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Restoring Internet Freedom: FCC Eliminates Common Carrier Regulation of Broadband Providers

New FCC order scales back net neutrality mandates while seeking to ensure internet openness through updated transparency requirements and FTC oversight.

Background

On January 4, 2018, the Federal Communications Commission (FCC) released the 2017 *Restoring Internet Freedom Order* (*Order*), which the agency had adopted by a 3-2 vote on December 14, 2017.[1] The *Order* marks the end of a hotly contested proceeding that saw a record-breaking 23 million comments filed in the agency's docket.

A variety of stakeholders, including consumer groups and many internet companies that provide web-based services (edge providers), contend that the legal framework and net neutrality safeguards adopted in 2015 are necessary to prevent broadband internet access service (BIAS) providers from throttling, blocking, and unfairly prioritizing internet content. By contrast, BIAS providers and allied interests have argued since 2015 that the common carrier model of regulation imposed during the Obama administration imposes undue regulatory burdens and chills broadband investment and innovation. The *Order* concludes that returning to the light-touch model that prevailed before 2015 will best promote investment and innovation without sacrificing internet openness or otherwise harming competition or consumers.

As a result, the *Order* makes several significant changes to the regulatory regime governing BIAS providers, including the following:

1) Reinstates the pre-2015 classification of BIAS as an interstate "information service" under the Communications Act (Act) — rescinding the "telecommunications service" classification adopted in 2015 and thus eliminating common carrier regulation of BIAS
2) Eliminates the open-ended general conduct standard and the rules prohibiting blocking, throttling, and paid prioritization
3) Adopts a revised transparency rule under Section 257 of the Act
4) Broadly preempts state and local regulation of BIAS
5) Eliminates regulation of BIAS providers' internet interconnection and traffic-exchange practices
6) Shifts regulatory oversight of BIAS providers' conduct — including, in particular, their privacy and data security practices — to the Federal Trade Commission (FTC)

Reclassification

The *Order's* most significant component is its reclassification of BIAS from a Title II telecommunications service — equivalent to a "common carrier" designation under the Act — to a Title I information service. Prior to 2015, the FCC had long classified retail BIAS under Title I, an interpretation of the Act that the US Supreme Court upheld as "reasonable" in 2005, in *Brand X*.[2] The FCC's 2015 *Title II Order* diverged from prior precedent in reclassifying BIAS as a common carrier telecommunications service, thereby subjecting retail BIAS providers to wide-ranging common carrier duties under Title II of the Act. The D.C. Circuit ultimately upheld that decision under a discretionary standard of review, but petitions for *certiorari* remain pending before the US Supreme Court.

Supporters of Title II regulation argue that BIAS is best considered a telecommunications service because BIAS providers offer a transparent pathway that consumers use to interact with edge providers' information services. But parties supporting a Title I classification argue that BIAS providers themselves offer various information-processing capabilities that support an information service classification.

The *Order* adopts the latter view, concluding that an information service classification for BIAS not only reflects the "best reading" of the Act,[3] but also represents the best policy choice for the internet ecosystem.[4] Among other determinations, the *Order* finds that "the basic nature of Internet service" has not changed since the *Brand X* decision, and that BIAS "provides consumers the 'capability' to engage in all of the information processes listed in the information service definition" — *i.e.*, "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[5] The *Order* goes on to explain that the telecommunications service classification adopted in 2015 led to a decline in aggregate broadband investment and "stifled network innovation" by BIAS providers.[6] The *Order* concludes that restoring the information service classification and eliminating the overhang of common carrier regulation will promote increased investment and innovation.[7] The *Order*'s discussion of classification issues also includes a ruling restoring the prior classification of mobile BIAS as a "private mobile service."[8]

Ensuring an Open Internet

The *Order* also takes a different approach to ensuring internet openness from the one adopted by prior FCC leadership in 2015 — primarily by eliminating prescriptive requirements governing BIAS providers' conduct and by relying instead on a revised transparency rule backed by FTC enforcement.

