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NEW FCC RULES PROPOSED FOR BROADBAND INTERNET ACCESS SERVICE PROVIDERS

Protecting the Open Internet or a Solution Without a Problem?

On October 19, 2023, the Federal Communications Commission ("FCC") led by Democratic Chairwoman Jessica Rosenworcel adopted a Notice of Proposed Rulemaking ("NPRM") to initiate a new "Open Internet" or "Net Neutrality" proceeding.[1] The FCC's NPRM reaches certain tentative conclusions and proposes specific rules applicable to providers of mass-market retail broadband Internet access service ("BIAS"). The NPRM was adopted by a 3-2 vote with the Republican commissioners dissenting, and Republican Commissioner Brendan Carr calling the approach "a solution that won't work to a problem that does not exist." Comments on the FCC's tentative conclusions and proposed rules are due December 14, 2023, and replies are due January 17, 2024.

Bottom Line Up Front

The FCC proposes to re-establish greater regulatory authority over BIAS by reclassifying the service as a telecommunications service subject to Title II of the Communications Act of 1934, as amended (the "Communications Act"), and adopting "bright-line" rules to protect Internet openness. The FCC proposes to forbear from all provisions of Title II that would otherwise permit rate regulation of BIAS. The FCC instead will depend on other statutory provisions to address non-rate related issues. The FCC also proposes to forbear from the requirements that BIAS contribute to the federal universal service fund or other federal funds (such as the telecommunications relay service fund) at this time.

Although classification as a telecommunications service normally would subject BIAS to all of Title II, the FCC proposes to use the same forbearance framework previously adopted in 2015 plus the statutory authorities necessary to advance the FCC's goals of national security and public safety.[2] The FCC proposes not to forbear from application of the following requirements (but seeks comment on those proposals):

- **Sections 201 and 202 (unjust, unreasonable, or unreasonably discriminatory practices)**

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

[2] BIAS would also remain subject to provisions of the Communications Act that apply irrespective of the Title II classification, such as the Communications Assistance for Law Enforcement Act ("CALEA"), liability limitations, preemption provisions, and provisions that simply reserve state authority.

- **Section 208 (complaints to the FCC)**
- **Section 214 (foreign ownership, oversight of networks)**
- **Sections 218 and 220 (seeking information from common carriers)**
- **Section 222 (privacy)**
- **Section 224 (access to pole attachments and rights-of-way)**
- **Sections 225, 255, and 251(a)(2) (disability access)**
- **Sections 254 and 214(e) (advancing universal service)**
- **Section 706 (deployment of advanced services)**
- **Wireless licensing requirements.**

History as a Guide

There has been a long history of efforts to alter the regulation of BIAS. Beginning in 2005, the FCC, led by then Chairman Michael Powell, approved an *Internet Policy Statement*, which identified four guiding principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet. From 2005 to 2010, these principles were incorporated as conditions into merger orders and applied in enforcement proceedings.

In 2010, the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit") rejected the FCC's application of the *Internet Policy Statement* principles in a complaint proceeding against Comcast.[3] The court found the FCC lacked authority to regulate Comcast's network management practices using only guiding principles adopted pursuant to the FCC's ancillary jurisdiction. The FCC, led by then Chairman Julius Genachowski, later adopted the *2010 Open Internet Order* to codify the *Internet Policy Statement*'s principles and adopt three rules governing Internet service providers: (i) no blocking; (ii) no unreasonable discrimination; and (iii) transparency. On appeal, the D.C. Circuit upheld a portion of the *2010 Open Internet Order*, but vacated the no blocking and anti-discrimination rules.[4] The court found those rules imposed *de facto* common carrier status on BIAS providers in violation of the FCC's classification of those services as information services.

