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FCC RELEASES OPEN INTERNET RULES

The Federal Communications Commission (Commission or FCC) has now released the text of its much-anticipated Open Internet Order (Order), which sets forth the Commission's revised net neutrality rules.[1] The Order, which marks a historic change in position for the Commission, reclassifies retail Broadband Internet Access Service (BIAS)[2] as a telecommunications service subject to "common carrier" (public utility) regulation under Title II of the Communications Act. Acting pursuant to that authority, the Order imposes a near-absolute prohibition on "paid prioritization" agreements in which a broadband Internet Service Provider (ISP), such as AT&T or Comcast, charges an "edge provider,"[3] such as Google or Netflix, for access to a "fast lane" between the edge provider and its end-user customers. The Order also bars BIAS providers from "blocking" or "throttling" (i.e., slowing) Internet traffic between edge providers and end-users. In another change from past practice, the FCC is applying its new rules to both wireline and wireless broadband ISPs. Finally, for the first time, the FCC has asserted authority to resolve disputes between broadband ISPs and entities – such as Internet backbone providers, content delivery networks (CDNs)[4] and edge providers – that seek to interconnect directly with the ISP.

The February 26, 2015 vote in which the FCC adopted the revised rules was a 3-2 split, with the three Democrats, Chairman Tom Wheeler and Commissioners Mignon Clyburn and Jessica Rosenworcel, in the majority. The two Republicans, Commissioners Ajit Pai and Michael O'Rielly, issued strongly worded dissents.

The revised rules come after more than a year of heated legal and policy debates regarding the FCC's role in Internet regulation. In January 2014, the United States Court of Appeals for the DC Circuit struck down the FCC's prior Open Internet rules in *Verizon v. FCC*.[5] Four months later, the FCC issued a Notice of Proposed Rulemaking (NPRM) which – based on guidance provided by the court – proposed to use Section 706 of the Communications Act[6] to ban blocking of Internet traffic while allowing "commercially reasonable" paid prioritization agreements.[7] The FCC received an estimated four million comments, many opposing the adoption of the "commercially reasonable" standard. Subsequently, in November 2014, President Obama called on the FCC to reclassify BIAS as a telecommunications service subject to regulation under Title II of the Communications Act and to ban blocking, throttling, and paid prioritization.[8]

The major provisions and the most significant legal and policy changes created by the Order are outlined below.

I. Reclassification of Broadband Internet Access Services and Legal Authority

The Communications Act divides services into "telecommunications services" and "information services." Telecommunications services are defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[9] By contrast, information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[10] Information services do not include capabilities used for the "management, control, or operation of a telecommunications system"; this is known as the systems management exception.[11] Telecommunications services are subject to common carrier regulation under Title II of the Act, while information services are subject to "light touch" regulation under Title I. Since at least 2002, the FCC has classified broadband Internet access service as an integrated information service, because it "combines the transmission of data with computer processing, information provision, and computer interactivity . . . [accordingly,] an Internet access service . . . is an information service."[12] The Supreme Court upheld the FCC's decision in the *Brand X* case.[13]

In the Order, the FCC found that, contrary to its prior conclusion, BIAS is not an information service even though it may be offered along with capabilities that might fall within the statutory definition of information service. For example, the FCC concluded that information services such as email or online storage offered in conjunction with Internet service were "sufficiently independent" from BIAS such that BIAS was not an information service. Similarly, the Commission found that the inclusion of capabilities such as domain name service (DNS),[14] or caching[15] did not render BIAS an information service. Rather, these services facilitate the provision of the transmission service and, therefore, fall within the "systems management" exception contained in the Communications Act. The FCC concluded that, unlike a decade ago, consumers now view BIAS as a service that merely transports and delivers traffic from end-users to any lawful Internet endpoints and transmits traffic from endpoints back to the consumer. Therefore, the agency concluded, BIAS should be classified as a telecommunications service. By reclassifying BIAS as a telecommunications service, the FCC sought to provide a sound legal basis on which to adopt strong Network Neutrality rules–especially a ban on paid prioritization.[16] The classification of BIAS applies regardless of the technological platform over which the service is offered, including wire, fixed and mobile wireless, and satellite.

II. Three Bright Line Rules to Protect the Open Internet

Relying on its authority under Title II, as well as Section 706, the FCC established three "bright line" prohibitions:

- **No Blocking:** Broadband ISPs may not block "lawful content, applications, services, or non-harmful devices, subject to reasonable network management."
- **No Throttling:** Broadband ISPs may not degrade or impair lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

- **No Paid Prioritization:** Broadband ISPs may not accept payment to provide an edge provider with access to a "fast lane" between the ISP and the end-user. Broadband ISPs may seek waivers of the rule against paid prioritization only if they can demonstrate that "a practice would provide some significant public interest benefit and would not harm the open nature of the Internet."[17] This standard is likely to be very difficult, if not impossible, to meet.

