or device; and (2) zero-rating some Internet content, applications or services in a category, but not the entire category. This aligns with both the California and EU open internet rules. There is strong support among consumer advocates for a clear *ex ante* rule or language clarifying that these two zero-rating practices are presumptively harmful to the open internet. Among other harms, a provider’s ability to monetize zero rating creates strong incentives for needlessly low data caps. If the Commission does not make these practices a *per se* violation, it should clarify that these two discriminatory zero-rating practices are a presumptive violation of the general conduct standard and allow the BIAS provider to seek a waiver under the same process that applies to paid prioritization.

**Non-BIAS Data Services:** OTI supported maintaining the framework adopted in the *2015 Order*, which defined non-BIAS services in relation to three general characteristics and also determined to continue monitoring the evolution of such services. OTI urges the Commission to explicitly require, as California does, that a non-BIAS service must not “negatively affect the performance of broadband Internet access service.” While the *2015 Order* struck a reasonable balance, the Commission should join California and the EU in explicitly
grounding the regulatory treatment of what providers claim are non-BIAS data services fundamentally on whether a data service sharing last-mile infrastructure with a BIAS offering could degrade either the quality or availability of service for other consumers. The Commission should also consider if the data service or optimization is “objectively necessary” to enable or ensure a specific functionality or level of quality that is not possible over the open, best-efforts Internet, as EU law requires. Finally, the Commission should reject suggestions that what mobile carriers decide to label or structure as a mobile 5G “network slice” is presumably a non-BIAS service and exempt from open internet protections. Mobile network “slices” that prioritize traffic that shares limited capacity with the carrier’s BIAS network should not be considered a non-BIAS service.

I. Public Safety

A. BIAS is essential to public safety

The internet plays a critical role in supporting public safety. Government agencies, first responders, emergency services, and public health officials use the web to monitor ongoing community issues and crises, disseminate information to the public via websites and social media channels, and coordinate emergency and disaster responses. Reliable access to internet-based services and communication is an integral component of public safety services and responses for both government agencies and the public. In their comments, the County of Santa Clara and the Santa Clara County Central Fire Protection District detail the vital role that mass-market retail BIAS plays in enabling local governments to effectively communicate important and timely information to the public, coordinate fire and emergency medical responses, and adequately
prepare for and respond to large-scale emergencies. The COVID-19 pandemic accelerated the reliance on BIAS as a primary form of communication during public safety events and exemplified the importance of reliable broadband access, with 90% of U.S. adults stating high-speed internet was essential or important during the pandemic.

B. Title II Telecommunications Classification of BIAS is critical to the FCC’s fundamental mission to promote safety

Given the importance of BIAS to public safety, OTI supports the Commission’s proposal to reclassify BIAS as a telecommunications service under Title II of the Communications Act of 1934, as amended, in order for the Commission to fulfill its fundamental mission to “promote[s] safety of life and property through the use of wire and radio communications” by taking any enforcement and regulation action needed to address national security and public safety. As such, OTI encourages the Commission to adopt the rules described in the 2023 NPRM Safeguarding and Securing the Open Internet to reinstate the general conduct standard for ISPs originally established in the 2015 Open Internet Order, as well as conduct rules that “prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements.” As noted in OTI’s and Common Cause’s comments in response to the Commission’s Public Notice

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6 2023 Safeguarding and Securing NPRM at ¶101.; 2015 Open Internet Order.

seeking comment on the issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit (“the Court”) in Mozilla Corp. v. FCC, the repeal of these rules through the 2017 Restoring Internet Freedom Order jeopardized public safety by allowing harmful practices that could impede emergency response and critical information sharing. These concerns were warranted. In 2018, Verizon throttled California firefighters’ internet access during the largest wildfire in the state’s history, disrupting their ability to coordinate life-saving action. Comments filed by Free Press detail more evidence that net neutrality rules are necessary to prevent the blocking and degradation of services critical to public safety.

