Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF INCOMPAS

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A federal framework for network neutrality is essential to ensure that all consumers in the U.S. can access the lawful online content, applications, and services of their choice. INCOMPAS submitted initial comments that set forth our comprehensive position[1] in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking on Safeguarding and Securing the Open Internet* ("*NPRM*").[2]

I. Introduction and Summary

We file these reply comments to elaborate on a number of topics in response to the comment record. First, INCOMPAS agrees with the Commission that it should "prohibit ISPs from imposing a fee on edge providers to avoid having the edge providers' content, service, or application blocked" or "throttled."[3] Second, we agree with the Commission that it should oversee interconnection practices pursuant section 201 and 202 of the Communications Act,[4] but INCOMPAS also recommends that the Commission explicitly state that ISPs should not be able

[1] Comments of INCOMPAS, WC Docket No. 23-320 (fil. Dec. 14, 2023).

[2] *See generally Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, FCC No. 23-83, WC Docket No. 23-320 (rel. Oct. 20, 2023) ("*NPRM*").

[3] *Id*. at paras. 152, 155. In these reply comments, we define "network access fees" to mean fees charged to edge providers "to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customers" or to "impose a fee on edge providers to avoid having the edge providers' content, service, or application throttled."

[4] *Id*. at para. 187.

to use interconnection practices to evade the Commission's Open Internet rules—just as the Commission did in the *2015 Open Internet Order*. Third, we support the Commission's tentative conclusion to maintain the *2015 Open Internet Order*'s approach to closely monitor the development of non-BIAS data services, also known as specialized services.[5] Fourth, the Commission should reinstate the *2015 Open Internet Order*'s reasonable network management standard; and fifth, the Commission should resume its case-by-case approach to zero rating practices first adopted by the Commission in the *2015 Open Internet Order*.

II. ISPs Should Not Be Permitted to Charge Network Access Fees.[6]

The Commission observed in 2015 that ISPs "are in a position to act as . . . 'gatekeeper[s]' between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users."[7] This remains true today: ISPs' role as gatekeepers both incentivizes and enables them "to engage in practices that pose a threat to Internet openness[.]"[8]

ISPs have sole control over their networks and have the ability to exploit this control to their financial advantage in ways that threaten the ability of users to freely consume the lawful content of their choosing. First, despite the fact that ISPs charge their subscribers to access the Internet, they also can use their market power to demand fees from content providers to avoid blocking or throttling the ISP subscribers' access to that content. Second, because many ISPs also operate affiliated content services, they can use their market power to preference their

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[5] INCOMPAS Comments, at 37-38.

[6] *See supra* note 3 for the definition of network access fees.

[7] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5629, at para. 80 (2015) ("*2015 Open Internet Order*").

[8] *NPRM*, at para. 126.

affiliated services over independent, third-party online content services. ISPs can do so by forcing third-party content providers to pay fees to avoid blocking and throttling and thus incur higher costs compared to their ISP-affiliated competitors, or by degrading the quality of third-party content services compared to those competitors. Either way, the ISP can use fees to undermine competition.[9]

The Commission has record support sufficient to address such fees, and INCOMPAS supports the Commission's proposal to "make clear" that the no-blocking and no-throttling rules "would prohibit ISPs from charging edge providers a fee to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customers"[10] or "throttled."[11] This prohibition is consistent with the Commission's *2015 Open Internet Order*[12] and is strongly supported by the record.[13]

[9] INCOMPAS remains concerned about the harmful impact that mandated edge provider fees would have on the Internet ecosystem and an open internet. *See* INCOMPAS Comments, at 44-46.

[10] *NPRM*, at para. 152.

[11] *Id*. at para. 155.

[12] *2015 Open Internet Order*, at paras. 113, 120 (2015) (stating that the "no-blocking rule prohibits broadband providers from charging edge providers a fee to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customer" and "broadband providers may not impose a fee on edge providers to avoid having the edge providers' content, service, or application throttled").

[13] *See, e.g.*, Public Knowledge Comments, at 85; Free Press Comments, at 134-136.

