

# FCC Releases Text of Net Neutrality Order

## *Judicial Challenges Afoot*

By Cliff Sloan, John Beahn and Joshua Gruenspecht

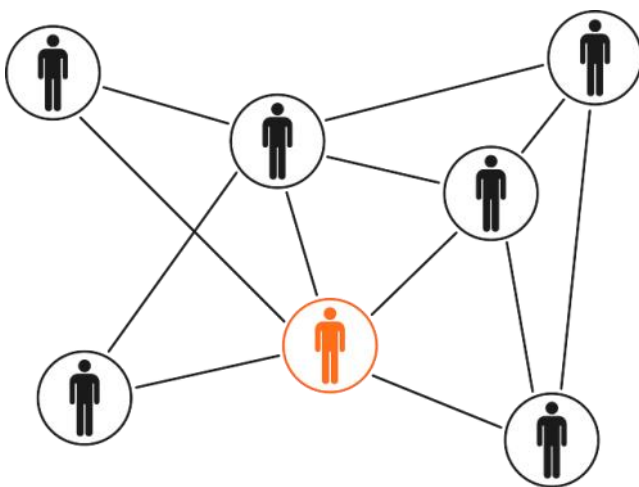
On March 12, the Federal Communications Commission (FCC or Commission) issued the text of its long-awaited network neutrality regulations, which if allowed to stand will have far-reaching implications for the media, content, broadband, Internet and technology industries. The complicated nature of the FCC's net neutrality action was confirmed by the nearly 400-page [Report and Order on Remand, Declaratory Ruling, and Order \(Order\) released by the Commission.](#)

Issuance of the Order is the culmination of nearly ten years of fractious regulatory

and judicial proceedings and follows President Obama's public endorsement last fall of stringent net neutrality regulations. For proponents, the core of "net neutrality" is the principle that gatekeepers of the Internet should be legally prohibited from favoring some content or traffic and disfavoring other content or traffic. For opponents, on the other hand, the regulatory structure for "net neutrality" is profoundly ill-advised because the heavy hand of extensive government regulation will inhibit and stifle innovation in what has been a successful, dynamic, and creative arena.

A number of parties have stated their intentions to quickly appeal the newly issued rules in federal court, and two already have

filed suit. These judicial challenges will play out during the next year (or two or three), meaning that the release of the text of the regulations represents only the end of the latest chapter in the continuing saga of net neutrality.



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### Background

The newly issued regulations represent the FCC's third attempt at solving the net neutrality regulatory conundrum. The first attempt began in 2005 when the

*(Continued on page 30)*

(Continued from page 29)

Commission issued its Internet Policy Statement, which contained a number of net neutrality principles. In 2008, Comcast filed suit in the U.S. Court of Appeals for the D.C. Circuit to overturn the Policy Statement after the FCC attempted to enforce the net neutrality principles against the company. The D.C. Circuit overturned the FCC's action in early 2010, ruling that the agency lacked the statutory authority to enforce the net neutrality principles under the Communications Act. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

The FCC tried again in 2010 when it adopted net neutrality regulations for the first time. These regulations imposed a series of obligations on broadband Internet service providers, including an anti-discrimination rule that prevented wireline broadband providers from engaging in unreasonable discrimination in the transmission of lawful Internet traffic. The regulations also included an anti-blocking rule that prohibited all broadband providers—wireline and wireless—from blocking or degrading lawful Internet content and applications. A transparency rule also required all broadband providers to publicly disclose information regarding their network management terms and practices.

Again, however, the FCC order implementing these rules was struck down by the D.C. Circuit. *Verizon Communications Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). In a January 2014 decision, the court vacated the anti-blocking and anti-discrimination regulations, finding that the Commission had improperly attempted to impose these common carrier obligations without expressly reclassifying broadband services as common carrier services under Title II of the Communications Act of 1934. The D.C. Circuit's ruling commenced yet another contentious regulatory debate about whether and how the FCC could issue net neutrality regulations under its existing authorities. The recently released Order responds directly to that January 2014 decision, and represents the FCC's most sweeping attempt to address net neutrality.

### **Analysis**

The Order released by the Commission on March 12 is an unusual regulatory action in that it actually contains three separate FCC actions. First, it includes a Report and Order on Remand that establishes the revised net neutrality rules. Next, it contains a Declaratory Ruling that takes the controversial step of reclassifying broadband internet access services as “common carrier” telecommunications services under Title II. Finally, it includes a Forbearance Order that establishes the statutory framework that will apply to providers of broadband internet access services going forward.

