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Client Alert

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Net Neutrality Order Deep-Dive: Open Internet Rules Repealed, Transparency Requirements Remain, FTC Role over Broadband Privacy Restored…For Now

In this Client Alert, we provide a deep dive on the FCC's recent *Declaratory Ruling, Report and Order, and Order,*[1] that largely repeals the so-called "Open Internet" regulatory framework implemented by the prior FCC Chairman in 2015.[2] Few other proceedings have drawn the amount of public interest as the adoption, subsequent revision and now repeal of the FCC's Open Internet rules. We also provide important background on the road to where we are today, including the status of the Federal Trade Commission's jurisdiction over broadband consumer practices involving privacy and data security, which while restored by the recent reclassification order, remains at issue in a pending *en banc* review in the 9th Circuit.

Background

The FCC's current approach to the regulatory treatment of Internet access began in 2002, when it decided to classify broadband cable modem service as a largely unregulated "information service" under Title I of the Communications Act of 1934, as amended (Act). This decision was based on a view of broadband Internet access service (BIAS) as a single, functionally integrated data manipulation and processing service that merely used telecommunications incidentally to function rather than as a series of information service applications running over a separate telecommunications platform. The Commission's interpretation, although questioned, was accorded substantial deference and ultimately upheld by the United States Supreme Court in its 2005 *Brand X* decision.[3] This hands-off regulatory approach was also extended in a series of subsequent decisions to Internet Protocol (IP)-enabled services that were beginning to be implemented by wireline and wireless telecommunications service providers and power companies at that time.

Following the *Brand X* decision, the FCC proceeded to establish open Internet principles as a matter of regulatory policy, first in a 2005 Open Internet Policy Statement and then in a 2008 decision finding that the network management practices of Comcast Corp. (Comcast) violated these principles following complaints regarding Comcast's use of reset packets to interfere with peer-to-peer (P2P) downloads of legal material. Comcast successfully challenged the FCC's decision at the U.S. Court of Appeals for the District of Columbia Circuit, which found that the Commission's ancillary jurisdiction under Title 1 of the Act was insufficient, standing alone, to justify the Commission's assertion of jurisdiction over an information services provider absent some other substantive provision of the Act giving the FCC authority to act.[4]

In response to the Comcast decision, the FCC adopted its 2010 *Open Internet Order*[5] in which it relied on newly-claimed regulatory authority under section 706 of the Telecommunications Act of 1996 to establish blocking and discrimination prohibitions applicable to residential BIAS providers, as well as a transparency rule that required BIAS providers to publicly disclose accurate information regarding their network management practices, the performance characteristics of their service, and the general commercial terms of service. Section 706 of the Telecommunications Act imposes on the FCC an obligation to encourage deployment of infrastructure for advanced

[1] *In the Matter of Restoring Internet Freedom*, WC Docket Nos. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166 (released January 4, 2018) (*Internet Reclassification Order*).
[2] Protecting and Promoting the Open Internet, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).
[3] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005) (*Brand X).*
[4] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*).
[5] Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (*Open Internet Order*).

telecommunications capability, including broadband, and reliance on Section 706 was intended to provide a statutory basis, lacking in the Comcast proceeding, for the FCC to assert authority over Title I information services, such as residential BIAS.

Federal court review of the *Open Internet Order* was immediately sought by Verizon. In 2014, the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's authority to regulate broadband Internet access under Section 706 of the Act and upheld the FCC's transparency rule but vacated the no-blocking and anti-discrimination rules finding that these rules impermissibly regulated both wireline and wireless BIAS providers as common carriers in conflict with the Commission's prior determinations that broadband Internet access service was not a telecommunications service and that mobile broadband Internet access service was not a commercial mobile service, but rather a private mobile service.[6] In so ruling, the court relied on Sections 153(51) and 332 of the Act which prohibit the imposition of common carrier obligations upon wireline telecommunications services providers to the extent that they are providing non-telecommunications, information services[7] or upon private mobile services for any reason.[8]

