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FCC Reinstates 'Network Neutrality' Rules

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After a closely divided vote, the Federal Communications Commission (FCC) has released an order effectively reinstating the "network neutrality" rules it adopted in 2015. This decision reverses a 2017 order during the Trump administration that revoked the 2015 decision. Under the new order, broadband internet access service (BIAS) has been classified as a telecommunications service subject to the Communications Act requirements for telephone services. The FCC also has adopted rules limiting blocking and throttling customer access to content and applications, preventing BIAS providers from offering content providers favorable access to users, and expanding the disclosures that BIAS providers must make.

Reclassification

The FCC readopted the 2015 conclusion that BIAS should be treated as a telecommunications service rather than as an information service subject to limited regulation. This decision applies only to mass-market services and to interconnection between BIAS providers and third-party content and application providers, but covers all technologies – including satellites – used to offer BIAS. Broadband service provided to businesses, services provided by businesses that offer internet access to customers as a convenience (such as internet access in coffee shops) and specialized services not offered to the public at large (such as some telemedicine services) will not be treated as telecommunications services. The FCC declined to treat "network slicing," a technique used by wireless providers to segregate some traffic on their networks, as a specialized service and will consider individual services that use network slicing on a case-by-case basis.

The FCC determined that BIAS should not be subject to many of the obligations that apply to most telecommunications carriers. The obligations that will not apply to BIAS include rate regulation, tariff rules, requirements to unbundle services and contributions to the federal universal service fund, although the FCC may review the question of contribution requirements at a later date.

However, BIAS providers will be subject to basic obligations to offer service on just, reasonable and nondiscriminatory terms and conditions, to accessibility requirements for people with disabilities, to obligations to comply with FCC information collection requirements, and to rules governing cooperation with law enforcement. BIAS providers also will be subject to the privacy requirements in the Communications Act, but not the current privacy rules, which the FCC determined were ill-adapted to BIAS. BIAS providers also will be subject to the FCC's ban on exclusive contracts to provide service to tenants of multiunit buildings.

One of the most significant differences between the 2015 order and the new order is that BIAS providers will be subject to Section 214 of the Communications Act, which governs entry and exit from the interstate telecommunications business. The order grants blanket authority to provide BIAS to all providers, except certain Chinese entities that have been banned from providing telecommunications services in the US. It also indicates that the FCC likely will consider whether to adopt rules that require approval for transactions involving BIAS providers, similar to the rules that are in place for other telecommunications carriers today.

Reclassification also gives BIAS providers certain rights under the Communications Act. These rights include access to utility poles and conduits for their facilities and the ability to obtain universal service funding.

Reinstated network neutrality rules

The order reinstates the basic network neutrality rules that were adopted in 2015, which include the following:

No blocking
BIAS providers cannot block user access to lawful content and services provided by third parties.

No throttling
BIAS providers cannot limit the speeds at which specific content or services are provided to customers. This rule does not prevent BIAS providers from selling plans that lower speeds once customers reach specific usage thresholds, so long as the speeds are lowered for all content and services the customers receive.

No paid or affiliate prioritization
BIAS providers cannot offer third parties the right to have their content or services carried at higher speeds or in preference to the content or services of other parties, and cannot give preferences to their own content or services. Providers can obtain exceptions to this rule if they can show that prioritization is beneficial.

General conduct
BIAS providers are not permitted to engage in other conduct that undermines the purpose of the rules, based on a test of whether the conduct creates unreasonable interference or an unreasonable disadvantage.

Transparency
The order reinstates requirements to provide certain information to customers, including performance characteristics like latency and network management practices. It also includes new mechanisms for disclosing the required information.

The limitations on blocking and throttling are subject to a BIAS provider's right to engage in reasonable network management practices. BIAS providers may request advisory opinions on whether their practices violate any of the rules and whether their network management practices are reasonable.

The order also reinstates the requirement that BIAS providers exchange traffic with content and service providers on reasonable terms and conditions. As in the 2015 order, the FCC will consider complaints about the terms of traffic exchange on a case-by-case basis. The order indicates that the rules do not require settlement-free traffic exchange or prohibit imposition of fees as a general matter, but did not rule out that these practices could be improper in specific cases.

Impact on state network neutrality laws

The FCC ruled that state laws that impose the same requirements as the reinstated network neutrality rules or that impose lesser burdens on BIAS providers can be enforced, but any law that imposes additional burdens will be preempted and unenforceable. This determination will be made on a case-by-case basis, but the FCC found that the California network neutrality law would not be subject to preemption.

Next steps

The rules will go into effect 30 days after notice of the decision is published in the Federal Register, except for a few rules that must be approved by the federal Office of Management and Budget.

Like all previous network neutrality orders, this order is certain to be appealed. The 2015 order was affirmed by the US Court of Appeals for the District of Columbia Circuit, and the same court largely affirmed the 2017 order but required the FCC to reconsider several issues. Unless the order is stayed by the court hearing the case, the rules will remain in effect during the appeal.

For more information on the network neutrality decision and how it affects providers of mass-market broadband services, content and app providers, and other participants in the internet ecosystem, please reach out to one of the Cooley lawyers listed below.

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