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# Net Neutrality Law: An Overview

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## Net Neutrality Law: An Overview

While there is general support for the basic concept of the open internet, net neutrality has been a perennially difficult subject for the Federal Communications Commission (FCC or Commission). The complexity lies, in part, in the fact that the FCC's ability to adopt net neutrality rules depends on the legal classification it gives to broadband internet access service under the Communications Act of 1934. 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 Communications Act, the FCC has much more limited regulatory authority over information service providers.

The FCC has alternated between classifying broadband as a telecommunications service and an information service. The U.S. Supreme Court and lower federal courts have affirmed the FCC's discretion to make this classification decision, but courts have also established that the FCC's ability to adopt net neutrality regulations is contingent on its classification choice. In 2010, the FCC tried to adopt binding net neutrality rules while classifying broadband as an information service, and the U.S. Court of Appeals for the D.C. Circuit largely overturned this effort. The FCC responded in 2015 by reclassifying broadband as a Title II telecommunications service and adopting even more extensive net neutrality rules that the D.C. Circuit upheld. These rules, among other things, prohibited broadband providers from discriminating against lawful internet traffic by blocking it, degrading it, or favoring other internet traffic over it in exchange for payment. The FCC's action was controversial, but not only because of the net neutrality rules. The Title II reclassification gave the FCC extensive regulatory authority over broadband and came with a new set of requirements, such as Title II's prohibition on carriers charging unjust and unreasonable rates to consumers.

Following a change in leadership, the FCC changed course again in 2017. Citing the regulatory uncertainty and compliance costs of Title II, the FCC reclassified broadband as an information service and jettisoned the 2015 net neutrality rules. This action likewise largely survived legal challenges, and remains in effect. This action has not, however, ended the debate on net neutrality regulation. Some states have passed their own net neutrality laws, and a further change in federal policy—either from Congress or the FCC—is possible.

This report provides an overview of net neutrality law as it has developed through FCC actions and court decisions. The report first lays out the statutory provisions that set the legal boundaries for the FCC's regulatory authority in this area. The report then provides a historical overview of the FCC's actions classifying broadband internet access service and addressing net neutrality, and examines the judicial decisions reviewing these actions. The report concludes by considering possible next steps in the field of net neutrality law, such as potential actions by Congress or the FCC.

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## Introduction

President Biden signed an executive order on July 9, 2021, calling on the Federal Communications Commission (FCC or Commission) to consider adopting “net neutrality” rules.<sup>1</sup> Net neutrality generally refers to the idea that internet service providers should neither control how consumers use their networks nor discriminate among the content providers that use their networks.<sup>2</sup> Should the FCC follow the President’s prompt, it will not be the first time the agency has wrestled with net neutrality. Rather, for more than a decade, net neutrality has been a perennially challenging issue for the Commission.

The difficulty springs in part from the fact that the FCC’s ability to adopt net neutrality rules is tied to the legal classification it gives to broadband internet access service (BIAS) under the Communications Act of 1934 (the Communications Act).<sup>3</sup> The Communications Act, as amended, gives the FCC different levels of regulatory authority depending on whether the Commission classifies a service as a “telecommunications service” or an “information service.”<sup>4</sup> The FCC has broad authority under Title II of the Communications Act to regulate providers of telecommunications services as common carriers.<sup>5</sup> By contrast, the FCC’s regulatory authority over information services—which are not subject to Title II—is limited.<sup>6</sup>

The FCC has alternated between classifying BIAS as a telecommunications service and an information service. In the early years of BIAS, the FCC concluded that BIAS provided over telephone lines—referred to as Digital Subscriber Line (DSL) service—involved a pure transmission of information that was best classified as a telecommunications service.<sup>7</sup> Several years later, the Commission took a different approach toward BIAS provided over cable television networks.<sup>8</sup> It determined that the pure-transmission aspect of cable broadband functionally integrated with a variety of other features that the Commission deemed information services.<sup>9</sup> Consequently, the FCC classified cable broadband service as a single integrated information service.<sup>10</sup> The U.S. Supreme Court upheld the FCC’s classification of cable BIAS in its landmark 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>11</sup> *Brand X* established the FCC’s discretion to choose between the telecommunications and information service categories in classifying BIAS.<sup>12</sup> Following *Brand*

<sup>1</sup> Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (issued July 9, 2021).

<sup>2</sup> See CRS In Focus IF10955, *Access to Broadband Networks: Net Neutrality*, by Angele A. Gilroy (“While there is no single accepted definition of net neutrality most agree that any such definition should include the general principles that owners of the networks that comprise and provide access to the internet should not control how consumers lawfully use that network; and should not be able to discriminate against content provider access to that network.”).

<sup>3</sup> 47 U.S.C. §§ 151–646.

<sup>4</sup> *Id.* § 153(24), (53).

<sup>5</sup> *Id.* §§ 153(51), 201–231.

<sup>6</sup> *Id.* § 153(24), (53).

<sup>7</sup> In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012 (1998) [hereinafter DSL Order].

