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Client Alert

This Changes Everything: The FCC Open Internet Report and Order on Remand, Declaratory Ruling, and Order

I. Not Your Father's Broadband

The Federal Communications Commission (FCC) on March 12, 2015, released a new template for future regulation of a basket of mass market retail services it has named "broadband Internet access services" (BIAS).[1] This highly anticipated Order reviews the agency's history of attempting to fashion policies and later rules designed to temper or prohibit what the agency views as potentially adverse practices of BIAS providers. It asserts that all BIAS providers, both fixed and mobile, are offering both consumers and edge providers broadband access and transmission capabilities as customers and as a result, that BIAS providers should be treated going forward as "lightly regulated" telecommunication service providers.

The justification offered for the change in regulatory classification of broadband Internet access from an information service to a telecommunications service is that both the broadband market and technology have evolved over the last 15 or more years, and that underlying service models have also evolved. The Order states that consumers currently combine their fixed or mobile broadband connections with their devices, operating systems, applications, Internet services, and the content of their choice. The FCC views consumers' fundamental understanding as that their broadband provider offers them a transmission platform over which they can access the third-party content or the functionalities of their choosing. Thus, regardless of how the provider packages its service, the FCC concludes that the market offering being made is fundamentally an access offering plus various "add-on" applications each consumer can choose. The FCC's choice to apply Title II telecommunications service classification to the BIAS transmission portion of the offering is expressly designed to address any legal limitations on the FCC's ability to adopt strong "open Internet" rules.

1 *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Order, and Order, GN Docket No. 14-28, rel. March 12, 2015 ("Order").

II. Summary of FCC Actions

The Order is comprised of several parts: the first deals with the legal questions of the agency's authority to adopt the "open Internet" rules that were remanded to the FCC by the *Verizon* court; the second is a declaratory ruling on fundamental questions of appropriate regulatory classification of fixed and mobile broadband Internet access services based upon analysis of the services offered; and the third part addresses a wide range of legal and implementation issues and ancillary regulatory matters as they relate to the classification of BIAS going forward as a lightly regulated, jurisdictionally interstate telecommunications service.

The Order states that the agency's previous rules struck down by the *Verizon* court are still necessary; the fact that BIAS providers have stated they will abide by the vacated rules, without having actual rules in place, was deemed to be an insufficient substitute for rules. Because the FCC's stated goal is to have the strongest possible legal foundation for re-adoption of rules and for rule enhancements, the FCC determines first to reclassify all services it defines as BIAS to be telecommunications services based upon how the FCC perceives BIAS providers are offering service in the market today. Relying upon this new definition and upon a perception of what broadband providers offer to end users, the FCC determines that these providers have complete control over access to their end user subscribers, and that application of some but not all of Title II statutory provisions and regulations can address the potential harms to subscribers and the "open Internet" stemming from the providers' gatekeeper role. In order to bring mobile broadband into the Title II fold, the FCC had to reinterpret portions of Section 332 of the Act and FCC precedent to determine that mobile BIAS includes "interconnection" of mobile end users via their IP addresses to the public switched network, a move that has broad implications beyond the Order and its implementation. The FCC also uses Title III of the Communications Act and Section 706 as additional bases for its actions. Using all its statutory tools, the FCC

readopts the no blocking, no throttling rules, as well as an enhanced disclosure rule to benefit end users and edge providers.

Despite the stated intention of Title II regulation to be "light-touch," the adoption of a new, nebulous general conduct rule (practices that unreasonably interfere with the ability of consumers or edge providers to select, access, and use broadband Internet access service to reach one another), the availability of advisory opinions and the warning of strong enforcement for rule or conduct infractions all suggest that BIAS providers need to approach implementation of the Order's provisions carefully and with deliberation. Delegation of authority to the FCC's Enforcement Bureau for resolution of a wide range of issues of first impression fails to create the type of certainty that the FCC claims to be providing with its new framework.

The Order specifies that certain portions of the Internet ecosystem are not meant to be swept within the new rules. The scope of the new rule is not intended to include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from BIAS). Similarly, specialized services and entities providing Internet access to patrons on premises (coffee shops, or airports for example) are not immediately subject to the new rules. While Internet connections for the exchange of traffic are not treated as BIAS, they will be monitored and practices that concern the FCC may be subject to some of the new conduct rules.

While the Order was not published in the Federal Register until April 13, 2015,[2] , several parties filed early appeals of the FCC's Declaratory Ruling classifying BIAS as a telecommunications service offering. The appeals that have already been filed have been consolidated in the D.C. Circuit, the same court that has reviewed the FCC's two previous attempts at Internet conduct regulation. Given that more lottery petitions are expected to be filed, it is not certain that this will be the court to ultimately resolve the challenges.

III. Report and Order on Remand

A. History of FCC Regulation

The FCC invokes decades-old decisions, namely its *Carterfone* and *Computer Inquiries* line of cases, claiming that they represent precedents for mandates of "open access, competition, and consumer choice."[3] As such the Order states that these proceedings provide guidance for the FCC's new Internet access framework.

In 2010, the FCC adopted three specific rules of the road for Internet service providers: (1) no blocking, (2) no unreasonable discrimination, and (3) transparency (the "Open Internet Order").[4] The Open Internet Order evaluated the potential for discriminatory conduct by fixed broadband service providers and allowed one exception from the prohibitions on blocking and discrimination for "reasonable network management." The Open Internet Order exempted mobile service providers from the anti-discrimination rule and prohibited mobile providers from blocking consumers' access to "lawful websites or applications that compete with the provider's voice or video telephony services." [5]

Verizon appealed the Open Internet Order on a number of grounds, including making a claim that the FCC overstepped its authority in attempting to regulate information services as quasi-telecommunications services. After the D.C. Circuit vacated the no-blocking and antidiscrimination rules in January 2014 as inconsistent with the classification of broadband Internet access as an information service,[6] the FCC issued the Notice of Proposed Rulemaking[7] that preceded the Order.

B. The Continuing Need for Open Internet Protections

In *Verizon*, the D.C. Circuit upheld the FCC's authority to regulate broadband Internet service providers as well as the policy justifications for the Open Internet Order.[8] Seizing upon this as a basis for its actions, the FCC asserts that fixed and mobile broadband providers have the incentive and technical ability to limit Internet openness due to their position as "gatekeepers" between end user customers, transit providers, content delivery networks, and edge providers. The FCC observes that this gatekeeper concern could be mitigated if customers were able to purchase broadband service from multiple networks or easily switch broadband providers, or if switching costs were lower and objective information about alternatives more available.

