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ALERT

Federal Communications Commission Seeks to Revive Net Neutrality Rules

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On Thursday, September 28, 2023, the Federal Communications Commission (FCC or Commission) released a draft Notice of Proposed Rulemaking (NPRM) that, if adopted, would comprehensively regulate broadband in the United States. Specifically, the NPRM would reclassify (i) broadband Internet access service as a telecommunications service under Title II of the Communications Act, and (ii) mobile broadband Internet access service as a commercial mobile service. The FCC proposes to then use its authority under Title II to largely reinstate the open Internet rules the FCC adopted in its 2015 Open Internet Order.

The draft NPRM has significant and broad-ranging implications for the business practices of Internet service providers (ISPs). If adopted, ISPs using terrestrial, wireless, and satellite facilities will be prohibited from blocking, throttling, or paid prioritization. The FCC also proposes requiring ISPs to comply with a vague "general conduct standard" and the FCC's transparency rule. Further, as proposed, ISPs will be subject to the Commission's consumer privacy regime, the FCC's Section 224 authorization process, and potentially any other requirement the Commission has the authority and wherewithal to impose under Title II. For example, the NPRM seeks comment on whether ISPs' prices should be reviewed for reasonableness under sections 201 and 202 of the Communications Act. The NPRM also suggests that Title II reclassification will enhance the FCC's ability to impose cybersecurity standards and take action based on national security concerns.

An NPRM on the reclassification of Internet access services was widely anticipated following the recent confirmation of Anna Gomez as FCC Commissioner, who was sworn in at the Commission earlier

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this week. The addition of Commissioner Gomez gives Chairwoman Rosenworcel a 3-2 Democratic majority for the first time during the Biden Administration, enabling her to move forward on more controversial policy priorities that could not have been adopted by a deadlocked 2-2 Commission. By returning to the Title II classification first adopted in 2015, the proposals in the draft NPRM would reverse the Title I classification for Internet services established by FCC Chairman Pai during the previous presidential administration.

The draft NPRM is the first step in what will certainly be a contentious rulemaking. The Commission will vote on whether to adopt the NPRM at its next open meeting on October 19, 2023. (Despite the looming potential for a government shutdown, the FCC has indicated it possesses sufficient funds to continue operating through October 20.) Once adopted, the NPRM will trigger a round of comments and reply comments. (Currently, comments are due December 14, 2023, and reply comments due January 17, 2024, but it is possible parties will seek extensions.) Following the public comment period, the Commission will likely then proceed to a final rule. Interested stakeholders should participate in the public comment period to ensure their views are heard and to preserve arguments for any future appeal.

Proposed Reclassification of Broadband Internet Access Service

The Commission proposes to (i) reclassify broadband Internet access service (BIAS) as a telecommunications service instead of an information service, and (ii) to reclassify mobile BIAS as a commercial mobile service. ¶ 16. Since 2018, BIAS has been classified as an "information service" and thus subject to the "the light-touch regulatory treatment of Title I" of the Communications Act (Act).[1] By reclassifying BIAS as a "telecommunications service," the Commission's proposal would subject BIAS to Title II of the Act. Title II has historically been used to regulate common carriers, subjecting such entities to a range of burdensome and far-reaching rules. As in the earlier 2015 Open Internet Order, the NPRM proposes to expressly forbear from a wide range of these Title II obligations, including *ex ante* rate regulation, but on a range of matters it leaves the door open to the imposition of liability through post hoc enforcement proceedings. ¶ 104.

Statutory Basis. The NPRM proposes that interpreting the statutory definition of "telecommunications service"[2] to include BIAS is "both a reasonable and the best reading" of the statutory terms. ¶ 69. The NPRM bases this conclusion on the finding "that BIAS is best understood as making available high-speed access to the Internet (that may be bundled with other applications and functions)—and therefore that it provides telecommunications—and that ISPs offer BIAS to the public for a fee." ¶¶ 69, 70–79, 18–19. The NPRM asks whether and/or how the "major questions doctrine"—which the Supreme Court has characterized as precluding agency authority over matters of political or economic significance absent clear congressional authorization and which Justice Kavanaugh raised as a barrier to net neutrality regulation in dissent when he was a judge on the D.C. Circuit—should inform the Commission's interpretation of the statutory text. ¶¶ 80–83.

Policy Justifications. The NPRM also proposes that reclassification is justified as a policy matter because the proposal will:

- Ensure Internet openness by allowing the Commission to adopt its desired open Internet rules, discussed in more detail below. ¶¶ 23–24.

