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FCC Reinstates Net Neutrality Rules

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On May 7, 2024, the Federal Communications Commission (FCC or Commission) released a *Declaratory Ruling, Order, Report and Order, and Order on Reconsideration* reclassifying broadband Internet access service (BIAS) as a common carrier service and reinstating "open Internet" regulations for BIAS providers. Adopted at the Commission's April 2024 open meeting in a 3-2 vote by the Democratic majority, the new item largely restores the policy decisions made in the 2015 Open Internet Order, with some notable differences. Those changes include subjecting BIAS providers to Section 214 of the Communications Act and other provisions that the Commission has indicated will bolster its ability to act in the areas of national security and public safety, as well as subjecting wireless providers to licensing and foreign ownership provisions under Title III of the Act.

The item will almost certainly be challenged on appeal, and arguments will include a focus on whether Title II regulation of BIAS is a "major question" that Congress has not given the FCC the authority to address. Along with reclassification of BIAS, stakeholders also can expect additional rulemakings from the FCC, including as related to BIAS provider obligations under Section 214 of the Communications Act, application of the foreign ownership rules under Section 310 of the Act, BIAS-specific privacy rules under Section 222, outage reporting requirements, and various national security and cybersecurity-related concerns such as border gateway protocol (BGP) vulnerabilities.

To learn more about the various aspects of the FCC's decision, click on the links below, or continue reading.

- The Declaratory Ruling: Reclassification of Broadband Internet Access Service as a Common Carriage Service

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Practice Areas

Telecom, Media & Technology
Telecommunications & Broadband Service

- The Order: Forbearance for Broadband Internet Access Services
- The Report and Order: Open Internet Rules
- Order on Reconsideration and Other Procedural Issues
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The Declaratory Ruling: Reclassification of Broadband Internet Access Service as a Common Carriage Service

As proposed in the Notice of Proposed Rulemaking (NPRM) in this proceeding, the Declaratory Ruling portion of the item reestablishes BIAS as a Title II "telecommunications service" and mobile BIAS as a "commercial mobile service," thereby imposing common carrier obligations on BIAS providers. Below we provide a summary of the Declaratory Ruling.

BIAS and Mobile BIAS Reclassification

The Communications Act establishes two mutually-exclusive concepts: "telecommunications services" and "information services." Telecommunications services are heavily regulated under Title II of the Communications Act and include things like traditional voice services carried over copper wires. Information services, by contrast, are services that are used to manipulate information and are subject to light-touch regulation. BIAS previously was classified as an information service pursuant to the 2017 Restoring Internet Freedom (RIF) Order. The Declaratory Ruling switches course and finds it is a telecommunications service.

BIAS as a Telecommunications Service. In the Declaratory Ruling, the FCC concludes (i) that BIAS providers offer "telecommunications" (defined as "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"), and (ii) that this offering constitutes a "telecommunications service" ("the offering of telecommunications for a fee directly to the public"). ¶¶ 109, 123. As a technical matter, the Commission concludes that BIAS transmits information "without change" because "the packet payload is not altered in transit," notwithstanding that "information may be fragmented into packets and unintelligible to users while in transit." ¶¶ 117–21. The Commission claims that the "consumer perspective" of BIAS is an "independent, alternative ground[ ]" for these conclusions, as users believe themselves to be "specifying the points for the transmission" when, for example, they type in the web address of the website they would like to visit, and expect content to be "sent and received without change." ¶¶ 112-113, 116, 123. The Commission also asserts that the way in which BIAS is marketed by providers supports the Commission's construction of telecommunications and telecommunications service in this context. ¶¶ 124–27.

Not an Information Service. As a corollary to its telecommunications service determination, the Commission concludes that BIAS is not an information service, which is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a

telecommunications service." The FCC claims that BIAS cannot satisfy this definition because it "functions as a conduit" for consumers to access distinct information-service "platforms" — like websites and streaming services. ¶¶ 128–129, 131–32, 133.

The Commission also claims that "information-processing capabilities, such as [Domain Name System (DNS)], caching, and others, when used with BIAS" do not meet the statutory definition of "information service" because of the definition's exception for "the management, control, or operation of a telecommunications system or the management of a telecommunications service." ¶¶ 133–39, 129. The Commission claims that even if these information-service capabilities did not fall within the telecommunications systems management exception and thus do qualify as information services, BIAS would still be a standalone "telecommunications service" because it is not "inextricably intertwined" with these information-service offerings. ¶¶ 140–53. The Declaratory Ruling finds that this conclusion is consistent with consumer perception, how BIAS is marketed, and the technical functioning of offerings like DNS and caching. ¶¶ 144-53.

Mobile BIAS. In addition to reclassifying BIAS as a telecommunications service, the Commission reinstates the classification of mobile BIAS as a commercial mobile service. Under Section 332, "commercial mobile service" is subject to common carrier regulation under Title II of the Communications Act. The Commission finds that mobile BIAS falls under that definition because it (1) is a "mobile service" (subscribers access it through mobile devices); (2) is provided for profit; (3) is widely available to the public; and (4) is an "interconnected service," or a service that is interconnected with the "public switched network." ¶¶ 215-236. In so doing, the Commission expands the definition of "public switched network" beyond traditional telephone networks to include networks that use public IP addresses. ¶¶ 219, 224. Notably, the Commission also expands the definition of "interconnected service" by reversing the RIF Order's determination that such service must provide the ability to communicate with *all* other users of the public switched network. ¶ 229.

