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REPLY COMMENTS OF ITIF

Before the

Federal Communications Commission

Washington, D.C.

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In the Matter of:	)	
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	)	WC Docket No. 23-320
Safeguarding and Securing the Open Internet	)	
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January 17, 2024

INTRODUCTION AND SUMMARY

The Information Technology and Innovation Foundation appreciates the opportunity to reply to comments regarding the Safeguarding and Securing the Open Internet.[1] As we noted in our comments, broadband is essential to consumers' ability to participate in today's world. Title II of the Communications Act would undermine the market dynamics that have enabled the broad-based benefits of connectivity we see today. Ensuring that all Americans experience the benefits of universal connectivity requires the Commission to double down on what works, not abandon it for utility-style regulation. That is why the Commission should reject the proposal to reclassify broadband Internet access service (BIAS) under Title II.

THE RECORD DOES NOT DEMONSTRATE A NEED FOR TITLE II REGULATION TO MAINTAIN THE OPEN INTERNET

ITIF's argument that the free and open Internet has and will persist in the absence of Title II regulation remains true. While some commenters waxed eloquent about the benefits of net neutrality principles, they do not go on to show why a drastic regulatory shift is necessary to preserve them. Rather, they simply gloss over the fact that we have had a free and open Internet prior to the 2015 Open Internet Order, and we have continued to have one since the Restoring Internet Freedom Order took effect in 2018. Instead, as ITIF and other commenters showed, broadband networks have thrived because they were not subject to Title II regulation.[2]

THE COMMISSION SHOULD PERMIT REASONABLE NETWORK MANAGEMENT

Consumers benefit most from broadband networks that work best when their Internet service providers (ISPs) manage traffic in a way that preserves or enhances the consumers' chosen applications. As broadband networks have enhanced their capabilities, the diversity of applications has increased alongside their connectivity needs. Meeting all those needs may sometimes entail traffic management, to which some commenters object. Network slicing, for example, has the potential to enable emergency services and other essential traffic to take advantage of connectivity. But Public Knowledge, for example, asserts that it comes at the cost of quality and capacity for general internet access."[3] New America's Open Technology Institute, for example, calls for the Commission to ban network slicing and characterizes it as a "giant loophole" in net neutrality protections but admits "it is unclear how this would work in practice."[4]

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[1] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, https://itif.org/about.

[2] Comments of ITIF, *Safeguarding and Securing the Open Internet*, WC Docket No 23-320, 3-5 (Dec. 14, 2023) https://www.fcc.gov/ecfs/document/12144466266l2/1.

[3] Comments of Public Knowledge, *Safeguarding and Securing the Open Internet*, WC Docket No 23-320, 22 (Dec. 14, 2023)https://www.fcc.gov/ecfs/document/12141254615295/1.

[4] Comments of New America's Open Technology Institute, *Safeguarding and Securing the Open Internet*, WC Docket No 23-320, 72 (Dec. 14, 2023) https://www.fcc.gov/ecfs/document/1215760807084/1.

This view is antithetical to enabling innovative broadband networks. Banning things without even knowing whether or how they are harmful will only cause stagnation of current capabilities rather than fostering the innovation necessary to enable the broad benefits of more advanced connectivity for all. Therefore, should the Commission proceed with a rulemaking, it should make clear that network slicing is a non-BIAS service, or at least reasonable network management, and that it is presumptively allowed.

ZERO RATING IS PRO-CONSUMER

Commenters who seek a blanket ban on zero rating do not accurately represent its effects on consumers. At the outset, giving consumers services they value for free is prima facie pro-consumer.[5] Only by assuming a nefarious self-preferencing and assumption of bandwidth shortages do commenters manage to concoct consumer harms. The underlying assumptions of such a view are antithetical to an environment of broadband abundance in which many different business models can coexist without grinding other traffic to a halt. Indeed, the harms that zero-rating opponents fear would be the natural result of Title II regulation that disincentivizes investment necessary to provide the high-capacity access that modern applications demand. Instead of stagnating the current Internet for fear of capacity constraints, the Commission should adopt policies that incentivize investment and thus increase the overall capacity of broadband networks.

Moreover, not adopting a blanket ban on practices such as zero rating would not deprive the Commission of the ability to address harms that arise. The Commission should adopt a rule that presumptively allows zero rating but still permits enforcement if consumer harm is proven. Isolated cases of harmful conduct, if they ever occurred, do not justify the chilling effect that would deprive consumers of salutary services that never come to market for fear of being deemed illegal without any showing of harm.

FORBEARANCE WILL NOT CONTAIN THE HARMFUL EFFECTS OF TITLE II

Commenters who support Title II often tie their arguments to minimal forbearance, a position at odds with the Chairwoman's claim that broad forbearance will make Title II for the Internet less burdensome. Commenters such as the Electronic Frontier Foundation and Lawyers' Committee for Civil Rights Under Law would turn net neutrality into a generalized mandate for equity, privacy, and other policy priorities unmoored from a focused conception of open Internet principles that have broad support.[6] While other values are important, the Commission should not grasp at every important goal to justify a vast expansion of regulatory authority. That outlook provides no limiting principle for mission creep and will, therefore, result in perpetual ratcheting up of the scope of the rules. The same activist pressure that has occasioned the NPRM despite the lack of evidence for its necessity will erode the safeguards of promised forbearance. Regardless of the merits of specific commenters' arguments, the fact that calls for less forbearance are already hitting the Commission before it has even adopted a reclassification demonstrates the inability of discretionary forbearance to provide the regulatory certainty necessary for broadband networks to grow and develop.

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[5] See e.g., Public Knowledge Comments at 73-78; Comments of Electronic Frontier Foundation, *Safeguarding and Securing the Open Internet*, WC Docket No 23-320 (Dec. 14, 2023), 15 https://www.fcc.gov/ecfs/document/1215074196426/1.

[6] Comments of Lawyers' Committee for Civil Rights Under Law, *Safeguarding and Securing the Open Internet*, WC Docket No 23-320 (Dec. 14, 2023), 5-10, https://www.fcc.gov/ecfs/document/121402227194/1; EFF Comments at 3-6.

Even if today's FCC is resolute in forbearing from more onerous aspects of Title II, a future FCC that is sympathetic to the ideological stances of the above commenters could too easily flip the switch to the detriment of broadband users. Because broadband is essential, the Commission should not set the stage for such future regulatory blunders by reclassifying broadband under Title II now.

Thank you for your consideration.

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