In 2015, the FCC, led by then Chairman Tom Wheeler, adopted the *2015 Open Internet Order*, which reclassified BIAS as a telecommunications service. The FCC adopted rules to prevent specific practices harmful to Internet openness – blocking, throttling, and paid prioritization – as well as a strong standard of conduct designed to prevent new practices that would harm Internet openness and enhancements to the transparency rule. In 2016, the D.C. Circuit upheld the *2015 Open Internet Order* in full.[5]

In 2018, the FCC, led by then Chairman Ajit Pai, eliminated the majority of the rules adopted in 2015. The *2018 Restoring Internet Freedom Order* maintained the transparency rule, but reclassified BIAS as an information service. On review, the D.C. Circuit remanded certain aspects of the decision to the FCC, but upheld the classification of BIAS as an information service.[6] In response to the remand, the FCC issued the *2020 Restoring*

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[3] *Comcast Corp.* v. *FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[4] *Verizon* v. *FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[5] *U.S. Telecom Ass'n* v. *FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 453 (2018).

[6] *Mozilla* v. *FCC*, 940 F.3d 1 (D.C. Cir. 2019).

Internet Freedom Remand Order, which found there were no grounds to depart from the determinations made in the 2018 decision.

BIAS to Become a Telecommunications Service Once Again

With the recent NPRM, the FCC again proposes to reclassify BIAS as a telecommunications service under Title II of the Communications Act.[7] The FCC finds BIAS has become "essential" to consumers for work, health, education, community, and everyday life, and the COVID-19 pandemic has increased the importance of BIAS. The FCC explains that developments in the importance of the Internet to consumers demonstrates that consumers perceive and use BIAS as a standalone service that provides telecommunications.

***Effect on Investment*.** The FCC states that the 2018 conclusions that Internet investment is closely tied to the classification of BIAS were unsubstantiated. The previous record demonstrated there were opposing views on the long-term effects on investment, and no party can quantify with any reasonable degree of accuracy how classification would affect future investment.

***Internet Openness*.** The FCC finds the open Internet must be protected to ensure consumers can use their BIAS connections in all the lawful ways they see fit, and reclassification of BIAS as a telecommunications service would allow the FCC to rely on its authority in Sections 201 and 202 of the Communications Act[8] to address practices that are unjust, unreasonable, or unreasonably discriminatory. Reclassification would enable the FCC to establish a nationwide framework of open Internet rules. Differing state requirements may be burdensome, especially for small providers, and hinder the broadband market while also failing to ensure all consumers are protected from harmful conduct. Reclassification would put the FCC's authority to preempt any inconsistent state laws on substantially stronger legal footing.

***National Security and Public Safety*.** According to the FCC, the demonstrated need to address national security and public safety concerns makes it necessary and timely to revisit the statutory classification of BIAS. Authority under applicable Title II provisions, reinforced by the FCC's existing authority, would enhance efforts to protect the national defense and the nation's communications networks. The FCC has used its authority under Section 214 of the Communications Act[9] to revoke or deny licenses to entities that raise national security and law enforcement concerns,[10] and those concerns equally apply to BIAS. The FCC asks whether there are specific national security and law enforcement threats in connection with the provision of BIAS. The FCC notes it has taken significant steps to improve supply chain security, and asks how reclassification of BIAS would support those efforts. Reclassification also would reinforce the FCC's authority to enhance cybersecurity in the communications sector, including security and integrity of the Border Gateway Protocol. Reclassification would enhance the FCC's jurisdiction over providers, which could be used to ensure BIAS meets the needs of public safety entities and individuals when they use BIAS for public safety purposes. The FCC suggests reclassification would further other public safety initiatives, such as Wireless Emergency Alerts, Telecommunications Service Priority, CALEA, and supplements to traditional 911 communications. Finally, the FCC finds reclassifying BIAS would enhance the FCC's ability to ensure the nation's communications networks are resilient and reliable.

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[7] 47 U.S.C. §§ 201 *et seq.*

[8] 47 U.S.C. §§ 201, 202.

[9] 47 U.S.C. § 214.