<sup>8</sup> In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798 (2002) [hereinafter Cable Broadband Order].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 545 U.S. 967 (2005).

<sup>12</sup> *Id.* As discussed later in the report, the Court also held that the FCC is free to change its position, within the limits of a reasonable statutory interpretation, as long as it provides an adequate justification for the change. *Id.* at 1001.

X, the FCC reclassified DSL service and uniformly treated all forms of BIAS as information services.<sup>13</sup>

At the same time, the FCC took steps toward promoting net neutrality. In 2005, the Commission adopted a policy statement proclaiming that consumers are entitled to lawful internet content, applications, and services of their choice.<sup>14</sup> In 2010, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rejected the FCC's effort to enforce this policy statement against the BIAS provider Comcast in *Comcast v. FCC*, concluding that the Commission failed to ground its action in a statutory provision giving it affirmative regulatory authority.<sup>15</sup> The Commission responded by issuing a new order (2010 Order) that adopted binding rules on internet openness.<sup>16</sup> The FCC based its authority for the 2010 Order on Section 706 of the Telecommunications Act, a non-Title II provision that directs the Commission to "encourage the deployment on a reasonable and timely basis" of "advanced telecommunications capability."<sup>17</sup> The 2010 Order imposed a transparency requirement on BIAS providers and prohibited them from blocking or discriminating against lawful internet traffic, services, or devices.<sup>18</sup> The D.C. Circuit again invalidated the FCC's action in its 2014 decision in *Verizon v. FCC*, overturning the anti-blocking and discrimination rules.<sup>19</sup> The court held that the anti-blocking and discrimination rules treated BIAS providers as common carriers, which is prohibited under the Communications Act unless they are classified as telecommunications carriers subject to Title II.<sup>20</sup>

The FCC responded to the *Verizon* decision by issuing a new order (2015 Open Internet Order) that reclassified BIAS as a Title II telecommunications service.<sup>21</sup> The 2015 Open Internet Order imposed three bright-line rules designed to foster net neutrality,<sup>22</sup> prohibiting BIAS providers from: (1) "blocking" lawful content, applications, services, or non-harmful devices; (2) "throttling" (i.e., impairing or degrading) lawful internet traffic on the basis of content, applications, services, or non-harmful devices; and (3) engaging in "paid prioritization," defined as favoring some internet traffic over others in exchange for consideration.<sup>23</sup> The 2015 Open Internet Order also established a more flexible standard, known as the "General Conduct Rule," which prohibited BIAS providers from "unreasonably interfer[ing] or unreasonably disadvantage[ing]" users from accessing the content or services of their choice.<sup>24</sup>

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<sup>13</sup> In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853 (2005) [hereinafter DSL Reclassification Order].

<sup>14</sup> In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14986, 14988 (2005) [hereinafter Internet Policy Statement].

<sup>15</sup> 600 F.3d 642 (D.C. Cir. 2010).

<sup>16</sup> In the Matter of Preserving the Open Internet, 25 FCC Rcd. 17905 (2010) [hereinafter 2010 Order].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>20</sup> *Id.*

<sup>21</sup> In the Matter of Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) [hereinafter 2015 Open Internet Order].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The D.C. Circuit upheld the 2015 Open Internet Order in *United States Telecom Ass’n v. FCC (USTA)*,<sup>25</sup> but the Commission itself reversed course under new leadership a few years later.<sup>26</sup> In a new order adopted in December of 2017, called “Restoring Internet Freedom” (RIF Order), the FCC reclassified BIAS as an information service and eliminated the bright-line rules and the General Conduct rule, leaving in place only a transparency rule applicable to BIAS providers.<sup>27</sup> The FCC justified the new approach by explaining that a “light-touch” regulatory framework for BIAS would promote investment and innovation better than the “heavy-handed utility-style regulation” of Title II.<sup>28</sup> It also reasoned that the 2015 Open Internet Order’s net-neutrality rules were unnecessary, given the transparency requirements, antitrust laws, and consumer protection laws that would still apply to BIAS providers.<sup>29</sup> The D.C. Circuit subsequently upheld the bulk of the RIF Order in *Mozilla Corp. v. FCC*.<sup>30</sup>

The net neutrality debate did not end with the RIF Order and the *Mozilla* decision. Several states have enacted net neutrality laws, and the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) has rejected arguments that California’s net neutrality law is preempted by federal law.<sup>31</sup> Congress has also considered bills that would directly address net neutrality. On July 28, 2022, some Members of Congress in the House and the Senate introduced the Net Neutrality and Broadband Justice Act of 2022, which would revise the Communications Act’s “telecommunications service” definition to include BIAS (S. 4676 and H.R. 8573, 117th Congress).<sup>32</sup> A number of bills were also introduced in the 116th Congress.<sup>33</sup> For instance, the Save the Internet Act, which passed the U.S. House of Representatives in 2020, would have restored the 2015 Order.<sup>34</sup> Absent passage of legislation, the FCC itself might adopt a new net neutrality order.<sup>35</sup>

This report provides an overview of net neutrality law as it has developed through FCC actions and court decisions. The report first lays out the statutory provisions that set the legal boundaries for the FCC’s authority, including the difference between a telecommunications service subject to Title II and a more lightly regulated information service. The report then provides a historical overview of the FCC’s various actions classifying BIAS and addressing net neutrality, and it examines courts’ review of these actions in *Brand X*, *Comcast*, *Verizon*, *USTA*, and *Mozilla*. The report concludes by considering possible next steps in the realm of net neutrality law, such as potential actions by Congress or the FCC.<sup>36</sup>

<sup>25</sup> 825 F.3d 674 (2016).

