Before the
Federal Communications Commission
Washington, DC 20554

In the matter of
Safeguarding and Securing the Open Internet WC Docket No. 23-320

WRITTEN EX PARTE
OF
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I. Introduction

Net neutrality protects Americans’ ability to use the applications of their choice without interference from BIAS providers. The resulting open Internet “promotes innovation, investment, competition, free expression, and other national broadband goals” and “enable[s] a ‘virtuous [cycle] of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.” However, BIAS providers have the ability and incentive to harm internet openness. That’s why the FCC, under Chairs from both parties, has protected Internet openness since the early 2000s, including, since 2010, by adopting comprehensive open Internet protections.

Open Internet protections primarily focus on BIAS providers’ practices when providing broadband Internet access service. But ever since the FCC first adopted comprehensive open Internet protections in 2010, the agency has recognized that other services that are delivered over the same last-mile connection as broadband Internet access service (so-called “non-BIAS data services”) may also undermine the open Internet, harming innovation, competition, investment, and user choice.

In particular, the 2010 and 2015 Open Internet Orders took specific steps to ensure that non-BIAS data services do not harm the open Internet by providing a functional equivalent to BIAS, evading the open Internet protections, or negatively affecting the capacity and performance of BIAS.

The 2024 Open Internet Order must restore these critical protections.

However, simply restoring the language of the 2015 protections, without greater elaboration to reflect changes in technology since 2015, is not enough.

Since 2015, technologies such as 5G network slicing have emerged that allow BIAS providers to provide different levels of Quality of Service to select applications, content, services, and devices. These technologies could be used in both BIAS and non-BIAS data services.

Although the original 2015 language could be interpreted as addressing the issues raised by these technologies, the record reflects considerable uncertainty regarding how the 2024 Open Internet Order would apply to services enabled by technologies such as network slicing. For example, T-Mobile asks the FCC to clarify that specific types of slicing-enabled services constitute permissible non-BIAS data services to which the Open Internet protections do not apply. As T-

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3 2015 Open Internet Order, para. 76.
4 2015 Open Internet Order, para. 77 (summarizing record evidence in the 2015 Open Internet proceeding and citing the 2010 Open Internet Order, para. 14).
5 See, e.g., 2015 Open Internet Order, paras. 78-86.
6 T-Mobile February 23, 2024 ex parte letter, p. 2 ("5G network slicing is an enabling technology that providers can use to support both BIAS and non-BIAS services").
7 See, e.g., T-Mobile February 23, 2024 ex parte letter, p.2 (asking the FCC to update its list of examples of permissible non-BIAS data offerings to “include present-day slicing-enabled offerings such as Massive Machine-
Mobile points out, clarifying how slicing-enabled offerings would be treated under the Open Internet framework “will give the industry greater certainty and help foster innovation and investment in these new service offerings.”

The Commission should clarify:

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. under what conditions non-BIAS data services may be provided.

This 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.

II. Terminology

“Non-BIAS data services” (formerly “specialized services”) are “services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service.”

In this document, the term “non-BIAS data service” is used as a shorthand for such services; it does not imply whether a specific non-BIAS data service may be provided consistent with the 2024 Open Internet Order.

“Permissible non-BIAS data service” is a service that may be provided consistent with the 2024 Open Internet Order.

“Applications” or “apps” is used as a shorthand for “applications, content, services, or devices.”

Type Communications (‘mMTC’) used to support the Internet of Things and Ultra-Reliable and Low Latency Communications (‘URLLC’)

T-Mobile’s ask is not limited to enterprise-service offerings. While services such as mMTC and URLLC can be used to support enterprise-service-customers-facing enterprise service offerings, T-Mobile itself notes that these services can also be used to support consumer-facing offerings. See T-Mobile Comments, p. 32 (“[T]he list of Commission-identified specialized services would include: … Massive Volumes mMTC Services: These services involve … connectivity for consumer wearables (e.g., fitness trackers, heart monitors) and IoT applications for consumer appliances (e.g., smart refrigerators or dishwashers). Massive Performance URLLC Services: … [These services] can also offer connectivity for specialized mass-market services like augmented reality and virtual reality applications and devices.”) (emphasis in original).

8 T-Mobile February 23, 2024 ex parte letter, p. 2.

9 See, e.g., 2010 Open Internet Order, para 7 (“We recognize that broadband providers may offer other services over the same last-mile connections used to provide broadband service. These ‘specialized services’ …”).
III. The Commission should clarify how technologies such as network slicing may be used to provide innovative offers as part of BIAS.

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.