III. The Commission Should Not Allow ISPs to Use Interconnection Practices to Evade Open Internet Rules.

INCOMPAS agrees with the *NPRM*'s proposal[14] that the Commission should adhere to the 2015 decision[15] to evaluate interconnection arrangements under sections 201 and 202 of the Communications Act. The Commission has the authority to maintain—and should maintain—oversight of an ISP's interconnection arrangements so that an ISP cannot evade Open Internet rules at interconnection points.

In addition, the Commission should explicitly state that it will rely on sections 201 and 202 to prevent ISPs from using interconnection practices to evade the Open Internet rules, just as the 2015 Commission did.[16] In 2015, the Commission explained that its assertion of authority over interconnection practices provided it "with the necessary case-by-case enforcement tools to identify practices that may constitute [an] evasion [of the scope of the rules]."[17] If the Commission relies on section 201 and 202 to regulate interconnection practices, this extra step is critical to ensure that ISPs cannot take advantage of the fact that interconnection agreements are not covered by the Commission's Open Internet rules.[18]

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[14] *NPRM*, at para. 187.

[15] *2015 Open Internet Order*, at paras. 193, 195.

[16] *Id.* at para. 206.

[17] *Id*.

[18] *See also* Lumen Comments, at 20 ("[T]the Commission should state, as it did in 2015, that it will ensure BIAS providers do not take actions that have the purpose or effect of evading the Commission's open Internet rules.").

IV. The Commission Should Monitor Non-BIAS Data Services (Specialized Services).

INCOMPAS supports the Commission's tentative conclusion to maintain the *2015 Open Internet Order*'s approach and continue to closely monitor the development of non-BIAS data services.[19] As INCOMPAS notes, however, it is critical to maintain a robust, open "best efforts" internet that continues to enable consumers to access the existing services of their choice, as well as innovative, new services going forward through "best efforts" internet without having to purchase a non-BIAS data service.[20] Thus, unless evidence transparently demonstrates that a specific service objectively cannot function or be supported except on a non-BIAS basis, the *presumption* should be that services can and should be supported by the open, "best efforts" internet, consistent with net neutrality principles. As Public Knowledge rightly asserts:

> 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 "non-BIAS," or as "specialized services," or as "managed services," or anything else.[21]

To protect the open Internet for all, it is important that regulators assess any purported non-BIAS

[19] *See* INCOMPAS Comments at 37-38.

[20] *Id.* at 37, n.87 (INCOMPAS also noted that the Commission emphasized that non-BIAS data services might still be subject to enforcement action if the Commission determined that: (1) a particular service is providing the functional equivalent of BIAS; (2) an ISP claimed or attempted to claim that a service that is the equivalent of BIAS is a non-BIAS data service not subject to any rules that would otherwise apply; or (3) a non-BIAS data service offering is undermining investment, innovation, competition, and end-user benefits." (citing *2015 Open Internet Order*, at para. 210). *See also* Public Knowledge Comments, at 71 ("[W]hile a genuine non-BIAS service may be outside the scope of the Open Internet rules, this does not end the inquiry. An ISP that offers a non-BIAS service may still be found to be acting anti-competitively, and its deployment decisions may be contrary to national broadband goals.").

[21] *See* Public Knowledge Comments at 69.

offerings against strong regulatory protections on a case-by-case basis. For example, regulators must ensure that any non-BIAS data services:

- Do not have the purpose or effect of evading net neutrality protections that apply to BIAS, for example by mandating that customers purchase connectivity tiers or plans for a particular function that would operate sufficient with "best efforts" internet.[22]
- Do not negatively affect the performance of a dynamic "best efforts" internet.
- Are offered on a non-discriminatory basis with respect to online content and services and based on consumer choice.
- Are not required to be used and paid for by online content and application providers (CAPs) (or others) in order to have their content or services delivered to end users, where it could otherwise be delivered over the "best efforts" internet.

These principles are core to an open Internet, as the Commission has repeatedly recognized in its past net neutrality orders.[23] They remain as critical today as they were then, as this Commission must recognize.

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[22] It would be premature to assume that non-BIAS data services will be needed to support future services beyond existing niche use cases (*e.g.*, autonomous cars, telemedicine procedures).