In the absence of general conduct standards and rules against blocking, throttling, or prioritization, ISP behavior did directly impact public safety efforts. The full extent of these impacts, particularly during the COVID-19 pandemic, which accelerated public safety activity and communications over mass-market retail BIAS, is unknown. As noted in comments filed by the County of Santa Clara, Santa Clara County Central Fire Protection District, and the City of Los Angeles in 2020 “it is difficult, if not impossible, for governments to identify harms caused


by violations of net neutrality principles.”\textsuperscript{12} As mentioned in comments filed by Public Knowledge\textsuperscript{13} and Free Press,\textsuperscript{14} without Title II authority the Commission is not able to monitor ISP performance, preventing the Commission from fully assessing resiliency and reliability of networks and analyzing outages that may impact public safety responses and public access to critical information during emergencies.

As consumers increasingly rely on broadband services and communications and the potential for climate- and public health-related disasters worsens,\textsuperscript{15} it is imperative that the Commission establish a solid basis to regulate BIAS services and take enforcement action in the interest of public safety through Title II classification and the creation of conduct standards.

\textbf{II. The Commission’s Rules Should Set a National Floor, Not a Ceiling, and Confirm States’ Roles in Oversight of Businesses Providing BIAS}

The Commission seeks comment on how best to exercise its preemption authority to establish a nationwide set of rules governing BIAS.\textsuperscript{16} OTI agrees with other commenters that the Commission’s rules should set a national floor guaranteeing all Americans a baseline set of

\begin{footnotesize}
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\item 2023 Safeguarding and Securing NPRM at ¶¶ 24, 94-97.
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protections against their BIAS providers, not a ceiling.\textsuperscript{17} In addition, the Commission should give states the latitude to jointly enforce the national rules, and to address new harms as they arise.

A consistent national framework that protects all Americans is necessary to fulfill the FCC’s objectives to ensure access to a fast, open, and fair internet. At the same time, preemptioning state and local laws that build on and enhance the national framework would undermine the FCC’s objectives. For example, states have demonstrated the ability to examine and address problematic BIAS provider practices that advance the FCC’s objectives, such as California’s SB 822, which addresses zero-rating and interconnection related harms.\textsuperscript{18-19}


Similarly, making it clear that States can both a) continue to enforce their existing general consumer protection laws, and b) enforce the Commission’s rules, would advance the Commission’s objectives by ensuring that rules are adequately enforced and that BIAS providers are subject to the same consumer protection standards as other businesses. Title II classification does not magically exempt BIAS providers from prohibitions on unfair and deceptive business practices, and the Commission should reiterate this.\textsuperscript{20}

As commenters have noted, there is precedent for the FCC sharing enforcement duties and oversight authority with states. For example, the FCC permits states to handle consumer complaints related to “cramming” and “slamming” and apply the FCC’s rules.\textsuperscript{21}

Finally, to the extent that any given state or local law conflicts with the FCC’s rules (other than those that extend or build on the FCC’s rules, which should be permitted, or those that offer weaker protections than the Commission’s rules, which should be preempted), the Commission should evaluate those laws on a case by case basis, and only exercise its preemption authority where preemption is clearly supported by evidence.

\textbf{III. Transparency}

The record shows strong support of OTI’s recommendations to the Commission to restore the more comprehensive 2015 version of the transparency rule, disclosure requirements of the 2015 Open Internet Order, and the accompanying 2016 Advisory Guidances, specifically those

\textsuperscript{20} FTC \textit{v AT&T Mobility LLC}, 883 F.3d 848 (9th Cir. 2018), holding that the FTC could pursue Section 5 unfair and deceptive business practice claims against a wireless phone carrier for deceptively marketing “unlimited” plans to consumers, despite the carrier’s classification by the FCC as a common carrier under Title II, since the FTC Act’s common-carrier exemption is activity-based, not status-based. States should similarly still be able to pursue consumer protection claims against BIAS providers if they are reclassified as common carriers under Title II.

\textsuperscript{21} Comments of California Public Utility Commission at 8.
regarding expected and actual network performance, and enhancing broadband labels and their value to consumers by requiring information regarding real-world cost and relevant performance characteristics like median download speeds and speed percentiles.