<sup>26</sup> In re Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) [hereinafter RIF Order].

<sup>27</sup> *Id.* at 312–13.

<sup>28</sup> *Id.* at 312.

<sup>29</sup> *Id.* at 313.

<sup>30</sup> 940 F.3d 1 (D.C. Cir. 2019).

<sup>31</sup> See the section “Next Steps” for a discussion of state net neutrality laws and possible congressional or FCC actions.

<sup>32</sup> *Id.*

<sup>33</sup> H.R. 1644, 116th Cong. (2019); H.R. 1101, 116th Cong. (2019); H.R. 1006, 116th Cong. (2019); H.R. 2136, 116th Cong. (2019); H.R. 1096, 116th Cong. (2019).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> For a discussion of policy issues related to net neutrality see CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola and CRS In Focus IF10955, *Access to Broadband Networks: Net Neutrality*, by Angele A. Gilroy.

## Statutory Framework

The FCC has relied on its legal authority under the Communications Act and the Telecommunications Act of 1996<sup>37</sup> (Telecommunications Act) to formulate its regulatory policy towards BIAS and net neutrality. Under the Communications Act, wire and radio communications are subject to a unified federal framework overseen by the FCC.<sup>38</sup> The Communications Act is divided into various titles, the first three of which are relevant to this report. Titles I and III define categories of services that determine whether a service provider may be classified as a highly regulated common carrier or a lightly regulated information service provider.<sup>39</sup> Title II contains the substantive requirements applicable to common carriers.<sup>40</sup> Along with these three titles, Section 706 of the Telecommunications Act figures prominently in the FCC’s net neutrality actions. While much of the Telecommunications Act amended the Communications Act, Section 706 is a stand-alone provision that directs the FCC to encourage the deployment of broadband.<sup>41</sup> Each of these provisions is discussed further below.

### Titles I and III

Title I of the Communications Act defines two terms foundational to the FCC’s net neutrality actions: “telecommunications service” and “information service.”<sup>42</sup> “Telecommunications service,” means the “offering of telecommunications for a fee directly to the public.”<sup>43</sup> “Telecommunications,” in turn, is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>44</sup>

“Information service” is defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>45</sup> This definition exempts “any such ability for the management, control, or operation of a telecommunications system or the management of a telecommunications service” (referred to as the “telecommunications management exception”).<sup>46</sup>

The Supreme Court has explained that these two key terms, which Congress added to the Communications Act in the Telecommunications Act, have their origins in the FCC’s 1980 “Computer II” order.<sup>47</sup> The Commission developed the Computer II rules to regulate computer-

<sup>37</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>38</sup> 47 U.S.C. § 151 (“[B]y centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the ‘Federal Communications Commission’ . . .”).

<sup>39</sup> *See id.* §§ 153, 332(c).

<sup>40</sup> *See id.* §§ 201–231.

<sup>41</sup> Pub. L. No. 104-104, § 706, 110 Stat. 56, 153–54 (1996) (codified at 47 U.S.C. § 1302).

<sup>42</sup> 47 U.S.C. § 153(24), (53).

<sup>43</sup> *Id.* § 153(53).

<sup>44</sup> *Id.* § 153(50).

<sup>45</sup> *Id.* § 153(24).

<sup>46</sup> *Id.*; *see also USTA*, 825 F.3d at 705 (“[T]he Communications Act’s telecommunications management exception. . . . excludes from the definition of an information service ‘any [service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service.’”) (quoting 47 U.S.C. § 153(123)).

<sup>47</sup> *Brand X*, 545 U.S. at 976 (“These two statutory classifications originated in the late 1970’s, as the Commission developed rules to regulate data-processing services offered over telephone wires. That regime, the Computer II rules,

processing services offered over telephone wires. The rules distinguished between “basic” service (i.e., telephone service) governed by Title II and “enhanced” service (i.e., computer processing service), which was not.<sup>48</sup> The Computer II rules also recognized a third category called “adjunct-to-basic,” which was a precursor to the telecommunications management exception.<sup>49</sup> The “adjunct-to-basic” category included telephone services such as speed dialing, call forwarding, and computer-provided directory assistance.<sup>50</sup> While such adjunct-to-basic services technically fell under the enhanced services definition, the Commission treated them as basic because of their role in facilitating basic telephone service.<sup>51</sup>

In keeping with Computer II’s dichotomy between enhanced and basic services, Title I specifies that entities providing telecommunications service—called telecommunications carriers—“shall be treated as common carriers” and are governed by Title II.<sup>52</sup> While the Act does not expressly state that “information service” providers shall not be treated as common carriers, the Supreme Court and the D.C. Circuit have described these two categories as mutually exclusive, and have stated that information-service providers are not subject to Title II.<sup>53</sup>

Along with these Title I definitions, Title III of the Communications Act defines two similar categories that are specific to mobile service: “commercial mobile service” and “private mobile service.”<sup>54</sup> Like telecommunications carriers, Title III says that a commercial mobile service provider “shall be treated as a common carrier” insofar as it is engaged in the provision of such service.<sup>55</sup> Title III defines commercial mobile service to include any mobile service that is

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distinguished between basic service (like telephone service) and enhanced service (computer-processing service offered over telephone lines.)” (internal citations and quotations omitted).