[23] *2015 Open Internet Order*, at para. 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 expressly reserves the authority to take action if a service is, in fact, providing the functional equivalent of broadband Internet access service or is being used to evade the open Internet rules. The Commission will vigilantly watch for such abuse, and its actions will be aided by the existing transparency requirement that non-broadband Internet access service data services be disclosed."); *2010 Open Internet Order*, at paras. 112-114 ("We will carefully observe market developments to verify that specialized services promote investment, innovation, competition, and end-user benefits without undermining or threatening the open Internet. We note also that our rules define broadband Internet access service to encompass "any service that the Commission finds to be providing a functional equivalent of [broadband Internet access service], or that is used to evade the protections set forth in these rules…. 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 constricting capacity available for broadband Internet access service." (citations omitted)). *See also Restoring Internet Freedom Order*, at para. 207 ("[W]e emphasize that we will act decisively in the event that a broadband provider attempts to evade open Internet protections (e.g., by claiming that a service that is the equivalent of Internet access is a non-BIAS data service not subject to the rules we adopt today."), at para. 213 ("Similar to the Commission's approach in 2010, if the Commission determines that a particular

Responding to the Commission's request for comment on whether to continue using its established definition of "broadband internet access service" and whether to continue excluding specialized services or "non-BIAS data services" from the scope of the Commission's open internet rules,[24] one large mobile provider argues for three changes in the Commission's proposals on non-BIAS data services: (1) affirm that "the category of 'non-BIAS data services' is expansive"—that is, all services that are not BIAS; (2) provide a more extensive and detailed list of examples of non-BIAS data services; and, (3) "jettison" the *2015 Open Internet Order*'s efforts to identify the essential characteristics of non-BIAS data services and rely instead on the existing definition of BIAS to define non-BIAS data services as anything that does not fall within the definition of BIAS.[25] This provider seems most concerned with its services offered via network slicing—"network slicing and many of the services supported by network slicing would qualify as 'non-BIAS data services' using these criteria."[26]

This position illustrates *precisely* why the Commission must be vigilant in its defense of the "best efforts" open Internet—to ensure that the expansive scope of services that would fall *outside* net neutrality protections under the proposals advanced by the mobile provider do not

service is 'providing a functional equivalent of broadband Internet access service, or . . . is [being] used to evade the protections set forth in these rules,' we will take appropriate enforcement action. Further, if the Commission determines that these types of service offerings are undermining investment, innovation, competition, and end-user benefits, we will similarly take appropriate action. We are especially concerned that over-the-top services offered over the Internet are not impeded in their ability to compete with other data services." (citations omitted)).

[24] T-Mobile Comments, at 25 (citing *NPRM*, at paras. 59, 64).

[25] *Id.* at 25-26.

[26] *Id.* at 27.

entirely eviscerate the rules, undermining the very service the Commission seeks to safeguard.[27] Any use of network slicing can and should stay consistent with net neutrality protections for the open internet; network slicing *per se* is not a reason to weaken or circumvent net neutrality protections[28] and instead should be subject to careful scrutiny using the factors outlined above.

Since 2010, broadband Internet access service providers have been required to disclose what non-BIAS data services they offer to end users and the impact of those non-BIAS data services on the performance of and the capacity available for broadband Internet access services.[29] The Commission must closely monitor such non-BIAS data services' disclosures, conduct regular assessments, and vigilantly watch for abuses. To do otherwise risks this now essential Internet service may well stagnate, or "become a dirt road" over time.

V. The Commission Should Reinstate Its Reasonable Network Management Standard from 2015.

CTIA and other commenters argue for a "flexible approach to network management" that would allow operators "to consider both network efficiency and customer interests while making

[27] *See, e.g.*, NPRM, at para. 21 ("Given how essential BIAS is to consumers' daily lives, we believe that our proposed reclassification of BIAS as a telecommunications service is necessary to unlock tools the Commission needs to fulfill its objectives and responsibilities to safeguard this vital service.").