Communications Workers of America, “endorses the full reinstatement of the 2015 Open Internet Order’s requirement to directly notify end users “if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the end user’s use of the service.” 22 These comments support consumers’ right to know about network management practices like throttling, which significantly impact a consumer’s experience of BIAS. Even in the case of nondiscriminatory network management practices, consumers should know ahead of time when their service might change from what has been advertised, and for what reasons.

Reinstating these transparency requirements are also important because they ensure that consumers have access to the most relevant facts about their service. Scott Jordan, Professor of Computer Science at the University of California, Irvine and former FCC Chief Technologist, notes that research has existed for over 20 years that user-perceived performance of real-time applications depends on speed, latency, and packet loss, disclosures of which were required by the 2015 Open Internet Order. 23 He specifies that the performance of applications such as real-time voice and video conferencing (e.g., Zoom, Skype, and Facetime) degrades rapidly depending on packet loss and latency, and that companies themselves highlight the importance of these aspects of service, making specific recommendations around latency and packet loss for


best use of their applications.24 “For example, Zoom recommends a latency of 150 ms or less and a packet loss of 2% or less, and the Zoom application reports these metrics to users.”25 Under current transparency requirements from the Restoring Internet Freedom Order, however, BIAS providers’ disclosures about packet loss or the suitability of their broadband Internet access services for real-time applications are “woeful.”26 For instance, Jordan notes that AT&T merely discloses that “[y]our service capability speed may not be suitable for some applications, particularly those involving real-time or near real-time, high-bandwidth uses such as streaming 4K video or video conferencing,” and that Comcast and Verizon (for its fiber and DSL services) make no mention at all about their service suitability for real-time applications. T-Mobile discloses that real-time application performance on their networks depends on the speed and latency of the subscriber's connection, and their data plan, but does not disclose which data plans are suitable for real-time applications nor what speed and latency would make them suitable.27 The requirement of disclosure of suitability for real-time applications has therefore been incomplete or entirely missing under current rules.

Several companies and trade associations including Lumen, USTelecom, WISPA, and WTA argue that changing transparency requirements would impose excessive cost burdens on providers, and that the Commission must provide evidence that additional disclosures would benefit consumers.28 However, Jordan points out that there is no additional incremental cost to

24 Ibid at 10.
26 Ibid at 11.
27 Ibid at 11.
28 Comments of Lumen, WC Docket No. 23-320 (December 14, 2023) at 33, available at https://www.fcc.gov/ecfs/document/121458730192/1.; Comments of USTelecom, WC Docket No. 23-
providers for reporting these factors.\textsuperscript{29} This is because providers already measure these factors for another FCC program, namely Measuring Broadband America. USTelecom argues in their comments that it should be sufficient for ISPs participating in the Measuring Broadband America program to report the speed and latency, and no other technical features because it would be “burdensome” for ISPs to report and “the benefit to consumers, if any, is negligible.”\textsuperscript{30} Jordan counters that the Measuring Broadband America program measures packet loss, or companies can obtain this data from commercial network performance measurement companies like Ookla. “Indeed, the Broadband Label Order also states that broadband service providers may use consumer speed test data or other reliable data from third-party sources. The providers of the two most popular consumer speed tests – Ookla Speedtest and Mlab – both measure packet loss.”\textsuperscript{31} What is negligible, therefore, is the supposed burden on providers to provide metrics including latency and packet loss. For customers, on the other hand, such information is crucial to their informed use of common real-time applications.

Most importantly, there is research to show that consumers want and benefit from increased transparency about their service. Research by academics at Carnegie Mellon University’s Center for Executive Education in Technology Policy, demonstrated in comments submitted by Jon Peha, former FCC Chief Technologist and a professor at Carnegie Mellon,


show that from a survey of 2,500 consumers, “consumers want to know detailed measures of how good BIAS services are, including some measures that are not currently required. They want to know the upstream speed, downstream speed, latency and packet loss of a BIAS. They want to know performance both when it is normal, and when performance is poor (e.g. perhaps at the 10th percentile, or the 20th).” Peha’s recommendation based on this research concurs with OTI’s: the FCC should require that all of this information be reported, including measures like (i) reliability (e.g. minutes of outage per year), (ii) packet loss, (iii) 20th percentile (or some other low percentile specified by the FCC) of upstream speed, and (iv) 20th percentile (or other low percentile) of downstream speed, none of which is currently on the mandatory broadband nutrition label. 32 Additionally—and in agreement with Jordan’s comments—Peha writes that the FCC should also require BIAS providers to clearly identify the geographic region for which all performance measures are applicable. 33

Companies’ arguments that there is no evidence consumers want increased transparency around qualities of their service, as well as their arguments that the cost of providing such information would be burdensome, are unfounded. It is clear that providers can easily access this information and in fact already have access to this information in their process of fulfilling disclosures required by other FCC programs. Research shows that consumers need and want this information.

