

D.C. Circuit Denies Stay, Open Internet Rules Become Effective June 12

June 12, 2015

On June 11, 2015, the D.C. Circuit rejected U.S. Telecom's request for stay which would have put the Open Internet rules on hold until the court issued a decision on their legality. However, the court agreed to expedite its proceedings, and is expected to issue a final decision in the case (no. 15-1063) by early next year.

As a result, the [Open Internet Order's](#) (Order) three bright line rules and the new "general conduct" standard will become effective on June 12. The reclassification of broadband Internet access service (BIAS) as a telecommunications service and the complementary action forbearing from the application and enforcement of sections of Title II of the Communications Act will also become effective on June 12.

Impact for BIAS Providers

The Commission's three "bright-line rules" prohibiting certain network practices of BIAS providers take effect today. Those provisions are:

- **No blocking.** Fixed and mobile BIAS providers may not block access to legal content, applications, services or non-harmful devices, subject to reasonable network management.
- **No throttling.** Fixed and mobile BIAS providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices, subject to reasonable network management.
- **No paid prioritization.** Fixed and mobile BIAS providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind. The "no paid prioritization" rule bans what are commonly referred to as "Internet fast lanes," and also prevents ISPs from giving preferential treatment to the content or services of their affiliates. This rule does not have an exception for reasonable network management.

In addition, other BIAS provider actions will be subject to a broad "general conduct" standard. The Commission will investigate the practices of BIAS providers on a case-by-case basis using the "no unreasonable interference/disadvantage" conduct standard, subject to a multi-factor test.

Further Proceedings

Other aspects of the Order will take effect over a period of months. First, a number of new requirements are subject to the approval of the Office of Management and Budget (OMB). These are:

The "Enhanced" Transparency Rule

The Order reinforced the 2010 transparency rule, which was the only rule that the D.C. Circuit upheld in *Verizon v. FCC*. While BIAS providers are subject to the 2010 transparency rule now, the enhanced elements will not take effect until approved by OMB. The Enhanced Transparency will increase the level of disclosures for commercial terms, performance characteristics, and network practices.

The Order temporarily exempts fixed and mobile providers with 100,000 or fewer subscribers from the requirements of the Enhanced Transparency Rule. The Commission's Consumer and Governmental Affairs Bureau (CGB) will determine whether to retain this exemption and must make their decision by December 15, 2015. If the Bureau fails to act by that date, the temporary exemption will expire.

Protection of Customer Information

The Order applies Section 222 of the Communications Act to BIAS providers. Accordingly, BIAS providers will be required to protect the confidentiality of "proprietary information" and a subset of proprietary information, Customer Proprietary Network Information (CPNI), that providers hold about their customers. However, the Commission refrained from applying the associated CPNI rules.

Later this year, the Commission will likely initiate a separate rulemaking proceeding to decide how to apply privacy provisions, including specific CPNI regulations to BIAS providers. In the meantime, as discussed in an earlier [blog post](#), the FCC Enforcement Bureau announced that it expects broadband providers to take "reasonable, good-faith efforts" to protect customer privacy in the interim.

For a more detailed explanation of the Open Internet Order's rules, read our recent [client advisory](#) or you can listen to a recording of our Open Internet [webinar](#) and view a copy of our [slide presentation](#).