Scope of Reclassification; Excluded Services

As proposed in the NPRM, the Declaratory Ruling maintains the Commission's existing definition of BIAS: "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." ¶ 189. The Commission declined to determine whether "network slicing" capabilities are "inherently" BIAS or non-BIAS, but instead said that it intends to monitor the provision of service using network slicing to ensure it is used as a "reasonable network management practice" rather than a means to evade the open Internet rules adopted in the Report and Order. ¶¶ 199-203.

However, the Commission identified several offerings that are excluded from the definition of BIAS:

- Services that are not offered on a mass-market, retail basis, such as enterprise Internet access service and Business Data Services. ¶ 192
- Non-BIAS data services, which may share capacity with BIAS services but are used only to reach a limited number of Internet endpoints, provide a specific "application layer" service, and use network management to segregate them from BIAS services. ¶ 195

- Dial-up Internet access service. ¶ 189
- The provision of BIAS connections by a "premises operator," such as a coffee shop, bookstore, airline, or library or university that enables a patron to access the Internet through its own subscribed BIAS. ¶ 210. However, the Commission clarifies that in-flight entertainment and connectivity services are not blanketly excluded, as some airlines are BIAS providers. ¶ 212
- Content delivery networks (CDNs), VPN services, web hosting, and data storage, which "are not 'mass market' services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints." ¶ 211

Preemption

The Commission notes that its open Internet rules will be a uniform framework that will preempt incompatible state broadband regulations. ¶¶ 265–67. The Commission declines to categorically preempt state or local broadband regulation, however, and notes that it will preempt such regulation on a case-by-case basis if it "unduly frustrate[s] or interfere[s] with interstate communications." ¶ 268. The Commission finds that California's Internet Consumer Protection and Network Neutrality Act of 2018 appears consistent with federal rules, and therefore is not preempted on the current record. ¶¶ 269-73. The Commission also declines to address any particular state broadband affordability program, though it notes that these programs are important and their mere existence does not constitute "rate regulation" — which the Commission suggests could be preempted by its decision to forbear from *ex ante* rate regulation. ¶ 275 fn. 1146.

Policy Justifications for Reclassification

In the Declaratory Ruling, the FCC builds upon the policy justifications identified in the NPRM, asserting that the "reclassification decision will ensure the Commission can fulfill statutory obligations and policy objectives," ¶ 27, of which "ensuring an open Internet" is only one of eight objectives highlighted. These policy justifications illustrate the extent to which safety and security concerns are animating the current Commission, and give an indication of additional rulemakings to come in these areas.

- *Ensure Internet Openness*. The FCC explains that its reclassification and associated rules will "more effectively safeguard the open Internet," thereby promoting free expression, competition, and innovation. ¶¶ 28-29
- *Defend National Security and Law Enforcement*. Citing the enumerated purpose of the FCC to "further the 'national defense,'" the Declaratory Ruling focuses heavily on the Commission's ability to promote national security and law enforcement objectives via reclassification. In addition to subjecting BIAS to Section 214 of the Act and other Title II provisions that the Commission states will allow it to "develop information collection requirements" such as the one-time collection adopted under Sections 214, 218, and 219, the FCC also anticipates agency oversight concerning Internet Points of Presence (PoPs) and use of enforcement authority to "prohibit a BIAS provider from exchanging Internet traffic with edge providers or other third parties that present threats to U.S. national security and law enforcement." The agency further expects to use "broader authority under Title II to safeguard BIAS providers, networks,

and infrastructure from equipment and services that pose national security threats," which includes, among other things, prohibiting authorization of equipment that poses a threat and the marketing and importation of such equipment in the United States. ¶¶ 30-41

- *Promote Cybersecurity*. The Commission plans to use its "bolster[ed]" authority to potentially "require BIAS providers to implement cybersecurity plans and risk management plans to protect their networks from malicious cyber activity," and coordinate with the Cybersecurity & Infrastructure Security Agency (CISA) on implementing the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA). The FCC identifies BGP vulnerabilities and threats to DNS as other cybersecurity issues that will benefit from more expansive authority. In response to skepticism in the record about the agency wading further into cybersecurity, the Declaratory Ruling asserts that Chairwoman Rosenworcel's position as Chair of the Cybersecurity Forum for Independent and Executive Branch Regulators, the agency's recently adopted cybersecurity labeling program for Internet of Things (IoT) devices and products, and the Enforcement Bureau's "data protection investigations" illustrate the agency's expertise and involvement in cybersecurity issues. ¶¶ 42-50
- *Safeguard Public Safety*. The Declaratory Ruling indicates a plan to adopt new rulemakings, some of which will be *ex ante*, to improve (1) "the effectiveness of emergency alerting and 911 communications"; (2) the "flow of voice communications, photos, videos, text messages, real-time text (RTT), and other types of communications from the public to emergency service providers"; and (3) broadband access in rural areas "where there is no substitute for copper wires which carry 911, closed captioning, and TTY services." The Commission also will use its enforcement authority to investigate specific instances of noncompliance which will serve to "prevent or mitigate future threats to BIAS by using data and information gathered as a result of those proceedings." ¶¶ 51-58
- *Monitor Network Resiliency and Reliability*. The Commission plans to implement new outage reporting requirements for BIAS providers and will expand the scope of the Commission's Network Outage Reporting System (NORS) by requiring BIAS providers "to submit outage reports in response to service incidents that cause outages or the degradation of communications services, such as cybersecurity breaches, wire cuts, infrastructure damages from natural disaster, and operator errors or misconfigurations." The Declaratory Ruling also suggests heightened obligations for BIAS providers to participate in the Disaster Information Reporting System (DIRS) in addition to potential risk management directives. The FCC further notes that its expanded authority in this area will allow the agency to "provide a robust regulatory platform so that all BIAS providers maintain the highest levels of business continuity when incidents occur." ¶¶ 59-66
- *Protect Consumers' Privacy and Data Security*. The Declaratory Order identifies the extension of 47 U.S. C. § 222's coverage to BIAS providers and that such coverage will further apply to "entities that interact with BIAS providers." The Commission also specifically notes that Section 222's protection of customers' customer proprietary network information (CPNI) includes "customer location information," and that "Section 222(a) also imposes obligations . . . with regard to protection of non-CPNI customer proprietary information." ¶¶ 67-68