<sup>48</sup> See *id.*; see also *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417–35 (1980) (discussing the distinctions between basic and enhanced services) [hereinafter *Computer II Order*].

<sup>49</sup> See *In re Implementation of the Non-Accounting Safeguards*, 11 FCC Rcd. 21905, 21958 (1996) (“In [a previous] order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services. . . . Similarly, we conclude that ‘adjunct-to-basic’ services are also covered by the ‘telecommunications management exception’ to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act”).

<sup>50</sup> *Id.* at 21958, n.245 (“Adjunct-to-basic services include, inter alia, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller i.d., call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.”).

<sup>51</sup> *Computer II Order*, 77 F.C.C.2d at 421 (“We indicated [in a tentative decision] that computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc., may be used in conjunction with voice service. The intent was to recognize that while [telephone service] is a basic service, there are ancillary services directly related to its provision that do not raise questions about the fundamental communications or data processing nature of a given service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service.”) (internal citations and quotations omitted); see also *USTA*, 825 F.3d at 691 (“Although adjunct-to-basic services fell within the definition of enhanced services, the Commission nonetheless treated them as basic because of their role in facilitating basic services.”).

<sup>52</sup> 47 U.S.C. § 153(51).

<sup>53</sup> See *Brand X*, 545 U.S. at 975 (“The Act regulates telecommunications carriers, but not information-service providers, as common carriers.”); *USTA*, 825 F.3d at 691 (“The [Act] subjects a telecommunications service, the successor to basic service, to common carrier regulation under Title II. By contrast, an information service, the successor to an enhanced service, is not subject to Title II. . . . The appropriate regulatory treatment therefore turns on what services a provider offers to the public: if it offers telecommunications, that service is subject to Title II regulation.”) (internal citations and quotations omitted).

<sup>54</sup> 47 U.S.C. § 332(c).

<sup>55</sup> *Id.* § 332(c)(1)(A).



“provided for profit and makes interconnected service available to the public.”<sup>56</sup> It further defines “interconnected service” as “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission).”<sup>57</sup> Title III defines private mobile service in the negative, simply stating that it is any mobile service “that is not a commercial mobile service or the functional equivalent of a commercial mobile service.”<sup>58</sup>

## Title II

Title II sets out the requirements applicable to entities that are classified as common carriers per Titles I and III.<sup>59</sup> Many of these provisions are common-carrier requirements drawn from the now-repealed Interstate Commerce Act of 1887.<sup>60</sup> In particular, Sections 201 and 202 require carriers to (1) provide communication service upon “reasonable request”; (2) charge “just and reasonable rates”; and (3) engage in “no unjust or unreasonable discrimination.”<sup>61</sup> Title II also incorporates the Interstate Commerce Act’s tariffing provisions, requiring carriers to file their rates with the FCC and restricting the ability of carriers to depart from these filed rates.<sup>62</sup> It further requires carriers to obtain authorization from the Commission before taking certain actions, such as discontinuing or reducing service.<sup>63</sup>

Along with the original common-carrier requirements, later statutes, such as the Telecommunications Act, have amended Title II to impose a variety of other obligations on common carriers. For instance, carriers must comply with requirements ensuring service is available to those with a hearing or speech disability,<sup>64</sup> abide by privacy rules when handling customer information,<sup>65</sup> and, if they provide interstate service, must contribute to a fund used to support “universal service” in rural and high-cost areas (the “Universal Service Fund”).<sup>66</sup>

Although Title II regulation is extensive, the Telecommunications Act amended the Communications Act to give the FCC authority to refrain (or “forbear”) from applying particular

<sup>56</sup> *Id.* § 332(d)(1).

<sup>57</sup> *Id.* § 332(d)(2).

<sup>58</sup> *Id.* § 332(d)(3).

<sup>59</sup> *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003) (“A provider of CMRS (commercial mobile radio service) such as Verizon is ‘a common carrier’ subject to Title II of the Communications Act.”).

<sup>60</sup> *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007) (“In authorizing this traditional form of [common carrier] regulation, Congress copied into the 1934 Communications Act language from the earlier Interstate Commerce Act of 1887 . . .”) (internal citations omitted).