[28] *See, e.g.*, Christopher Yoo and Justin Hurwitz Comments, at 8-9, 14 (asserting that BIAS providers can simply "opt out" of Title II regulation "by reducing the scope of their services to the point that they cannot be seen as holding themselves out as common carriers.").

[29] *See 2015 Open Internet Order*, at para. 167 ("In addition, the existing rule concerning performance characteristics requires disclosure of the 'impact' of specialized services, including what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service."). *See also 2018 Restoring Internet Freedom Order*, at para. 212 ("Since the 2010 Open Internet Order, broadband Internet access providers have been required to disclose the impact of non-BIAS data services on the performance of and the capacity available for broadband Internet access services.").

complicated network management decisions."[30] One of those commenters asserts that "even if the Commission adopts prescriptive rules, it should at least follow the comparatively flexible approach to network management that it took in 2010."[31] One large mobile provider, in particular, seeks to "update" the definition of "reasonable network management" in two ways: (1) defining the term simply as one that has a technical purpose, as opposed to distinguishing a "primarily technical" purpose from "other business practices;" and (2) "acknowledging that, so long as network management functions for broadband internet access service do not discriminate between similar applications, network management activities may include a wide variety of practices, including measures aimed at ensuring network security and integrity; addressing unwanted or harmful traffic; reducing or mitigating congestion; and optimizing or improving network performance, efficiency, and reliability—would provide valuable guidance to operators and the public on the types of activities that fall within the exception."[32]

The Commission should reject these arguments and adopt the approach from the *2015 Open Internet Order*. In the *2015 Open Internet Order*, the Commission explicitly recognized the ongoing threats to the open Internet, particularly from mobile wireless providers: "The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."[33] It noted that while the Internet Protocol created the opportunity to leap from the carrier-controlled "walled garden," the Commission had

[30] CTIA Comments, at 100. *See also* Telecommunications Industry Association Comments, at 7-9; WISPA Comments, at 45-47.

[31] CTIA Comments, at 100.

[32] T-Mobile Comments, at 38.

[33] *2015 Open Internet Order*, at para. 8.

continued to hear concerns about other broadband provider practices involving blocking or degrading third-party applications[34] and noted specifically that "consumers must be protected, for example from mobile commercial practices masquerading as 'reasonable network management.'"[35]

Thus, the Commission revised the definition of reasonable network management adopted by the Commission in 2010,[36] intentionally and purposefully tying "reasonable network management" to a technical network management justification.[37] The Commission explained:

> For a practice to even be considered under this exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network management justification rather than other business justifications. If a practice is primarily motivated by such an other justification, such as a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed, then that practice will not be considered under this exception.[38]

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[34] Paid prioritization is not subject to the reasonable network management exception. *See 2015 Open Internet Order*, at n.18 ("Unlike the no-blocking and no-throttling rules, there is no "reasonable network management" exception to the paid prioritization rule because paid prioritization is inherently a business practice rather than a network management practice.").

[35] *2015 Open Internet Order*, at para. 9.

[36] *2010 Open Internet Order*, at para. 82 ("A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.").

[37] The *2015 Open Internet Order* defined reasonable as: "A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." *2015 Order Internet Order*, at para. 215.

[38] *2015 Open Internet Order*, para. 216 (citing Prepared remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show, Las Vegas, NV (Sept. 9, 2014), where then-Chairman Wheeler referenced the network management practices of the four national wireless providers in throttling some customers, expressing his difficulty in understanding how those practices "could be a reasonable way to manage a network.").

To ensure people can continue to use the internet as *they* want even when the network is busy, the Commission also recognized that network management must be "as application-agnostic as possible."[39]

Although "reasonable network management" is designed to be an exception to prohibited conduct under the FCC's no blocking and no throttling rules and the general conduct standard, the proposals by mobile providers in this record would seriously undermine the principles of net neutrality, allowing them virtually unfettered opportunity to engage in prohibited practices under the guise of "reasonable network management." Allowing *any* purpose, if coupled with some technical purpose, rather than requiring a *primarily technical* purpose, would open the door to limitless post-hoc justifications for practices that block, throttle, or interfere with otherwise lawful content or applications. Nevertheless, as in 2015, the Commission also should retain flexibility to consider differences in network technology and architecture in assessing whether a given network management practice is, or is not, reasonable.[40]

With regard to the second "update," obviously practices to ensure network security and improve network reliability are not prohibited by net neutrality rules if they do not violate the principles of net neutrality. Nor are these practices prohibited if they have a legitimate network management purpose and that purpose is primarily technical. It is hard to fathom what additional purpose mobile providers would seek to implement that would not be covered by the existing definition, but it should not serve as an exception to net neutrality.