OTI also reiterates that transparency requirements should include guidance around when information is made available to consumers, specifically that information should be accessible


not just at point of sale, but also on monthly bills after purchases. The point of increased transparency around BIAS service conditions is to help people stay informed and make choices around service that best fit their needs. Since BIAS providers are already required to publish broadband nutrition labels describing their service, there is no additional cost to providers to include these labels in their bills, while doing so can significantly benefit consumers. Including the label in every monthly bill would give consumers a regular opportunity to confirm that they are getting billed for what they were promised and to challenge their provider if their billing statements and experience of service do not match what was advertised.

IV. Zero Rating: There is Strong Support for Presumptively Prohibiting Two Inherently Harmful Practices, as California has Done

In our initial comments, OTI strongly supported restoring a general conduct standard that tracks the language of the 2015 Open Internet Order. OTI agrees that bright-line rules related to network management are necessary but not sufficient to preserve an open internet. Further, OTI urged the Commission to avoid future uncertainty by drawing clear lines that identify two zero-rating practices that should be presumptively prohibited, as California and the European Union have done. The first is zero rating in exchange for commercial consideration or to advantage the ISP’s own affiliated content, application, service, or device. The second practice is zero-rating some Internet content, applications, or services in a category, but not the entire category. These two discriminatory practices have the same harmful impact as paid prioritization and throttling, respectively. We recommended that even if the Commission does not make these practices a per se violation, it should clarify that these two discriminatory zero-rating practices

are a presumptive violation of the general conduct standard while allowing BIAS providers to seeking a “waiver” using the same process and factors the Commission proposes for waivers from the presumptive ban on paid prioritization.

There is strong support among consumer advocates for a clear ex ante rule or language clarifying that these two zero rating practices are presumptively harmful to the open internet. We agree with the Electronic Frontier Foundation (EFF) and with Public Knowledge that the Commission should enact a bright-line rule against harmful zero-rating practices.\textsuperscript{35} EFF is correct in observing that “blocking, throttling, paid prioritization, and zero rating remain key threats to a free and open internet.”\textsuperscript{36} We further agree with Public Knowledge that “while the Commission’s caution in avoiding bright-line rules may have been warranted in 2015 based on the record as it then existed, applying the Commission’s own [General Conduct rule] factors to zero-rating as it is understood today would appear to violate them at the outset. This warrants the imposition of bright-line rules.”\textsuperscript{37}

For example, almost immediately after the 2015 Order left zero rating to benefit affiliated content, applications or services unresolved, AT&T acquired HBO and began zero-rating its own HBO content, but not other video streaming services. Although the Wireless Bureau concluded

\textsuperscript{35} Comments of Electronic Frontier Foundation, WC Docket No.23-320 (December 14, 2023), at 15 (“[w]e urge the commission to (1) enact a bright-line rule against harmful zero-rating”) available at https://www.fcc.gov/ecfs/document/1215074196426/1. ; Comments of Public Knowledge, WC Docket No.23-320 (December 14, 2023), at 76. Accord Comments of the New York State School Boards Association, WC Docket No.23-320 (December 6, 2023), at 2 (“[g]enerally, zero rating can act as a form of paid or affiliated prioritization, where providers choose content or websites that align with their business or ideological interests”) available at https://www.fcc.gov/ecfs/document/12062599925566/1.; Comments of Jon Peha, WC Docket No.23-320 (December 13, 2023), at 9 (“any zero-rating practice that discriminates based on content, application, service provider or device [should be] prohibited”), available at https://www.fcc.gov/ecfs/document/12141463300725/1.