The Order states that once a customer chooses a broadband provider there are costs and uncertainties that limit end users' willingness to switch BIAS providers, and the provider holds a monopoly on access to that subscriber. Because the BIAS provider controls access to end users and to edge providers, the Order asserts that that relationship can be exploited by giving preferential access to affiliated content or by demanding fees from edge providers or placing technical barriers to reaching end users. Moreover, the FCC observes that broadband providers have the ability to monitor and regulate the traffic over their networks, which allows them to discriminate. The Order speculates that deep packet inspection and network control algorithms can be abused, affecting the quality of service that users receive.

2 Unless stayed, the Order is effective on June 12, 2015. The modified information collection requirements in paragraphs 164, 166, 167, 169, 173, 174, 179, 180, and 181 of the Order are not applicable until approved by the Office of Management and Budget. The approval and relevant effective dates will be published in the Federal Register separately.

3 Order ¶ 64

4 2010 Open Internet Order, 25 FCC Rcd 17905, 17906 at ¶ 1.

5 47 C.F.R. § 8.5.

6 *Verizon*, 740 F.3d 623 (D.C. Cir. 2014); see Previous Client Alert for an in-depth analysis of Court's decision.

7 2014 Open Internet NPRM, 29 FCC Rcd 5561, 5563 at ¶ 2.

8 *Verizon*, 740 F.3d 635-42, 644-45.

Even without market concentration and even if they do not have the ability to raise prices, the Order states that broadband providers naturally will act as gatekeepers. Thus, the threats to innovation, growth and competition do not depend upon their exerting market power as to end users; so long as end users are not fully responsive to the imposition of restrictions by broadband providers the FCC's gatekeeper concern would remain. The Order makes plain that the reclassification of BIAS as telecommunications service is not based on a market power analysis but rather upon the statutory definition of telecommunications service.

The FCC's 2010 Open Internet Order differentiated between fixed and mobile broadband, in part because of operational constraints faced by mobile operators, leading the FCC at that time to apply a different no-blocking standard and exclude mobile broadband from the unreasonable discrimination rule. However, the Order states that mobile broadband has developed significantly in the last four years, and the public interest would be served by applying the same set of rules to both forms of access, with appropriate application of a reasonable network management rule.

Because the Order finds that the incentives and technical abilities of broadband providers as gatekeepers apply regardless of the nature of their technology platform, the FCC applies the same set of requirements for both mobile and fixed broadband networks.[9] The Order observes: "maintaining a regime under which fewer protections apply in a mobile environment risks creating a substantively different Internet experience for mobile broadband users as compared to fixed broadband users. Broadband users should be able to expect that they will be entitled to the same Internet openness protections no matter what technology they use to access the Internet."[10] The FCC recognizes that mobile service providers must take into account factors such as mobility and reliance on spectrum. However, it concludes that retaining an exception to the no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard for reasonable network management allows sufficient flexibility for mobile service providers.

C. Rules to Maintain the Open Internet

Finding that past FCC rules on blocking, throttling, and paid prioritization had aided openness, the FCC determined that there was a need to readopt these rules, while adding some enhancements. The rules are:

- No Blocking - a prohibition on blocking lawful content, applications, services, or non-harmful devices.
- No Throttling - a prohibition on impairing or degrading lawful Internet traffic on the basis of content, application, service, or use of a non-harmful device.
- No Paid Prioritization - a ban of all paid prioritization, subject to a narrow waiver process.

No Blocking

BIAS providers will be prohibited from charging a fee to avoid having the edge providers' lawful content, service, or application blocked from reaching the provider's end-user customer. The phrase "content, applications, and services" means all traffic transmitted to or from end users of BIAS, including traffic that may not directly fit into any of these categories. The rule does not restrict a broadband provider from refusing to transmit unlawful content, including for example, copyright infringing materials or child pornography. The FCC relied upon the same reasoning in its 2010 Open Internet Order to re-adopt a no-blocking rule: incentives to block competitors' content and to protect a consumer's right to access lawful content and to use non-harmful devices require a practice prohibition.

No Throttling

The no-throttling rule bans conduct that "inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services." This includes conduct that "impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices, that is not reasonable network management." The rule's scope includes impairing or degrading content that might compete with a broadband provider's affiliated content. Like the no-blocking rule, BIAS providers are banned from charging edge users a fee to avoid impairment in the transmission of the edge providers' content, service, or application throttling. This rule is not meant to cover occasions where a broadband provider slows an end user's Internet connection because of a choice made by the end user (*e.g.*, a tiered data plan, which may be reviewed in the future under the no-unreasonable interference/disadvantage standard). The Order states that any reasonable network management exception to this rule must be used primarily for legitimate network management and not for business purposes.

No Paid Prioritization

This rule prohibits BIAS providers from accepting consideration (either monetary or other forms) from a third party in order to manage its broadband network to favor particular content, applications, or services; this ban includes managing a network in a way that benefits content, applications, or services of an affiliate. While the FCC acknowledged broadband providers' statements that they currently do not engage in, or have no future plans to engage in, paid prioritization, the FCC determined that those voluntary assurances do not have the legal force of a rule.

The FCC will analyze prioritization waiver requests when filed. The Order states that any waiver applicant will face a high bar to receive a waiver and must show: (1) "the

9 "Fixed" broadband Internet access service is defined as "a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (*e.g.*, cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. "Mobile" broadband Internet access service refers to "a broadband Internet access service that serves end users primarily using mobile stations. It also includes services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet, as well as mobile satellite broadband services."

10 Order, ¶ 92.

practice will have some significant public interest benefit, such as providing evidence that the practice furthers competition, innovation, consumer demand, or investment;" and (2) the practice does not harm the nature of the open Internet, including, but not limited to, providing evidence that the practice: does not materially degrade or threaten to materially degrade the broadband Internet access service of the general public; does not hinder consumer choice; does not impair competition, innovation, consumer demand, or investment; and does not impede any forms of expressions, types of service, or points of view.