[10] *See, e.g.*, *China Telecom (Americas) Corporation*, 36 FCC Rcd 15966 (2021), *aff'd China Telecom (Americas) Corp.* v. *FCC*, 57 F.4th 256 (D.C. Cir. 2022).

Privacy and Data Security. The FCC finds the current classification of BIAS inhibits the FCC's ability to fully ensure consumers are protected from harmful conduct. Reclassification supports the FCC's efforts to protect consumers' privacy and data security, as well as relieve them from unlawful robocalls and texts. Reclassification would allow the FCC to use its authority under Section 222 to protect consumers' privacy.[11] Absent statutory and regulatory requirements to do so, providers may not adopt adequate safeguards to protect consumer data. Reclassification would provide a consistent privacy and data security framework for voice and data services, which consumers often subscribe to from one provider in a bundle and perceive to be part of the same service, particularly for mobile services. Reclassification also would protect information concerning entities that interact with providers, such as resellers, equipment manufacturers, content creators, and edge providers.[12]

Supporting Access to BIAS. The FCC explains that reclassification of BIAS would better support the deployment of wireline and wireless infrastructure, advance universal service, increase the accessibility of communications networks, and protect public investments in BIAS access and affordability.[13] Reclassification would allow the FCC to use its power under Section 224 of the Communications Act[14] to ensure pole attachment access for BIAS providers. Reclassification also would bolster the FCC's ability to provide universal service support for this "essential" service, including both high-cost and low-income support, and support in Tribal areas. Reclassification may benefit those that live and work in multiple-tenant environments by giving the FCC additional authority to promote tenant choice and competition. The FCC also asks how reclassification affects diversity, equity, inclusion, accessibility, and free-expression.

Access for Persons with Disabilities. The FCC asks how reclassification may impact the FCC's authority to ensure individuals with disabilities can communicate using BIAS. The FCC finds that people with disabilities increasingly rely on Internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language and through video relay service.

FCC Asks How Far Reclassification Should Extend

The FCC proposes to keep its current definition of BIAS as a mass-market retail service, and exclude enterprise service offerings that are typically offered to larger organizations through customized or individually negotiated arrangements and special access services. The FCC also proposes to remain consistent with its prior conclusions that BIAS can be provided over any technology platform, including wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.

The FCC asks whether there are other types of services it should address in defining the scope of BIAS, such as non-BIAS data services or Internet traffic exchange. The FCC proposes to continue closely monitoring the development of non-BIAS data services. It also finds that the definition of BIAS includes arrangements for the exchange of Internet traffic by an edge provider or an intermediary with the provider's network, referred to as Internet peering, traffic exchange, or interconnection. The FCC also asks whether it should exclude any particular services or

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[11] 47 U.S.C. § 222; *see also* New FCC Task Force Seeks to Protect Consumer Privacy, https://www.cahill.com/publications/firm-memoranda/2023-08-29-new-fcc-task-force-seeks-to-protect-consumer-privacy.

[12] 47 U.S.C. § 222(a).

[13] The FCC notes the "large influx" of Congressional funding for broadband deployment and consumer access, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the American Rescue Plan Act of 2021, the Infrastructure Investment and Jobs Act, and the establishment of the Emergency Broadband Benefit Program, Emergency Connectivity Fund, and Affordable Connectivity Program.

[14] 47 U.S.C. § 224.

functions from the definition of BIAS, such as virtual private network services, web hosting services, data storage services, content delivery networks, Internet backbone services, and transit arrangements.

FCC Finds Legal Support for Reclassification

The FCC reviews the relevant statutory definitions, and tentatively concludes that both the reasonable and best reading of these definitions support classifying BIAS as a telecommunications service.[15] The FCC finds BIAS is best understood as making available high-speed access to the Internet (that may be bundled with other applications and functions) and therefore it provides telecommunications to the public for a fee. There is no change or modification to the form or content of information during transmission. As such, BIAS is not an information service under the best reading of the Communications Act. Further, companion services, such as the Domain Name System and caching, when provided with BIAS, fit within the telecommunications systems management exception and do not convert BIAS into an information service. The FCC asks whether there are other functionalities provided or offered with BIAS that might fall into the telecommunications systems management exception, as well as other add-on information services offered in conjunction with BIAS and how they might affect the analysis.