III. Additional New Rules

In addition to the three bright line rules, the FCC established a number of other new rules designed to protect against future conduct that may "threaten the Open Internet," including:

- **No Unreasonable Interference/Disadvantage Standard:** Broadband ISPs cannot "unreasonably interfere with or unreasonably disadvantage" the ability of consumers to select, access, and use the lawful content, applications, services, or devices they choose. Broadband ISPs also may not unreasonably interfere with or unreasonably disadvantage the ability of edge providers to make lawful content, applications, services, or devices available to end-users. The FCC will apply this rule on a case-by-case basis and the Order lays out a non-exhaustive list of factors to guide application of the rule. For example, the FCC found that a practice that allows end-user control and promotes consumer choice is less likely to unreasonably interfere with the end-user's ability to use the Internet as he or she wishes.[18]
- **Greater Transparency Requirements:** The Order implements transparency requirements that are more stringent than the transparency rules that the agency adopted in 2010, which were upheld by the DC Circuit in *Verizon*. The rules require broadband ISPs to publicly disclose accurate information concerning their network management practices, performance, and commercial terms of their Internet service. They establish a temporary exemption from the disclosure requirements for providers with 100,000 or fewer subscribers and direct the FCC's Consumer and Governmental Affairs Bureau to modify or remove that exemption by December 15, 2015.
- **Exception for Reasonable Network Management:** The rules provide an exception to the prohibitions against blocking and throttling for "reasonable network management." The FCC defines "network management" as a practice that has a primarily technical network management justification but not including other business practices. Network management is reasonable if it is primarily used for achieving a "legitimate network management purpose," taking into account the particular engineering attributes of the technology involved. However, the FCC expressly bars broadband ISPs from seeking to justify paid prioritization agreements as a form of network management.

IV. Application of the Open Internet Rules

The FCC's prior Open Internet rules imposed few requirements on mobile providers. By contrast, the FCC's new rules apply equally to both fixed and mobile broadband Internet access service. To enable the FCC to apply common carrier regulations to mobile broadband providers, the FCC had to reclassify BIAS as a Commercial Mobile Radio Service (CMRS). The Communications Act, however, defines CMRS as services that are interconnected to "the public switched network." The FCC has long defined the "public switched network" to mean the public switched *telephone* network. However, exercising authority granted by Congress to redefine "the public switched network" in response to changing conditions, the FCC expanded the definition to include the Internet. The blurring of the regulatory distinction between the telephone network and the Internet could have far-reaching consequences.

The FCC adopted a different approach to ISP interconnection. ISP Interconnection refers to the physical or logical connection of, and the exchange of traffic between, a broadband ISP and connecting networks. BIAS providers typically interconnect directly with Internet backbone providers. However, CDNs and edge providers may seek to directly interconnect with a BIAS provider in order to obtain faster access to end-users. Historically, ISP interconnection agreements have been viewed as purely commercial arrangements, not subject to FCC oversight. The FCC did not apply the substantive Open Internet rules to these agreements. However, the FCC stated that – because it views interconnection as a part of the telecommunications service that BIAS providers offer to their end-user customers – parties that have entered (or that seek to enter) such agreements could file complaints under Section 208 of the Communications Act and that the agency will take action, on a case-by-case basis, if it determines that the interconnection arrangements (or proposed agreements) do not meet the "just and reasonable" standard contained in Title II.

The substantive rules established in the Order do not apply to non-BIAS services. These services, previously known as "specialized services," include things like facilities-based VoIP offerings, heart monitors, or energy consumption sensors, that are sometimes offered by a broadband provider, but do not provide access to the Internet generally. However, such services may still be subject to enforcement action if the FCC finds that such a service is "providing the functional equivalent of broadband Internet access service or . . . is [being] used to evade the protections" of the Open Internet rules.

V. Enforcement of the Open Internet Rules

The Order provides that the FCC will enforce the Open Internet rules primarily through the investigation and processing of formal and informal complaints. The FCC may also issue advisory opinions and enforcement advisories. In addition, the FCC's Enforcement Bureau may request opinions from outside technical organizations. Finally, the Order establishes an "Open Internet Ombudsperson," who will be housed in the FCC's Consumer and Governmental Affairs Bureau. The ombudsperson will be tasked with assisting consumers, businesses, and organizations with Open Internet complaints and questions. The Ombudsperson has investigatory powers and may refer matters to the Enforcement Bureau.