Unreasonable Interference/Disadvantage Standard of Conduct

In addition to the these rules, the Order also adopts a standard to prohibit "practices that unreasonably interfere with the ability of consumers or edge providers to select, access, and use broadband Internet access service to reach one another." This nebulous new standard is presented as a means to protect against as of yet unidentified harms to the open nature of the Internet while maintaining for the agency some flexibility to respond to changing circumstances.

The Order includes a non-exhaustive list of factors it states the FCC will evaluate when deciding on a case-by case basis whether a particular practice or conduct violates this new standard. These include analyzing end-user control; the competitive effects of the conduct; consumer protections; the effect of the conduct on innovation, investment, broadband deployment or free expression; whether the BIAS provider's policy or approach is application agnostic; and whether it represents a standard practice.

This new standard will apply to mobile as well as to fixed BIAS. The Order rejects use of a "commercially reasonable" standard as an alternative; the FCC states that the reasonable network management exception is designed to accommodate mobile providers' need for flexibility to manage their networks. The Order also addresses a divided comment record on the question of mobile data caps and the use of zero rating for some services, and declines to make blanket findings about these practices.

Transparency Requirements

The FCC also approved an expanded transparency rule designed to ensure that service providers do not evade the Order "through exploitation of narrowly-drawn exceptions for reasonable network management or through evasion of the scope of [the] rules." These enhanced disclosures are meant to improve informational awareness of BIAS network practices and terms for edge providers as well as for end users.

Building off the prior Open Internet Order disclosure requirements on broadband providers, the FCC enhances existing transparency rules for end users—refining and expanding the required disclosures of commercial terms, performance characteristics, and network practices. Fixed and mobile providers are required to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" of their broadband Internet access service.[11] The Order further expands required disclosures to include commercial terms (price, other fees, data caps and allowances) and performance characteristics (the network performance disclosures are to include packet loss, must be reasonably related to the performance the consumer would likely experience in the geographic area where service is purchased, and measured in terms of average performance over a reasonable period of time and during peak usage times). The Order also creates a new personal alert disclosure to "require a mechanism for directly notifying 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."[12]

No particular format is mandated for the existing and new enhanced disclosures. Instead, while adopting the concept of a voluntary safe harbor for the format and nature of required disclosures to consumers, if a BIAS provider provides a "consumer-focused, standalone disclosure," the FCC announces that it will seek proposals from its Consumer Advisory Committee to formulate and submit a proposed disclosure format for FCC consideration, based on input from stakeholders. This proposed safe harbor disclosure is to be submitted to the FCC no later than October 31, 2015.

D. Scope of the Rules

The Order creates a new definition for the type of service and practices to which the new rules will apply. "Broadband Internet access service" (BIAS) is:

> *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. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.*

Though the definition "encompasses arrangements for the exchange of Internet traffic, the open Internet rules . . . do not apply to that portion" of BIAS. The definition also is not intended to include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from BIAS). It is also meant to exclude premises operators that may offer Internet access to patrons.

Internet Traffic Exchange

The provision of BIAS "encompasses the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network." Historically, arrangements for Internet traffic exchange have been commercially

11 2010 Open Internet Order, 25 FCC Rcd at 17937, ¶ 54; *see also* 47 C.F.R. § 8.3.

12 The Order grants a temporary exemption, until December 15, 2015, with the potential that it may become permanent, of the enhanced transparency requirements for small businesses (BIAS providers with 100,000 or fewer broadband subscribers as per their most recent Form 477, aggregated over all providers' affiliates).

negotiated, and the Order states that they will continue to be. While the FCC continues to monitor developments in this subsection of the market, the Order states an intention for the FCC to review any disputes presented to it about problems with Internet traffic exchange agreements on a case-by-case basis. To the extent it determines to act, the FCC states that it intends to rely on "the regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices." The Order claims that this "light touch" approach does not directly regulate interconnection practices.

Non-BIAS Data Services

The Order clarifies that the rules do not apply to services offered by broadband providers that share capacity with BIAS over providers' last-mile facilities. This class of service is deemed to be a "non-BIAS data service." However, the FCC will monitor the development and use of these services. The focus of the effort is to ensure that BIAS providers are not evading the conduct-based rules.

Generally, non-BIAS data services (1) are not used to reach large parts of the Internet; (2) are not a generic platform—but rather a specific "application level" service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services. The following are examples of what the FCC will consider to be non-BIAS data services: some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings; connectivity bundled with e-readers, heart monitors, or energy consumption sensors; and limited-purpose devices such as automobile telematics and services that provide schools with curriculum-approved applications and content.

Reasonable Network Management

The no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard will be subject to reasonable network management. BIAS providers will have to demonstrate that any challenged practice is "primarily motivated by a technical network management justification rather than other business justifications." The Order states that a BIAS provider may implement network management practices primarily used for, and tailored to, ensuring network security and integrity, including addressing traffic that is harmful to its network. Complaints about management practices will be reviewed on a case-by-case basis. Network management practices that alleviate congestion without regard to the source, destination, content, application, or service are singled out as practices that would also likely be considered reasonable. The Order also offers the availability of advisory opinions or declaratory rulings so that proposed practices can be vetted in advance.

E. Enforcement

Not surprisingly, the Order states that the agency intends to take strong enforcement action against parties who violate the rules. Two options are available for parties aggrieved by potentially harmful BIAS practices: filing of informal complaints (which provide end users, edge providers, and others with a simple vehicle for bringing potential open Internet violations to the FCC's attention) or the filing of formal complaints (which allow any person to file a complaint alleging a rule violation and to participate in an adjudicatory proceeding to resolve the complaint).

In addition, the FCC notes the value of providing legal certainty, flexibility, and effective access to dispute resolution mechanisms. With that in mind, the agency expands its complaint processes to include the availability of advisory opinions similar to Department of Justice business review letters, which will enable businesses to inquire about prospective, non-hypothetical conduct that the party intends to pursue. Any advisory opinions issued will be available to the public. The Enforcement Bureau also may publish enforcement advisories. The FCC will continue to accept anonymous informal complaint filings which will continue to be reviewed on a case-by-case basis. The FCC also established a new position—the Open Internet Ombudsman—to assist with questions or complaints, and it also revised procedures to make online filing informal complaints simpler.