- *Support Access to Broadband Internet Access Service*. The Commission identifies several areas where it believes Title II authority will expand access to BIAS, including: (1) increased investment and deployment of wireless and wireline infrastructure pursuant to provisions such as Sections 224 and 253; (2) regulation of BIAS-only providers that serve multi-tenant environments; and (3) increased ability to support BIAS through the Universal Service Fund and Lifeline programs, among others. ¶¶ 69-100
- *Improve Access for People with Disabilities*. The Declaratory Ruling suggests that Title II authority will be used to "ensure that BIAS and equipment used for BIAS are accessible to and usable by people with disabilities and precludes the installation of 'network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255[.]'" The Commission adds that Title II authority allows the Commission to restrict bandwidth limits or data caps to facilitate access to disability-focused offerings such as Video Relay Service (VRS). ¶¶ 101-104

In addition to emphasizing these affirmative policy justifications, the Declaratory Ruling rebuts dissenting comments that suggest reclassification will harm private investment in BIAS. The FCC asserts that regulation is only one factor that contributes to private investment in telecommunications and digital media markets, and in fact, reclassification will ultimately lead to "a more competitive broadband marketplace, increase overall regulatory certainty, and provide a more level playing field for all market participants." ¶ 279.

Legal Analysis Supporting Reclassification

Consideration of Commission and Court Precedent. While the Commission states that its decision is consistent with Commission and court precedent, it largely downplays that precedent rather than finding support in it. With respect to the pre-1996 *Computer II* dichotomy of "basic" and "enhanced" services (the precursor to the telecommunications/information service distinction adopted by the 1996 Telecommunications Act), the Commission states that while its decision is consistent, the aspects of that precedent that "undercut[]" its current classification are not "grounded in the best understanding of the statutory text." ¶¶ 158-64. The Commission likewise contends that the "body of precedent" governing service classifications that developed from the 1982 Modification of Final Judgment in the AT&T antitrust case was displaced by the 1996 amendments to the Communications Act and subsequent FCC precedent, and further does not "clearly" undercut the Declaratory Ruling's analysis. ¶¶ 166-71.

The Commission also downplays the post-1996 precedent, which it states does not provide a "uniform regulatory history" but instead gives the Commission discretion to classify BIAS based on how the service "functions and is perceived" and even "policy objectives." ¶ 173. In adopting this view, the Commission contends that much of the post-1996 precedent — from both Commission-level rulings to Supreme Court opinions — is irrelevant because it analyzed BIAS when it functioned differently than it does today. ¶¶ 176, 181. At the same time, the Commission calls "informative" the aspects of the post-1996 precedent that it considers to support its classification decision. ¶¶ 177, 182, 184. And of course, the Commission devotes much of its analysis to distinguishing and critiquing the RIF Order, which the Commission claims exploits precedent to reach a "preordained information service classification." ¶ 186. And it asserts that the RIF Order's classification determination lacks "any precedential value" itself because it was "flawed" and the D.C. Circuit

was "skeptical of" the order's analysis even though the court ultimately upheld it. ¶ 187.

Statutory Authority and Major Questions Doctrine. In addition to parsing the relevant service classification definitions as set forth above, the Declaratory Ruling separately addresses the antecedent proposition that the Communications Act provides it authority to classify communications services, including BIAS. ¶¶ 238–42. The Declaratory Ruling notes that under the Administrative Procedure Act (APA), it need only acknowledge that it is changing course and explain its reasons for the change. ¶ 243. The Commission claims that its reclassification order meets that threshold and "is particularly warranted" for policy reasons. ¶ 244–47.

The Commission rejects various arguments that the Communications Act precludes reclassification of BIAS. The Declaratory Ruling asserts that Section 230's characterization of "a service or system that provides access to the Internet" as an "information service" and its declaration that "'Internet access service' . . . does not include telecommunications services" did not settle the classification of BIAS. ¶ 249. The Commission also asserts that the broadband-specific provisions in the Infrastructure and Jobs Act of 2021 do not "counsel[] against reclassification." ¶ 250. And it claims that the telecommunications/information service distinction is not "tied to market power or similar considerations," and thus BIAS can be reclassified even if there is competition in the market. ¶ 251.