\textsuperscript{36} Comments of Electronic Frontier Foundation, supra, at 15.

\textsuperscript{37} Comments of Public Knowledge, supra, at 76.
that this clearly violated the General Conduct Rule, shortly thereafter the new Chairman withdrew the report, even though there was no change in the Order or the rule for nearly another year.\textsuperscript{38} As a result, there is clearly uncertainty about the most basic application of a general conduct standard to discriminatory and self-interested zero rating practices.

We further agree with EFF, Public Knowledge, and others that permitting discriminatory forms of zero rating creates an enormous and counterproductive incentive for mobile BI\$AS providers to impose data caps and to keep them low.\textsuperscript{39} Perversely, needlessly low data caps create bandwidth scarcity that can be auctioned off to content or application providers seeking a competitive advantage, or to favor an affiliate. Public Knowledge points to a study in Europe supporting the finding that consumers ultimately pay more when “zero-rating (particularly versions that charge edge providers for inclusion) encourages providers to keep data caps low, as a means of monetizing bandwidth scarcity.”\textsuperscript{40} As EFF similarly asserted: “Zero rating practices incentivize ISPs to make the favored content more attractive by adopting artificially low caps for other content, thereby raising users’ overall costs.”\textsuperscript{41} Put differently, as former FCC Chief Technologist Jon Peha observed, discriminatory zero rating “is the imposition of selective data caps, creating a paid prioritization to those it favors because of payments or affiliation.”\textsuperscript{42}

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\textsuperscript{38} FCC Wireless Telecommunications Bureau, \textit{Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero-Rated Content and Services}, (Jan. 11, 2017) (retracted), at 10 (“\textit{WTB Zero Rating Report}”). The report was sent to members of Congress who had written requesting prospective guidance on the issue, but was vacated by the new Chairman shortly after its release.

\textsuperscript{39} Accord Comments of Public Knowledge, \textit{supra}, at 75; Comments of EFF, \textit{supra}, at 15; Comments of Jon Peha, \textit{supra}, at 9.

\textsuperscript{40} Comments of Public Knowledge, \textit{supra}, at 75.

\textsuperscript{41} Comments of EFF, \textit{supra}, at 15.

\textsuperscript{42} Comments of Jon Peha, \textit{supra}, at 9.
A bright-line rule or even a clear statement in the Order that the two discriminatory zero rating practices barred under the California rules are presumptive violations would also address the criticism of mobile BIAS providers that a general conduct standard that tracks the language of the 2015 Open Internet Order “would create uncertainty and harm innovation and investment.” In this respect, we agree with T-Mobile’s argument, concerning the definition of reasonable network management, that “the Commission should eliminate hairsplitting distinctions of intent in favor of more definitive guidance about prohibited practices or outcomes.” We agree with the Chamber of Commerce that certain zero rating practices can benefit consumers. The Commission’s challenge is to minimize uncertainty and maximize the long-term consumer benefits of an open internet by preemptively carving out zero rating practices that are inherently discriminatory or anti-competitive.

A virtue of the California rule on zero rating is that while it permits non-discriminatory practices, it offers clear ex ante guidance that zero rating in exchange for commercial consideration or to advantage the ISP’s own affiliated content, application, service, or device is prohibited, as is the practice of zero-rating some Internet content, applications, or services in a category, but not the entire category. By providing this clarity, the Commission can allow and encourage BIAS providers to innovate and differentiate around zero rating practices that both benefit consumers and avoid anti-competitive harms.


Finally, we believe the Commission should also be clear in rejecting the claim by CTIA and Verizon that prohibiting any zero rating practice is the equivalent of rate regulation. This is a rather fantastical claim considering that the Commission’s three bright-line rules—both in 2015 and as proposed in this restoration proceeding—serve the explicit purpose of prohibiting a two-sided market for broadband internet access. As noted above, the view of consumer advocates—and of the European Union, as we explained in our comments—is that while discriminatory zero rating may be a business practice (and not network management in a technical sense), it is the functional equivalent of paid prioritization. And like the rule against paid prioritization, a rule prohibiting discriminatory zero rating would not in any way regulate the price that BIAS providers choose to charge for their service.