Finally, the FCC added a discretionary process it may use to seek out and include the expertise of technical advisory groups when reviewing compliance with its rules. The Order also specifies that interested parties may seek permission to file an amicus brief in any complaint proceeding. Also, the Enforcement Bureau can, at its discretion, request a written opinion from outside technical organizations about technical questions to aid in its deliberations.

F. Legal Authority

Anticipating multiple challenges to its authority to act as it did, the FCC grounds the readopted and revised rules in multiple sources of authority: Title II and Title III of the Act and Sections 706(a) and (b) of the 1996 Act. Based on these authorities, the FCC concludes that it has "ample legal basis" to adopt the rules against blocking, throttling, and paid prioritization. The FCC explains that as the D.C. Circuit found with regard to the 2010 rules, the regulation of such practices falls squarely within the FCC's Section 706 authority. They are also grounded in Title II authority, given the FCC's conclusion that blocking and throttling and paid prioritization of BIAS are unjust and unreasonable practices under Section 201(b). The FCC further states that Title III, which allows the FCC to protect the public interest through spectrum licensing, also provides the agency with authority to adopt and enforce the rules as to mobile BIAS.

With regard to the new no-unreasonable interference/disadvantage standard adopted for unspecified conduct outside of the scope of the readopted rules, the FCC similarly concludes that this new standard is supported by its authority under Sections 706 of the 1996 Act, as well as under Sections 201 and 202 of the Act, and Title III for mobile broadband providers. The FCC states that "this rule—on its own—does not constitute common carriage *per se*" because it does not contain an obligation to provide service to any consumer or edge provider or necessarily preclude individualized negotiations so long as they do not otherwise cause unreasonable interference with the ability of end users and edge providers to use BIAS to reach each other. The Order observes, however, that the choice to offer BIAS obligates the provider to comply with this new standard.

The FCC states that because the rules carry out the provisions of the Act, they are covered by the FCC's Title IV and V authority to investigate and enforce rule violations. Further, the FCC relies upon the D.C. Circuit's suggestion that Section 706 is part of the Act, which means that rules adopted pursuant to Section 706 also fall within the agency's Title IV and V authorities. But even if a reviewing court were to determine that the D.C. Circuit's suggestion was not correct, the FCC states that just as the D.C. Circuit found to be reasonable the FCC's view of its obligation to carry out the purposes of this Section,[13] it is likewise reasonable to conclude that the FCC has the authority to enforce the measures needed to further the goals of Section 706. Indeed, as the FCC mentions, some commenters suggested that the FCC could take enforcement action relying upon Section 706 even without adopting rules.

G. Other Laws and Considerations

The Order does not alter BIAS providers' rights or duties with respect to other laws or with respect to emergency communications and safety and security considerations. The rules protect and provide rights and obligations only as to lawful content. They do not inhibit broadband providers from making reasonable efforts to address transfers of unlawful content or unlawful transfers of content.

IV. The Classification of Broadband Internet Access Services as Telecommunications Services

Using aspects of the *Verizon* court decision that touch on the offerings that BIAS providers are making to both retail customers and edge providers, the FCC revisits its history of common carrier and telecommunications services regulation both before and after the passage of the 1996 Act. Recognizing the *Verizon's* court's implicit invitation to revisit regulatory classification of broadband access services, the FCC, in a Declaratory Ruling, determines that its current best understanding of what BIAS providers are offering for purchase is not an integrated information service but rather a telecommunications service with information service add-ons.[14]

The Order addresses what some commenters and the dissenting FCC Commissioners assert is an unbroken line of FCC decisions classifying Internet access as an information service reaching as far back as the FCC's 1998 report to Congress (known as the Stevens Report). The Order states that the Stevens Report was not a binding FCC order and did not limit the FCC's authority to interpret ambiguous statutory terms in response to changing circumstances. As for the contents of the Stevens Report, the Order claims that the Report reserved judgment as to whether entities that provided access over their own facilities were offering a separate telecommunications service, and thus the information service classification for facilities-based providers was conditional and subject to reexamination. The FCC also notes that LEC-provided DSL services, for example, were regulated as telecommunications service even after the Stevens Report was sent to Congress.

Further, in reviewing and making determinations about regulatory classification of cable modem services several years after the Report, the FCC weighed options and determined, based on the service being provided, that the combination of transmission and Internet services was best viewed as an integrated information service. While the Ninth Circuit vacated this finding, the Supreme Court in *Brand X* upheld the FCC's determination, stating that the statutory term "offering" was ambiguous, and that the FCC's finding that cable modem service was a functionally integrated information service was permissible, although not the only interpretation available. Then, in a series of orders the FCC applied this same regulatory classification to LEC-provided DSL service, to broadband over power line service, and to wireless broadband access services. The Order notes the FCC's finding that wireless broadband access did not fall within the statutory definition of Commercial Mobile Radio Service (CMRS) because the FCC determined in 2007 that it was not an "interconnected" service as that term is defined by the Act.

In 2010, the D.C. Circuit rejected the FCC's attempt to enforce the agency's open Internet principles based on Title I ancillary authority in *Comcast v. FCC.* The FCC's next attempt to find appropriate regulatory authority was its Open Internet Order. That Order used Section 706 as an additional ground for FCC authority to maintain Internet rules and policies. The *Verizon* court accepted Section 706 as an independent grant of legislative authority over broadband services. However, the court nevertheless vacated the non-blocking and antidiscrimination portions of the rules as "de facto" common carrier requirements on broadband access providers that it viewed as fundamentally inconsistent with the FCC's classification of the services as information services.

The FCC grounds its new rules and requirements on numerous sources of legal authority, relying both upon Section 706 and Title II of the Communications Act. The Order notes in particular that both the U.S. Supreme Court in *Brand X* and the 2014 *Verizon* court acknowledged that the FCC has delegated authority to interprete ambiguous terms in the Communications Act. In concluding that the broadband access market today is very different from that of 2002, when the FCC decided to treat cable broadband as an "information service," the FCC cites the Supreme Court's statement in the *Brand X* case that the FCC could return to classification of the service as a telecommunications serivce if it provided an adequate justification.