The current FCC's comfort with a deregulatory approach stems from the view that the internet has been subject to light-touch regulation (if any) for most of its existence, without any pattern of anticompetitive conduct or harm to consumers. Former Chairman Michael Powell had articulated four internet "freedoms" that he encouraged service providers to maintain,[9] and the FCC adopted a Policy Statement memorializing these core principles in 2005; however, the Policy Statement lacked the force of law, as the D.C. Circuit recognized.[10] In 2010, the FCC sought to adopt rules requiring transparency by BIAS providers and prohibiting them from engaging in blocking and unreasonable discrimination, but the D.C. Circuit struck down the latter two requirements in *Verizon v. FCC*.[11]

Eventually, the 2015 *Title II Order* adopted the rules against blocking, throttling, and paid prioritization that have been in effect for the last two years, and it also introduced the Internet Conduct Standard, an open-ended general conduct rule that gave the FCC expansive authority to regulate most aspects of BIAS providers' businesses. Supporters argue that these rules provide critical safeguards for consumers and that eliminating them will pose great risks to the internet ecosystem. But the *Order* concludes that consensus principles of openness will be preserved through less invasive means that better promote expanded broadband investment and deployment.

Specifically, the new *Order* centers on a revised transparency rule that, among other things, requires BIAS providers to disclose any blocking, throttling, paid prioritization, or affiliate prioritization practices.[12] In the event that a BIAS provider acts in a manner inconsistent with its disclosures (*e.g.*, if a BIAS provider that has committed never to block access to lawful internet content begins engaging in such blocking), the FTC can bring an enforcement action using its authority to prevent unfair or deceptive acts or practices under Section 5 of the FTC Act.[13] Previously, the *Title II Order*'s classification ruling had barred the FTC from taking enforcement action against BIAS providers, since Section 5 exempts common carriers from the FTC's jurisdiction. The *Order* also clarifies that both the FTC and the Department of Justice are able to bring antitrust actions challenging any anticompetitive conduct in the internet arena.[14] In conjunction with this approach, the *Order* repeals the 2015 rules prohibiting blocking, throttling, and paid prioritization, along with the Internet Conduct Standard, explaining that such rules are superfluous and potentially counterproductive in light of market forces and the existence of this new regulatory backstop.[15]

Legal Authority

The *Order* finds authority for the revised transparency rule in Section 257 of the Act. Section 257(a) instructs the FCC to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services,"[16] and Section 257(c) requires the FCC to submit reports about such market barriers to Congress.[17] The *Order* interprets Section 257(c) as an ongoing obligation for the FCC to identify and address any future barriers to entry described in Section 257(a).[18] The *Order* concludes that this obligation confers authority on the FCC to require disclosures of information that would further the objectives of Section 257(a).[19] Notably, the FCC pointed to Section 257 as one possible source of authority for the agency's initial transparency rule adopted in 2010, and the D.C. Circuit recognized that Section 257 can be interpreted as authority to "impose disclosure requirements on regulated entities in order to gather data needed" for reports to Congress.[20]

At the same time, the *Order* concludes that the statutory provision that had previously served as the basis for the transparency rule and other requirements — Section 706 of the Telecommunications Act of 1996 — does not constitute a separate, affirmative grant of regulatory authority.[21] The D.C. Circuit has held the FCC's prior interpretation of Section 706 as a grant of authority reflects a reasonable reading of the statute,[22] but the *Order* finds that Section 706 is better understood as hortatory, noting that the court's upholding of a more expansive reading of Section 706 as permissible by no means compels such an interpretation.[23] In turn, the *Order* concludes that shifting the legal basis for the transparency rules does not run afoul of this precedent.[24]