- Safeguard national security and preserve public safety by (i) subjecting BIAS providers to FCC authorization under Section 214 of the Act,[3] ¶ 27, (ii) allowing the Commission to better monitor security threats to communications infrastructure, ¶ 29, (iii) giving the Commission "authority to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes," ¶ 33–38, and (iv) allowing the FCC to better ensure network resiliency and reliability by potentially requiring BIAS to report outages, ¶ 39.
- Improve cybersecurity by allowing the FCC to require "cybersecurity standards or performance goals" for BIAS. ¶¶ 30–32.
- Protect consumers' privacy and data security by subjecting BIAS to the FCC's customer privacy rules under Section 222 of the Act.[4] ¶¶ 42–44.
- Help combat robocalls and robotexts by potentially improving enforcement against Voice over Internet Protocol (VoIP) networks and over-the-top messaging services. ¶ 45.
- Support access to BIAS by (i) providing broadband-only ISPs with section 224 pole-attachment rights,[5] ¶ 47, (ii) potentially applying the Act's preemptive infrastructure-deployment provisions to BIAS,[6] ¶ 48, (iii) bolstering the Commission's ability to provide support for BIAS through the Universal Service Fund and Lifeline programs, among others, ¶¶ 49–51, (iv) allowing the Commission to "promote tenant choice and competition" in multi-tenant environments, ¶ 52, and (v) allowing the Commission to further digital equity, *id.* ¶ 53.
- Facilitating access for persons with disabilities by allowing the Commission to potentially impose accessibility regulations. ¶ 54.

Scope. The NPRM proposes to maintain its current definition of "broadband Internet access service,"[7] which is limited to "mass-market retail service" offerings or their functional equivalent. ¶¶ 58–60. The definition would encompass broadband offerings over any medium—from wire and wireless to satellite. ¶ 60. It would also include "arrangements for the exchange of Internet traffic by an edge provider or an intermediary with the ISP's network," subject to certain conditions. ¶ 65. The proposed definition excludes enterprise service offerings and other non-mass-market offerings, such as private end-user networks. ¶¶ 59, 61. The NPRM seeks comment on whether it should include other services in the proposed reclassification, including non-BIAS data services, services that offer 5G connectivity, ¶¶ 62–64, virtual private network services, content delivery networks (CDNs), Internet backbone services (including transit agreements), web hosting services, and/or data storage services, ¶ 66.

Mobile BIAS Reclassification. In addition to reclassifying BIAS as a telecommunications service, the NPRM also proposes reclassifying mobile BIAS as a commercial mobile service. ¶ 84. "Commercial mobile service" is a service classification established by Section 332 of the Communications Act that is subject to common carrier regulation.[8] The NPRM reasons that mobile BIAS meets the definition of commercial mobile service because it is a service that is (i) accessed through mobile devices, (ii) offered for a profit, and (iii) available to the public. ¶ 85. The NPRM also proposes to classify mobile BIAS as an "interconnected service" that is interconnected with the "public switched network."[9] ¶¶ 86–88. The Commission's proposals would also subject mobile BIAS to Title II regulation and thus the Commission's proposed open Internet rules. ¶¶ 90, 92.

Preemption. The Commission seeks "comment on how best to exercise [its] preemption authority to ensure that BIAS is governed by a national, uniform framework." ¶¶ 93–96. It expressly seeks to avoid a "regulatory patchwork." ¶ 93. But it also seeks comment on whether to adopt "a broad preemption decision like the Commission did in the *RIF* Order," or "proceed more incrementally, such as by only addressing in this proceeding those state or local legal requirements squarely raised in the record." ¶ 95. The Commission also asks whether federal rules should operate both as a floor and a ceiling in preempting state net neutrality rules. ¶ 96.

Proposed Forbearance

Despite classifying BIAS as a telecommunications service, the Commission proposes to not subject BIAS to every requirement in Title II. It proposes to instead forebear from applying many of those requirements, subjecting BIAS to only a subset of Title II regulations.

Specifically, the NPRM proposes that BIAS will be subject to:

- The open Internet rules described below and section 706 of the Telecommunications Act of 1996 (a statutory basis for those rules). ¶ 103.
- "Sections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide." ¶ 103. However, the Commission proposes "to forbear from applying sections 201 and 202 to BIAS insofar as they would support adoption of ex ante rate regulations for BIAS." ¶ 104.
- Section 222 of the Act (the Commission's consumer privacy regime). ¶ 103.
- Section 224 of the Act and the Commission's implementing rules "which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way." ¶ 103.
- "Sections 225, 255, and 251(a)(2) of the Act and the Commission's implementing rules, which collectively advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband Internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time." ¶ 103.
- "Section 254 of the Act and the interrelated requirements of section 214(e), and the Commission's implementing regulations to strengthen the Commission's ability to support broadband, supporting the Commission's ongoing efforts to support broadband deployment and adoption." ¶ 103. However, the Commission proposes to forebear "from the first sentence in section 254(d) and" its "associated rules insofar as they would *immediately* require new universal service contributions associated with BIAS." ¶ 104 (emphasis added).
- "Requirements governing the wireless licensing process in section 309(b) and (d)(1) of the Act and sections 1.931, 1.933, 1.939, 22.1110, and 27.10 of the Commission's rules." ¶ 103.
- Sections 1 and 4(n) of the Act so that the Commission may "advance the Act's goals of national security and public safety." ¶ 106.