Finally, the Commission proclaims that the major questions doctrine — the notion, articulated by the Supreme Court in *West Virginia v. EPA*, that a clear statement from Congress is necessary to allow agencies to regulate matters of significant breadth or impact — poses "no obstacle" to its classification decision. ¶ 252. It first asserts that the major questions doctrine is not even implicated because (i) the FCC's classification decision follows the statutory text, (ii) the Supreme Court did not appear to apply the major questions doctrine when the FCC previously classified BIAS, and (iii) both the FCC and Congress have tried to classify BIAS in different ways since 1996. ¶¶ 253–55. The Commission next states that even if the major questions doctrine were applicable, it would not preclude the reclassification decision because (i) the decision will not have an "extraordinary economic and political effect," (ii) the Commission's asserted power is not novel but instead aligns with the agency's statutory service-classification authority, and (iii) the regulatory issue "falls squarely within the Commission's technical and policy expertise." ¶¶ 257–61. Lastly, the Commission asserts that even if the major questions doctrine applied and a "clear statement" of Congress were required, the statute offers sufficiently clear grants of authority under Section 4(i), 201(b), and 303(r) of the Communications Act. ¶ 264.

The Order: Forbearance for Broadband Internet Access Services

Consistent with its obligations under Section 10 of the Communications Act, the Order portion of the item provides the FCC's forbearance analysis, identifying the laws that will not apply to BIAS services despite common carrier classification because "enforcement of such regulation or provision is not necessary" to ensure just and reasonable practices by providers or to protect consumers, and because "forbearance from applying such provision or regulation is consistent with the public interest." ¶ 303.

Title II and III Provisions That Will Apply to BIAS Providers

The Commission determined the statutory criteria for forbearance was not met, and thus the legal obligations will apply to BIAS, with respect to the following provisions:

- Sections 201 and 202 of the Act, including Section 64.2500 of the FCC's rules governing Multiple Tenant Environment (MTE) contracts. ¶ 326
- Sections 206, 207, and 209, which permit "redress through collection of damages" and thus aid in the Act's enforcement authority. ¶ 330
- Section 208, which provides a complaint process that will permit challenges to a carrier's conduct if a carrier violates its common carrier duties. ¶ 330
- Section 214 of the Act, so that the Commission may use its authorization procedures "to address national security and law enforcement concerns." ¶¶ 332, 345. The Commission grants blanket Section 214 authority to all current and future BIAS providers, except for certain Chinese entities whose authorizations were previously denied or revoked. ¶ 332. The Order directs those entities and their affiliates to discontinue all provisions of BIAS no later than 60 days after the effective date of the Order. ¶ 341. For the remainder of providers, the Commission finds it "appropriate" to treat BIAS as a mixed domestic and international service for purposes of Section 214. ¶ 335. However, the Commission waives the rules implementing Section 214(a)-(d) with respect to BIAS at this time, and states that it plans to release a Further Notice to examine whether any BIAS-specific Section 214 rules are warranted. ¶ 342
- Section 216 and 217, which "were intended to ensure that a common carrier could not evade complying with the Act by acting through others over whom it has control or by selling its business." ¶ 330
- Sections 218, 219, and 220(a)(1) and (c)-(e) so that the Commission can inquire into the management of providers, collect information, and require reporting, among other things. ¶ 347
- Section 222, which "establishes core privacy protections for customers of telecommunications services, as well as other entities that do business with Title II providers." ¶ 349. However, the Commission has waived the rules implementing Section 222 "to the extent such rules are applicable to BIAS as a telecommunications service by virtue of [the] Order." *Id.* The Order notes that waiving the CPNI rules will give the Commission "the opportunity to carefully evaluate appropriate rules for BIAS, particularly given the need to consider the effect of the Resolution of Disapproval" by Congress nullifying the 2016 privacy rules adopted by the Commission the last time BIAS was classified as a Title II service. ¶ 359
- Provisions such as 223, 230(c), and 231 that benefit BIAS providers by providing liability limitations. ¶ 381
- Section 224 and the Commission's associated pole attachment rules. ¶ 360
- Sections 225, 255, and 251(a)(2) governing access to BIAS by individuals with disabilities. ¶ 372
- Section 229, the Communications Assistance for Law Enforcement Act (CALEA). ¶ 381

- Sections 253 and 332(c), which preempt state and local requirements that unduly burden infrastructure deployment. ¶ 381
- Section 254, 214(e) and the Commission's implementing regulations governing universal service, except for Sections 254(d) and (k), and the first sentence of subsection (d) to the extent it would result in new contributions for BIAS providers. ¶¶ 363–71
- Section 257, which grants the Commission additional authority to address outage requirements and reserves state or local authority. ¶ 381
- Section 276, to the extent it applies to incarcerated people's communications services (IPCS) and related rules. ¶ 428
- Title III provisions and regulations governing wireless licensing. ¶ 433
- Section 310 of the Act governing foreign investment in radio station licenses, other than Section 310(b)(3) for wireless common carriers. ¶ 434
- For wireless BIAS providers, the data roaming rule under Section 20.12(e) of the Commission's regulations. ¶ 431

