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Net Neutrality

On March 12, the Federal Communications Commission released the text of its controversial Open Internet Order. Mayer Brown's Angela E. Giancarlo and Howard W. Waltzman break down the order, which fundamentally changes how broadband is regulated in the United States.

With New Net Neutrality Rules, FCC Asserts Sweeping Jurisdiction Over Broadband

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On March 12, the Federal Communications Commission released its *Open Internet Order* (Order) and rules.¹ Based on the FCC's finding that "broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like," the agency has fundamentally changed how Broadband Internet Access Service (BIAS) will be regulated in the United States. The Order goes beyond so-called network neutrality requirements, however, reaching into areas such as privacy and interconnection, and asserting FCC authority over present and future Internet-related services and technologies, including any that employ "the North American Numbering Plan or public IP addresses."

Background and Legal Underpinning. The FCC adopted a first order and rules seeking to preserve an open Internet in December 2010.² At that time, the FCC relied on Section 706 of the Telecommunications Act of 1996 (the 1996 Act) to: require all broadband providers to publicly disclose network management practices, restrict broadband providers from blocking Internet content and applications, and bar fixed broadband providers from engaging in unreasonable discrimination in transmitting lawful network traffic. The FCC concluded

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, ___ FCC Rcd ___, FCC 15-24 (rel. Mar. 12, 2015).

² *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).

that the new rules would ensure much-needed transparency and continued Internet openness, while making clear that broadband providers can effectively manage their networks and respond to market demands.

Next, in January 2014, the US Court of Appeals for the D.C. Circuit (D.C. Circuit) largely struck down the rules established in the 2010 order.³ In *Verizon*, the D.C. Circuit interpreted Section 706, which directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” to grant the FCC substantive authority to impose obligations on providers of BIAS to advance the section’s broadband deployment goals. On the other hand, the D.C. Circuit held that the FCC could not regulate broadband providers as “common carriers” as long as the agency classified the provision of BIAS as “an information service.”⁴

Against this backdrop, in the Order, the FCC finds that the *Verizon* case “made clear that section 706 affords the Commission substantive authority.” The FCC also concludes, however, that “in light of *Verizon*, absent a classification of broadband providers as providing a ‘telecommunications service,’ the Commission could only rely on section 706 to put in place open Internet protections that steered clear of regulating broadband providers as common carriers per se.” The FCC further describes its desire to “bring a decade of debate to a certain conclusion,” and its opinion that the broadband Internet market today “is very different from” the market that supported the Commission’s prior decisions to classify BIAS as an information service. Thus, while the FCC continues to rely on Section 706, it reclassified BIAS as a “telecommunications service” and grounded its authority to impose anti-blocking and discrimination rules on its authority in Title II of the Communications Act of 1934 (the Act) over common carriers.

Moreover, the FCC cites Title III of the Act, which pertains to wireless services, as additional authority to regulate mobile BIAS providers. To overcome Section 332(c)’s prohibition on the imposition of common carrier obligations on private mobile services, the Commission reclassified mobile BIAS as an interconnected service, essentially by redefining the “public switched network” to include IP addresses.

In an effort to “establish a light-touch regulatory framework,” the FCC invokes Section 10 of the 1996 Act, which applies only to telecommunications service providers, to “forbear” from imposing certain Title II requirements and conditions that have been historically applied to telecommunications carriers. The FCC does not forbear, however, from the foundational Title II provisions, including Section 201, which requires “[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service” to be “just and reasonable;” Section 202, which prohibits common carriers from making “any unjust or unreasonable discrimination in charges, practices, [and] classifications;” and Section 208, which set forth the process for filing formal complaints against service providers. The FCC also subjects BIAS providers to Section

222’s privacy⁵ and Section 255’s disability access requirements. With respect to universal service contribution requirements (fees assessed on service providers to fund deployment of broadband to rural and low-income Americans), the FCC does not forbear from Section 254 of the Act. Rather, the agency temporarily forbears from assessing additional charges presumably until its work in a separate proceeding is completed sometime later this year.

Applicability: What is ‘Broadband Internet Access Service’? The new rules 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.” This definition encompasses both fixed and mobile broadband Internet access service. The rules further state that BIAS “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.”

