



October 19, 2023

FCC Adopts Proposed Net Neutrality Rule

On October 19, 2023, the Federal Communications Commission (FCC) adopted a Notice of Proposed Rulemaking (NPRM) that proposes to reclassify broadband internet access service (BIAS) as a Title II common carrier service and reinstate net neutrality rules.

The NPRM is the FCC's latest action on a subject with a lengthy regulatory and legal history. This In Focus provides an overview of net neutrality regulation, a brief discussion of how the FCC's classification of broadband affects that regulation, a summary of the NPRM, and a discussion of potential legal challenges and policy considerations.

Net Neutrality Regulation

Net neutrality generally refers to the idea that internet service providers should neither control how consumers lawfully use their networks nor discriminate among the content providers that use their networks. The FCC has sought to implement net neutrality rules several times, most recently in 2015. In its 2015 net neutrality order, the FCC laid out what it called “clear, bright-line rules” that BIAS providers were required to follow. Specifically, they were prohibited from: (1) “blocking” lawful content, applications, services, or non-harmful devices; (2) “throttling” (i.e., impairing or slowing) lawful internet traffic on the basis of content, applications, services, or use of non-harmful devices; and (3) engaging in “paid prioritization,” which is defined as favoring some internet traffic over others in exchange for consideration. The FCC also imposed a broad catch-all rule referred to as the “general conduct standard.” That standard prohibited BIAS providers from unreasonably interfering with or disadvantaging users and edge providers (i.e., persons or companies providing content and services to a BIAS provider's subscribers) in accessing or providing the lawful content, applications, services, or devices of their choice. The FCC repealed most of its net neutrality rules, however, in an order adopted at the end of 2017.

Net Neutrality and Broadband Classification

The FCC's ability to adopt net neutrality rules depends on the legal classification of BIAS under the Communications Act of 1934 (“the Act”). As amended, the act defines two mutually exclusive categories of services: telecommunications services and information services. While telecommunications service providers are treated as highly regulated common carriers under Title II of the act, the FCC has much more limited regulatory authority over information service providers.

The FCC has alternated between classifying BIAS as a telecommunications service and an information service. The U.S. Supreme Court and U.S. Court of Appeals for the D.C. Circuit have affirmed the FCC's discretion to make—and to change—this classification decision. The D.C.

Circuit has also held that the FCC may enact net neutrality rules only if it has classified BIAS as a telecommunications service. Currently, per the FCC's 2017 order, BIAS is classified as an information service.

The NPRM

The NPRM proposes to again reclassify BIAS as a telecommunications service and to reinstate the 2015 net neutrality rules, including the general conduct standard. As in 2015, the NPRM proposes to forbear from applying many Title II requirements to BIAS providers. It also emphasizes that the FCC would not use Title II to prospectively set the rates BIAS providers can charge. The NPRM further asserts that Title II reclassification would allow the FCC to further goals other than net neutrality, including national security, public safety, network resiliency, and privacy.

National Security. The NPRM explains that reclassification would enhance the FCC's ability to respond to national security threats by subjecting BIAS providers to authorization requirements under Section 214 of the act. The FCC has used this authority to ban several China-affiliated Title II carriers from operating in the United States for national security reasons. The NPRM indicates that the FCC could take similar action with BIAS providers deemed to pose a threat to national security.

Public Safety. The NPRM states that the FCC could use the reclassification in combination with other statutory authority to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes. For example, the agency believes the proposed reclassification would enable the FCC to support public safety officials' use of BIAS for public safety purposes; ensure BIAS is available to the public to communicate with first responders during emergency situations; allow the public to access public safety resources and information; and provide consumers with the connections they need to operate home safety and security systems (such as cameras and window sensors).

Network Resiliency. The NPRM tentatively concludes that reclassifying BIAS as a telecommunications service would enhance the FCC's ability to ensure the nation's communications networks are resilient and reliable. In particular, the reclassification may allow the FCC to require that BIAS providers report network outages to the Network Outage Reporting System (NORS). The NPRM explains that such reporting requirements could inform the FCC's network resiliency efforts and give officials greater transparency during outages.

Privacy. The NPRM tentatively concludes that reclassification of BIAS as a telecommunications service would support the FCC's goal to safeguard consumers' privacy and data security. As discussed further in a CRS

report (R45631), Title II carriers are subject to data privacy requirements under Section 222 of the act. The NPRM explains that applying Section 222 to BIAS providers could “support a uniform privacy and data security framework for voice and data services.” The NPRM also seeks comment on whether Title II classification would allow the FCC to require BIAS providers to block illegal robocalls and robotexts transmitted over broadband networks.