Title II and Other Provisions from Which the FCC Will Forbear

In the Order, the Commission takes a similar regulatory forbearance approach as it did in 2015. The FCC concludes that forbearance is warranted for Sections 201 and 202 of the Communications Act insofar as they would permit rate regulation and Sections 211, 213, 215, and 220(a)(2), and (b), (f)-(j), which are typically used in the ratemaking context, ¶¶ 386, 396; tariffing requirements under Sections 203 and 204, ¶¶ 391–93; Section 205 (providing for Commission investigation of existing rates and practices), ¶ 394; Section 212 (providing for monitoring of interlocking directorates), ¶ 395; the interconnection and market-opening provisions of Sections 251, 252, and 256, ¶¶ 396–421; unbundling and network access requirements under Sections 221 and 259, ¶ 426; the first sentence of Section 254(d), Section 225(d)(3)(B), and related rules insofar as they would immediately require new universal service fund or telecommunications relay service (TRS) fund contributions, respectively, ¶¶ 365, 376; Sections 254(g) and (k) and associated rules, ¶ 371; Section 258 (governing subscriber changes); other miscellaneous sections that are unnecessary or irrelevant to BIAS, including Sections 226, 227(c)(3), 227(e), 228, 260, and 271-276 (other than Section 276 as it applies to IPCS), ¶¶ 425, 427; the Commission's truth-in-billing rules, ¶ 429; the roaming rule applicable to commercial mobile radio service (CMRS) providers (although the data roaming rule in place before the reclassification will continue to apply), ¶ 431; and terminal equipment rules, ¶ 432.

The Commission also adopts limited forbearance related to Section 310 governing foreign investment in radio station licenses, extending its existing Section 310(b)(3) forbearance policy obviating a petition for declaratory ruling "where and to the extent the Commission has already found the foreign ownership at issue to be in the public interest." ¶ 437. To this end, the Commission concludes "foreign ownership interests that exceed the statutory benchmarks in common carrier wireless licensees that are providing *only* BIAS are in the public interest," and thus waives the requirement for such providers to petition for declaratory ruling, "pending adoption of any rules for BIAS." ¶ 438. The Commission explains that this "temporary forbearance" will "afford

additional time after the Order's effective date for other BIAS providers newly subject to Title II to restructure to the extent necessary to bring any foreign ownership interest in the licensee below the statutory limit…" ¶ 439.

The Report and Order: Open Internet Rules

The Open Internet Rules

The Report and Order reinstates the three "bright-line" rules prohibiting blocking, throttling, and paid prioritization, as well as the "general conduct" standard, from the Commission's 2015 Open Internet Order. It also returns the transparency rule retained by the RIF Order to its original 2015 form. In reinstating these rules, the FCC adopts the same language, and largely the same rationale and interpretations, as it did in 2015.

1. No Blocking

The Commission reinstated "a bright-line rule prohibiting BIAS providers from blocking lawful content, applications, services, or non-harmful devices[,]" but "subject to reasonable network management." ¶ 494. As it did in 2015, the Commission clarified that: (1) the phrase "content, applications, and services" encompasses *all* traffic transmitted to or from end users, even if it doesn't clearly fit into one of these categories; (2) BIAS providers may still block unlawful content like copyright-infringing materials; (3) end users may connect any lawful device of their choice as long as it does not harm the network; and (4) BIAS providers may not charge edge providers a fee to avoid being blocked. ¶ 495.

2. No Throttling

The Commission reinstated a second "bright-line rule" (also "subject to reasonable network management") prohibiting "throttling," described as "impairing or degrading lawful Internet traffic on the basis of content, application, service, or use of non-harmful device." ¶ 497. The Commission clarifies that "a BIAS provider's decision to *speed up* 'on the basis of Internet content, applications, or services' would 'impair or degrade' other content, applications, or services which are not given the same treatment." ¶ 499 (emphasis added). The Commission also notes that this rule "does not address the practice of slowing down or speeding up an end user's connection to the Internet based on a choice clearly made by the end user[,]" thereby allowing BIAS providers to "offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier." ¶ 500.

3. No Paid or Affiliated Prioritization

The Commission reinstated the third "bright-line" rule from 2015 prohibiting "arrangements in which a BIAS 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, or manages its network in a manner that favors the content, applications, services, or devices of an affiliated entity[,]" which the Commission refers to as paid or affiliated prioritization. ¶ 502. The Commission clarified, however, that "the ban on paid prioritization does not restrict the ability of a BIAS provider to enter into an agreement with a CDN to store

content locally within the BIAS provider's network." ¶ 508.

The Commission also adopted a narrow waiver rule, consistent with the 2015 order. ¶ 510. Under this rule, applicants for a waiver must (a) "demonstrate that the practice will have some significant public interest benefit" by "providing evidence that the practice furthers competition, innovation, consumer demand, or investment[;]" and (b) "demonstrate that the practice does not harm the open nature of the Internet, including, but not limited to, providing evidence that the practice: (i) does not materially degrade or threaten to materially degrade the BIAS of the general public; (ii) does not hinder consumer choice; (iii) does not impair competition, innovation, consumer demands, or investment; and (iv) does not impede any forms of expression, types of service, or points of view." ¶ 511. The Commission further noted that waiver applicants "face[] a high bar" and that it "anticipate[s] approving such exemptions only in exceptional cases." *Id.*

4. General Conduct Rule

Finally, the Commission reinstated a catch-all "no-unreasonable interference/disadvantage standard," pursuant to which the agency "can prohibit practices that unreasonably interfere with the ability of consumers or edge providers to select, access, and use BIAS to reach one another[.]" ¶ 513. The Commission adopted "a case-by-case approach that will consider the totality of the circumstances[,] . . . balanc[ing] the Commission's ability to protect consumers and edge providers . . . while still allowing BIAS providers the flexibility and encouragement, to develop new technologies and business practices." ¶ 518. However, the Commission expressed that this rule "is not an attempt to institute any form of rate regulation; nor is it an attempt . . . to expand [the] bright-line conduct rules in an indeterminate manner." *Id.*

The Commission adopted the following non-exhaustive list of factors that it "will consider to aid in [its] analysis": "(i) whether a practice allows end-user control and enables consumer choice; (ii) whether a practice has anticompetitive 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." ¶ 519. The Commission provided additional detail on each of these factors, and also established "an advisory opinion process for BIAS providers to seek Commission advice on potential conduct[.]" ¶ 520.