New Bright Line Rules Applicable to BIAS Providers. As an initial matter, the new rules bar fixed and mobile BIAS providers from “Blocking” or “Throttling” (each subject to “reasonable network management”) and from offering “Paid Prioritization.” In addition, the FCC expands the transparency requirements applicable to fixed and mobile BIAS providers. Finally, the new rules include a “catch-all” provision that governs future Internet-related conduct.

- *No Blocking:* Finding that consumers of retail broadband Internet access service have a right to “access to all (lawful) destinations on the Internet,” the rules provide, “A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”

- *No Throttling:* Described as “the degradation of lawful content, applications, services, and devices”), the rules provide, “[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”

- *Reasonable Network Management:* A network management practice is “reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.”

- *No Paid Prioritization:* To protect against so-called “fast lanes” or “paid prioritization,” the rules bar

³ See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“*Verizon*”).

⁴ See *Verizon*, 740 F.3d at 653 (holding that the no blocking and no unreasonable discrimination rules impermissibly “obligated [BIAS] providers to act as common carriers”).

⁵ Providers of BIAS will now be subject to Section 222’s requirements that telecommunications carriers protect certain customer information from unauthorized disclosure and use. While the Commission subjects BIAS providers to Section 222, however, it declines to subject such providers to the Commission’s specific Customer Proprietary Network Information rules.

“the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic,” including through such techniques “as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”

■ **Greater Transparency:** BIAS providers must “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices.” This requirement includes disclosing prices, other fees, data caps and allowances, and providing notice of network management practices that can affect service. The rules prescribe a “safe harbor” process for the format and nature of the required disclosure to consumers. To take advantage of the safe harbor, BIAS providers must “provide a consumer-focused, stand-alone disclosure.” The FCC granted a temporary exemption from the transparency enhancements for fixed and mobile BIAS providers with 100,000 or fewer subscribers.

■ **Catch-all Standard of Future Conduct:** The rules include a “catch all” standard, under which BIAS providers may not “unreasonably interfere with or unreasonably disadvantage” end users’ “ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice,” or edge providers’ “ability to make lawful content, applications, services, or devices available to end users.” The rule further states that “[r]easonable network management shall not be considered a violation of this rule.” (Emphasis added.)

Expanded FCC Authority: New Definitions and Case-by-Case Analysis. The Order spells out new, expanded definitions and explains that application and interpretation of the rules will occur through case-by-case analysis by the FCC’s Enforcement Bureau.

New Definitions

■ **Public Switched Network (PSN):** As set forth in the Order, the FCC augmented the longstanding definition of “Public Switched Telephone Network.” Now, the “Public Switched Network” is “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 uses the North American Numbering Plan, or public IP addresses in connection with the provision of switched services.” This change appears to capture any present

or future technology that employs either a unique number or public IP address.

■ **Interconnection:** The new rules define “Interconnection Service” as a service that “is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network[.]” The new definition includes not just services that interconnect with the PSN directly, but also those that interconnect with the PSN indirectly, and, by implication, confers interconnection negotiation rights and obligations on service providers that have no direct connection to the PSN.

Case-by-Case Enforcement

The FCC adopts a “case-by-case” approach to further refine and enforce the new rules, explaining that this method is the “appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations.” More generally, the FCC may enforce the rules “through investigation and the processing of complaints (both formal and informal)” and may provide additional guidance through advisory opinions. In addition, the rules permit “[a]ny person claiming to be damaged by any” BIAS provider to “bring suit for the recovery of the damages” in any federal district court.

What’s Next?

Severability

As a preliminary matter, we note that the FCC included a severability clause in the Order. Specifically, the FCC asserted that if the Order is appealed and a court finds any one rule or other policy invalid, the court may strike down only that provision. The FCC intends that whatever other provisions remain in the rule, unaffected by the court’s decision, will survive and remain in effect.

Appeal

Under the Act, an appeal must be filed within 60 days of the rule’s publication in the Federal Register and may be filed in any U.S. court of appeals. If multiple petitions for review are filed in different circuit courts of appeals within the first ten days of this 60-day window, a lottery will decide the venue for the appeal, though the prevailing court may transfer the case to another circuit.⁶

⁶ See FCC’s Office of General Counsel Updates Requirements and Guidance For Litigants Seeking to Invoke the Judicial Lottery System, Public Notice, DA 11-63 (rel. Jan. 13, 2011); See also 47 C.F.R. § 1.3(b)(1), Example 1.