VI. Forbearance and the "Light-Touch" Regulatory Framework

Title II contains a large number of requirements which were adopted to regulate monopoly telephone companies. As a result of the Commission's decision to reclassify BIAS as a telecommunications service, BIAS providers will now be subject to many of these provisions. Since 1996, however, the FCC has had the authority to "forbear" from applying these rules where the FCC determines that: (1) enforcement is not necessary to ensure that the practices of a common carrier are just and reasonable, (2) enforcement is not necessary for consumer protection reasons or (3) forbearance is in the public interest.[19] Up until now, the FCC has exercised its forbearance power when it has determined that a market has become sufficiently

competitive. In the present case, however, the FCC decided to forbear from applying many of these provisions to BIAS notwithstanding its conclusion that the BIAS market is not fully competitive.

The following provisions of Title II **will apply** to providers of Broadband Internet Access Services, who are now classified as common carriers:

- **"Just and Reasonable" Service and Charges:** Section 201 requires that "all charges, practices, classifications, and regulations" relating to communications service "shall be just and reasonable."
- **Discriminations and Preferences:** Section 202 prohibits common carriers from making any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" in connection with communications services, or giving any "undue or unreasonable preference or advantage" to any person or persons.
- **Complaints:** Section 208 provides that any person, political body, municipal organization or State commission may file a petition with the FCC stating a complaint regarding any common carrier. The FCC then forwards the complaint to the common carrier, which is required to answer the complaint. Unless the carrier redresses the injury appropriately and directly, the FCC is required to investigate the matter "by such means as it shall deem proper."
- **Enforcement Provisions:** Several Title II provisions provide that carriers who violate any applicable provision of Title II are liable to the persons injured for full damages plus reasonable attorneys' fees (Section 206). To recover damages, persons may file a complaint with the FCC or bring suit in district court, but may not do both (Section 207). These provisions also authorize the FCC, after a hearing on a complaint, to award damages to the complainant and issue an order directing the carrier to pay those damages (Section 209). Finally, Title II imposes liability on receivers and operating trustees of common carriers and to common carriers for actions of their officers and agents when acting within the scope of their employment (Section 216 and 217).
- **Privacy of Customer Information:** Section 222 establishes privacy protections for customer information; primarily, it sets forth the carriers' duty to protect the confidentiality of proprietary information of and relating to other carriers, equipment manufacturers, and customers (Section 222(a)). "Proprietary information" is not defined in the statute but has been defined by the FCC as "all types of information that should not be exposed widely to the public." Section 222(c) requires carriers to generally maintain the confidentiality of Customer Proprietary Network Information (CPNI) collected by virtue of its provision of a telecommunications service. In this case, the FCC will apply the statutory provision but forbear from applying its existing implementing rules, which were tailored to voice service. The FCC will conduct a separate rulemaking to implement customer information privacy rules that are appropriate for BIAS.[20]
- **Fair Access to Poles and Conduits:** A "pole attachment" is "any attachment" by a telecommunications service provider to a pole, duct, conduit or right-of-way owned or controlled by a utility. Under section 224, the FCC has authority to "regulate the rates, terms, and conditions for pole attachments to provide that such terms are just and reasonable. The FCC is required to adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions." The FCC believes that this provision will facilitate broadband deployment by reducing the cost of accessing passive infrastructure.
- **Access for Persons with Disabilities:** Several Title II provisions provide for access to telecommunications services by persons with disabilities. Section 225 establishes and governs telecommunications relay services (TRS), which are telephone services that provide deaf, hard of hearing, deaf-blind or speech-disabled persons the ability to engage in communication in a manner functionally equivalent to that of a person without a disability. Carriers providing telephone voice transmission services are required to provide TRS in their service areas (Section 225(c)). The FCC is required to establish rules and standards to regulate TRS (Section 225(d)).

  Section 255 provides that telecommunications equipment manufacturers and service providers must ensure that their equipment or service is accessible to and usable by individuals with disabilities, if "readily achievable" (a term of art meaning "easily accomplishable . . . without much difficulty or expense") (Sections 255(b) and (c)). Where not readily achievable, manufacturers or providers are required to ensure that the equipment or service is compatible with "existing peripheral devices" or "commonly used" equipment used by individuals to achieve access (Section 255(d)).

