

FCC to Repeal Net Neutrality

On the eve of Thanksgiving, the Federal Communications Commission (FCC) released a draft order to repeal its own [net neutrality rules](#). The order, which is expected to be voted upon and approved by a partisan 3-2 vote on December 14, 2017, is the latest chapter in the long and contentious history of the FCC's efforts to oversee the practices of broadband internet access service (BIAS) providers.

[As expected](#), the order reclassifies BIAS as an unregulated "Title I" information service, rather than a regulated "Title II" common carrier service under the Communications Act of 1934 as amended. The order also effectively repeals nearly all of the broadband consumer protection measures previously adopted by the FCC, including the anti-blocking, anti-throttling and anti-discrimination rules. Left in place is a revised version of the BIAS reporting requirements that compel BIAS providers to disclose their network management practices, performance and terms of service. While a deregulatory decision was widely anticipated, the scope of the draft order goes further than many FCC observers expected in light of past statements by Republican FCC commissioners and BIAS providers in favor of safeguarding consumers against harmful practices by BIAS providers.

Earlier this year, U.S. Congress relied on the Congressional Review Act to overturn the FCC's 2016 broadband privacy rules. This deregulatory step, however, left the privacy obligations for BIAS providers in an awkward position. That is, while Congress overturned the FCC's specific broadband privacy rules, the broader privacy-related statutory obligations in the Communications Act continued to apply to BIAS providers because, under the 2015 Open Internet Order, BIAS providers remained Title II telecommunications service providers covered by the statute. Similarly, while BIAS providers remained classified as Title II telecommunications providers, the Federal Trade Commission (FTC) arguably lacked jurisdiction over them for purposes of consumer protection enforcement, under a U.S. Court of Appeals for the [Ninth Circuit decision currently under appeal](#). Under the FCC's draft reclassification of BIAS providers as a Title I service, however, privacy-related obligations of the Communications Act will no longer apply to BIAS providers.

As a result of the FCC's draft order and the previous deregulatory act by Congress, the FCC is relinquishing authority to meaningfully oversee the business practices of BIAS providers and, consequently, will be unable to take enforcement actions in response to the [approximately 54,000 complaints about BIAS providers](#) that the FCC has received since the net neutrality rules went into effect in 2015.

Current Regime

[As discussed in previous updates](#), current net neutrality rules prohibit BIAS providers from treating online content, apps, connected devices and services in a discriminatory manner, and classify BIAS as a Title II telecommunications service, while "forbearing" from imposing full Title II obligations that historically applied to landline telephone communications, such as tariffs and rate regulation.

Instead, the FCC adopted a more lenient version of Title II regulation akin to what has applied to the mobile wireless industry since 1993. Thus, contrary to a successfully deployed talking points by the BIAS industry, net neutrality did not subject BIAS providers to "utility-style" regulation in the style of regulations applicable to traditional landline telecoms since the 1930s.

Essentially, the net neutrality rules provided the FCC with enforcement authority over BIAS providers found to be engaging in unjust or unreasonable practices. This FCC authority was affirmed by the U.S. Court of Appeals for the D.C. Circuit in [*U.S. Telecom Association v. FCC*](#) in 2016.

The Surviving Reporting Requirement

The FCC's draft order repeals all FCC net neutrality rules, i.e. rules against blocking, throttling discrimination and paid prioritization of content, except the existing transparency reporting rule. The draft order revises the reporting rule to require BIAS providers to disclose network management practices, performance and commercial terms of their services.

Interestingly, the FCC's existing transparency rule was first affirmed by the D.C. Circuit in [*Verizon Communications v. FCC*](#) in 2014 due to the FCC's reliance on Section 706 of the Communications Act, but the draft order overturns the FCC's prior finding that Section 706 provides the FCC with affirmative authority. Instead, the draft order chooses to rely on other statutory authority in the Communications Act to undergird the transparency reporting rule. Whether the reporting rule will survive judicial review after having its Section 706 authority kicked from underneath it remains to be seen.

Other Venues for Enforcement

Under its new order, the FCC expects other actors to step in for the FCC and fill the regulatory void. The FCC trusts that, in the event that BIAS providers attempt to undermine the openness of the internet, consumers and edge providers would have enough clout to resist such business practices.

Further, the FCC contends that the FTC and state attorneys general would step in to police deceptive trade practices. One difference, however, is that the FTC and state attorneys general only enforce specific cases after the fact, while the FCC has authority to adopt binding prescriptive rules and policies of general application.

Finally, in as much as discrimination and blocking of content indicates an anticompetitive practice, the draft order finds that existing antitrust laws should provide a sufficient remedy.

While calling on state authorities to help fill this jurisdictional void, the order also federally preempts all state and local governments from implementing laws or adopting rules similar to rules that the FCC repealed by the draft order. Thus, for states that may wish to adopt their own net neutrality rules (much like some states adopted their own broadband privacy rules after the FCC's were overturned), their efforts would be federally preempted by the FCC's new order. The FCC's assertion of federal preemption will likely be challenged and appealed by states interested in retaining state-level net neutrality protections for consumers and edge providers.

What This Means for the Internet Ecosystem

With Title II net neutrality gutted by the FCC, BIAS providers could start charging content providers and consumers extra to receive content at reasonable or preferential speeds. In negotiations with edge and content providers, the BIAS providers will now have the leverage of potentially rejecting "carriage" of certain edge or content providers on the BIAS provider's service.

For example, a BIAS provider could slow down certain online services (such as streaming video or audio or e-commerce services), or block some outright, for any reason and without any recourse to the FCC. In addition, because edge providers may now have to pay extra for preferred transmission speeds and quality by BIAS providers, those costs will likely be passed through to the consumer. As noted above, even if the FCC did become aware of these practices by way of the BIAS reporting requirement, there would be little the FCC could

do about them.

The most vulnerable stakeholders in the online ecosystem will likely be the new edge and content provider startups that lack the resources and leverage to negotiate equitably with BIAS providers. On the other hand, numerous BIAS providers maintain that the deregulatory order will provide them with competitive flexibility and latitude to innovate and invest in improvements to their BIAS network infrastructure and technology, which will redound to the benefit of consumers.

However, as of today, many established BIAS providers have made public commitments to the basic principles of net neutrality, i.e., they have said that they will not block, throttle or discriminate against lawful content. State attorneys general, or even the FTC (pending the appellate court decision noted above), might be able to police violations of such statements as deceptive acts.

Of course, with the new FCC rules, service providers are free to change their tune at any time, and reverse these statements going forward. That is, if BIAS providers give notice to consumers that they will not uphold the tenet of net neutrality, then there would be no deception and, consequently, no enforcement from the states. We also note that many BIAS provider statements leave room to allow them to engage in paid prioritization or strike exclusive relationships with certain platforms or content providers.

Legal Challenges

Those in favor of net neutrality are already gearing up to challenge the FCC's order. Among their arguments will be allegations that the FCC acted arbitrarily and capriciously and without support in the record in its relatively quick reversal of its 2015 Open Internet Order. They will also question the apparent lack of legitimacy of the record before the FCC in this proceeding. In its draft order, the FCC did not appear to distinguish comments that were generated by spambots from bona fide comments.

At the same time, commenters are advocating for a congressional solution to permanently establish net neutrality by statute. Whatever the outcome of the challenges and potential congressional action, we know one thing for certain—the long simmering debate over net neutrality is not over.

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