The Order reflects upon the state of the broadband market in 2002 at the time of the FCC's groundbreaking *Cable Modem Declaratory Ruling* and today, as consumers perceive they are receiving separate services of transmission and add-on applications, content and other services that are generally information services. Observing that BIAS providers market services based on their speed, reliability, or in the

13 *Verizon*, 740 F.3d 638, 683 (D.C. Cir. 2014) (stating "necessarily invested the [FCC] with the statutory authority to carry out those acts").

14 Distinguishing virtual private networks, content delivery networks (CDNs), hosting and data storage and Internet backbone from BIAS, the FCC characterizes BIAS as a mass market retail service. It contrasts these other offerings as not able to provide the capability to reach all or substantially all Internet endpoints. Further, the Order states that the provision of BIAS by a coffee shop or other premises operator would not normally be expected to be BIAS. Similarly, a person employing their own wireless router is not offering BIAS because the user is not marketing or selling the service.

case of mobile, service coverage, the Order concludes that marketing of broadband access today emphasizes the offering as a platform for the transmission of data across the Internet to be provided to end users by payment of a subscription fee.

The Order states that "the critical distinction between a telecommunications and an information service turns on what the provider is 'offering.' If the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service." The Order then states that BIAS consists of two things: both high speed access to the Internet and other applications and functions.[15] Finding that the access function is sufficiently independent so as to be a separate "offering," the FCC rejects the notion that it has a high hurdle to reclassify the service or that BIAS providers have a vested right in the sustained treatment of the offering as an information service. The Order states that the decision to apply telecommunications service regulation, when combined with the forbearance granted in the Order, does not unjustly upset any reasonable reliance interests.

Rejecting arguments that end users have no idea where their "points specified by the user" are and thus, the service cannot satisfy the definitional statutory requirements of a telecommunications service, the FCC observes that uncertainty about the geographic location of content or application providers is irrelevant to the statutory analysis as content or other requests are sent and returned. Further, the FCC observes that the "packet payload" of content requested or sent by the user is not altered by the possible variety of protocols used to deliver content. Also rejected are arguments that the offering of transmission is private rather than common carriage, with the FCC finding that carriage of edge provider content by the BIAS provider is not typically the subject of individualized negotiations. Even if individualized terms are or can be negotiated, the service is held out directly to the public, and as such is telecommunications service.

The Order also analyzes why features and functionalities of BIAS do not make the service an information service. Domain Name Service (DNS) and caching, for example, are deemed to be telecommunications management functions. Likewise, network security functions are not information services, any more than telephone call blocking services would be. An IP address assignment is akin to assigning a phone number to make a user locatable, and conversion functionality is incidental to the provision of the underlying telecommunications capability, and is thus "adjunct to basic" telecommunications. Addressing whether the integration of telecommunications with information services modifies the entire package into an information service, the Order rejects that idea, stating that simply because a provider does not market the functionalities separately does not mean it can thereby avoid Title II regulation.

15 The Order states that domain name service and caching, when provided as part of BIAS, would fit squarely within the telecommunications management exception to the information services definition.

Acknowledging that email, cloud-based storage and spam protection are information services, the Order states that these are separate offerings that ride over transmission networks, just as the Internet has a series of network layers, and the transmission layer does not rely upon the services provided by the higher layers. The application layer services (DNS, caching, security) do not depend upon the presence or operation of add-on information services. The Order concludes that because of that, the transmission and management services are not "inextricably intertwined" with BIAS. The FCC reaffirms the Stevens Report concept that a service cannot be both an information and telecommunications service at the same time, but it notes whether the services are packaged together by BIAS providers, the distinctions the agency draws in its Order do not meld the two distinct offerings into an integrated package.

Reclassification of BIAS as a Title II telecommunications service resolves a range of edge provider/BIAS relationship issues. The FCC states that BIAS providers represent to potential customers that users can reach Internet end points and have desired material transmitted back. Edge service is secondary and in support of that promise made to consumers. Any Title II analysis of BIAS provider practices such as zero rating of traffic to BIAS subscribers would be viewed by the FCC from the perspective of whether the provision of a particular service to an edge provider would be inconsistent with retail service provision under Title II. The FCC thus attempts to sidestep any in-depth examination of the service arrangement a BIAS operator may be offering but certainly is providing to edge operators.

Treatment of Mobile Broadband

In addressing prior statutory interpretations of mobile broadband access, the FCC reverses a previous finding that mobile BIAS is not an "interconnected service" meaning "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)." Even though mobile BIAS does not depend upon or use telephone numbers to function, the FCC determines that its view of the public switched network (PSN) should be updated to include the view that the PSN is not a static definition and that its basic purpose is to "allow the public to send and receive messages to or from anywhere in the nation." This notion of ubiquitous access, which in 1994 (when the FCC last confronted the question) was represented in proxy form by the North American Numbering Plan (NANP), has changed. The FCC updates the definition of PSN to mean "the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan or public IP addresses, in connection with the provision of switched services." This revised definition recognizes IP addresses as standardized addressing identifiers for routing packets in a universally recognized format.

As a result of this expanded definition, the Order finds that mobile BIAS is "interconnected" and that as a result,

it constitutes a functional equivalent of Commercial Mobile Radio Service (CMRS). The FCC rejects that its actions on mobile BIAS are not the logical outgrowth of its May 2014 Notice of Proposed Rulemaking and disagrees with arguments that the FCC is barred from updating its definition of PSN by adding IP addresses to the mix. The Order rejects the idea that the word "telephone" in some definitions of the PSN cannot support expansion of the PSN definition to include IP addresses. The FCC observes that for many years it has recognized the PSN was potentially broader than the telephone networks of traditionally regulated carriers. Moreover, the Order states that the agency has the authority and obligation to reflect on current technology and make appropriate adjustments, such as expanding the scope of the PSN definition to reintegrate mobile BIAS offerings into a telecommunications carrier framework.

Because mobile BIAS is offered as a commercial, interconnected service under the expanded PSN definition, the Order observes that the unavoidable conclusion is that it cannot be classified as any form of private carriage, as it is effectively available to the public at large. The Order rejects industry arguments that mobile BIAS cannot be the functional equivalent of CMRS. Accepting that argument would, in the FCC's view, make that statutory language irrelevant by requiring all functionally equivalent services to meet the literal statutory definition of CMRS, and such a narrow reading would overlook congressional intent to provide the agency with some flexibility to address changing circumstances. The Order also provides an additional independent reason for reclassifying wireless; even under the FCC's prior definition of PSN, mobile BIAS users can communicate with NANP numbers using their broadband connection and VoIP applications. To the extent that that is considered a change in the FCC's view of mobile VoIP, the FCC states such a change is justified by wireless customers increasingly communicating indiscriminately using IP endpoints and NANP on the public switched network.