  Finally, section 251(a)(2) provides that carriers have the duty not to install network features, functions, or capabilities that are not compliant with the FCC's guidelines and standards issued under Section 255.
- **Universal Service** (Sections 254(a)-(c), (e)-(f), (h)-(j), (l) and 214(e)): At least initially, broadband ISPs will not be required to make new universal service contributions. However, certain aspects of universal service are now applicable to BIAS. Specifically, these rules contain the basic principles of universal service including the provision of advanced telecommunications services to all regions of the nation at just, reasonable and affordable rates (Section 254(b)). This is an evolving level of service that the FCC must periodically review and establish (Section 254(c)).

  If carriers meet certain eligibility requirements, they are entitled to receive universal service support (Section 214(e)), which they must then use to provide, maintain and upgrade advances telecommunications facilities and services (Section 254(e)). The FCC and state commissions are charged with designating carriers eligible to receive universal service support (Section 214(e)).

  Special requirements apply to the provision of service to rural healthcare providers and schools and libraries (Section 254(h)). As a general matter, carriers are required to, upon receiving a "bona fide request," provide telecommunications services necessary for the provision of healthcare services to rural healthcare providers

at rates reasonably comparable to rates charged for similar services in urban areas (Section 254(h)(1)(A)), and the provision of service to libraries and elementary and secondary schools for educational purposes at rates less than the amounts charged for similar services to other parties (Section 254(h)(1)(B)).

States are entitled to make regulations that are not inconsistent with the FCC's rules to preserve and advance universal service (Section 254(f)). Both states and the FCC are charged with ensuring that universal service is available at rates that are just, reasonable, and affordable (Section 254(i)).

While the FCC will apply the foregoing Title II provisions to BIAS providers, it will forbear from applying the provisions set forth below:

- **Universal Service Contributions:** Under section 254, all telecommunications carriers providing interstate telecommunications services are required to contribute to universal service support mechanisms designed to ensure universal access to telecommunications services. Historically, such contributions have been based on a percentage of providers' "end-user telecommunications revenue." The current percentage is 16.8%; the proposed contribution factor for the second quarter of 2015 is 17.4%. Providers typically pass these costs on to their customers. As a result of the reclassification of BIAS as a telecommunications service, broadband ISPs (and, ultimately, their customers) are subject to these charges.

  The FCC will forbear from applying to broadband ISPs sections 254(d), (g) and (k), which set out the contribution obligations. Broadband ISPs will therefore not be required to make universal service contributions based on revenue from the provision of BIAS at the present time. The FCC will address this issue in an ongoing proceeding concerning universal service contribution reform, which is considering how contributions should be assessed in the future.[21]

- **Tariffing:** The FCC will forbear from requiring broadband ISPs to file (and obtain advanced FCC approval of) tariffs specifying the standardized prices, terms, and conditions on which they will provide service under sections 203 and 204. However, end-users will be able to bring a complaint about rates under section 208. This could result in "ex post" ratemaking, in which the FCC invalidates effective rates (and potentially requires refunds) on the grounds that the rates were not just and reasonable or were unreasonably discriminatory. An FCC decision finding a rate unreasonable as applied to a single complaining party could lead to class action lawsuits on behalf of all customers who paid the same rate. The FCC notes that this has not occurred in the cellular market, which is subject to a comparable Title II with forbearance regime. However, unlike the BIAS market, the cellular market is effectively competitive.

- **Enforcement Provisions:** The FCC will forbear from exercising its authority under section 205 to prescribe rates and practices. The rules also forbear from section 212, empowering the FCC to monitor interlocking directorates.

- **Information Collecting and Reporting Provisions:** The FCC will forbear from applying the information collection and reporting provisions in sections 211, 213, 215 and 218-220.

- **Section 214 Discontinuance, Transfer of Control, and Network Reliability Approval:** The FCC will partially forbear from applying the portions of section 214 that require approvals for discontinuance, transfers of control and network reliability of telecommunications services.

- **Interconnection and Market-Opening Provisions:** The FCC will forbear from applying sections 251, 252 and 256, which pertain to the FCC's authority to establish procedures for effective and efficient interconnection and require telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers.

- **Subscriber Charges:** The FCC will forbear from enforcing the prohibition on unauthorized carrier charges under section 258.

The FCC contends that, by forbearing from a significant number of statutory requirements, it has created a Title II "tailored for the 21st century."[22] However, one of the dissenting Commissioners derided this as "fauxbearance"[23] because the agency can use the remaining Title II provisions – such as the prohibition of unjust and unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services contained in section 202(a) – to impose comparable requirements.