(Continued on page 31)

*(Continued from page 30)*

### **Report and Order on Remand – Net Neutrality Rules**

The Report and Order on Remand establishes a number of net neutrality rules that will apply to providers of broadband Internet access services (BIAS, to use the acronym deployed by the FCC throughout its Order), which the FCC defines, in part, 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.”

Three aspects of this definition are of particular importance. First, the definition includes wireless services. This is not an accident as the FCC has determined that wireless broadband services will be subject to the full slate of net neutrality rules. This determination significantly departs from the FCC’s prior net neutrality actions, which had exempted wireless services from the more onerous requirements. It also departs from the Commission’s tentative conclusions in its original May 2014 notice of proposed rulemaking (NPRM) that commenced the net neutrality proceeding that led to the Order. Second, the BIAS definition only covers “mass-market retail service[s].”

In other words, broadband services offered on an individualized basis to end user customers or on a wholesale basis to other broadband providers or telecommunications carriers are not BIAS services directly subject to the net neutrality rules. Third, the definition includes “any capabilities that are incidental to and enable the operation of the communications service.” The Order clarifies that this includes certain technical services that allow the interconnections between end users and edge providers. However, the Order also declines to apply the full set of net neutrality protections to these interconnection services. Questions surrounding the set of services covered and the remaining Title II rules that may apply to those services are highly technical and will require case-by-case analysis.

In addition to defining BIAS services subject to the rules, the Report and Order on Remand also delineates a category of services called “non-BIAS data services” that are not subject to the net neutrality regulations. According to the FCC, these specialized services are IP data services that do not travel over BIAS services or otherwise provide access to the Internet generally. Non-BIAS data services have received much attention in recent weeks, with press reports speculating whether rumored over-the-top video services will be categorized as non-BIAS data services exempt from the net neutrality regulations. The FCC recognized that the exemption for non-BIAS data services could be used in ways it did not anticipate. As a result, the FCC reserved the right to regulate any service as a BIAS service, subjecting it to the net neutrality rules, if it determines

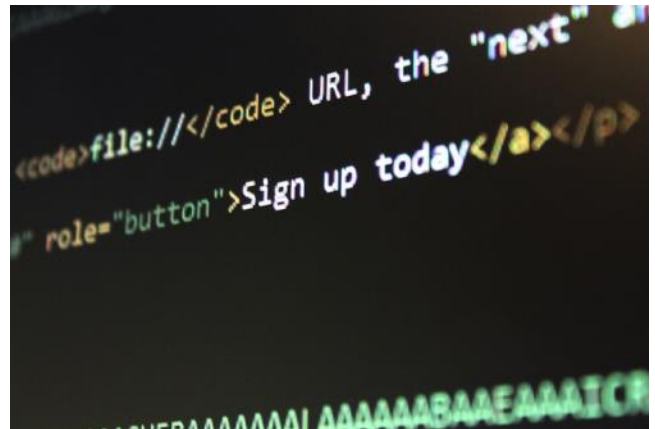
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that the service is the “functional equivalent” of a BIAS service or the service is being offered to evade the rules.

In the Report and Order on Remand, the FCC establishes three bright-line net neutrality rules applicable to providers of BIAS services:

- *No blocking of any lawful Internet traffic, content or applications.* This rule prohibits any BIAS provider from blocking any lawful Internet traffic, including content, applications or services, subject to a reasonable network management exception. However, BIAS providers will be permitted to block illegal or unlawful content, such as traffic that contains copyright-infringing content.
- *No throttling of any lawful Internet traffic.* Under this rule, providers of BIAS services may not impair or degrade lawful Internet traffic on the basis of content, applications or service. Like the anti-blocking rule, this rule is subject to a reasonable network management exception. The rule does not prohibit BIAS providers from reducing the speed of all traffic. For instance, reducing the speed of traffic on a content-agnostic basis to ensure that a customer’s data cap requirement is not exceeded may be permissible, as long as such reduction does not otherwise violate the general conduct standard described below. That said, BIAS providers may not specifically reduce the speed of traffic on the basis of the content, application or service. In other words, a provider of BIAS services would not be able to reduce the speed of traffic related to a gaming application solely because that application competes with the provider’s own gaming service.