Although CTIA does not actually explain why limits on zero rating or the sale of sponsored data plans to edge providers is equivalent to rate regulation—and although any such rule would not regulate the prices that BIAS providers charge end users—the argument apparently is based on the notion that it impacts the value of the product. However, almost any business regulation—including the three bright-line rules adopted in the 2015 Order—impacts the cost and/or value of the ultimate product. It may be true that if an ISP has the choice to implement discriminatory zero rating, some consumers could get more for their money by selecting the content, apps, or services the ISP is steering them toward. But that same argument would be equally true for the rule against paid prioritization: many consumers could get an optimized version of certain content, apps, or services by selecting the ones the ISP chooses to prioritize, typically for payment or to favor an affiliate. In both cases, that benefit is outweighed

46 See Comments of CTIA, supra, at 99 (“the plan to restrict alternative rate structure arrangements like zero-rating and sponsored data illustrates the Commission’s willingness to regulate rates”); Comments of Verizon, supra, at 7.
by anti-competitive harms, by squelching innovation and smaller edge providers, and by undermining the long-term benefits of an open and non-discriminatory internet.

V. Non-BIAS Data Services: The Record Supports a Requirement that Protects the Performance of BIAS and Does Not Create Back-Door Paid Prioritization

In our initial comments, OTI supported maintaining the framework adopted in the 2015 Order, which defined non-BIAS services in relation to three general characteristics and also determined to continue monitoring the evolution of such services. We particularly support requiring, as the 2015 Order did, that non-BIAS services must be “a specific ‘application level’ service . . . and . . . use some form of network management to isolate the capacity used by these services from that used by the broadband internet access service.”47 We also proposed that the Commission go further in one critical respect: the new rules should explicitly adopt the requirement codified by the state of California and by the European Union in their respective open internet laws. Although it is arguably implicit in the FCC’s 2015 Order, we urge the Commission to explicitly require, as California does, that a non-BIAS service must not “negatively affect the performance of broadband Internet access service.”48 While the 2015 Order struck a reasonable balance in defining criteria to distinguish non-BIAS data services, the criteria adopted will fall short if the data service is sharing last-mile infrastructure with a BIAS offering and is degrading either the quality or availability of service for other consumers.

OTI urges the Commission to join California and the EU in explicitly grounding the regulatory treatment of what providers claim are non-BIAS data services on the impact to other providers.

47 Id. at ¶ 64, citing 2015 Open Internet Order, 30 FCC Rcd at 5697, ¶ 209.

BIAS end users. Unless the Commission adds this specific protection for the capacity and performance of the general BIAS on shared infrastructure, we fear that the Commission’s exception for non-BIAS data services will become a giant loophole that enables widespread paid prioritization on mobile networks. Whether or not a data service, or an optimized feature on a BIAS network (e.g., a premium gaming subscription), is subject to Title II open internet protections should not become primarily a definitional game.

In that respect, we agree completely with Public Knowledge that the Commission “adopt a framework that ensures that only genuine non-BIAS services are so categorized. ISPs must not be able to bypass the Open Internet rules with word games, by simply labeling online services or applications they are favoring as . . . ‘specialized services,’ or as ‘managed services,’ or anything else.”

OTI agrees that the three defining characteristics adopted in the 2015 Open Internet Order must remain foundational and that the Commission should retain them.

In addition, OTI proposed, as did Public Knowledge, that an additional characteristic should be whether the data service or optimization is “objectively necessary” to enable or ensure a specific functionality or level of quality that is not possible over the open, best-efforts Internet. This would align with Europe, where BEREC has clarified that Article 3(5) of the EU’s Open Internet Regulation requires that one of the three defining characteristics of a non-BIAS data

49 Comments of Public Knowledge, supra, at 69. Public Knowledge proposes a few other relevant considerations, including whether the service is “subject to an alternate regulatory regime,” as cable TV has long been, and whether a consumer can subscribe separately to the non-BIAS service, or is the service actually just special treatment for selected traffic over the same BIAS network (e.g., optimized video conferencing or phone calling). Id. at 70.