The Interstate Commerce Act was the first federal law to codify common-carrier requirements that had been developed by courts at common law. *See, e.g.*, *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087, 1091 (N. Cal. 2015) (“The Interstate Commerce Act was the first federal regulation to impose duties on common carriers and applied to ‘any common carrier or carriers’ engaged in the railroad transportation of people or property interstate.”) (internal citations and quotations omitted). The Act initially applied only to railroads but, with the Mann-Elkins Act of 1910, expanded to include interstate telegraph and telephone service. Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544–45 (1910).

<sup>61</sup> 47 U.S.C. §§ 201(a)–(b), 202(a).

<sup>62</sup> *See also MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000) (“The Act requires carriers to file their tariffs with the FCC, and they are prohibited from charging consumers except as provided in the tariffs.”) (internal citations omitted).

<sup>63</sup> 47 U.S.C. § 214; 47 C.F.R. part 63.

<sup>64</sup> 47 U.S.C. §§ 225, 255.

<sup>65</sup> *Id.* § 222. For an overview of Title II’s privacy requirements, see CRS Report R45631, *Data Protection Law: An Overview*, by Stephen P. Mulligan and Chris D. Linebaugh.

<sup>66</sup> 47 U.S.C. § 254.

legal requirements to telecommunications carriers.<sup>67</sup> Specifically, the FCC must forbear from applying any statutory or regulatory requirement under the Communications Act to telecommunications carriers if it determines that: (1) enforcement is unnecessary to ensure just, reasonable, and non-discriminatory rates or practices; (2) enforcement is unnecessary for the protection of consumers; and (3) forbearance is consistent with the public interest.<sup>68</sup> Similarly, Title III allows the Commission to “specify by regulation” any Title II requirements—other than the antidiscrimination and other core Title II requirements—that are inapplicable to commercial mobile services.<sup>69</sup> The FCC has used these authorities to, for example, eliminate tariffing for services offered by long-distance telephone carriers and by commercial mobile service providers.<sup>70</sup>

Should a common carrier violate Title II’s requirements, the Act provides a process by which any person can file a complaint with the Commission.<sup>71</sup> The Commission is obligated to resolve the complaint and, if it determines the complainant is entitled to damages, may order the carrier to pay damages to the complainant.<sup>72</sup> As an alternative to the complaint process, Title II also allows individuals injured by a carrier’s violation to sue the carrier in federal district court for damages and attorney’s fees.<sup>73</sup> The FCC also has civil enforcement authority and may impose a “forfeiture penalty” against carriers who willfully or repeatedly violate the statute or the FCC’s implementing regulations.<sup>74</sup>

## Section 706 of the Telecommunications Act

Section 706 of the Telecommunications Act is the final key statutory provision underlying the FCC’s net neutrality actions. Section 706 directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>75</sup> It defines advanced telecommunications capability as “high-speed, switched, broadband telecommunications capability” that enables users to “originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>76</sup> It specifies that, in doing so, the Commission shall, in a manner consistent with the public interest, use “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure.”<sup>77</sup> It further requires that the FCC conduct regular studies on the availability of advanced telecommunications capability.<sup>78</sup> When the Commission finds that advanced telecommunications

<sup>67</sup> *Id.* § 160.

<sup>68</sup> *Id.* § 160(a).

<sup>69</sup> *Id.* § 332(c)(1)(A).

<sup>70</sup> *See, e.g., Orloff*, 352 F.3d at 418–19 (“Congress gave the Commission authority to render [the tariff provisions] inapplicable to CMRS and, in 1994, the Commission exercised that authority.”); *MCI WorldCom*, 209 F.3d 762–66 (upholding the FCC’s use of its forbearance authority to require mandatory de-tariffing of long-distance carriers).

<sup>71</sup> 47 U.S.C. § 208.

<sup>72</sup> *Id.* §§ 208–09.

<sup>73</sup> *Id.* §§ 206–07.

<sup>74</sup> *Id.* § 503(b)(1). For telecommunications carriers, forfeiture penalties may be up to \$207,314 for each violation or each day of a continuing violation. 47 C.F.R. § 1.80(b)(2). The total amount assessed for any continuing violation may not exceed \$2,073,133 for any “single act or failure to act.” *Id.*

<sup>75</sup> (a).

<sup>76</sup> *Id.* § 1302(d)(1).

<sup>77</sup> *Id.* § 1302(a).

<sup>78</sup> *Id.* § 1302(b).

capability is not being deployed to all Americans in a “reasonable and timely fashion,” it must take “immediate action” to accelerate deployment by “removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>79</sup>

As discussed further below, a key question is whether Section 706 is an affirmative grant of regulatory authority, or whether it is merely exhorting the FCC to use its existing authority under the Communications Act to encourage broadband deployment. The FCC has alternated views on this issue, most recently taking the position that it is not an affirmative grant of regulatory authority. The D.C. Circuit has upheld both the FCC’s disclaimer and its exercise of regulatory authority under Section 706.<sup>80</sup>

## FCC Actions and Court Decisions

The FCC has relied on the foregoing statutory provisions to create a regulatory framework for BIAS and net neutrality. The Commission’s approach, however, has not always been consistent, and the FCC has had mixed success defending its actions before courts. This section describes the FCC’s various attempts to articulate a regulatory policy towards BIAS and net neutrality. It starts by reviewing the Commission’s early efforts to determine the appropriate classification of BIAS under the Communications Act and the Supreme Court’s decision in *Brand X*, which confirmed the FCC’s authority to make such a determination. The section then discusses the FCC’s various net neutrality actions and the court decisions resolving challenges to those actions.