Innovative offerings as part of BIAS that satisfy these four protections are consistent with Open Internet principles: ¹⁰

- They keep users in control of their Internet experience and ensure that users can get the desired performance for the applications of their choice if and when they need it.
- They foster application innovation by allowing all apps, not just the ones selected by ISPs, to get the quality of service users want them to have.
- They prevent BIAS providers from using the provision of different types of service to distort competition. For example, they make it impossible for a BIAS provider to offer prioritized service only to select apps (e.g., only to YouTube, but not to Netflix) or only to select classes of apps (e.g., only to online gaming, but not to online telephony).
- They foster innovation in the network and fuel the virtuous cycle by allowing the open Internet to evolve and support applications that may not be possible today.

However, if BIAS providers can charge for selective higher levels of service as part of a BIAS plan, they may have an incentive to degrade the default service so that consumers are motivated to pay for a higher level of service. The above guidance will prevent that from happening.

BIAS offerings that satisfy the above clarifications do not violate the no throttling and no paid prioritization rules. Under the 2015 Open Internet Order, they would have been evaluated under the general conduct standard. Clarifying how such offerings would be treated under the 2024 Open Internet Order is needed in light of the uncertainty over how the Open Internet protections apply to network-slicing enabled offerings.

IV. The Commission should clarify the framework for non-BIAS data services.

1. The FCC should restore the general 2015 framework for non-BIAS data services.

The Open Internet protections generally apply to BIAS providers when they provide BIAS. The 2015 Open Internet Order recognized that other services that are delivered over the same last-mile connection as broadband internet access service may also undermine the Open Internet and stated that “that will not be permitted.”

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.

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11 See also 2010 Open Internet Order, para. 29 (discussing the same concern in the context of BIAS providers’ charging application providers for preferential treatment); 2015 Open Internet Order, para. 82, 85, 126-127 (same).

12 Under the 2010 Open Internet Order, the offerings discussed in the text would have been evaluated under the no unreasonable discrimination rule and would likely have been found to be reasonable. See van Schewick, 2015, Net Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, p. 157-158.

13 2015 Open Internet Order, para. 35 (“Nonetheless, these other non-broadband Internet access service data services could be provided in a manner that undermines the purpose of the open Internet rules and that will not be permitted.”) (emphasis added)

14 2015 Open Internet Order, para. 210 (“[I]f the Commission determines that a particular service is ‘providing a functional equivalent of broadband Internet access service …,’ we will take appropriate enforcement action.”).

15 2015 Open Internet Order, para. 210 (“[I]f the Commission determines that a particular service … ‘is [being] used to evade the protections set forth in these rules,’ we will take appropriate enforcement action.”).

16 See, e.g., 2015 Open Internet Order, paras. 213 (“[W]e 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.”), 35 (“[T]hese other non-broadband Internet access service data services could be provided in a manner that undermines the purpose of the open Internet rules and that will not be permitted. … The Commission will vigilantly watch for such abuse, and its actions will be aided by the existing transparency requirement.”), 167
The Commission “expressly reserved the authority to take action if a [non-BIAS data] service is, in fact, providing the functional equivalent of broadband Internet access service or is being used to evade the open Internet rules.”\(^{17}\) The Commission stated it would “vigilantly watch for such abuse”\(^{18}\) and “act decisively”\(^{19}\) and “take appropriate enforcement action,”\(^{20}\) if a particular non-BIAS data service violated these requirements.

**The FCC should restore these critical requirements.**

Even non-BIAS data services that are neither a functional equivalent of regular BIAS nor evade the open Internet protections may undermine the open Internet by negatively affecting the capacity for or the performance of BIAS, as the 2010 and 2015 Open Internet Orders recognized. The 2010 and 2015 Open Internet Orders adopted requirements to prevent that.\(^{21}\)

**The FCC should clarify these capacity- and performance-related requirements (see Section IV.4 below).**

2. **The FCC needs to clarify how it will determine whether non-BIAS data services that use technologies such as network slicing evade the Open Internet protections.**

As noted above, simply restoring the 2015 requirements without clarification is not enough. In particular, the record reflects considerable uncertainty regarding how the Commission would apply the “no evasion” requirement to non-BIAS data services that use technologies such as network slicing to support specific applications or classes of applications.

