

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**Ex Parte Comments of the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

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**Ex Parte Comments of the
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I. INTRODUCTION AND SUMMARY

The National Telecommunications and Information Administration (NTIA) is pleased to offer *ex parte* comments in response to the Notice of Proposed Rulemaking (Notice) in the above-captioned proceeding.¹ As the President’s principal advisor on telecommunications and information policy,² NTIA is charged with developing, coordinating, and presenting the Executive Branch’s views to the Federal Communications Commission (FCC or Commission).³ NTIA is deeply committed to advancing the Internet for All programs and promoting a robust digital economy. NTIA commends the Commission for opening this important proceeding, consistent with the Biden Administration’s recommendation that the Commission adopt “through appropriate rulemaking ‘Net Neutrality’ rules similar to those previously adopted under Title II of the Communications Act” in 2015.⁴

¹ See Notice of Proposed Rulemaking (Notice), adopted October 19, 2023, <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

² 47 U.S.C. § 901(b)(6), § 902(b)(2)(D).

³ *Id.* § 902(b)(2)(I), (J).

⁴ E.O. 14036 of Jul 9, 2021 (“Promoting Competition in the American Economy”) at Sec. 5(l)(i), <https://www.federalregister.gov/d/2021-15069/p-107>. Consistent with the 2015 approach, we share the understanding expressed by some on the record that “the scope of the proposed order [is] limited to Internet access transmission services.” Ex Parte Letter of Daniel J. Weitzner, WC Docket No. 23-320 (October 15, 2023),

The Commission should act to reinstate strong net neutrality rules. An Internet that is open, secure, and accessible to all is an Internet that drives innovation, economic growth, and the free exchange of ideas around the world. Net neutrality helps ensure that creators of new Internet-based applications and content, for example, are able to make their products available to users around the world without needing to negotiate with every Internet service provider.⁵ Similarly, open Internet protections enable end users to choose their preferred content, devices, applications, and services, allowing them to make meaningful use of today’s information technologies as circumstances change, while driving continued technological evolution.⁶ These are just some of the ways in which well-crafted rules of the road can help ensure continued innovation and opportunity online.

NTIA also supports the Commission’s proposal to return broadband Internet access service (BIAS)⁷ “to its classification as a telecommunications service under Title II” of the

<https://www.fcc.gov/ecfs/document/1015175439314/1>. NTIA urges the Commission to focus squarely on broadband Internet access service (BIAS) in this proceeding, and to ensure—as it previously did in the *2015 Open Internet Order*—that this focus is clear to all. For example, the Commission in 2015 noted (correctly, in NTIA’s view) that they “do not find that [domain name service (DNS)] is a telecommunications service (or part of one) when provided on a stand-alone basis by entities other than the provider of Internet access service” (even though the Commission found that DNS falls within the telecommunications management exception when offered as part of BIAS). *2015 Open Internet Order* Fn 1046.

⁵ Electronic Frontier Foundation Comments at 11-12.

⁶ Microsoft Comments at 2-4.

⁷ NTIA agrees with the Commission’s proposal to “continue using the definition of ‘broadband Internet access service’ as a ‘mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service,’ as well as ‘any service that the Commission finds to be providing a functional equivalent of the service described [in the definition] or that is used to evade the protections set forth’ in part 8 of the Commission’s rules.” As the Commission notes, it has employed approximately that definition of BIAS since first defining the term in 2010. Notice ¶ 59. Further, we urge the Commission to re-adopt the previous, well-vetted understanding of what does and does not constitute BIAS that was articulated in the *2015 Open Internet Order*, including the conclusion that BIAS “does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from broadband Internet access service).” *2015 Open Internet Order* ¶ 190; see Notice ¶ 67.

Communications Act and “to reclassify mobile BIAS as a commercial mobile service.”⁸ That said, and as the Commission recognizes throughout its *Notice*, there is more to Title II than net neutrality alone. For example, reclassification can also advance national security objectives. NTIA supports reclassification on these grounds, while urging the Commission to reaffirm its long-running commitment to a whole-of-government and multistakeholder approach toward these complex national security matters.

II. THE FCC SHOULD REINSTATE NET NEUTRALITY “CONDUCT” RULES

NTIA strongly supports the Commission’s proposal to prohibit Internet Service Providers (ISPs) from engaging in blocking, throttling, or paid or affiliated prioritization; and to impose a general conduct standard against interfering with consumers or edge providers.⁹ We agree that reinstating similar rules to those adopted in the *2015 Open Internet Order* will help ensure that BIAS providers do not interfere with their customers’ communications with edge providers. Non-neutral practices can jeopardize free expression, innovation, and efforts to close the digital divide. Indeed, practices that violate net neutrality principles can create new disparities between those who can access open Internet service and those who are subject to a less open Internet.¹⁰

NTIA supports reclassification, subject to reasonable application of the Commission’s forbearance authority. For example, NTIA agrees with the *Notice*’s proposal “to forbear from all

⁸ Notice ¶ 16.

