

Divided FCC Begins Proceeding to Revise Internet Oversight Policy, Reverse Many “Open Internet Order” Decisions

May 18, 2017



On May 18, 2017, at the Federal Communications Commission’s (“FCC” or “Commission”) May Open Meeting, the Commission adopted, on a two-one vote, a notice of proposed rulemaking (“NPRM”), titled “Restoring Internet Freedom,” that would negate and replace the Commission’s 2015 Open Internet Order, which the NPRM refers to as the “Title II Order.” This action begins a process that reignites differences between the Republicans and lone Democrat on the Commission, and signals that the effort to repeal the rules will be bumpy. Despite all the immediate public interest and controversy surrounding the proposal, however, the notice and comment process initiated looks to take at least four months before any rule changes can be adopted, and likely several months after that before they take effect. There are also other legal avenues that could impact the network neutrality debates—the Supreme Court could review a previous D.C. Circuit decision to uphold the Title II Order, or Congress could intervene by writing an update to the Communications Act or FTC Act that would reconsider FCC jurisdiction over Internet access services. Either action could moot the proceeding begun today.

The NPRM seeks to reclassify broadband Internet access service (BIAS) as a Title I information service, and reinstate a prior determination that mobile BIAS does not constitute a commercial mobile service. It proposes, in short, essentially the opposite conclusions as were reached by the Democrat-controlled Wheeler FCC in 2015. By classifying BIAS as an information service, the item seeks to return privacy jurisdiction over Internet service providers (“ISPs”) to the Federal Trade Commission (“FTC”). Furthermore, the NPRM seeks to eliminate the Title II Order’s general conduct standard, and seeks comment on whether to keep, modify, or eliminate the bans on blocking, throttling, and paid prioritization. Moreover, the item questions the wisdom and propriety of the Commission’s oversight authority with respect to the broadband interconnection market. Finally, the NPRM questions the necessity of the Open Internet transparency rule - a non-behavioral disclosure

requirement upheld in two forms by the D.C. Circuit.

As described by proponents, the NPRM is a necessary response to regulatory uncertainty and reductions in network investment that resulted from the Title II Order.

As is always the case on matters of net neutrality, this NPRM is highly controversial. Prior to the item even being released, over 1.6 million comments had already been filed in the docket – a number that would have been even higher had the Commission not [invoked sunshine rules](#) to prohibit further comments in the week prior to the release of the NPRM.

The text of the NPRM has not yet been released. However, according to a draft of the item, comments will be due on July 17, and reply comments will be due August 16, assuring that the debate will continue into the fall.

The depth of the disagreement was evident in the Commissioners' statements during consideration of the item. FCC Chairman Ajit Pai and Republican Commissioner Michael O'Rielly released statements in favor of the NPRM. Unsurprisingly, Democratic Commissioner Mignon Clyburn vehemently dissented.

Chairman Pai defended the item by citing the robust growth of BIAS under the prior Title I regime, claiming the FCC's utility style regulation under Title II was stifling investment in broadband networks, and lamenting the chilling effects of regulatory uncertainty on "pro-consumer" plans such as wireless zero rating and sponsored data services. He also claimed that the Title II Order damaged small carriers that struggled under the weight of the compliance costs associated with the 2015 order. Furthermore, Chairman Pai claimed that the Title II Order's general conduct standard would result in DC lawyers micromanaging the complex technical decisions of network engineers in ways that would stifle innovation and threaten the viability of next-generation 5G service.

Commissioner O'Rielly asserted that the Title II Order leaped to prohibitive conclusions on the basis of insufficient evidence (such as with the ban on paid prioritization), and welcomed the NPRM as a chance to reassess the validity of prior conclusions through cost-benefit analysis. He also emphasized the importance of the Commission reaching a conclusion with respect to whether or not BIAS is an interstate service, since an affirmative conclusion in that regard could preclude certain state privacy laws currently under consideration.

However, Commissioner Clyburn blasted the NPRM as an unnecessary and harmful abdication of the Commission's responsibilities to protect consumers and promote competition. She warned that the proposal leaves too much discretion for ISPs to self-police, relies on questionable assumptions about investment in broadband infrastructure, and is myopic in its economic analysis insofar as it fails to account for the benefits of robust Open Internet rules for the broader Internet economy (i.e. edge providers). Finally, she touted the benefits of an Open Internet for those most vulnerable in our society, and expressed concern that reclassification may harm other efforts of the Commission to facilitate communications access for low-income Americans.

If the terminology is any indicator, neither side is likely to give ground. Democrats touted the 2015 order as "Protecting the Open Internet" while the Republicans have titled this proceeding as "Restoring Internet Freedom." This NPRM certainly is the latest word on the subject, but it is unlikely to be the last.