The FCC asks whether, and if so how, the major questions doctrine should inform its conclusions. That doctrine holds that Congress is expected to speak clearly when delegating authority in certain extraordinary cases. The FCC therefore asks whether the classification of BIAS falls within its recognized expertise and authority or whether there is any basis for concluding its proposed action is an exercise of "newfound power" not previously recognized.

Mobile BIAS Also Reclassified

The FCC proposes to reclassify mobile BIAS as a "commercial mobile service," as was done in 2015. Even if mobile BIAS does not meet that definition, the FCC proposes to find that mobile BIAS is the functional equivalent of a commercial mobile service and thus not a private mobile service. The FCC also finds that mobile BIAS is interconnected with the "public switched network." According to the FCC, reclassification of mobile BIAS is most consistent with congressional intent to apply common carrier treatment to telecommunications services.

FCC Seeks National Framework for BIAS Regulation

The FCC seeks comment on how best to exercise its preemption authority to ensure BIAS is governed primarily by a national framework and the best sources of that authority under the Communications Act. The FCC also asks whether it should apply blanket preemption or only address those state/local requirements raised in the record and future case-by-case adjudications of preemption. The FCC seeks comment on how best to define the scope of preemption to ensure BIAS principally is governed by a federal framework and whether its rules should be seen only as a "floor" or also as a "ceiling" on state and local regulation.

The FCC asks whether it should affirmatively preempt state regulations that restrict entry into the broadband market through certification requirements or that regulate the rates of BIAS, or whether it should leave those scenarios for future case-by-case evaluation. The FCC also asks whether it should identify instances in which the

[15] *See* 47 U.S.C. §§ 153(24) (defining "information service"), 153(50) (defining "telecommunications"), and 153(53) (defining "telecommunications service").

FCC would decline to preempt and thereby share regulatory responsibility with the states, such as privacy and consumer protection laws.

Return to 2015 – Proposed Open Internet Rules

The FCC finds that rules are needed to promote innovation and free expression, protect public safety, address providers' incentive and ability to harm Internet openness, and encourage consumer demand and edge innovation. The FCC states that it is the expert agency on communications and is best positioned to safeguard Internet openness and notes that Chair of the Federal Trade Commission ("FTC") Lina Khan agrees. The FCC seeks comment on the application of consumer protection laws by the FTC and whether existing consumer protection and antitrust laws provide sufficient protections against blocking, throttling, paid prioritization, and other conduct that harms the open Internet. The FCC notes that, while the FTC has generally proceeded through after-the-fact enforcement actions and public guidance, reclassification would allow the FCC to proceed by establishing commonly applicable rules. The FCC seeks comment on whether the FTC's and Department of Justice's antitrust enforcement authority is limited in its ability to protect against open Internet harms.

Proposed Rules. The FCC proposes to return to the basic framework adopted in 2015. The last several years have demonstrated the essential value of broadband and the consequences to consumers in its absence or degradation. The FCC therefore finds that it is important to establish clear, bright-line rules and that the rules will not have a harmful effect on investment.

First, the FCC proposes to reinstate the rules to prohibit providers from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. These rules would prohibit providers from blocking or throttling of lawful content, applications, services, or non-harmful devices. The rules also would ban arrangements in which a provider accepts consideration (monetary or otherwise) from a third-party to manage its network in a manner that benefits particular content, applications, services, or devices. Providers may seek a waiver of the prioritization rule, and the FCC proposes specific guidance on how it would evaluate such requests.