The Commission also explained that it will assess both zero-rating programs (where a BIAS provider exempts edge services, devices, applications, and/or content from an end user's usage allowance or data cap) and data caps under this rule, consistent with the 2015 order. ¶¶ 533, 542. The Commission explained that "a zero-rated program is likely to raise concerns under the general conduct standard where it zero rates an edge product (1) in exchange for consideration (monetary or otherwise) from a third party, or (2) to favor an affiliated entity," but that it would consider all zero-rating practices on a case-by-case basis under the general conduct standard. ¶¶ 538, 540. The Commission refrained from "mak[ing] any blanket determinations regarding the use of data caps" and instead concluded that it would "evaluate individual data cap practices

under the general conduct standard based on the facts of each individual case, and take action as necessary." ¶ 542.

5. Transparency Rule

The Commission modified its current transparency rule by restoring certain disclosure requirements eliminated by the RIF Order, adopting changes to the means of disclosure, and adopting a direct user notification requirement. ¶ 543. The new rule closely follows the transparency rule originally adopted in 2010 and reaffirmed in 2015, and requires providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings." ¶ 544.

Content. Consistent with previous guidance, the Commission made clear that BIAS providers must maintain the accuracy of all disclosures and must update disclosures whenever there is a "material change." ¶¶ 550–51. The Commission provided relevant guidance describing the type of information that providers must disclose for each category set forth in the rule as updated. ¶ 551.

- Regarding network practices, the Commission no longer requires reports of blocking, throttling, affiliated prioritization, or paid prioritization, as was required under the RIF Order, "except to the extent that a provider engages in paid or affiliated prioritization subject to a Commission waiver." ¶ 552. Consistent with the 2015 Open Internet Order and its rationale, the Commission now requires, among other things, that "'disclosures of user-based or application-based practices [must] include the purpose of the practice, which data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on end users' experiences,'" as well as any zero-rating practices.
- Regarding performance characteristics, the Commission reinstated certain enhanced performance characteristics disclosures eliminated by the RIF Order, including disclosures of packet loss, and requirements that performance characteristics be reported with greater geographic granularity and be "measured in terms of average performance over a reasonable period of time and during times of peak usage." ¶¶ 555–56. The Commission declined to codify specific methodologies for measuring performance, and delegated authority to the to the Office of Engineering Technology (OET) and the Consumer and Governmental Affairs Bureau (CGB) to offer relevant guidance. ¶ 556.
- The Commission declined to adopt any additional disclosures with respect to commercial terms at this time, finding such disclosures unnecessary because broadband labels now require largely the same disclosures as those required by the 2015 Open Internet Order. ¶ 561.

Means of Disclosure. The Commission requires providers to disclose all information required by the transparency rule on "a publicly-available, easily-accessible website" in a machine-readable format. ¶¶ 563–64.

Direct User Notification. Consistent with the 2015 Open Internet Order, the Commission now requires BIAS providers to directly notify end users "if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the end user's use of the service." ¶ 565. The Commission provided a temporary exemption to this requirement for BIAS providers that have 100,000 or fewer broadband subscribers. ¶ 567. The Commission directed the CGB to seek comment on whether the exemption should be permanent and to adopt an Order within 18 months announcing whether it will maintain the exemption. *Id.*

Oversight of Internet Traffic Exchange Arrangements

The Commission concluded that disputes involving a BIAS provider regarding Internet traffic exchange are subject to FCC authority. ¶ 575. Finding it "premature to adopt prescriptive rules," the Commission declined to apply any open Internet rules to Internet traffic exchange. ¶¶ 578–79. Instead, the Commission will, consistent with the 2015 Open Internet Order, hear disputes raised under Section 201 and 202 related to such matters on a "case-by-case basis." ¶¶ 575, 578.

Enforcement

The Report and Order provides an enforcement framework for the open Internet rules that includes advisory opinions, enforcement advisories, Commission-initiated investigations, informal complaints, and formal complaints. ¶ 581. BIAS providers may request advisory opinions from the Enforcement Bureau, and these requests "must pertain to a policy or practice that the requesting party intends to utilize, rather than a mere possible or hypothetical scenario," and may not involve ongoing or prior conduct. ¶¶ 583–84, 586. The Enforcement Bureau will not take enforcement action based solely on a request for an advisory opinion, and the process is "fully voluntary." ¶¶ 586–88. The Commission's existing Section 1.41 informal complaint and Section 208 formal complaint processes will apply to complaints arising under the open Internet rules. ¶¶ 589–91.

Relationship With Other Laws

The Report and Order concludes that, as proposed in the NPRM, the open Internet rules will not supersede any requirements or obligations under other laws, including CALEA, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act. ¶ 629. Moreover, the Report and Order also explains that the open Internet rules do not preclude ISPs from "responding to safety and security considerations — including the needs of emergency communications and law enforcement, public safety, and national security authorities," or from taking efforts to address "unlawful transfers of content or transfers of unlawful content" such as copyright infringement or other unlawful activity. ¶¶ 626, 630–31.