Following the *Verizon* decision, the FCC commenced a proceeding to re-evaluate its legal authority to impose revised anti-blocking and anti-discrimination rules. The Commission initially indicated that it might adopt a hybrid Section 706 approach to Internet regulation which would continue to treat mobile wireless broadband differently from wireline broadband. However, after widespread fierce debate with unprecedented participation in the comment proceeding and even a statement from the White House, then FCC Chairman Wheeler announced that the Commission would reclassify BIAS as a Title II telecommunications service and largely forbear from imposing most, but not all, of the myriad of rules and policies that apply to telecommunications services. The Commission also reclassified mobile wireless broadband service from a private mobile service to a Commercial Mobile Radio Service (CMRS) and for the first time applied its net neutrality rules equally to both wireline and mobile wireless broadband.[9] The *Title II Order* adopted "bright line" net neutrality rules of no blocking, no throttling, and no paid prioritization of traffic. The *Title II Order* also adopted a generalized Internet Conduct Standard to prevent unreasonable interference or unreasonable disadvantage in end user or edge provider activity that would be enforced on a case-by-case basis.

The new rules adopted in the *Title II Order* were immediately challenged by a number of telecommunications, cable and wireless service providers and their industry associations but were ultimately upheld by the United States Court of Appeals for the District of Columbia Circuit.[10] In May 2017, following a change in administration and the appointment of a new FCC chairman, the Commission adopted a *Notice of Proposed Rulemaking* in which it proposed to reverse the *Title II Order's* reclassification of broadband Internet service as a telecommunications service and reinstate the information service classification for those services. Additionally, the *Internet Freedom NPRM* proposed to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service and reclassify it as a private mobile service.[11]

Internet Reclassification Order

The *Internet Reclassification Order* essentially repeals the *Title II Order* and reclassifies all broadband Internet access services, regardless of technology platform and regardless of whether the service is provided as a facilities-based or resale service, as information services under Title I of the Communications Act. Mobile wireless broadband Internet access service is likewise reclassified from CMRS to a private mobile service and the definitions of "interconnected service" and "public switched network," that were expanded in the *Title II Order* in order to bring mobile wireless broadband Internet access services within the definition of CMRS, have been restored to the definitions that existed before adoption of the *Title II Order*.[12] The Commission continues to define BIAS as "a mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."[13] The *Internet*

[6] *Verizon v. FCC*, 740 F.3d 623, 655-58 (D.C. Cir. 2014) (*Verizon*).
[7] 47 U.S.C. § 153(51). That section states, in relevant part, that "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services."
[8] 47 U.S.C. § 332. Section 332(c)(2) of the Act states that "A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act]."
[9] Protecting and Promoting the Open Internet, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).
[10] *United States Telecom Ass'n v. F*CC, 825 F.3d 674 (D.C. Cir. 2016) (*USTelecom*).
[11] Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (*Internet Freedom NPRM*).
[12] Specifically, the Commission reasoned that because that mobile wireless broadband Internet access service does not use the North American Numbering Plan to access the Internet, mobile BIAS does not meet the regulatory definition of "interconnected service" that the Commission originally adopted in 1994 and therefore it does not meet the definition of CMRS. *Internet Reclassification Order* at para. 79. The Commission also rejected the finding in the *Title II Order* that mobile broadband service was functionally equivalent to CMRS. Id. at paras. 83-85.
[13] *Internet Reclassification Order* at para. 21.

Reclassification Order also retains the exclusion from the BIAS definition for "specialized services" offering connectivity to one or a small number of Internet endpoints for a particular device, such as connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device.[14]

In repealing the *Title II Order*, the *Internet Reclassification Order* finds, not surprisingly, that classification of BIAS as an information service is more consistent with regulatory policies and decisions that existed prior to the reclassification of BIAS as a telecommunications service in the *Title II Order*. The Commission also found that regulatory uncertainty stemming from the potential imposition of Title II common carrier regulation on broadband service providers was responsible for a diminution in broadband investment nationwide between 2014 and 2016. The *Internet Reclassification Order* particularly focuses on rural service providers and cites claims that increased regulatory burdens imposed on rural broadband service providers by the *Title II Order* required those providers to divert scarce resources away from implementing new services or expanding their networks to hiring lawyers and consultants to navigate the risks of the new regulatory regime. The Commission also found that the "black cloud of common carrier regulations" made it more difficult for small Internet Service Providers (ISPs) to obtain much needed financing.

