Restoring Internet Freedom

*Declaratory Ruling, Report and Order, and Order*

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Overview
The Federal Communications Commission today voted 3-2 to approve a *Declaratory Ruling, Report and Order, and Order* ("Order") [1] setting aside nearly in its entirety the open Internet rules it adopted in 2015. The Order reverses the classification of broadband Internet access service ("BIAS") as a common carrier service subject to Title II of the Communications Act of 1934, reclassifying BIAS as an information service. It eliminates the bright-line net neutrality rules—the prohibitions on blocking, throttling, and paid prioritization. And it eliminates the general conduct standard. Instead, the Commission will rely on transparency requirements to protect the openness of the Internet.

**Broadband Internet Access Service Will No Longer Be a Common Carrier Service Subject to Title II of the Communications Act; Instead It Will Be Classified as an Information Service**

Claiming an end to “public-utility regulation of the Internet,” the Commission sets aside its previous decision to classify BIAS as a common carrier service subject to Title II of the Communications Act and reinstates the “information service” classification for both fixed and mobile services. By reclassifying BIAS as an “information service” and disclaiming authority under Section 706, Section 230, and other provisions of Title II, III, and VI, the Commission argues it lacks the authority to regulate BIAS and instead will rely upon the Department of Justice and the Federal Trade Commission to enforce the relevant antitrust and consumer protection laws. Additionally, the Commission states that the Title II classification was unnecessary in light of the commitments of the four largest ISPs to not block or throttle content. The Commission also states that it expects its transparency rule will empower consumers to avoid ISPs that block or throttle traffic. This represents a change from the previous Commission, which for over a decade had sought to create a jurisdictional basis to enforce the open Internet principles.

**Mobile BIAS**

The Commission reverses its 2015 finding that mobile broadband Internet access is a commercial mobile service. It does so by applying a functional equivalence test to determine that mobile broadband Internet access service is fundamentally different than the voice services governed by Section 332 of the Communications Act given that there is no interconnection with the public switched network. ¶¶ 82-85.

**Consumer Protection to Be Left to the Justice Department and the FTC**

The Commission reasons that it can do away with Title II regulation in part because antitrust law and the Federal Trade Commission Act will address anticompetitive behavior or acts that are unfair and deceptive. Additionally, the Commission believes that consumer outcry is likely to deter ISPs from behaving in an anticompetitive manner, and that a consumer can switch to a different ISP if it does not like its broadband service.

**FTC Authority to Regulate Broadband Privacy and Data Security**
The Commission claims that reclassification restores the FTC’s authority to take enforcement action against unfair acts or practices and enforce any commitments made by ISPs regarding their network management practices that are included in their advertising or terms and conditions. ¶ 141.

The Order also “returns jurisdiction to regulate broadband privacy and data security to the FTC.” ¶ 177. The Commission’s 2015 decision, which reclassified BIAS as a common carriage telecommunications service, removed FTC authority over ISPs because the FTC is prohibited by statute from regulating common carriers. ¶ 141. Last year, the Commission adopted an order implementing Section 222 of the Communications Act that regulated ISPs regarding consumer privacy, but Congress, under the Congressional Review Act, voted to disapprove of that decision. That Congressional action left a void over broadband privacy regulation that the FTC will now fill, though through ex-poste case-by-case enforcement rather than through ex ante rules as adopted previously by the Commission. ¶ 179.

Local and State Open Internet Regulation Preempted

The Order preempts “any state or local requirements that are inconsistent with [its] federal deregulatory approach.” ¶ 190. The Order preempts “any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.” ¶ 191.

The Commission Will Rely on Transparency to Protect the Internet

The Commission retains the transparency rule with modifications and will use it as the main tool to protect the open Internet. ¶ 204. ISPs will be required to disclose their network management practices, including security and congestion practices. ¶ 215. Additionally, ISPs must disclose any blocking, throttling, paid prioritization, or affiliated prioritization. ¶ 216. ISPs must also disclose the performance characteristics of services, including a general service description, expected and actual speeds. ¶¶ 217-18. Finally, ISPs must disclose prices, including monthly usage fees and early termination fees, privacy policies, and redress options. ¶ 219.

At the same time, the Commission eliminates the 2015 transparency rule enhancements, including the performance metric reporting requirements that required disclosing packet loss, geographic-specific disclosures, and the disclosure of performance at peak usage times. ¶ 221. The Commission believes the transparency rule will be sufficient to allow consumers to choose among ISPs and prevent ISPs from surreptitiously interfering with service.

The Order Eliminates the Prohibitions on Blocking, Throttling, and Paid Prioritization, as well as the General Conduct Standard

The Commission eliminates the prohibitions against blocking, throttling, and paid prioritization, as well as the general conduct rule after concluding that these rules are not needed because transparency, competition, antitrust, and consumer protection laws achieve similar benefits at less cost. ¶¶ 236, 249, 260. The Commission concludes that blocking and throttling are unlikely to cause harm because (1) most attempts by ISPs to block or throttle content will likely be met with a fierce consumer backlash; (2) numerous ISPs, including the four largest fixed ISPs, have publicly committed not to block or throttle the content that consumers choose; (3) antitrust laws prohibit anticompetitive conduct, and to the extent blocking or throttling by an ISP constitutes such conduct, the existence of these laws likely deters potentially anticompetitive conduct; and (4) ISPs have long-term incentives to preserve Internet openness, which creates demand for the Internet access service that they provide. ¶¶ 260-61.

Cost-Benefit Analysis

Relying on studies undertaken by ISP trade organizations and their economists, the Commission concludes that ISP investment has fallen as a result of the Title II reclassification. Although it references criticisms of those studies, it concludes that the balance of the evidence in the record suggests that Title II classification has reduced ISP investment in the network, as well as hampered innovation, because of regulatory uncertainty. ¶¶ 99-101. The Commission does not find any inconsistency between ISPs’ pleadings in this docket and their executives’ generally contradictory statements; it argues that these statements were taken out of context and are open to interpretation. ¶ 102.

The Commission appears to dismiss the virtuous cycle theory favored by USTA v. FCC, arguing that the economic analysis in previous FCC decisions was at best only loosely based on the existing economics literature, in some cases contradicted peer reviewed economics literature, and included virtually no empirical evidence. ¶ 118. The Commission also concludes that the record does not suggest a correlation between edge provider investment and Title II regulation, nor does it suggest a causal relationship that edge providers have increased their investments as a result of the Commission’s 2015 decision. ¶ 107. Instead, it posits that the record suggests that edge providers would have invested even more in the absence of Title II regulation. ¶ 108.

Denial of Motions
The Commission denies the motion of INCOMPAS to incorporate materials from previous merger proceedings that could shed light on ISPs’ market power, finding that because of administrative difficulties and the Commission’s determination that the material was not relevant because it came from only a few ISPs and was outdated. ¶ 324-26. The Commission also denies the motion of the National Hispanic Media Coalition to incorporate informal complaints that the Coalition obtained through a FOIA request. The Commission denies the motion because the Coalition could have entered the documents on its own after it received them from the FOIA request and it did not consider the complaints relevant ¶¶ 337-38.

[1] This summary is based on the draft Order released on November 22, 2017. The text of the Commission-approved Order is not yet available.