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[39] *2015 Open Internet Order*, at paras. 220, 221.

[40] *See 2015 Open Internet Order*, at para. 224 ("[T]he Commission will take into account when and how network management measures are applied as well as the particular network architecture and technology of the broadband Internet access service in question, in determining if a network management practice is reasonable."); SpaceX Comments at 1-9.

The Commission in the *Restoring Internet Freedom Order* returned to the 2010 definition of "reasonable network management," giving into ISPs' request for greater flexibility.[41] This Commission should not abandon the prudent course laid out by the Commission in the 2015 decision. Instead, it should adhere to the 2015 definition and principles incorporated therein (including "application-agnostic" practices), *precisely* to "ensure that the reasonable network management exception is not used to circumvent"[42] the vital net neutrality rules that are the foundation of an open Internet.

VI. The Commission's Oversight of Zero Rating in 2015 Is Sufficient to Protect Consumers and Ensure that They Obtain the Benefits of Increased Choice and Lower Costs.

The record supports maintaining the approach to zero rating practices adopted by the Commission in 2015 that has allowed them to flourish for nearly nine years. In 2015, while mindful of some concerns, the Commission recognized that zero rating practices can benefit consumers, increasing choice and lowering costs, as well as help edge providers distinguish themselves and target their services and applications to meet consumer expectations, as well as continue the virtuous cycle of innovation and investment.[43] Thus, the Commission adopted a case-by-case approach, under which it "will look at and assess such practices under the no-

[41] *2018 Restoring Internet Freedom Order*, at para. 220 ("The record reflects an overwhelming preference for this approach from the Open Internet Order, which provides ISPs greater flexibility and certainty.") (citing comments by ADTRAN, CenturyLink, Nominum, Nokia, Immarsat, Gogo, and Sprint).

[42] *NPRM*, at para. 188.

[43] *2015 Open Internet Order*, at para. 151.

unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary."[44]

Numerous parties note the pro-consumer benefits of zero rating practices that may be especially important to consumers with lower data usage plans, helping them to access content and applications that might not otherwise be available to them.[45] Zero rating practices can enable consumers to take advantage of the ability to work remotely, engage in online or distance learning, seek medical care via telehealth applications, and stay connected with family and friends virtually—all applications and experiences that were critical during the COVID-19 pandemic and which continue to be essential to full participation in our increasingly digital world, as Chairwoman Rosenworcel has recognized for years. At this important juncture, when a whole of government approach to broadband for everyone is center stage, the Commission should not discard a practice that offers a myriad of consumer benefits, but should instead continue its measured case-by-case approach that would allow it to address any concerns.[46]

[44] *Id.* at 152.

[45] *See, e.g.*, CTIA Comments, at 102 ("In the BIAS context, usage-based pricing and zero-rating are quintessential examples of offers that facilitate choice."), 103 n.430; Information Technology & Innovation Foundation Comments, at 7-8 ("These harms [of banning all paid prioritization] disproportionately fall on potential new entrants who are most likely to want to differentiate their service, perhaps by "zero-rating" popular services, but who are also least able to afford the cost of lawyers and consultations."); CCIA Comments, at 14 ("Zero-rating practices also can help consumers experience the full range of innovative and diverse content available on an open Internet, expanding opportunities for online work, learning, healthcare, and civic and social engagement.").

[46] *See also* INCOMPAS Comments, at n.130 (e.g., data caps by fixed wireline providers).

VII. Conclusion

For the reasons stated herein, INCOMPAS urges the Commission to consider the recommendations in these reply comments as it examines the issues raised in the *NPRM*.

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