VII. Next Steps

The Open Internet rules will be published in the Federal Register within a few weeks. After publication in the Federal Register, affected parties will have 60 days to file petitions for review, most likely in the DC Circuit. Oral arguments on petitions for review will likely occur in the fall of 2015 and a decision from the court would be likely by the end of 2015. If the case goes to the United States Supreme Court, there may not be a final resolution until the first half of 2017.

The major issues likely to be raised are:

- Whether the FCC provided sufficient notice and opportunity for comment given the significant differences in the rules adopted as compared to the *2014 Open Internet NPRM*;

- Whether the FCC lawfully reclassified BIAS as a telecommunications service;

- Whether the FCC has the authority to apply common carrier regulation to wireless BIAS providers;

- Whether the FCC can impose an absolute prohibition against offering paid prioritization on a common carrier;

- Whether the FCC has the authority to regulate the interconnection agreements of ISPs; and

- Whether the FCC appropriately applied the statutory forbearance requirement.

While these are serious challenges to the FCC's Order, the FCC is entitled to significant deference from the courts and has made significant efforts to try to anticipate the likely challenges. As a result, it is not possible to predict the outcome with certainty. What is certain is that broadband ISPs, edge providers, end-users and investors are entering a period of increased regulatory uncertainty. In addition, besides the inevitable judicial challenges, Congress might seek to alter the FCC's decision. However, at least in the near term, Congress is unlikely to be able to enact any legislation that the President would sign.

Should you require any further information regarding the FCC's new Open Internet rules or the relevant Order please contact one of the individuals listed in this publication.

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Footnotes

[1] *In the Matter of Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) (*Open Internet Order*).

[2] The FCC defined BIAS 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." The rules do not apply to dial-up Internet access service.

[3] Edge providers offer services, applications and content over the Internet.

[4] A content delivery network is a system of distributed servers that deliver web content to a user based on the geographic locations of the user, the origin of the web content and a content delivery server. Edge providers use CDNs to ensure fast delivery of their content and applications to end-users.

[5] 740 F.3d 623 (D.C. Cir. 2014) (*Verizon*).

[6] Section 706 directs the FCC to encourage deployment of "advanced telecommunications capability" to all Americans and directs the FCC to take "immediate action to accelerate deployment of that capability by removing barriers to infrastructure investment." *See* 47 U.S.C. § 1302.

[7] *See In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, 29 FCC Rcd 5561 (rel. May 15, 2014) (*2014 Open Internet NPRM*).

[8] *See* The White House, Statement by the President on Net Neutrality (Nov. 10, 2014), available at https://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality.

[9] 47 U.S.C. § 153(50).

[10] 47 U.S.C. § 153(24).

[11] *Id.*

[12] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.*, GN Docket No. 00-185, et al., 177 FCC Rcd 4798, ¶ 38 (2002).

[13] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 978 (2005).

[14] DNS is used to translate domain names into numerical IP addresses that are used to locate the desired content.

[15] Caching is the storing of copies of content to enable rapid retrieval of information from websites that consumers wish to see most often.

[16] Title II prohibits common carriers from charging rates that are "unreasonably discriminatory." 47 U.S.C. § 202(a). Consistent with this, common carriers have traditionally been allowed to provide different "tiers" of service at different prices. However, the ban on paid prioritization effectively prohibits any discrimination: the only rate that a BIAS provider may charge an edge provider to deliver its traffic is zero. In the Order, the FCC explained that, while Section 202(a) may not provide the requisite authority, the Commission has authority under Section 201(b) to ban paid prioritization as an "unjust and unreasonable" practice. Open Internet Order ¶ 292.

[17] *Open Internet Order* ¶¶ 130-31.

[18] *Id.* ¶ 139.

[19] *See* 47 U.S.C. § 160(a).

[20] Besides the FCC, the Federal Trade Commission (FTC) also plays an active role in policing consumer data privacy. Note, though, that because the FTC's enabling statute exempts Title II services from FTC jurisdiction, the FCC's revised rules remove BIAS from FTC jurisdiction and, with it, the FTC's authority to take action against broadband ISPs that expose customer information. The FCC's rules should not impact enforcement activities that the FTC is currently pursuing in this space because, as footnote 792 of the Order states, the FCC's reclassification of BIAS under Title II is prospective only and does not apply retroactively.

[21] *Open Internet Order* ¶ 489.

[22] *Id.* ¶ 5.

[23] See *Open Internet Order*, Dissenting Statement of Commissioner Michael O'Rielly, at 1.

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