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- *No paid prioritization.* This rule prohibits BIAS providers from favoring some traffic over other traffic in exchange for consideration (monetary or otherwise) or to benefit an affiliate. Net neutrality advocates have long hoped to implement a binding rule that prohibits broadband providers from engaging in paid prioritization. In the Commission’s view, paid prioritization deals require BIAS

(Continued on page 33)

*(Continued from page 32)*

providers to discriminate against all other traffic and content. While the rules prohibiting blocking and throttling are subject to a reasonable network management exception, the paid prioritization prohibition will not be given any leniency.

The FCC also adopted a revised and enhanced transparency rule, which was the one prior regulation the D.C. Circuit left in place in its January 2014 decision. Under the newly issued rule, providers of BIAS services must now offer specific information about network management practices affecting consumers and edge providers, including certain network maintenance practices (e.g., technical and engineering traffic prioritization), performance characteristics (e.g., effective upload and download speeds, latency and packet loss) and/or terms and conditions of service to end users (e.g., data caps).

In addition to these rules, the FCC also adopted a catch-all rule governing the general conduct of BIAS providers. While net neutrality opponents view this conduct rule as a very broad grant of authority by the FCC to itself, the Commission maintained that this conduct standard is necessary to outlaw future harmful practices that are not specifically prohibited by the three bright-line rules. Under the conduct standard, BIAS providers may not “unreasonably interfere with or unreasonably disadvantage” end users or edge providers in respect to Internet content, traffic or applications. The FCC provided a list of factors that it would use in examining whether a specific broadband provider practice violated the conduct standard. These factors include, but are not limited to, the following: the practice’s impact on innovation and investment, its consumer protection effects and any impact on competition.

While the FCC indicated that it would apply the general standard to judge future broadband practices, it declined to judge certain current practices—at least at this time. Two of these practices, zero rating and data allowances, received significant attention during the FCC’s proceeding. Instead of deciding whether these practices satisfy the general conduct standard, the FCC stated that it would defer any decision at this time to gauge marketplace developments.

### **Declaratory Ruling – Reclassification Under Title II**

One of the most contentious aspects of the FCC’s net neutrality proceeding was the regulatory classification that would apply to broadband services. Advocates for stringent net neutrality regulations, including President Obama, pressed the FCC to reclassify broadband services as “telecommunications services” – and thus “common

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*(Continued from page 33)*

carriers” with extensive legal responsibilities - under Title II of the Communications Act. These advocates argued that reclassification under Title II would provide the strongest legal protections for Internet openness and innovation, particularly in light of the prior court decisions holding that the FCC had exceeded its authority under other statutory provisions. Opponents of net neutrality vehemently objected to Title II reclassification, noting that many sections of Title II stem from the original 1934 version of the Communications Act, which imposed a wide range of obligations on traditional telephone carriers operating in a monopoly environment.

In the Declaratory Ruling, the FCC took the momentous step of extending Title II to BIAS services, both fixed and wireless. In doing so, the FCC concluded that Title II provides it with the strongest legal authority for implementing the net neutrality rules. Although the FCC relied on Title II as its primary legal justification for the regulations, it also stated that Section 706 of the Communications Act serves as a secondary authority supporting its issuance of the rules. In its January 2014 decision, the D.C. Circuit cited Section 706 as one of the statutory authorities the Commission might attempt to use in adopting net neutrality regulations. In using both Title II and Section 706, the Commission clearly hopes to increase its chances of having the new regulations withstand the expected judicial review.

### **Forbearance Order – Title II Framework**

While the Commission chose to extend Title II to broadband services, it refrained from applying the full breadth of the statutory requirements to broadband providers. It did so in the Forbearance Order aspect of its action and pursuant to specific authority granted to the FCC under the Communications Act. This authority allows it to “forbear” from application of any statutory requirement that it concludes to be (i) no longer in the public interest, (ii) necessary to protect consumers or (iii) needed to ensure that telecommunications services are offered on just and reasonable rates and terms of service.