Policy Justifications for Open Internet Regulations

The Commission states that the rules adopted in the R&O will ensure that the country has access to "affordable, competitive, secure, and reliable broadband." ¶ 443. The Commission states that the new rules will, just as with the 2010 and 2015 orders, promote "'innovations at the edges of the network [to] enhance

consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.'" ¶ 446. The *Verizon* court previously found that this "virtuous cycle" was "reasonable and grounded in substantial evidence," a conclusion that was not questioned in the public record here. ¶ 446. The Report and Order states that small and emerging edge providers drive innovation and diversity in the Internet ecosystem and an open Internet is essential for new businesses to find investors. ¶ 449. It further finds that the incentives the FCC identified in 2010 that BIAS providers may face to reduce Internet openness continue to exist. ¶¶ 468–471.

The Commission also notes that its rules will help to prevent harms to public safety that result from blocking, throttling, paid prioritization, and other actions that could make it more difficult for the public to receive emergency services and critical information, or impair the ability of first responders to communicate during emergency situations. ¶ 441. The Commission rejects arguments that the conduct rules would have a limited impact because public safety entities rely on enterprise-level dedicated networks, noting that public safety officials' reliance on BIAS has become "integral" to their services. ¶ 457. The Commission also rejects arguments that open Internet rules could deter providers from blocking or throttling access to websites that pose a threat to public safety "for fear of violating the rules" because the rules adopted "only apply to lawful content and the use of non-harmful devices." ¶ 459. Lastly, the Commission finds that the open Internet conduct rules will ensure that people with disabilities have access to essential information and can communicate with public safety personnel during emergencies. ¶ 461.

The Commission further highlights that, despite the increasing number of BIAS providers, many consumers still lack a choice of provider and where they do have a choice, they have a choice of only two providers and the services offered by competing providers are often not close substitutes. ¶ 472. Even where end users have competitive choices, the Commission notes they may face significant switching costs, ¶ 475, and consumers will not be able to identify when the BIAS provider is degrading the quality of particular edge services. ¶ 476. Lastly, the Commission concludes that consumer protection and antitrust laws — even when combined with transparency requirements — are not sufficient to protect against blocking, throttling, and other conduct that harms the open Internet. ¶ 484.

The Report and Order also provides a cost-benefit analysis concluding that the benefits of Title II reclassification and the open Internet rules outweigh the costs of such regulatory shifts. In so doing, the Report and Order concludes that the "primary benefits and costs" are "the changes in the economic welfare of consumers, BIAS providers, and edge providers that would occur due to [the FCC's] actions." ¶ 633. The Report and Order also asserts that there will be "substantial additional benefits" from the reclassification "enabling the Commission to defend national security, promote cybersecurity, safeguard public safety, monitor network resiliency and reliability, protect consumer privacy and data security, support consumer access to BIAS, enable access to infrastructure, and improve disability access." ¶ 634. Moreover, the Report and Order concludes that the bright-line rules — blocking and throttling prohibitions and prohibitions on paid and affiliated prioritization — will create benefits for consumers and edge providers that are not outweighed by costs to ISPs. ¶¶ 642–644. The Report and Order further concludes that the general conduct rule will provide both "greater flexibility for the Commission to address new issues as they arise and greater certainty to BIAS

providers in terms of the factors that will be considered when assessing whether new practices will be likely to harm the open Internet[,]" and that the transparency rules will "provide consumer benefits that exceed these small costs by enabling consumers to select the appropriate BIAS that meets their needs" and will ensure that consumer notification capabilities are already in place. ¶¶ 646–47. Finally, the Report and Order concludes that broad preemption of state or local statutes or regulations that either interfere or are incompatible with the new rules will reduce ISP compliance costs. ¶ 648.

Legal Analysis Supporting Open Internet Rules

Consistent with its proposals in the NPRM, the Commission largely relies on the same sources of authority as it relied on in the 2015 Open Internet Order. ¶ 593. The Report and Order specifically relies on Sections 201, 202, 206, 207, 208, 209, 216, and 217 of the Communications Act, ¶¶ 595–603, Section 706 of the Telecommunications Act of 1996, ¶¶ 606–620, and Title III of the Communications Act for mobile providers, ¶¶ 621–625. The Report and Order also finds, consistent with the RIF Order, that Section 257 of the Communications Act supports the transparency requirements that the Commission retains. ¶ 604.

The Report and Order also addresses constitutional concerns raised about the open Internet rules under the First and Fifth Amendments. The Commission concludes that its rules "fully comport with the First Amendment" and do not undermine free speech. ¶ 649. The Commission asserts that BIAS providers are not speakers engaged in expressive activity when they carry consumer communications, but instead act as conduits for others — like telephone companies or package-delivery services — because they do not select, modify, arrange, or contextualize content. ¶¶ 651–54. Relatedly, the Commission concludes that limiting traffic is not expressive or communicative conduct. ¶¶ 655–56. The Commission also finds that even if BIAS providers were speakers under the First Amendment, the agency's content- and viewpoint-neutral rules withstand intermediate scrutiny because these rules further important government interests, including public access to a diverse array of information, fair competition, and "widespread access to a vibrant Internet." ¶¶ 659–60. The Commission likewise rejects arguments that the transparency rule unconstitutionally compels speech, finding that it requires BIAS providers to disclose only "'purely factual and uncontroversial information'" that is "justified" and not "unduly burdensome" under the Supreme Court's *Zauderer* standard. ¶ 665–69. The Commission asserts that the transparency rule would satisfy intermediate scrutiny even if *Zauderer* did not apply. ¶¶ 670–71.