Opposing Views

The Commission adopted the NPRM by a 3-2 vote. In a statement, one of the dissenting commissioners indicated his belief that net neutrality rules would “prevent last-mile ISPs [internet service providers] from being able to charge large originators of traffic, like streaming platforms, transit fees” and leave open the “ever-present possibility of rate regulation stifling investment and innovation.”

Potential Legal Challenges

The FCC must complete the rulemaking process before any rules could be challenged in court. One argument in a legal challenge might be that the FCC’s reclassification of BIAS exceeded the Commission’s statutory authority. This argument has been consistently rejected in the past. In *NCTA v. Brand X Internet Services* (2005), the Supreme Court applied the *Chevron* doctrine—under which courts generally defer to an agency’s reasonable interpretation of an ambiguous statutory provision—to uphold the FCC’s reclassification of BIAS. Lower courts followed suit, applying the *Chevron* doctrine to uphold all subsequent FCC reclassifications. The future of *Chevron* may be in doubt, however. As discussed in a CRS report (R44954), several Supreme Court Justices have criticized the doctrine, and the Court will be considering whether *Chevron* should be curtailed or overruled in its current term.

The Court’s increasing emphasis on the major questions doctrine has also raised questions about judicial deference to agencies. Under the major questions doctrine, the Court has rejected claims of regulatory authority involving issues of “vast economic and political significance” when there is no clear statutory language establishing that authority. Consequently, even if the Court declines to overrule *Chevron*, any future net neutrality rules may be met with major questions doctrine challenges. Such challenges might assert that the FCC needs express statutory authorization in order to adopt net neutrality rules.

Policy Considerations

Establishing the appropriate regulatory framework for BIAS has become a perennial debate. As the FCC conducts its business both now and into the future, the regulatory philosophies of the current and future FCC chairpersons may affect how they decide regulatory questions, including a continued review of net neutrality. The Supreme Court has said not only that an administrative agency can change its interpretation of an ambiguous statute, but that it “must consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to changed factual circumstances or a change in administrations.” Some observers have suggested that Congress could settle the debate through legislation, with or without classifying BIAS as a Title II service. To date, however, Congress has not passed legislation either

mandating or prohibiting net neutrality. No related legislation has been introduced in the 118th Congress.

Despite having left net neutrality regulation to the FCC in the past, there are indications that Congress may pursue a more active approach. Since the beginning of Coronavirus Disease 2019, Congress has sought to increase broadband connectivity for telework, remote learning, and telehealth, including bridging the “digital divide,” by appropriating billions of dollars for broadband infrastructure deployment throughout the United States. In the Infrastructure Investment and Jobs Act alone, Congress appropriated \$62.4 billion for six new programs. With those funds now being distributed, some Members have expressed concern that oversight of these programs could prove difficult. In the NPRM, the FCC stated that regulating BIAS providers under Title II would allow that funding to go as far as possible and enable the agency to ensure the connections supported by these funds align with the other policy goals (e.g., advancing national security, ensuring public safety, and protecting consumers).

In a May 2023 hearing, the Chair of the House Committee on Energy and Commerce expressed concern that funds for some of the new programs may overlap with previously existing programs. A 2023 Government Accountability Office report, presented at the hearing, identified federal broadband efforts as “fragmented and overlapping, with more than 133 funding programs administered by 15 agencies.” Congress might examine the FCC’s assertions concerning net neutrality providing improved opportunities for oversight.

In considering possible legislation, Congress may weigh whether to preempt state net neutrality laws. After the FCC repealed its 2015 net neutrality rules, states began adopting their own requirements. California and Washington enacted net neutrality laws that apply to all BIAS providers operating in their states. States including Colorado, Maine, Vermont, and Oregon have enacted laws requiring BIAS providers contracting with the state to comply with net neutrality requirements. Most of these laws mirror the FCC’s 2015 net neutrality rules. California’s law goes further by regulating the practice of “zero-rating” (the practice of not counting the usage of a particular application or class of applications toward a data cap). Should Congress adopt a federal net neutrality law, it could choose to preempt such state laws or leave them intact to the extent they are consistent with the federal law.

Additional CRS Products

CRS Report R45825, *Federal Preemption: A Legal Primer*, by Bryan L. Adkins, Alexander H. Pepper, and Jay B. Sykes

CRS Infographic IG10037, *FCC Regulation of Broadband Service and Action on Net Neutrality*, by Chris D. Linebaugh

CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola

CRS Report R46973, *Net Neutrality Law: An Overview*, by Chris D. Linebaugh

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