Preemption

The *Order* includes a broad preemption ruling, affirming that BIAS is an *interstate* information service subject to a uniform federal policy of non-regulation and expressly preempting any state and local "economic" or "public utility-type" regulation of BIAS.[25] The *Order*'s preemption ruling applies to "any state or local measures that would effectively impose rules or requirements that [the FCC has] repealed or decided to refrain from imposing in this order," and any state or local measures that "would impose more stringent requirements for any aspect of broadband service that [the FCC] address[es] in this order."[26] In addition, the *Order* preempts any efforts to administer or enforce generally applicable state or local laws in a manner that "interfere[s] with federal regulatory objectives."[27] The *Order* explains that it will not prevent states or localities from performing functions reserved to them under the Act, such as designating eligible telecommunication carriers (ETC) or engaging in rights-of-way management, so long as those efforts do not conflict with federal law and policy.[28]

The *Order* supports its preemption ruling by citing precedent on the interstate nature of BIAS, the longstanding federal policy of non-regulation for information services, and statutory authority in Sections 3, 230(b)(2), and 10(e) of the Act. The *Order* notes in particular that "[f]ederal courts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation."[29] The *Order* also explains that the language of Section 706 supports preemption, as precluding states and localities from separately regulating BIAS would best serve efforts to "encourag[e] broadband deployment and remov[e] barriers to [broadband] infrastructure investment."[30]

Other Issues

Finally, the *Order* touches on a few matters beyond the core issues of statutory classification and open internet regulation. For instance, the *Order* rescinds the regulatory framework governing BIAS providers' interconnection practices that the *Title II Order* had put in place. The *Title II Order* had imposed common carrier prohibitions on "unjust" and "unreasonable" practices by BIAS providers in the internet interconnection marketplace, but did not place the same requirements on other marketplace participants, such as edge providers or content delivery networks. The new *Order* removes what the FCC majority views as a Title II overhang and returns internet interconnection and traffic exchange to the free-market framework that existed prior to 2015.[31]

Additionally, the *Order* returns oversight of broadband privacy to the FTC, which historically had jurisdiction over such matters prior to the *Title II Order*. As noted above, the 2015 decision to reclassify BIAS as a common carrier service deprived the FTC of jurisdiction over BIAS providers, and the FCC's return to an information service classification permits the FTC to regulate privacy practices by all participants in the internet arena.[32]

Conclusion

The new *Order* represents the latest phase in the debate over BIAS regulation and net neutrality. While the *Order* in many ways reinstates the pre-*Title II Order* status quo, the FCC's action marks a significant shift from the approach that prior agency leadership had adopted in 2015 and has engendered vehement opposition by defenders of the 2015 rules. Like the FCC's prior orders in this arena, the new *Order* will certainly be the subject of judicial challenges in the months to come. The *Order* is also likely to stoke renewed interest by Congress in legislative measures in this arena.

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Endnotes

[1] *See generally Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (rel. Jan. 4, 2018) (*Order*).

[2] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 US 967 (2005).

[3] *Order* ¶ 26.

[4] *See id.* ¶¶ 86-140.

[5] *See* 47 U.S.C. § 153(24).

[6] *See Order* ¶¶ 88-102.

[7] *Id.* ¶¶ 1-5.

[8] *Id.* ¶¶ 65-85.

[9] Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

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

[11] *See Verizon v. FCC*, 740 F.3d 623, 655-58 (D.C. Cir. 2014).

[12] *Order* ¶¶ 215-20.

[13] *Id.* ¶¶ 140-42.

[14] *Id.* ¶¶ 143-52.

[15] *Id.* ¶¶ 239-45.

[16] 47 U.S.C. § 257(a).

[17] *Id.* § 257(c).

[18] *Order* ¶¶ 232-33.

[19] *Id.*

[20] *Id.*

[21] *Id.* ¶ 267.

[22] *See United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016); *Verizon*, 740 F.3d at 635-42.

[23] *Order* ¶¶ 267-83.

[24] *Id.*

[25] *Id.* ¶¶ 194-95.

[26] *Id.* ¶ 195.

[27] *Id.* ¶ 196.

[28] *Id.* ¶ 196.

[29] *Id.* ¶¶ 194.

[30] *Id.* ¶¶ 195 n.731, 194-204.

[31] *Id.* ¶¶ 162-70.

[32] *Id.* ¶¶ 181-84.