As the record shows, ISPs want to use non-BIAS data services to provide special treatment to *any* application that the ISP chooses – including those that can be provided over the Open Internet – and to charge edge providers for this special treatment.\(^{22}\)

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\(^{17}\) 2015 Open Internet Order, para. 35.
\(^{18}\) 2015 Open Internet Order, para. 35.
\(^{19}\) 2015 Open Internet Order, para. 207.
\(^{21}\) See the discussion in Section IV.4 below.
\(^{22}\) For example, CTIA suggests that using network slicing to enhance the performance of an app that can be provided over BIAS should constitute a beneficial non-BIAS data service. T-Mobile argues that using network slicing to support specific applications generally meets the characteristics of permissible non-BIAS data services in the 2015 Open Internet Order, regardless of whether the application can be provided over the Open Internet.

See, e.g., CTIA February 23, 2024 ex parte letter, p. 10 (arguing that other commenters’ proposals would prohibit useful non-BIAS data services, including providing enhanced Quality of Service to regular Internet applications that are currently used over BIAS: “[A] service could be provided over BIAS but would benefit from heightened capabilities that can be delivered via a network slice-enabled non-BIAS data service.” Ibid, p. 10); T-Mobile Comments, pp. 31, 34-35.
That would create a giant loophole.

The Open Internet protections prohibit BIAS providers from providing preferential treatment only to select apps or classes of apps ("no throttling") and from charging an app provider to treat the provider’s app better than others ("no paid prioritization").

If an ISP could take an app that can be provided over BIAS and simply create a non-BIAS data service, e.g., on a “slice” of the network’s capacity, using the exact same practices that would be prohibited as part of BIAS, the Open Internet protections would become meaningless.23

These questions are not hypothetical. T-Mobile and AT&T have conducted trials on the use of network slicing to create a de facto 5G fast lane for select apps such as online video conferencing and online gaming that are widely used over fixed and mobile BIAS today.24

Commenters acknowledge the lack of certainty in this area.25

*The FCC should clarify that providing a different type of service to support an application or class of applications as a non-BIAS data service (or as part of a non-BIAS data service) evades the Open Internet protections unless:

- the particular type of application requires a specific level of quality of service, which is objectively necessary for the specific type of application,26

- 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).

23 See, e.g., van Schewick, 2024, Open Internet Reply Comments, p. 16.


Verizon’s press release on its trial of “advanced Low-Latency, Low-Loss, Scalable Throughput (L4S) capabilities” over 5G listed “time-critical applications, including entertainment, gaming, AR/VR, real-time video conferencing” as applications whose providers would benefit from the enhanced performance enabled by L4S technology. [https://www.verizon.com/about/news/verizon-and-ericsson-collaborate-innovative-5g-feature-enhance-user-experience](https://www.verizon.com/about/news/verizon-and-ericsson-collaborate-innovative-5g-feature-enhance-user-experience).

25 For example, CTIA argues that due to the “open-ended nature” of the anti-evasion requirement, the Commission would have to provide “adequate notice to and opportunity for comment by a provider” before it could find that a particular non-BIAS data service evades the Open Internet protections. T-Mobile asks the Commission to clarify that specific types of network-slicing enabled services constitute permissible non-BIAS data services to which the Open Internet protections do not apply, arguing that doing so “will give the industry greater certainty and help foster innovation and investment in these new service offerings.” See CTIA February 23, 2024 ex parte letter, p. 12 (“The Commission can reiterate that the definition of BIAS already encompasses a limited and defined backstop for services ‘that the Commission finds to be providing a functional equivalent of’ BIAS or ‘that [are] used to evade the protections set forth in [the rules].’ Although the Commission can retain these provisions, their open-ended nature heights the importance of adequate notice to and opportunity for comment by a provider before its service could be treated as BIAS pursuant to either provision.” Ibid., p. 12 and p. 12, fn. 67.); T-Mobile February 23, 2024 ex parte letter, p.2 (for a fuller discussion, see fn. 7 above).

26 Quality of Service requirements may include, but are not necessarily limited to, throughput, latency, and packet loss.
To ensure the FCC and other stakeholders can assess whether these requirements are met, the BIAS provider must transparently disclose, on an ex post basis, objective, technical evidence that clearly demonstrates:\textsuperscript{27,28}

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.

This definition of evasion strikes the right balance.\textsuperscript{29} It correctly identifies practices that would circumvent the Open Internet protections.\textsuperscript{30} It fuels the virtuous cycle by ensuring that ISPs continue to improve the capacity, performance, and capabilities of the Open Internet, which in turn allows applications to emerge that may not be possible today.\textsuperscript{31} It also fosters application innovation: it allows all applications, not just the ones selected by ISPs for non-BIAS data services, to benefit from new types of Quality of Service on the Open Internet, and it allows applications to emerge whose Quality of Service requirements cannot be met by the Open Internet, even with the type of application-agnostic, user-controlled, and user-paid Quality of Service described above.\textsuperscript{32}

3. The FCC needs to clarify how it will determine when BIAS providers’ facilities-based VoIP and IPTV offerings do not evade the Open Internet protections.