⁹ Notice ¶ 23.

¹⁰ NTIA Internet Use Survey underscore the importance of ensuring less-resourced users are not consigned to a digital “dirt road” through policies that deprioritize their packets in favor of those sent and received by wealthier users. New Analysis Shows Offline Households Are Willing to Pay \$10-a-Month on Average for Home Internet Service, Though Three in Four Say Any Cost is Too Much, <https://www.ntia.gov/blog/2022/new-analysis-shows-offline-households-are-willing-pay-10-month-average-home-internet>. .

provisions of Title II that would permit Commission regulation of BIAS rates.”¹¹ NTIA also supports the Notice’s other forbearance proposals, and it urges the Commission to carefully limit how it applies Section 214 in the national security context.¹²

III. THE COMMISSION SHOULD HAVE AUTHORITY TO PROMOTE NATIONAL SECURITY AND ENSURE IT APPLIES THIS AUTHORITY JUDICIOUSLY

NTIA supports a limited use of Title II authority to meet the needs of national security.

As the Commission has explained:

In today’s increasingly connected world, safeguarding the security and integrity of America’s communications infrastructure has never been more important. Broadband networks have transformed virtually every aspect of the U.S. economy, enabling the voice, data, and Internet connectivity that fuels all other critical industry sectors—including our transportation systems, electrical grid, financial markets, and emergency services.¹³

The lightning-fast evolution of our communications technologies and our growing dependence on these offerings necessitate a whole-of-government approach to security that engages all available federal government resources. NTIA supports the Commission’s effort to ensure it has the authority to act when needed to protect national security. At the same time, NTIA urges the Commission to reaffirm its longstanding commitment to a collaborative and carefully calibrated approach to these security challenges, including through interagency coordination, targeted

¹¹ Notice ¶ 105.

¹² See generally Section III.B, *infra*.

¹³ *Protecting Against National Security Threats to the Communications Supply Chain through FCC Programs, Report and Order, Further Notice of Proposed Rulemaking, and Order*, WC Dkt 18-89, ¶ 1 (Nov. 26, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-121A1.pdf>. See also *id.*, ¶ 5 (“Modern communications networks are an integral component of the U.S. economy, enabling the connectivity and information exchange underlying the operations of businesses, public safety organizations, and government. But these networks are vulnerable to various forms of surveillance and attack that can lead to denial of service, and loss of integrity and confidentiality of network services. With the proliferation of ubiquitous broadband, mobile devices, and the Internet of Things, threats to our nation’s networks have only increased.”).

forbearance, and deference to existing multistakeholder processes. In particular, we urge the Commission to 1) work closely with the Executive Branch on issues of overlapping jurisdiction, deferring as appropriate to expert agencies that are actively addressing the relevant issues; 2) rely on well-established and successful multistakeholder processes; and 3) when a regulatory approach is necessary, craft rules that are carefully targeted to remedy the national security problem while preserving important Open Internet principles.

A. Reclassification Ensures the Commission Has the Authority It Needs to Protect National Security.

The 2023 National Cybersecurity Strategy recognized the need to realign incentives “to make cyberspace more resilient and defensible.”¹⁴ The Commission has encountered challenges that have hampered its ability to fully protect the public from serious national security threats. Notably, in 2021 and 2022, the Commission, pursuant to Section 214,¹⁵ revoked the authority of certain foreign-owned network service providers to provide service in the United States on the grounds that they presented threats to national security.¹⁶ The Commission observed that these providers’ presence in the United States gave them the opportunity to access U.S. telecommunications infrastructure, access U.S. customer records, monitor communications, disrupt communications, misroute communications, and facilitate espionage. The Commission

¹⁴ *National Cybersecurity Strategy* (“The United States has an opportunity to rebalance the incentives necessary to lay a stronger, more resilient foundation on which to build the future of our digital ecosystem.”).

¹⁵ 47 U.S.C. § 214; 47 CFR §§ 63.01-63.53.

¹⁶ See *China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285, Order on Revocation and Termination, 36 FCC Rcd 15966 (2021) (*China Telecom Americas Order on Revocation and Termination*), *aff’d* *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256 (D.C. Cir. 2022); *China Unicom (Americas) Operations Limited*, GN Docket No. 20-110, File Nos. ITC-214-20020728-00361, ITC-214-20020724-00427, Order on Revocation, 37 FCC Rcd 1480 (2022), *argued* 9th Cir. Argued Feb. 15, 2023; *Pacific Networks Corp. and ComNet (USA) LLC*, GN Docket No. 20-111, File Nos. ITC-214-20090105-00006, ITC-214-20090424-00199, Order on Revocation and Termination, 37 FCC Rcd 4220 (2022), *aff’d* *Pacific Networks Corp. and ComNet (USA) LLC v. FCC*, No. 22-1054 (D.C. Cir. 2023).