The Order states that the regulatory reclassification of both fixed and mobile broadband access will not discourage investment in the facilities that support access. Reflecting on trends of increasing demand for access and the presence of competition, the Order states that creation of regulatory certainty, coupled with regulatory forbearance, will not chill investment. The FCC rejects arguments that reclassification will require that BIAS providers tariff a termination service for Internet content, but it does not explain why it believes the argument to be flawed. Finally, the Order reflects on the investments made in communications services providers, for example, CMRS carriers were lightly regulated with a number of statutory provisions forborne. Another example of successful, light regulation of Title II offered is the development of enterprise services by large Local Exchange Carriers (LECs); these services are subject to forbearance while still classified under Title II.

<u>State and Local Regulation</u>

The Order reaffirms the FCC's longstanding conclusion that BIAS is a jurisdictionally interstate service for regulatory purposes and that states are preempted from attempts to regulate any "intrastate" BIAS market entry or service offerings. Specifically with respect to state universal service, the Order states that the FCC's decision to forbear from imposing mandatory universal service contributions on the BIAS offerings now reclassified as telecommunications services precludes any state action to attempt to collect their own universal service assessments from BIAS providers until the FCC acts in the future. The Order also notes that the federal Internet Tax Freedom Act precludes state taxation of Internet access.

V. Order: Forbearance for Broadband Internet Access Services

Having classified BIAS as a telecommunications service, the FCC next considers whether it should grant forbearance as to any of the resulting requirements of the Act or the FCC's rules. Under Section 10 of the Act, the FCC must forbear from applying any regulation or provision of the Act if it determines that:

- Enforcement is not necessary to ensure that the relevant charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory;
- Enforcement of such regulation or provision is not necessary for the protection of consumers; and
- Forbearance is consistent with the public interest.[16]

Section 706 further directs the FCC to use forbearance to encourage the deployment of advanced telecommunications capability on a reasonable and timely basis.[17] The FCC states that Section 10 allows the FCC to forbear on its own motion and finds that its reasoning in the Order satisfies the general reasoned decision-making requirements of the Administrative Procedure Act. The agency rejects claims from numerous commenters that granting broad forbearance at the same time as making classification decisions is arbitrary and capricious.

In reaching its forbearance determinations, the Order states that requirements which applied to BIAS prior to this Order are unaffected, as are any previously applicable requirements with regard to entities who are otherwise LECs. The FCC also explains that, prior to the Order, some carriers chose to offer Internet transmission services as telecommunications services subject to the requirements of Title II. Since the FCC's forbearance with respect to BIAS does not encompass Internet transmission services, those providers remain subject to the rights and obligations they were subject to under Title II by virtue of their choice to provide such service. These providers are also subject to the new rules adopted in the Order, to the extent those services fall within the scope of those rules.[18]

The FCC chose not to forbear from regulating under Sections 201, 202, and 208, along with the related provisions of Sections 206, 207, 209, 216, and 217 dealing with enforcement. The FCC finds that Sections 201 and 202 of the Act are necessary to protect consumers and ensure just and

16 *See* 47 U.S.C. § 160(a).

17 *EarthLink v. FCC*, 462 F.3d 1, 8-9 (D.C. Cir. 2006) (alteration in original).

18 The Order provides that if the carrier wants to change to offer Internet access services pursuant to the framework adopted in the Order, it should notify the Wireline Competition Bureau 60 days prior to implementing such a change.

reasonable conduct, providing a basis for the Open Internet Rules as well as a "backstop" that allows the FCC to adopt a more tailored approach to regulation, including with regard to interconnection.[19] Accordingly, the FCC finds that complete forbearance is not in the public interest.

In discussing the determination not to forbear, the FCC notes that its decision was informed by its experience with CMRS, where Congress's express exclusion of Sections 201 and 202 from possible forbearance did not lead to hindered investment or ex ante rate regulation. The FCC further states that the application of these two provisions removes any ambiguity regarding its authority to enforce the Open Internet Rules. In response to concerns expressed by commenters about future rules the FCC might adopt based on these two sections, the FCC observes that it did forbear from applying Sections 201 and 202 in a way that would allow for *ex ante* regulation of BIAS and expressly states that it "cannot, and do[es] not envision going beyond our open Internet rules to adopt *ex ante* rate regulations based on that section 201 and 202 authority in this context."

The FCC also retains enforcement provisions and rules governing Section 208 complaint proceedings, including Sections 206, 207, 209, 216, and 217, so as to be able to enforce Sections 201 and 202. Here, too, the FCC noted that Congress' decision to preclude the FCC from forbearance of Section 208 in the CMRS context was informative, as was the general experience with CMRS forbearance.

The Order places some gloss on how other Title II provisions may apply to BIAS going forward:

- Section 222 imposes a duty on every carrier to protect the confidentiality of its customers' private information and imposes restrictions on a carrier's ability to use, disclose or permit access to customer proprietary network information (CPNI). In declining to forbear from the requirements of Section 222, the FCC explains that broadband providers serve as a necessary conduit for information passing between an Internet user and Internet sites or other Internet users, and therefore obtain large amounts of personal and proprietary customer information that require appropriate privacy protections. The FCC did, however, forbear from applying the FCC's existing telephone-related CPNI rules pending further proceedings.

- Section 224 (along with the FCC's implementing regulations) provides carriers with access to utility poles, ducts, conduits and rights-of-way. In declining to forbear from the requirements of this section, the FCC explains that this section will help ensure just and reasonable rates for BIAS by continuing pole access and limiting input costs. The FCC clarifies that the Order did not require any party to increase the pole attachment rates it charges to BIAS providers, "emphatic[ally] conclu[ding] that no utility could impose any increase retroactively" as a result of the FCC's decision.