The *Internet Reclassification Order* concludes that the well documented instances of harm resulting from the blocking or discrimination practices engaged in by certain ISPs in the past were relatively few and outweighed by the burdens imposed by Title II regulations, which the Commission referred to as a solution in search of a problem. In reaching this conclusion, the Commission expressed the belief that market forces were sufficient in and of themselves to prevent the type of anticompetitive conduct prohibited by the *Title II Order*'s bright line net neutrality rules prohibiting ISPs from blocking, throttling, or engaging in paid prioritization of Internet traffic. In a similar vein, the Commission cites market forces as leading to the resolution of disputes between edge providers, backbone providers and ISPs over the terms and conditions of exchanging Internet traffic and notes that its *Internet Reclassification Order* also removes Internet traffic exchanged among these entities from common carrier regulation.[15]

In cases where market forces prove to be inadequate, the Commission believes that consumers still have adequate recourse to antitrust and consumer protection laws to obtain redress. Additionally, the Commission indicated that the Federal Trade Commission (FTC) retains authority to enforce adherence to the terms of service that ISPs are required to disclose to consumers under the enhanced transparency rules that are retained under the *Internet Reclassification Order*.[16] The Commission also points out that by reinstating the information service classification of broadband Internet access service, the *Internet Reclassification Order* returns jurisdiction to regulate broadband privacy and data security to the FTC, which was the federal agency primarily responsible for these matters in the past and the agency responsible for policing privacy and data security across a wide range of industries.

Having laid out its rationale for reclassifying BIAS as an information service, the *Internet Reclassification Order* makes clear that the *Internet Reclassification Order* eliminates the bright-line and general conduct rules adopted in the *Title II Order*—including the general conduct rule and the prohibitions on paid prioritization, blocking, and throttling. The *Internet Reclassification Order* also clarifies that access to poles and ducts by both wireline and wireless broadband providers remains unchanged by the reclassification of BIAS as an information service as do the limitations on zoning and tower siting that the Commission has imposed on local authorities under section 332(c)(7) of the Communications Act. Additionally, the Commission clarifies that the limitations imposed on local authorities by the Commission pursuant to section 337(c) apply not only to the facilities of the wireless services provider but also to any third party facilities that may be leased to or used by such a provider. Finally, the *Internet Reclassification Order* affirms that the reclassification of consumer and small business broadband Internet access as an information service does not in any way alter the Commission's existing high-cost universal service support mechanisms, such as the Connect America Fund, and does not require the Commission to deal in this proceeding with the extent to which broadband services are eligible for Lifeline support, a question which will be dealt

[14] *Id*. at para. 23.

[15] The bandwidth hungry nature of video streaming led to a well-publicized dispute between Netflix and Comcast concerning whether the online video service provider or the ISP should bear the cost of providing the additional network capacity required to deliver such services to the mutual customers of these providers, which has since been resolved. Although the *Title II Order* did not attempt to resolve this dispute, it did indicate that the Commission would continue to monitor the situation and step in under its Title II authority to regulate the exchange of Internet traffic if necessary. It is unclear the degree to which the potential assertion of Title II authority over Internet traffic exchanges may have provided the grease to allow the marketplace to arrive at a resolution of this dispute.

[16] The scope of the FTC's authority over information services offered by common carriers has recently been called into question and is under review in the federal courts. See *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

with in a separate proceeding.[17] Nor does the reclassification alter any obligations under the disability access provisions of the Act or Commission's rules, which already apply to broadband service providers and equipment manufacturers.

The Commission has also indicated its intent not only to cede its authority to regulate broadband Internet access services by reclassifying them as information services, but also to prevent the states from stepping into the fray by imposing their own regulatory requirements, apart from consumer protection measures, on broadband service providers. Effectively, the Commission argues that Internet access service is an inherently interstate service, and that as a matter of federal regulatory policy it has made a conscious decision that the Internet should not be regulated. Accordingly, any state action to impose regulations similar to those regulations being abandoned by the Commission would frustrate this federal policy and would be preempted. In response to the Commission's preemption effort, the states of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington, and the District of Columbia, have filed a Protective Petition for Review with the United States Court of Appeals for the District of Columbia Circuit seeking a determination that the *Internet Reclassification Order* violates the Administrative Procedure Act, the United States Constitution, the Communications Act, and the FCC's own regulations.[18]