50 NPRM at ¶ 64. As the NPRM notes, the 2015 Order defined defined three characteristics of what it called “specialized,” non-BIAS services, “explaining that they (1) are not used to reach large parts of the Internet; (2) are not a generic platform, but rather a specific “application level” service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband Internet access service.” Id., citing 2015 Open Internet Order, 30 FCC Rcd at 5697, ¶ 209.
service is that “the optimisation is objectively necessary in order to meet requirements for a specific level of quality.” In addition to this requirement, the EU law imposes the general condition, also adopted by California, that the specialized service is “not . . . to the detriment of the availability or general quality of internet access services” for any other end users.\(^{52}\)

California’s law likewise explicitly states that it “shall be unlawful for a fixed [or mobile] Internet service provider to offer or provide services other than broadband Internet access service . . . over the same last-mile connection . . . if those services negatively affect the performance of broadband Internet access service.”\(^{53}\) The Commission should have no problem adopting this additional criterion, particularly since we are not aware that any commenter has asserted on the record that the provider of a non-BIAS service should be able to disrupt or congest its general BIAS network unless, in certain special cases (e.g., a real-time online gaming feature) the consumer is in control and makes that choice. Accordingly, the Commission should clarify that offering prioritization or special treatment to selected content, services or applications—such as online gaming, online telephony, or online video that can function on the general BIAS—is a circumvention of open internet protections unless the offering meets specific requirements that ensure it cannot negatively impact the capacity or performance of consumers’ BIAS experience.

Although the factors adopted in the 2015 Order—and others supported by OTI and Public Knowledge—are sufficient, we encourage the Commission to consider the more

\(^{51}\) BEREC 2020 Guidelines, supra, at ¶ 101. The EU law states that The EU law states that providers are “free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality. Regulation (EU) 2015/2120, Article 3(5), supra at L 310/9 (emphasis added).


streamlined definition of non-BIAS services proposed by former FCC Chief Technologist Jon Peha. In his comments, Peha emphasizes, as OTI does, that the primary consideration is to safeguard the capacity available to other BIAS users and the open, neutral character of the internet. He proposes the following “litmus test” to establish an appropriately relevant and narrow definition of a non-BIAS service sharing infrastructure with BIAS:

A communications service can be considered a specialized service under Open Internet rules if (i) the primary use of the service is not to access content, services, or systems that are accessible through an Internet access service, and (ii) the service does not share capacity with Internet access.

Two services are said to “share capacity” if it is ever possible for utilization of one service to affect the performance of the other service.

Peha’s proposed definition could help the Commission provide ex ante clarity about some emerging services that are being positioned to end-run the open internet rules. In our comments, we expressed particular concern about the potential for mobile carriers to claim that “5G network slicing” is by definition a non-BIAS data service even when it operates in practice as a form of paid prioritization. The record now bears this out. Although it seems to be the only mobile BIAS provider to make this claim, in its comments T-Mobile seems to explicitly propose that the Commission dispense with examining particular characteristics of an offering and exempt any service the carrier labels as a “slice” from open internet protections. T-Mobile argues that “[c]larifying that specialized services created using 5G network slicing are ‘non-BIAS’ fits with

54 Comments of Jon Peha, supra, at 10.
55 Id. at 10-11 (emphasis in original).
the Commission’s longstanding approach to distinguishing specialized services from general-purpose broadband.”56

We do expect that the majority of use cases for mobile “network slicing” will serve the special needs of enterprises for customized and closed private networks for IoT, sensing and other purposes. In the NPRM, the Commission likewise observed that “with respect to 5G deployments, new network architectures and uses of the technology are emerging, including some that offer both private and public 5G connectivity, like 5G Internet of Things (IoT).”57 Accordingly, we agree with T-Mobile that “in many cases, network slices customized for specialized applications like industrial IoT may not be intended for mass-market consumers at all.”58 This type of customized and special purpose data service should be considered non-BIAS.