- Section 225, 255, and 251(a)(2) (along with the FCC's implementing regulations) address communications access for persons with disabilities. In declining to forbear from the requirements of this section, the FCC explains that while it is not adopting any new Section 225-based rules, preserving these provisions for BIAS is necessary to avoid uncertainty regarding Internet-based Telecommunications Relay Service (TRS) providers' obligations under existing rules. The FCC explains that while forbearance from the application of TRS contribution obligations that would otherwise apply to BIAS, Section 225(d)(3)(B) and the corresponding implementing rules but is not granted to the extent it fails to authorize the FCC to require such contributions in a future proceeding.

- Section 254 and the related requirements of Section 214(e) (along with the FCC's implementing regulations) further the FCC's efforts to support broadband deployment and adoption. Accordingly, the FCC states that section 254, section 214(e) and the FCC's rules promulgated under these sections apply to BIAS.

- The FCC did forbear from immediately requiring the assessment of new universal service contributions associated with BIAS interstate and user telecommunications revenues as would normally be required under Section 254(d), pending resolution of ongoing proceedings.[20] In the TRS context, however, the FCC made plain that the agency retains its authority to require such contributions in a future rulemaking.

The FCC concluded that forbearance from the following statutory requirements was warranted:

- Sections 203 and 204, which require common carriers to file a schedule of rates and charges for interstate common carrier services. The FCC mandatorily de-tariffed BIAS for purposes of the regulatory framework adopted in the Order.

- Sections 211, 213, 215, and 218-220, which provide the FCC with discretionary power to compel the production of information or the filing of regular reports, but are principally used by the FCC to implement its traditional rate-making authority over common carriers. Since the FCC did not include tariffing requirements or *ex ante* rate regulation to BIAS, the FCC forbore from these provisions.

- Section 205 (which provides for rate and practice investigations and allows the FCC to prescribe rates and practices if carrier rates are noncompliant) and Section 212 (granting the FCC authority to monitor interlocking directorates);

- Section 214 (relating to discontinuance approval requirements, approval of transfers of control involving BIAS). The FCC states that "it is [its] predictive judgment that other protections will be sufficient to ensure just,

19 The FCC explained that it is the application of Sections 201 and 202 that, for example, allow it to engage in case-by-case decision making in the case of a broadband provider's interconnection practices, "which are not covered by the open Internet rules adopted" in this order, as well as pre-existing tariffing requirements and Commission rules governing rate regulation.

20 *See Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012); *Federal State Joint Board on Universal Service; Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, Order, 29 FCC Rcd 9784 (2014).

reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers for purposes of sections 10(a)(1) and (a)(2)." The FCC also grants forbearance from Section 214(d), under which a carrier may be required to provide itself with adequate facilities to provide its service expeditiously and efficiently. The FCC expressly rejects arguments against forbearance from applying Section 214 to enable the FCC to engage in merger review.[21]

- Sections 251, 252, and 256 (relating to interconnection and market opening provisions, instead favoring the more tailored framework made possible by the Order). The FCC concludes that the availability of other protections adequately addresses concerns about forbearance from the interconnection provisions, and retains authority under Sections 201, 202 and the open Internet rules to address interconnection issues should they arise, including through evaluating, on a case-by-case basis, whether the conduct of a BIAS provider is just and reasonable.

- Section 258 (prohibitions on unauthorized carrier changes). In support of its decision, the FCC explained that while unauthorized carrier change problems theoretically might arise even outside such a context, the record here does not reveal whether, or how, these changes could occur.

The Order grants forbearance from a number of other Title II provisions, regarding which no commenters raised significant concerns, as well as a number of other miscellaneous provisions that are not necessary or even relevant to BIAS:[22]

- Sections 271-276;[23]

- Section 221's property records classification and valuation provisions;

- Section 259's infrastructure sharing and notification requirements;

- Truth-in-billing rules;[24] and

- Terminal equipment rules.

The Order recognizes that the regulatory classification decision potentially alters the scope of a mobile BIAS provider's roaming obligations. The Order retains the data roaming obligations that applied prior to the reclassification of mobile BIAS,[25] but the FCC commits to commencing a separate proceeding to determine the prospective data roaming obligations of BIAS providers in light of the reclassification decision. In the meantime, the FCC grants forbearance from the application of the CMRS roaming rule to mobile BIAS providers.[26]

Beyond the Title II provisions, the FCC also granted forbearance[27] from the following:

- Certain provisions of Titles III and VI and related FCC rules that apply to "providers" to the extent the provision would apply to the carrier exclusively by virtue of its provision of BIAS.[28]

- Certain provisions of Titles III and VI and rules associated with those Titles or those provisions of Title II that would apply by their terms to services classified and from where forbearance was granted.[29]

- To the extent not already identified in the first two categories, any other FCC rule based entirely on the FCC's authority under provisions for which forbearance has been granted under the first and second categories above, or from which these provisions provide essential authority, to the extent the rules apply as a result of the reclassification of BIAS.

- Any pre-existing rules primarily intended to implement the requirements and substantive jurisdiction in Sections 201-202, including accounting, billing and recordkeeping rules.

- Any provisions or regulations not already discussed that would require immediate payment of contributions or fees (rather than the FCC's authority to impose those fees or contributions) by virtue of the reclassification of BIAS.

The FCC also addresses arguments regarding other statutory provisions and regulatory requirements from which the FCC did not forbear, and explains, among other things, that any forbearance is granted only to the extent of the FCC's authority under Section 10 of the Act to forbear. The Order addresses overarching concerns expressed by some

21 As the FCC explained, it has commonly reviewed transactions among entities that provide broadband services and "[a]lthough these comments speculate about a future time when communications services have evolved in such a way that the Commission would lack some other basis for its review, the record here does not demonstrate that it is sufficiently imminent to warrant deviating from our section 10 analysis regarding section 214 above."

22 This includes Section 226 (which protects consumers making interstate operator services against unreasonably high rates and anti-competitive practices when making calls from public phones), Section 227(c)(3) (imposing certain notification obligations on carriers relating to the Telephone Consumer Protection Act) and 227(e) (restricting the provision of inaccurate caller identification information associated with any telecommunications service), Section 228 (regulates the offering of pay-per-call services and imposing certain recordkeeping and other requirements), and Section 260 (regulates LEC practices regarding telemessaging services).