### Early Classification of BIAS and the *Brand X* Decision

In the early years of broadband, the Commission grappled with the question of whether to treat BIAS as an information service or a telecommunications service. The Commission’s first broadband classification decision dealt with Digital Subscriber Line (DSL) service.<sup>81</sup> DSL service uses packet-switching technology to deliver high-speed internet over telephone lines.<sup>82</sup> In a 1998 order (1998 Order), the FCC concluded that DSL has both telecommunications service and information service components.<sup>83</sup> The aspect of DSL service that uses phone lines to transmit the data is a telecommunications service, the FCC explained, because it involves the pure transmission of information “without change in the form or content of the information as sent and received.”<sup>84</sup> On the other hand, the FCC recognized a separate information service component of DSL service, in which DSL providers perform additional functions that enable the users to access the internet.<sup>85</sup> While the 1998 Order did not describe precisely what this separate information service component entails, the FCC would later explain that it includes things like Domain Name System (DNS) capability, which matches the user’s selected website address with the IP address of the website’s host server.<sup>86</sup> In the 1998 Order, the FCC concluded that telephone carriers

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<sup>79</sup> *Id.*

<sup>80</sup> See *Verizon*, 740 F.3d at 641 (upholding the FCC’s interpretation of Section 706 to grant regulatory authority to promulgate non-common-carrier regulations over BIAS providers); *Mozilla Corp. v. FCC*, 940 F.3d 1, 46 (D.C. Cir. 2019) (upholding the FCC’s interpretation of Section 706 as hortatory).

<sup>81</sup> DSL Order, 13 FCC Rcd. 24012.

<sup>82</sup> *Id.* at 24027.

<sup>83</sup> *Id.* at 24030–31.

<sup>84</sup> *Id.* at 24030.

<sup>85</sup> *Id.*

<sup>86</sup> DSL Reclassification Order, 20 FCC Rcd. at 14863.

providing DSL services would be regulated as Title II telecommunications carriers, unless they created a separate affiliate to provide only the internet access service component of DSL.<sup>87</sup>

In a 2002 order (2002 Order), the Commission took a different approach to BIAS provided by cable television operators.<sup>88</sup> By the time of the 2002 Order, cable broadband had become the most widely used form of broadband service, and phone companies had pared back their DSL deployment plans.<sup>89</sup> Up to that point, the FCC had not clarified cable broadband's regulatory treatment.<sup>90</sup> The FCC explained that, in addressing this question, it was guided by policy goals of encouraging the widespread availability of broadband and maintaining the "vibrant and competitive free market" for internet services by avoiding unnecessary regulatory costs.<sup>91</sup> Rather than treating the transmission and internet access components as separate stand-alone offerings, the Commission concluded that they formed a "single, integrated information service."<sup>92</sup>

The FCC explained that the classification of a service depends on the nature of what it offers the end user.<sup>93</sup> Cable broadband providers, the FCC concluded, were offering not only the ability to transmit and receive data over the internet, but also information service functions offered by the internet service providers.<sup>94</sup> For instance, the FCC observed, providers typically gave users the ability to set up their own email address or web page and participate in newsgroups.<sup>95</sup> Cable broadband providers also facilitated users' ability to communicate with the rest of the internet by providing things like DNS, IP address number assignment, network security, and "caching" (which allows users to access a website more quickly by storing the website's data on a local server).<sup>96</sup> The FCC concluded that these features were not separable from the pure transmission component, and comprised a single, integrated offering that is properly classified as an information service rather than a Title II telecommunications service.<sup>97</sup>

The Supreme Court subsequently upheld this classification of cable broadband in *Brand X*, applying the framework set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,<sup>98</sup> under which courts generally defer to an agency's reasonable interpretation of an ambiguous statutory provision.<sup>99</sup> In the course of its analysis, the Court concluded that the term "offering" in the telecommunications service definition is ambiguous and that it is reasonable for the FCC to interpret it as only referring to the finished product offered by a provider, rather than the discrete parts of that product.<sup>100</sup> The relevant question then, the Court explained, was whether the transmission components and the information service components were "sufficiently

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<sup>87</sup> *Id.* at 24030, 24052.

<sup>88</sup> Cable Broadband Order, 17 FCC Rcd. 4798.

<sup>89</sup> *Id.* at 4804.

<sup>90</sup> *Id.* at 4801.

<sup>91</sup> *Id.* at 4802.

<sup>92</sup> *Id.* at 4823.

<sup>93</sup> *Id.* at 4822 ("[W]e conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered.").

<sup>94</sup> *Id.* at 4822.

<sup>95</sup> *Id.* at 4821–22.

<sup>96</sup> *Id.* at 4811, n.76.