raised concern, for example, that China Telecom Americas “has the ability to cause traffic to be routed through unexpected paths,” taking advantage of its presence at Internet exchange Points and Internet interconnection with networks within the United States, and routing domestic traffic through extra-territorial routes.¹⁷

Having identified these threats, though, the Commission had limited ability to act. These foreign service providers offered both telecommunications services and information services.¹⁸ Because Section 214’s reach is limited to Title II telecommunications services, the Commission could halt the providers’ provision of those services (*e.g.*, traditional telephony), but it had no authority to stop adversarial networks from providing BIAS or other Internet-based services.¹⁹ To protect our networks from malicious actors—as the Act requires it to do—the Commission should leverage the appropriate tools at its disposal, including the relevant Title II provisions. Reclassifying BIAS is necessary to ensure that the Commission has the authority it needs to advance national security objectives.

B. When Acting to Protect National Security, the Commission Should Commit to Interagency Coordination, Multistakeholder Processes, and Narrowly Tailored Rules.

While national security needs necessitate the reestablishment of the Commission’s Title II authority over BIAS, it is important that the Commission continue to oversee a broad and inclusive approach to national security matters, recognizing the expertise and information possessed by private-sector experts and governmental partners both within and beyond the Executive Branch. To the extent that regulations are necessary, they should be narrowly tailored

¹⁷ See *China Telecom Americas Order on Revocation and Termination*, ¶ 70.

¹⁸ See, *e.g.*, *China Telecom (Americas) Corporation*, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC-214-20020716-00371, ITC-T/C-20070725-00285, *Order Instituting Proceedings on Revocation and Termination and Memorandum Opinion and Order*, 35 FCC Rcd 15006, ¶ 7 (2020).

¹⁹ *China Telecom Americas Order on Revocation and Termination*, ¶ 83.

to the particular problem that must be addressed and should take into consideration the significant relevant policies, programs, and authorities that exist across Executive Branch agencies, as well as the highly successful and effective collaborations between the private sector and government agencies—including some facilitated by the Commission itself.

NTIA urges the Commission to rely on three principles when considering activities in support of national security. First, in considering the application of its national security authorities with respect to BIAS under Title II, the Commission must ensure it is collaborating closely with relevant Executive Branch agencies. To the extent the Commission's jurisdiction may overlap with that of another agency with appropriate expertise, it should defer to that agency, forbearing from action where it makes sense, and working in concert when beneficial to the lead agency's efforts. Second, the Commission's primary mode of involvement in intricate national security matters should be in partnership with the private sector, and particularly via longstanding multistakeholder processes. The success of initiatives like the Communications, Security, and Interoperability Council (CSRIC), and recent Internet routing security efforts show that these complex issues can be addressed through broad and non-regulatory means, and the Commission should continue to leverage such approaches moving forward. Finally, when voluntary initiatives fail and other agencies cannot address the problem, the Commission should develop narrowly-tailored regulatory solutions.

Furthermore, various federal agencies already exercise substantial authorities with respect to the information and communications sectors. The Commission should work closely with these agencies to ensure that U.S. government action is coordinated and focused on those areas where potential enforcement will be most efficient and effective. For example, the Department of Commerce's Bureau of Industry and Security (BIS) oversees an Information and

Communications Technology and Services (ICTS) program, which implements three Executive Orders and related regulations under the International Emergency Economic Powers Act. These authorities charge BIS with (among other things) investigating U.S. ICTS transactions with foreign participation in the supply chain, and then prohibiting or imposing mitigation measures on any such transaction that poses undue or unacceptable security risks to the United States.²⁰ Careful collaboration is therefore necessary to ensure that BIAS providers understand the extent to which they would be subject to both the Commission's Section 214 jurisdiction and the ICTS authority and to ensure that agencies reach consistent conclusions about particular transactions. To avoid potential conflicts in the exercise of any expanded 214 jurisdiction, the Commission should exercise discretion in invoking its jurisdiction in areas where other government entities might exercise preexisting authority, including, for example, by deferring to BIS on matters it is investigating under its ICTS authority.

In sum, the Commission should reclassify BIAS as a telecommunications service to advance security and should continue to engage in the type of multistakeholder processes that have proven so effective in this sphere. It also should work closely with other national security agencies to ensure that the Commission's actions advance and do not undercut those entities' ongoing activities.

IV. CONCLUSION

For the reasons stated above, NTIA respectfully urges the Commission to reclassify BIAS as a telecommunications service to promote the open Internet, and employ a

²⁰ Exec. Order No. 13,873, 15 C.F.R. Part 7.

multistakeholder, whole-of-government approach to national security issues related to broadband Internet access services.

Respectfully Submitted,



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