The Commission claims that its rules effect neither a *per se* nor a regulatory taking in violation of the Fifth Amendment. The Report and Order first explains that the rules do not grant a right to physical occupation of the broadband providers' property, but that even if they did, this imposition would not be unconstitutional, as "BIAS providers are compensated for the traffic passing over their networks through end-user revenues." ¶¶ 672–75. The Commission also concludes that its rules do not constitute a regulatory taking under the Fifth Amendment, based on its characterizations that the economic impact of its rules on BIAS providers' property interests is limited, and that there is no meaningful interference with providers' investment-based expectations. ¶¶ 676–80. Lastly, the Commission states that its actions are not "confiscatory" under Fifth Amendment ratemaking precedent because the rules still allow BIAS providers to set market rates for their services, and thus enables providers to obtain a fair return on network costs associated with carrying traffic. ¶¶ 672, 681–82.

Order on Reconsideration and Other Procedural Issues

Order on Reconsideration. The Commission grants the Petitions for Reconsideration of Common Cause from INCOMPAS, Public Knowledge, and Santa Clara seeking reconsideration of the RIF Remand Order to the extent they are consistent with the Commission's order. ¶ 683. The Commission also vacates the RIF Remand Order to the extent requested in the petitions and finds that it has provided the relief sought by the petitions. *Id.* Petitioners highlighted that the Commission did not open the record to receive comment on the impact of the COVID-19 pandemic, and therefore failed to adequately consider the harms of reclassifying BIAS as a Title I service on public safety, pole attachments, and the Lifeline program. ¶ 687. The Commission agrees with the petitioners and explains that it has fully considered those issues in this decision. ¶ 691.

Severability. The Commission explains that each of the rules, requirements, classifications, definitions, and other provisions that established in the Order are separate and severable — each rule or requirement operates independently to promote and protect the open Internet, safeguard national security and public safety, and promote the deployment of broadband on a timely basis. ¶ 692. Should any of the individual rules be held invalid, the Commission explains the remaining regulations are severable and would continue to serve as valuable tools for promoting the open Internet. ¶ 693. And should the application of the open Internet rules to either fixed or mobile broadband Internet access services be held invalid, the application of the rules to the remaining mobile or fixed services would remain intact. ¶ 694.

What Happens Next?

The Appeal

The *Declaratory Ruling*, *Order*, *Report and Order*, and *Order on Reconsideration* will almost certainly be appealed. Parties will do so by petitioning for review in the D.C. Circuit or "in the judicial circuit" where they "reside[ ]" or have their "principal office." For example, a regulated party in Texas may appeal to the Fifth Circuit, while a regulated party in Florida may appeal to the Eleventh Circuit. If multiple petitions for review are filed and served on the Commission within 10 days of the item's publication in the Federal Register, it will trigger a judicial lottery, and the Judicial Panel on Multidistrict Litigation will randomly select one of the courts in which a petition was timely filed and served. All pending and future challenges will then be transferred to that one circuit, which will decide the validity of the FCC's decision for the entire country. Given the importance of the issue, the losing party is likely to petition the Supreme Court for certiorari. At that point, the Supreme Court will either deny (leaving the circuit court's decision in place) or grant (and decide the issue for itself). This process is likely to take months or even years, though the process could be accelerated if the parties seek (and appeal) a stay of the order pending review.

The fate of Title II reclassification for BIAS also depends on the result of the upcoming presidential election. Notwithstanding the appeal process, a Republican-led FCC likely would reverse course yet again and restore the prior information service classification.

Compliance with the New Rules

The *Declaratory Ruling*, *Order*, *Report and Order*, and *Order on Reconsideration* will be effective **60 days** after the publication in the Federal Register, except for those amendments which contain new or modified information collection requirements — the amendments will not become effective until after the Office of Management and Budget completes any review that the Wireline Competition Bureau determines is required under the Paperwork Reduction Act. The Wireline Competition Bureau will announce the effective date for those amendments through subsequent Public Notice. ¶ 710.

Parties appealing the Commission's order may seek a stay of the effective date pending the outcome of the appeal, which may or may not be granted by the reviewing court.

Future Rulemakings

Stakeholders also should pay close attention to additional FCC proceedings that are forecast in the *Declaratory Ruling*, *Order*, *Report and Order*, and *Order on Reconsideration*. In particular, stakeholders can expect to see:

- A Further Notice of Proposed Rulemaking on whether any BIAS-specific rules are required under Section 214;
- A Further Notice of Proposed Rulemaking on the application of foreign ownership requirements under Section 310;
- A rulemaking considering whether to adopt BIAS-specific CPNI rules under Section 222;
- A rulemaking or series of rulemakings on information collection requirements for BIAS providers pursuant to various provisions of the Act, including Sections 218, 219, and 220;
- A potential new rulemaking that would require BIAS providers to implement cybersecurity plans and cybersecurity-related risk management plans;
- A rulemaking proceeding by the Consumer & Governmental Affairs Bureau on whether to maintain the Commission's decision to exempt BIAS providers with 100,000 or fewer customers from aspects of the transparency rule; and
- BIAS-focused rulemakings on emergency communications and outage reporting. In fact, the Commission already has placed on circulation an item that is expected to cover these topics. The item will be released once all Commissioners have voted on it.

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For questions about the *Declaratory Ruling*, *Order*, *Report and Order*, *Order on Reconsideration,* and other issues discussed in this alert, please contact the authors.

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