<sup>97</sup> *Id.* at 4823–32.

<sup>98</sup> 467 U.S. 837 (1984).

<sup>99</sup> *Brand X*, 545 U.S. at 980. For a more detailed overview of the *Chevron* deference framework, see CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

<sup>100</sup> *Id.* at 989–99.

integrated” such that it is “reasonable to describe the two as a single, integrated offering.”<sup>101</sup> The Court held that the Commission had reasonably answered this question in the affirmative.<sup>102</sup> The Court explained that BIAS providers’ use of DNS services and caching supported the FCC’s classification,<sup>103</sup> even though users could access third-party websites rather than a provider’s own web page or email service.<sup>104</sup> The Court also rejected the petitioner’s contention that the Commission acted “arbitrar[ily] and capricious[ly],” in violation of the Administrative Procedure Act (APA), by treating cable broadband differently from DSL.<sup>105</sup> Under the arbitrary and capricious standard, agencies must demonstrate that they engaged in reasoned decisionmaking in reaching their determinations.<sup>106</sup> The Court explained that the FCC is free to change its position, within the limits of a reasonable statutory interpretation, as long as it “adequately justifies the change.”<sup>107</sup> The Court held that the Commission had given an adequate justification, given the FCC’s explanation of changed market conditions.<sup>108</sup>

## Internet Policy Statement and the *Comcast* Decision

In the wake of *Brand X*, the Commission unified its treatment of all forms of BIAS by similarly classifying DSL and mobile broadband internet service as integrated offerings of information services.<sup>109</sup> Even though BIAS providers were not subject to the anti-discrimination and other provisions applicable to common carriers under Title II, the Commission still sought to further the principles of internet openness. In 2005, the FCC adopted a policy statement (Internet Policy Statement) in which it declared, among other things, that consumers are entitled to access the lawful Internet content of their choice and to run applications and use the services of their choice.<sup>110</sup> The FCC stated that these principles would ensure that broadband networks are widely deployed and accessible to all consumers and that it would incorporate them into its ongoing policymaking activities.<sup>111</sup> The Internet Policy Statement also asserted that, even without Title II, the FCC had jurisdiction to impose regulatory obligations on BIAS providers under “its Title I ancillary jurisdiction,” which allows the agency to regulate any interstate communication by wire or radio if the regulation is in furtherance of its statutory responsibilities.<sup>112</sup>

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<sup>101</sup> *Id.* at 990.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 990–91.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 706–10.

<sup>106</sup> See *Motor Vehicle Mfg. Ass’n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 52 (1983) (“In this case, the agency’s explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking.”) (emphasis in original). For further background on the arbitrary and capricious standard, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

<sup>107</sup> 545 U.S. at 1001.

<sup>108</sup> *Id.*

<sup>109</sup> DSL Reclassification Order, 20 FCC Rcd. at 14,863–64; In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd. 5901, 5901–02 (2007).

<sup>110</sup> Internet Policy Statement, 20 FCC Rcd. at 14,988.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 14,987–88. For a further discussion of the FCC’s ancillary jurisdiction, see CRS Report R46736, *Stepping In: The FCC’s Authority to Preempt State Laws Under the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

Five years later, in the 2010 case *Comcast v. FCC*, the D.C. Circuit struck down the FCC’s attempt to enforce the principles in its Internet Policy Statement.<sup>113</sup> In *Comcast*, non-profit advocacy organizations filed a complaint with the FCC alleging that the BIAS provider Comcast violated the Internet Policy Statement by interfering with subscribers’ use of peer-to-peer programs that allowed them to share large files directly with each other.<sup>114</sup> The FCC resolved the complaint through an adjudication, issuing an order requiring Comcast to implement a plan to ensure that it would no longer engage in “unreasonable management practices.”<sup>115</sup> Similar to its position in the Internet Policy Statement, the FCC maintained that it had authority to regulate Comcast’s network management practices in this way under its ancillary jurisdiction.<sup>116</sup> The D.C. Circuit, however, invalidated the FCC’s order.<sup>117</sup> The court said that the FCC failed to show that its regulation of Comcast’s network management practices furthered the effective performance of its “statutorily mandated responsibilities.”<sup>118</sup> The court reasoned that the FCC primarily relied on congressional statements of policy, which by themselves do not create statutorily mandated responsibilities.<sup>119</sup> The court acknowledged that Section 706 of the Telecommunications Act, which is one of the provisions the FCC relied upon, could be read as giving the FCC affirmative regulatory authority over broadband.<sup>120</sup> However, in a prior order the FCC had disclaimed regulatory authority under Section 706, and the Commission was bound by this prior interpretation since it had never rescinded it.<sup>121</sup>

## 2010 Order and the *Verizon* Decision

The FCC responded to the *Comcast* decision by issuing a new order (2010 Order).<sup>122</sup> In the 2010 Order, the FCC repudiated its prior reading of Section 706 and reinterpreted it as vesting the Commission with affirmative regulatory authority.<sup>123</sup> The 2010 Order also set forth binding net neutrality requirements applicable to BIAS providers. Specifically, BIAS providers had to comply with: (1) a transparency rule requiring them to disclose their network management practices, performance, and commercial terms; (2) an anti-blocking rule prohibiting them from blocking lawful content, applications, services, or non-harmful devices; and (3) an anti-discrimination rule prohibiting them from unreasonably discriminating in transmitting lawful network traffic.<sup>124</sup> While the first two rules applied to both “fixed” (e.g., residential) and mobile BIAS providers, the FCC applied the anti-discrimination requirement only to fixed BIAS, citing greater competition and higher operational constraints in the mobile market.<sup>125</sup>

<sup>113</sup> 600 F.3d 642 (D.C. Cir. 2010).