According to the FCC, application of many of the Title II requirements to broadband providers was not necessary for net neutrality purposes. While Title II comprises nearly 50 different sections of the Communications Act, the Forbearance Order states that the Commission will forbear from applying 27 of those sections (corresponding to over 700 FCC rules), while retaining at least part of a number of other provisions and the related rules, such as:

- Section 201 (requirement for just and reasonable service and charges);

*(Continued on page 35)*



*(Continued from page 34)*

- Section 202 (prohibition against unreasonable discrimination);
- Sections 206-209, 216-217 (processes governing complaints filed with the Commission and related enforcement provisions);
- Section 222 (requirements governing customer privacy);
- Section 224 (requirement that providers of telecommunications services be granted fair access to poles and conduits);
- Section 254 (universal service fund obligations of telecomm carriers); and
- Sections 225 and 255 (access by persons with disabilities).

The Forbearance Order notes that the Commission intends to closely review implementation of several of these sections. For example, while the Commission extended Section 254, which imposes universal service fees (USF) on telecommunications services, it stated that it will refer the question of the imposition of USF fees on BIAS services to the Federal-State Joint Board on Universal Service, suggesting that universal service obligations for BIAS providers may be forthcoming.

### **Litigation Scenarios**

Several broadband providers and industry associations already have stated their intent to challenge the regulations in federal court. Two already have done so, including the United States Telecom Association, which filed a Petition for Review in the D.C. Circuit on March 23.

One of the first decisions that net neutrality opponents will need to make is whether to seek a judicial stay of the Order and the regulations. To obtain a stay, opponents would have to convince a reviewing court that they are likely to succeed on the merits of their appeal of the regulations and that they would be irreparably damaged by imposition of the regulations. Judicial stays of FCC actions are not unprecedented. In fact, the D.C. Circuit recently stayed the effectiveness of an FCC order in the Comcast/Time Warner merger review. At the same time, judicial stays are far from automatic, and depend on the court's evaluation of the showing made by those who have sought the stay.

Whether or not a stay is granted, opponents are likely to raise a number of claims regarding the FCC's statutory authority to issue the regulations, its compliance with the requirements of administrative law during the related proceeding, and the constitutionality of the Order in any challenges to the FCC's action.

*(Continued on page 36)*

(Continued from page 35)

In asserting that the FCC lacked statutory authority for its action, challengers are likely to argue that Title II reclassification is beyond the Commission's statutory authority over all BIAS providers and for mobile broadband providers, in particular. Challengers are also likely to assert that Section 706 provides insufficient statutory authority to support some or all of the regulations, including the paid prioritization rule and the general conduct standard.

Challenges focusing on compliance with administrative procedures will claim that the net neutrality rules were not the product of reasoned decision-making on the FCC's part. In particular, challengers likely will argue that the FCC acted arbitrarily and capriciously by failing to adequately explain its decision or to sufficiently justify the choices it made on the basis of the facts in the record. In addition, challengers will argue that the record in the proceeding does not support the FCC's conclusions and that the Commission failed to provide adequate justification for its changes in position regarding the regulatory classification of BIAS services. Challengers may also assert that the Commission's original 2014 NPRM provided insufficient notice of the sweeping changes that were ultimately enacted and that the President and the White House impermissibly interfered with the independent agency's rulemaking process.

Lastly, challengers may make a number of constitutional arguments. They may claim a violation of the First Amendment because the net neutrality rules impermissibly impinge on BIAS providers' right to edit or control the information they carry. Separately, they may also claim that the transparency rule compels carrier speech without an adequate basis. They may also raise Fifth Amendment/takings claims, suggesting that the rules are a *per se* taking because they give edge providers an effective right of access to BIAS provider property, or that they serve as a regulatory taking because they unjustifiably interfere with BIAS providers' investment-based expectations.

The outcomes of these challenges may depend heavily on which court ultimately reviews the FCC's action. The U.S. courts of appeals have exclusive jurisdiction to review FCC orders, with the D.C. Circuit reviewing many FCC orders pursuant to specific authority granted to it under the Communications Act. If multiple appeals of the Order are made in different circuits, however, a system of random selection—a



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*(Continued from page 36)*

lottery—will be used to determine which appellate court will review the Commission’s action.

Any judicial decision, of course, could be subject to further review, including by the United States Supreme Court.

Accordingly, the ultimate fate of the new net neutrality rules – and the question whether they receive the judicial validation that was denied to the FCC’s two previous attempts at imposing net neutrality – will not be known until the litigation challenging the rules on a wide range of grounds is resolved and decided.

*Cliff Sloan is a litigation partner in the Washington, DC office of Skadden, Arps, Slate, Meagher & Flom. John Beahn is a counsel, and Joshua Gruenspecht an associate, in the communications practice in Skadden’s Washington office.*

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