23 Sections 271, 272, 274, and 275 establish requirements and safeguards regarding the provision of certain services by the Bell Operating Companies (BOCs) and their affiliates; Section 273 addresses the manufacturing, provision, and procurement of telecommunications equipment and customer premises equipment by the BOCs and their affiliates, technical standards for telecommunications equipment and CPE, and joint network planning and design, among other matters; and Section 276 addresses the provision of "payphone service," including nondiscrimination standards for BOC provision of payphone service. As the one exception, the FCC noted that there is no forbearance from Section 276 requirements to the extent applicable to inmate calling services and the corresponding rules.

24 The FCC stated that the core broadband Internet access requirements, including the prohibitions on unjust and unreasonable conduct, will provide important protections in this context even in the absence of specific rules.

25 47 C.F.R. § 20.12(e).

26 47 C.F.R. § 20.12(d).

27 To the extent these requirements would be newly triggered by virtue of the reclassification of BIAS, but not insofar as a provider is subject to these requirements by virtue of some other service it provides.

28 In a footnote, the FCC explains that the classification of BIAS could trigger requirements that apply by their terms to, for example, "common carriers," "telecommunications carriers," "providers" of common carrier or telecommunications services, or "providers" of CMRS or commercial mobile services. The FCC provides the following as an "illustrative example:" in 47 C.F.R. § 61.3(ss), a "tariff" is defined as "[s]chedules of rates and regulations filed by common carriers."

29 Otherwise, the classification BIAS as a telecommunications service could trigger any requirements that apply by their terms to "common carrier services," "telecommunications services," or "CMRS" or "commercial mobile" services. The FCC provides the following as an "illustrative example:" in 47 C.F.R. § 64.708(i), "operator services" are defined as certain interstate telecommunications services.

commenters about how forbearance should be considered and applied. The FCC rejects the arguments that forbearance should be deferred to a future proceeding, stating that the agency was able to conclude on the record that the Section 10(a) criteria are met as to the forbearance granted. The FCC also rejects concerns that forbearance might be burdensome or uncertain, or that it should be interim or time-limited. The Order also rejects claims that the FCC failed to provide adequate notice and opportunity for comment with regard to forbearance, among other things.

Finally, the FCC characterizes as "misguided" complaints about the potential for forbearance decisions to be challenged in court or reversed by the FCC in the future. Having concluded that BIAS is a telecommunications service, the Order observes that immediate forbearance provides BIAS providers with regulatory certainty. Recognizing that it did not take a provision-by-provision and regulation-by-regulation approach in analyzing possible forbearance in the Notice of Proposed Rulemaking, the FCC makes plain that it was not required to "resolve potentially complex and/or disputed interpretations and applications of the Act and Commission rules that could create precedent with unanticipated consequences for other services beyond the scope of this proceeding, and which would not alter the ultimate regulatory outcome in this Order in any event."

VI. Constitutional Considerations

The FCC also addresses Constitutional concerns about its actions. First, it rejects the claim that the Order limits the free speech of BIAS providers, because providers are not acting as speakers but rather as conduits for the speech of end users and other edge providers. The situation contrasts with that of cable operators, who provide access only to a limited number of channels and exert editorial control over the channels carried. The FCC notes that BIAS providers in general have disavowed any editorial control over content, to limit their copyright infringement liability.

The FCC characterizes its Order as content neutral, and thus to be upheld on review, the new regulations must only further a substantial government interest without burdening substantially more speech than necessary. The government interest the agency identifies is promoting broadband deployment and ensuring broad access to information, with a minimal burden on speech. The public disclosure requirements face an even lower bar, only needing to be rationally related to the interest in protecting against consumer deception. The FCC asserts that the enhanced transparency disclosures will lead to informed consumer decisions and drive innovation by edge and broadband providers.

The FCC also addresses assertions of possible Fifth Amendment takings. The Order does not give BIAS end user subscribers or edge providers a permanent right to access the broadband provider's infrastructure. Instead, it regulates the transmission of communications traffic over those networks. Likewise, the FCC asserts that the Order will enhance the value of broadband networks, and that the providers should have foreseen the potential for Title II reclassification since 2002. Since providers could have no investment-backed expectation that they would not be classified (or reclassified) as Title II carriers, and the FCC's determinations in the Order do not take away the value of or their essential control over their networks, the FCC concludes it has not effectively taken broadband providers' networks that could implicate a Fifth Amendment taking.

Commisioner Statements

The three Commissioners who voted in favor of the Order characterized the FCC's actions as a modernized take on Title II that will preserve the Internet as a dynamic venue for free speech and robust competition without paving the way for future rate regulation or service tariffs. Commissioners Pai and O'Reilly, however, raised substantive concerns with the lack of robust evidence that BIAS providers had or would act in a manner harmful to edge providers or consumers that might necessitate the majority's jurisdictional conclusions and substantive new rules. They further assert that the Order signals the FCC's eventual intent to regulate the Internet and that the promise of forbearance is a mirage. Commissioner Pai claims that the majority's decision is a product of White House interference rather than the proper notice-and-comment rulemaking procedures. He claims that the official proposals by the FCC preceding this Order did not give sufficient public notice of the possibility of Title II classification, which could lead to courts overturning the Order. Likewise, he asserts that far-reaching Title II classification breaks with Congressional intent and that the FCC is exceeding its statutory forbearance authority, which could be fatal legal weaknesses on judicial review of the Order.

Court Challenges

Even before the Order was published in the Federal Register, the Order was challenged twice in federal court. Alamo Broadband Inc., a Texas ISP, filed a petition in the 6th Circuit on March 23, while the same day the United States Telecom Association ("USTelecom") filed a petition in the D.C. Circuit. Both Petitioners challenged the Order as arbitrary and capricious and contrary to the Constitution and Federal law. Alamo pled that the Order is outside the Commission's authority, while USTelecom emphasized defects in the notice-and-comment procedures. USTelecom also noted that it filed its petition so quickly in case there was a 10-day deadline to file petitions after the Order was issued. USTelecom suggested that any deadline should instead be measured from the date the Order is published in the Federal Register. The FCC adopted that position, and moved for the petitions to be consolidated so that it could move for both petitions to be dismissed as premature.[30] Since its publication in the Federal Register, CTIA, NCTA, ACA, and AT&T have filed suit as well.

30 Both petitions were consolidated in the D.C. Circuit, but more lottery petitions are expected to be filed now that the Order has been published in the Federal Register and it is not certain that this will be the court to ultimately resolve the challenges.

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