Transparency Requirements

In reclassifying broadband Internet access service as an information service, the Commission has decided to retain, with some modifications, the transparency requirements established in the 2010 *Open Internet Order* and upheld in the *Verizon* decision. The new transparency rule states:

Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

The *Internet Reclassification Order* requires ISPs to prominently disclose network management practices, performance, and commercial terms of their broadband Internet access service. Specifically, all ISPs are required to disclose the following:

Network Management Practices

- Blocking. Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.
- Throttling. Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.
- Affiliated Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.
- Paid Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.
- Congestion Management. Descriptions of congestion management practices, if any. These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.
- Application-Specific Behavior. Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
- Device Attachment Rules. Any restrictions on the types of devices and any approval procedures for devices to connect to the network.
- Security. Any practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be

[17] Bridging the Digital Divide for Low-Income Consumers et al., WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155 (Dec. 1, 2017).

[18] *State of New York, et al. v. FCC*, Case No. 18-1013, Protective Petition for Review (filed January 16, 2018).

invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics

- Service Description. A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.
- Impact of Non-Broadband Internet Access Service Data Services. If applicable, what non-broadband Internet access service data services, if any, are offered to end users, and whether and how any non-broadband Internet access service data services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms

- Price. For example, monthly prices, usage-based fees, and fees for early termination or additional network services.
- Privacy Policies. A complete and accurate disclosure about the ISP's privacy practices, if any. For example, whether any network management practices entail inspection of network traffic, and whether traffic is stored, provided to third parties, or used by the ISP for non-network management purposes.
- Redress Options. Practices for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.

All additional reporting requirements, such as disclosure of packet loss, geographically-specific disclosures, and disclosure of performance at peak usage times are eliminated.

ISPs are given two options for making the required transparency disclosures. First, they may include the disclosures on a publicly available, easily accessible website, in which case they neither have to provide a hard copy to their customers nor file a copy of the policies with the Commission. Alternatively, ISPs can elect to transmit their disclosures to the Commission, which will post the disclosures on a publicly available, easily accessible website. The consumer broadband label safe harbor for form and format of disclosures adopted in the Title 11 Order is eliminated. Broadband service providers should update their transparency disclosures, including their Acceptable Use Policy (AUP) and Privacy Policy posted on their website, to conform to the *Internet Reclassification Order*.

Conclusion

Few other proceedings have drawn the amount of public interest as the adoption, subsequent revision and now repeal of the Commission's Net Neutrality rules. In all fairness, the FCC's earlier decision to reclassify Internet services under Title II was one made reluctantly, and only after court decisions had twice struck down the Commission's attempt to adopt anti-blocking and anti-discrimination requirements upon ISPs under other provisions of the Communications Act. Whether the Title II reclassification went too far probably depends on perspective. From the perspective of broadband service providers, and some rural broadband providers that prefer to operate with less regulatory protection under Title II, it certainly did. From the perspective of edge providers and many consumer advocates and public interest groups it may not have gone far enough. Adding to the complexity of the issue is the status of the FTC's jurisdiction over broadband consumer practices involving privacy and data security. One of the effects of the FCC classifying broadband Internet access as a Title II service is that it divested the FTC of jurisdiction over broadband provider practices under a provision of the FTC Act excluding communication common carriers from FCC oversight. In reclassifying broadband Internet access as a non-common carrier service, the Commission sought to restore the FTC's jurisdiction over the privacy and data security practices of broadband providers. However, whether the FTC's consumer protection jurisdiction extends to broadband services provided by common carriers such as commercial wireless providers is currently pending *en banc* review in the 9th Circuit, after a panel in the 9th Circuit found that the common carrier exception in Section 5 of the FTC Act is a status-based exemption barring FTC oversight of common carriers.[19] While it is difficult to fathom, if the 9th Circuit were to rule *en banc* that the common carrier exception is status based, then it is conceivable that neither the FCC nor the FTC would have jurisdiction over the privacy and data security practices of broadband providers that are also common carriers.

[19] *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), *vacated and reh'g en banc granted*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

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