- Section 214 of the Act so that the Commission may use its authorization procedures "to address national security and law enforcement concerns related to U.S. telecommunications networks." ¶ 107.
- "Title III licensing authorities, including sections 301–303, 307–309, 312, and 316 of the Act" so that the Commission may use those provisions "to advance national security and public safety with respect to the services and equipment subject to licensing." ¶ 108. For similar reasons, the Commission seeks comment on whether to exclude from forbearance section 218, 220, 305, 310, and 332 of the Act. ¶ 108.

The NPRM intentionally proposes to mirror much of the forbearance approach from its 2015 Open Internet Order.[10] ¶¶ 103–06. But the proposals to not forebear from Sections 1, 4(n), 214, and the Title III licensing authorities would go further than the 2015 Order. *See* ¶ 103. The NPRM also proposes conditional forbearance from common carrier roaming regulations, ¶ 111, and to apply the same forbearance framework to the Internet traffic exchange portion of BIAS, ¶ 112.

Proposed Open Internet Rules

The NPRM proposes "to return to the basic framework the Commission adopted" in the 2015 Open Internet Order. ¶ 114. Pursuant to that framework, the Commission proposes five categories of requirements for ISPs.

First, the Commission proposes adopting "a bright-line rule prohibiting ISPs from blocking lawful content, applications, services, or non-harmful devices." ¶ 150–52. The Commission proposes to track the language of the rule adopted in the 2015 Open Internet Order. ¶ 151. The Commission also largely relies on the rationale of the 2015 Open Internet Order, concluding that a prohibition on blocking is necessary to preserve Internet openness. ¶ 150.

Second, the Commission proposes to prohibit ISPs from throttling lawful content, applications, services, and non-harmful devices. ¶¶ 153–56. As with the no-blocking proposal, the Commission's no-throttling proposal mirrors both the language and the rationale of the 2015 Open Internet Order. ¶ 154–55.

Third, the Commission proposes to prohibit ISPs from accepting consideration from a third party in exchange for paid or affiliated prioritization. ¶¶ 157–62. Again, the Commission proposes adopting both the language and reasoning of the 2015 Open Internet Order. ¶ 158. Specifically, the Commission seeks to "prevent the bifurcation of the Internet into a 'fast' lane" and a "'slow' lane." ¶¶ 158–59. The Rule would also include a waiver provision allowing the Commission to waive this prohibition if waiver would "provide some significant public interest benefit and would not harm the open nature of the Internet." ¶¶ 161–62.

Fourth, the Commission proposes to impose a "general conduct standard, which would prohibit practices that unreasonably interfere with or disadvantage consumers or edge providers." ¶¶ 163–67. The Commission proposes that this standard will act as a catch-all to prohibit activity that does not fall within one of the three previous bright-line rules. ¶ 163. The Commission proposes to enforce the general conduct standard on a "case-by-case" basis analyzing the "totality of the circumstances," including an enumerated set of non-exhaustive factors. ¶ 165. The Commission alternatively proposes to "rely on the 'just and reasonable' standards in sections 201 and 202 of the Act." ¶ 167.

Fifth, the Commission proposes to require ISPs to comply with the FCC's current transparency rule as a "baseline."[11] ¶¶ 168, 171. The Commission seeks comment on whether to require additional disclosures. ¶¶ 172–75. It also seeks comment on how ISPs should be required to make available the required disclosures, suggesting as possibilities disclosures on public websites and at points of sale. ¶¶ 176–81. And it seeks "comment on whether the Commission should adopt new safe harbors for compliance with the transparency rule." ¶ 183.

Scope. The Commission proposes to not apply the open Internet rules to Internet traffic exchange and instead use "case-by-case review under sections 201 and 202" in lieu of "prescriptive rules." ¶ 186. It also proposes "that reasonable network management would not be considered a violation of prohibitions on blocking and throttling, or the general conduct rule." ¶ 187.

Enforcement, Investigations, and Complaints. The Commission seeks comment on the best way to enforce and investigate compliance with the proposed open Internet rules. ¶¶ 188–92. It proposes enforcement options such as informal complaints, formal complaints, advisory opinions, and enforcement advisories. ¶¶ 188–92.