Second, the FCC proposes to reinstate the general conduct standard, which would prohibit practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers. The general conduct standard is necessary to ensure providers do not find a technical or economic means to evade the bright-line bans to wield their gatekeeper power in a way that would compromise the open Internet. The FCC proposes to enforce this standard on a case-by-case approach considering the totality of the circumstances, plus review of certain factors.[16] The FCC finds that the proposed general conduct standard provides sufficient guidance, but also asks whether the FCC should instead rely on the "just and reasonable" standards in Sections 201 and 202.

Third, the FCC proposes to retain the current transparency rule and disclosure requirements. The FCC anticipates that the transparency requirements are likely to continue playing a key role in the broadband marketplace. The FCC seeks comment on the means of disclosure, the content of the disclosures, the interplay between the transparency rule and the FCC's existing broadband label requirements, and any additional enhancements or

[16] These non-exhaustive factors are: (i) whether a practice allows end-user control and enables consumer choice; (ii) whether a practice has anti-competitive effects in the market for applications, services, content, or devices; (iii) whether a practice affects consumers' ability to select, access, or use lawful broadband services, applications, or content; (iv) the effect a practice has on innovation, investment, or broadband deployment; (v) whether a practice threatens free expression; (vi) whether a practice is application agnostic; and (vii) whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organizations.

changes it should consider. The FCC also asks whether it should adopt recordkeeping requirements governing the types of information or records providers rely upon to support the content of their disclosures.

Scope of Rules. The FCC proposes that the new rules would not apply to Internet traffic exchange, which would instead be subject to a case-by-case review under Sections 201 and 202 for enforcement of disputes. The FCC also proposes that reasonable network management would not be considered a violation of the rules. The FCC asks how it should define "reasonable network management" and asks commenters to provide examples of how this term is best interpreted with regard to management of today's broadband networks.[17]

Enforcement of Rules. The FCC seeks comment on the best framework for enforcing the rules. The FCC asks whether it would be beneficial to re-establish a formal complaint process for open Internet complaints in addition to the existing informal complaint process.

Legal Authority for Rules. The FCC includes a lengthy discussion regarding its "authority" to adopt the rules, and proposes to use the same sources of authority from the Communications Act relied on in 2015: Section 706; Title II; spectrum management authority under Title III; and Section 257, which addresses market barriers. The FCC seeks comment on each of these sources of authority as well as other potential sources of authority. The FCC also includes a lengthy discussion of constitutional considerations, and tentatively concludes that its proposed rules do not raise any First Amendment speech or Fifth Amendment takings issues.

Other Laws and Considerations. The FCC proposes to continue the approach adopted in 2015 that the rules do not change providers' rights or obligations under other laws, such as CALEA, the Foreign Intelligence Surveillance Act, or the Electronic Communications Privacy Act. The FCC also proposes that the rules would protect only lawful content, and would not be intended to inhibit efforts by providers to address unlawful transfers of content or transfers of unlawful content. The FCC asks whether there are other categories of otherwise-applicable laws or legal requirements that should be addressed.

Conclusion

Despite the regulatory uncertainty that has persisted for BIAS, for more than 20 years the service has flourished under the FCC's light-touch authority.[18] The question now is whether this time is different. Has the burgeoning demand for resources dependent on BIAS altered the analysis? Can the FCC continue to foster the public interest with minimal regulation? Or does the ever-expanding need for Internet access, national security, and supply chain management mean the latest FCC NPRM is simply a *fait accompli?*

The answers are unclear. For now, BIAS regulatory treatment awaits a Final Order to determine whether the new iteration of the open Internet rules survive, or whether they "will be overturned by the courts, by Congress, or by a future FCC," as FCC Commissioner Brendan Carr predicts.

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[17] The FCC proposes to define "reasonable network management" as a network management practice that has a primarily technical network management justification, but does not include other business practices, and states 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 service.

[18] 47 U.S.C § 154(i).

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Chérie R. Kiser (Partner) at ckiser@cahill.com or 202.862.8950 or Angela F. Collins (Counsel) at acollins@cahill.com or 202.862.8930 or email publications@cahill.com.