The 2010 and 2015 Open Internet Orders stated that “some broadband providers’ existing facilities-based VoIP and Internet Protocol-video offerings” would be considered non-BIAS data services.\textsuperscript{33}

Many fixed BIAS providers offer their own traditional facilities-based voice telephony and television services; mobile BIAS providers offer their own traditional voice telephony

\textsuperscript{27} BIAS providers do not need prior approval from the Commission before introducing non-BIAS data services, as under the 2010 and 2015 Open Internet Orders.

\textsuperscript{28} “Acceptable methodologies will be grounded in commonly accepted principles of scientific research, good engineering practices, and transparency.” (See FCC 2015 Open Internet Order, para. 166 fn. 412, citing FCC’s Office of Engineering and Technology and Consumer & Governmental Affairs Bureau, Measuring Broadband America Policy on Openness and Transparency, http://www.fcc.gov/measuring-broadband-america/openness-transparency-policy.)

\textsuperscript{29} The following paragraph is adapted from van Schewick, 2024, Open Internet Reply Comments.

\textsuperscript{30} See, e.g., van Schewick, 2024, Open Internet Reply Comments, p. 16.

\textsuperscript{31} See, e.g., van Schewick, 2024, Open Internet Reply Comments, pp. 14, 16-17.

\textsuperscript{32} See, e.g., van Schewick, 2024, Open Internet Reply Comments, pp. 14, 17-18.

\textsuperscript{33} 2010 Open Internet Order, para. 112; 2015 Open Internet Order, para. 208.
services. These services travel over the same last-mile infrastructure as regular BIAS, but are sold separately from BIAS. They are increasingly provided over IP-based technology and typically receive special treatment in the network.\(^{34}\)

However, under the clarification of evasion proposed above, providing special Quality of Service to the BIAS provider’s own facilities-based VoIP and IPTV offerings would constitute an evasion of the Open Internet protections.

*To account for BIAS providers’ reliance interests, the FCC should clarify that providing a different type of service to a BIAS provider’s own facilities-based VoIP or IPTV offering does not evade the Open Internet protections, if:*

1) the different type of service is provided to fixed and mobile BIAS providers’ own facilities-based VoIP or IPTV offerings; and

2) these services are regulated as telecommunications services under Title II or as interconnected VoIP services (for VoIP offerings), or as cable services or MVPD services under Title VI (for IPTV offerings), respectively.\(^{35}\)

*As an exception to the clarification of evasion proposed above, this exception should be interpreted narrowly.*

That’s important because many BIAS providers also offer their own over-the-top online video services that are delivered over regular BIAS. Under the 2015 Open Internet protections, a BIAS provider that provided special Quality of Service only to its own over-the-top online video service would violate both the no throttling rule and the no paid prioritization rule. Under the clarification of evasion proposed above, providing special Quality of Service to the BIAS provider’s over-the-top online video service as a non-BIAS data service would rightly constitute an evasion of the Open Internet protections.

4. **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.**

Due to the essential nature of BIAS, ensuring “that consumers be able to use their BIAS connections without degradation” rightly is a key goal of the 2024 Open Internet Order.\(^{36}\)

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\(^{34}\) This applies, for example, to cable operators’ digital voice offerings or mobile operators Voice-over-LTE offerings.

\(^{35}\) Similarly, in the FCC 2011 Comcast/NBCU Merger Order, the FCC exempted Comcast’s existing Digital Voice Service and services regulated as telecommunications services under Title II of the Communications Act or as MVPD services under Title VI of the Communications Act from the definition of specialized service in the merger conditions. See FCC 2011 Comcast/NBCU Merger Order (“‘Specialized Service’ means any service provided over the same last-mile facilities used to deliver Broadband Internet Access Service other than (i) Broadband Internet Access Services, (ii) services regulated either as telecommunications services under Title II of the Communications Act or as MVPD services under Title VI of the Communications Act, or (iii) Comcast’s existing VoIP telephony service.” Ibid., Appendix A, §1.)

\(^{36}\) See, e.g., 2023 Open Internet NPRM, para.117 (“Above, we express our belief that consumers perceive and use BIAS as an essential service, critical to accessing healthcare, education, work, commerce, and civic engagement.”)
As the 2023 NPRM recognizes, ISPs might interfere with consumers’ ability to use their BIAS without degradation “through blocking, throttling, paid prioritization, or other harmful conduct.”