Legal Authority. The Commission proposes to largely rely on the same sources of authority as it relied on in the 2015 Open Internet Order. ¶ 193. Specifically, it proposes to rely on section 706 of the Telecommunications Act of 1996, ¶¶ 194–200, sections 201, 202, 206, 207, 208, 209, 216, and 217 of the Communications Act, ¶¶ 201–02, and Title III of the Communications Act for mobile providers, ¶ 203. In a change from the 2015 Order, the Commission asks whether Title VI of the Act (which governs cable service) gives it additional "authority to adopt open Internet rules addressing the full array of ISPs." ¶ 204.

Relationship With Other Laws. The Commission proposes that the open Internet rules will not supersede any requirements or obligations under other laws, including "the Communications Assistance for Law Enforcement Act, the Foreign Intelligence Surveillance Act, and the Electronic Communications Privacy Act." ¶¶ 207–08. It further proposes that ISPs will not be prohibited from reasonable efforts to address copyright infringement or other unlawful activity. ¶ 209.

Constitutionality. The Commission concludes that its "proposals would withstand any review under the First Amendment" because (i) common carriage regulations do not raise First Amendment concerns, ¶ 213, and (ii) the rules are content-neutral and would survive intermediate scrutiny, ¶ 214. It also finds that the transparency rule would not be an unconstitutional compelled disclosure because it requires only the "disclosure of factual, noncontroversial information." ¶ 219. And it finds that none of the proposed rules would constitute a Fifth Amendment takings. ¶¶ 221–22.

Areas of Record Development

As stakeholders consider their advocacy before the Commission, it may be helpful to focus their efforts toward building the record on one or more of the following issues:

- The Need for Rules. Throughout the item, the Commission stresses the importance of "BIAS connectivity" in light of "the COVID-19 pandemic." ¶ 23. Stakeholders should consider submitting record evidence

about whether broadband performance during the pandemic was hindered by a lack of open Internet rules. The Commission also claims that it needs to reclassify BIAS based on concerns it raised in 2015, *e.g.*, "ISPs have the incentive and ability to engage in practices that pose a threat to Internet openness." ¶ 122. Because ISPs have been operating for five years without being subject to the open Internet rules, stakeholders should consider submitting record evidence on whether the Commission's justifications hold true.

- Cybersecurity, National Security, and Privacy. The Commission proposes far-reaching privacy rules under section 222, ¶ 43, as well as mandatory cybersecurity requirements, ¶¶ 30–32. Stakeholders should consider offering feedback on whether these requirements are necessary in light of other sources of congressional authority and whether the Commission would have authority to impose them under Title II in any event. They should also consider whether Congress's disapproval under the Congressional Review Act of the Commission's previous privacy rules affects the ability of the Commission to adopt new privacy rules in this proceeding.[12]
- Price Regulation. The Commission proposes *ex post* review of ISP practices under section 201 and 202 of the Act to determine whether they are just and reasonable. ¶¶ 23, 104. Given the Commission's representation this week that "rate regulation" is supposed to be "strictly prohibited" under these rules, stakeholders should consider pressing the Commission to make clear how that representation is consistent with the review under sections 201 and 202.
- Preemption. The Commission proposes that its open Internet rules will be a uniform framework that will preempt state broadband regulations. ¶¶ 93–96. Commenters should consider submitting record evidence regarding the need for uniformity.
- Major Questions Doctrine. The Commission previewed a part of its plan to respond to the objection that Title II classification presents a major question that Congress alone can decide. ¶¶ 93–96, 80–83. Specifically, the NPRM describes the Commission's attempts to impose core anti-blocking regulations on the Internet and its classification authority pertaining to Internet services as having deep roots, citing examples from the time of the adoption of the 1996 amendments to the Communications Act. Commenters should consider weighing in on this narrative, including, for example, by exploring the limited nature of those early classification decisions and how the caselaw on major questions has evolved since that time.

Conclusion

Wiley's deep and experienced bench of attorneys represents clients in broadband matters, the Administrative Procedure Act, and compliance with FCC regulations. Please contact any of the authors on this alert to discuss your needs in relation to this matter.

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1 Restoring Internet Freedom, Report and Order on Remand, Declaratory Ruling, and Order 33 FCC Rcd. 311, 313, ¶ 20 (2018) ("Restoring Internet Freedom Order").

2 *See* 47 U.S.C. § 153(50), (53).

3 47 U.S.C. § 214.

4 47 U.S.C. § 222.

5 47 U.S.C. § 224.

6 47 U.S.C. § 253, 332.

7 47 C.F.R. § 8.1(b).

8 47 U.S.C. § 332(d)(1).

9 47 U.S.C. § 332(d)(2).

10 *See* Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) ("*2015 Open Internet Order*").

11 47 C.F.R. § 8.1.

12 Pub. L. No. 115-22, 131 Stat. 88 (2017).