The problem, however, is that T-Mobile—unlike other mobile carrier commenters—leaps from the established fact that network “slices” can be customized to create non-BIAS services for a specific use case (e.g., factory automation, auto safety) to the general claim that anything a mobile carrier labels as a “slice” of its network should by definition be treated as a non-BIAS data service and be exempt from network neutrality protections. In place of the narrowing characteristics adopted in the 2015 Order, T-Mobile suggests defining non-BIAS services as “services that do not offer access to ‘substantially all Internet endpoints’ or support specific applications and data traffic between a subset of endpoints, such as IoT devices that do not support general-purpose broadband service.”59 While this would include the sort of “specialized services” listed in the 2015 Order (e.g., customized industrial IoT or sensing

56 Comments of T-Mobile, supra at 30.
57 NPRM at ¶ 63.
58 Comments of T-Mobile, supra, at 30.
59 Comments of T-Mobile at 27.
networks) it could also describe a pay-for-prioritization video conferencing service that runs over the shared BIAS network alongside competing video conferencing services that do not pay for prioritization. This is a key reason why the Commission must reinstate the more qualitative definition of non-BIAS services from the 2015 Order or, alternatively, substitute the more precise and streamlined version proposed by Jon Peha (discussed just above).

As part of its general opposition to network neutrality, Ericsson takes a similar posture, although more obliquely. Citing “network slicing” and other mobile broadband innovation, Ericsson’s comments suggest that barring selective (and presumably paid) prioritization of certain content, applications, or services is an antiquated policy going forward. We strongly disagree with Ericsson that what it derides as “the ‘fast lane/slow lane’ rhetoric of the mid-2010s is an outdated concept as today’s networks address the needs and demands of various applications and services.”60 It may be true, as Ericsson asserts, that some “smartphone users seek differentiated 5G service experiences for demanding applications, and they are willing to pay for it.”61 But that doesn’t mean the Commission should create an enormous loophole for prioritized versions of content, apps, or services over the open internet. Ericsson also quotes an analyst claiming that the U.S. is falling behind since “Huawei and ZTE are implementing hundreds of network slices every month for China Mobile, China Telecom and China Unicom.”62 Of course, China is not a shining beacon of internet freedom that should illuminate how the U.S. regulator should continue on its long road to preserving a free, open and neutral internet for all.

61 Id. at 10.
62 Id. at 12.
Neither T-Mobile nor Ericsson offer any persuasive technical or policy reason why a “slice” of a mobile BIAS network should be treated differently under the new rules than a “slice” of a wireline cable or fixed wireless or any other network. As we stated in our initial comments, regardless of the technology used, a non-BIAS service must be distinct and operate separately from the shared BIAS network where other end users could be impacted. Accordingly, if a specialized service that is not technically feasible on a BIAS network (e.g., real-time gaming on the go!), is offered as a separate service (or “slice”) that does not crowd out or disrupt the performance of the BIAS network, that could be a net benefit for consumers who choose it. As noted above, as consumer advocates we celebrate the potential ability of mobile BIAS networks to meet the specialized needs of enterprises for customized IoT networks, sensor networks, and other innovations. However, none of these opportunities need to come at the cost of giving mobile carriers a special exemption from the open internet rules that are necessary, regardless of the underlying technology, to protect consumers and promote innovation and economic growth.

In conclusion, OTI urges the Commission to harmonize with California and the EU by imposing a general condition that a non-BIAS data service must not negatively affect the performance of broadband Internet access service for other users. We also encourage the Commission to return to the 2015 Order’s commitment to closely monitor the development of non-BIAS data services—and to request disclosures on the impact they have on the availability and quality of the BIAS sharing the same last-mile infrastructure. Finally, we strongly support maintaining the three definitional characteristics of non-BIAS services adopted in the Commission’s 2015 Order, along with the addition of a fourth criteria requiring that the data service or optimization is “objectively necessary” to enable or ensure a specific functionality or level of quality that is not possible over the open, best-efforts Internet.
VI. Conclusion

OTI supports the Commission’s proposal to re-establish its authority over BIAS by classifying it as a telecommunications service and its efforts to reinstate the general conduct standards and rules originally established in the 2015 Open Internet Order. Reinstating ISP conduct standards, greater transparency and disclosure requirements, and clarifying the Commission’s understanding of preemption and non-BIAS services related to the proposed rules is essential to better protect consumers from discriminatory practices, empower consumer choice over broadband service providers, and support state and local action for further consumer protections.

Respectfully submitted,

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