Most relevant here, even permissible non-BIAS data services can undermine the open internet by negatively affecting the capacity and performance of BIAS, both in the moment and over time, as the FCC has recognized since 2010.37

The 2010 and 2015 Open Internet Orders took various steps to prevent that from happening.38 They included, but were not limited to, disclosure requirements.

Establishing such explicit requirements is critical. That’s because as the FCC has recognized since 2010, including in the context of non-BIAS data service, transparency and competition alone are not sufficient to prevent ISPs from degrading BIAS.39 It’s why the 2023 NPRM proposes to restore the Open Internet conduct rules against, e.g., blocking, throttling, and paid prioritization.40

Because of its importance, we further believe it is paramount that consumers be able to use their BIAS connections without degradation due to blocking, throttling, paid prioritization, or other harmful conduct.” Emphasis added; ibid., para. 148 (“The last several years have demonstrated not only broadband’s essential value, but also the consequences to consumers of its absence or degradation, and we therefore believe it important to establish clear, bright-line rules.”)

37 See, e.g., 2010 Open Internet Order, para. 112 (“In addition, broadband providers may constrict or fail to continue expanding network capacity allocated to broadband Internet access service to provide more capacity for specialized services. If this occurs, and particularly to the extent specialized services grow as substitutes for the delivery of content, applications, and services over broadband Internet access service, the Internet may wither as an open platform for competition, innovation, and free expression. These concerns may be exacerbated by consumers’ limited choices for broadband providers, which may leave some end users unable to effectively exercise their preferences for broadband Internet access service (or content, applications, or services available through broadband Internet access service) over specialized services.”) (emphasis added).

38 See, e.g., 2010 Open Internet Order, paras. 56 (transparency requirements), 113 (“We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constraining capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace.” Ibid., para. 113); 2015 Open Internet Order, paras. 213 (“[W]e 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.”), 167 (transparency requirements), 209 (permissible non-BIAS data services generally “use some form of network management to isolate the capacity used by these services from that used by broadband internet access,” which prevents non- BIAS data services from negatively affecting the capacity available for and the performance of BIAS) (emphasis added in all quotes).


40 See, e.g., 2023 Open Internet NPRM, para. 137.
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.

This clarification allows BIAS providers to take advantage of “modern network management techniques” enabled by network virtualization and manage their networks efficiently, while protecting consumers’ “[ability] to use their BIAS connections without degradation.” It also maintains the virtuous cycle between improvements in the network and in applications by ensuring that BIAS providers continue to improve both the capacity and performance of BIAS.

5. 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 previous 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.”
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.”
3. The Commission will "monitor the potential for anticompetitive or otherwise harmful effects from [permissible] specialized services, including from any

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41 Performance includes, but is not necessarily limited to, throughput, latency, and packet loss.
42 On this concern, see, e.g., T-Mobile 2023 Open Internet Comments, p. 36; CTIA February 23, 2024 ex parte letter, pp. 10-11.
43 FCC 2023 Open Internet NPRM, para.117.
44 2015 Open Internet Order, para. 213.
arrangements a broadband provider may seek to enter into with third parties to offer such services. ⁴⁶

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. ⁴⁷

V. Conclusion

The Commission in 2015 understood the importance of preventing BIAS providers from simply recasting prioritized ‘fast lanes’ as non-BIAS data services. At the time, technology did not easily allow providers to use such evasions, so the Commission could rely on general language to properly balance the capacity for innovation with bright-line rules for protecting the open Internet. As the record reflects, advances in technology over the last 9 years now require the Commission to clarify the boundary between permissible non-BIAS data services and impermissible evasion of the open internet rules. Allowing uncertainty to persist will create a moral hazard for ISPs by diverting efforts from permissible non-BIAS data services to evasions of the Open Internet rules. The clarifications proposed here will provide stakeholders with certainty, permitting ISPs to innovate without undermining the virtuous cycle of the open internet.

⁴⁶ 2010 Open Internet Order, para. 114 (citing, in the footnote to the sentence cited in the text, concerns by commenters “regarding potential exclusive arrangements between broadband providers and third parties for the provision of specialized services” and “the risk of anticompetitive conduct from specialized services that involve arrangements between broadband providers and affiliates.” Ibid., fn. 348).

⁴⁷ See, e.g., similar clarifications in the 2010 Open Internet Order, para. 113, fn. 345 (“Our decision not to adopt rules regarding specialized services at this time involves an issue distinct from the regulatory classification of services such as VoIP and IPTV under the Communications Act, a subject we do not address in this Order.”)