<sup>114</sup> *Id.* at 644.

<sup>115</sup> In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C. Rcd. 13028, 13028, 13060 (2008).

<sup>116</sup> *Id.* at 13034–44.

<sup>117</sup> *Comcast*, 600 F.3d at 644.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 644, 651–661.

<sup>120</sup> *Id.* at 658.

<sup>121</sup> *Id.* at 659.

<sup>122</sup> 2010 Order, 25 FCC Rcd. at 17906.

<sup>123</sup> *Id.* at 17968–72.

<sup>124</sup> *Id.* at 17906.

<sup>125</sup> *Id.* at 17956–62.

In its 2014 decision in *Verizon v. FCC*, the D.C. Circuit again overturned the FCC’s attempt at enforcing net neutrality rules.<sup>126</sup> The court vacated the 2010 Order’s anti-blocking and anti-discrimination rules, leaving only the transparency rule intact.<sup>127</sup> The court deferred to the FCC’s interpretation of Section 706 as an independent grant of authority sufficient to support the rules established by the 2010 Order.<sup>128</sup> The court concluded, however, that the anti-blocking and anti-discrimination rules amounted to *per se* common carrier regulation because they required BIAS providers to offer service indiscriminately,<sup>129</sup> which is the fundamental characteristic distinguishing common carriers from private carriers.<sup>130</sup> Because the FCC had classified BIAS providers as information service providers instead of telecommunications service providers, this *per se* common carrier treatment was unlawful. The court explained that the FCC was prohibited by Title I’s statement that “[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services.”<sup>131</sup>

## 2015 Open Internet Order and the *USTA* decision

After *Verizon*, the FCC changed its approach. In a 2015 order titled “In the Matter of Protecting and Promoting the Open Internet” (2015 Open Internet Order), the Commission reclassified BIAS as a telecommunications service subject to Title II.<sup>132</sup> This reclassification allowed the FCC to impose net neutrality rules on BIAS providers, like those struck down in *Verizon*, without running afoul of the Communications Act.<sup>133</sup> As a policy rationale for its action, the FCC maintained that net neutrality rules are essential to preserving a “virtuous cycle” of broadband growth.<sup>134</sup> This virtuous cycle occurs when innovation by edge providers (i.e., companies who provide content and services to internet users) enhances consumer demand for broadband services, which leads to expanded investment in broadband infrastructure by broadband providers, which in turns leads to more innovation by edge providers.<sup>135</sup> The Commission explained that the “key insight” of the virtuous cycle is that BIAS providers have the “incentive and ability to act as gatekeepers” between content providers and consumers, for instance by blocking or exacting unfair tolls on edge providers who compete with the BIAS providers’ own services.<sup>136</sup> Consequently, the Commission concluded, net neutrality rules are necessary to prevent this harmful gatekeeping behavior.<sup>137</sup>

From a legal perspective, the agency reasoned that BIAS fit the telecommunications service definition due to changes in the broadband market.<sup>138</sup> According to the Commission, consumers primarily use BIAS as a “conduit” to reach content and services provided by third parties.<sup>139</sup> Any

<sup>126</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>127</sup> *Id.* at 628.

<sup>128</sup> *Id.* at 636–49.

<sup>129</sup> *Id.* at 655–56.

<sup>130</sup> *Id.* at 651–52.

<sup>131</sup> *Id.* at 650 (citing 47 U.S.C. § 153(51)).

<sup>132</sup> 2015 Open Internet Order, 30 FCC Rcd. 5601.

<sup>133</sup> *Id.* at 5733–34.

<sup>134</sup> *Id.* at 5604.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 5608.

<sup>137</sup> *Id.* at 5625.

<sup>138</sup> *Id.* at 5752–57.

<sup>139</sup> *Id.* at 5615, 5752–57.

information services, such as BIAS-provided email, are perceived by consumers as distinct offerings.<sup>140</sup> The FCC said that BIAS providers' use of DNS and caching did not prevent this classification because these services fell under the telecommunications management exception and thus were not information services.<sup>141</sup>

Along with reclassifying BIAS as a telecommunications service, the FCC reclassified mobile BIAS as a commercial mobile service instead of a private mobile service.<sup>142</sup> This reclassification, the Commission explained, ensured equivalent treatment between mobile and fixed BIAS, since private mobile service providers may not be treated as common carriers subject to Title II.<sup>143</sup> The FCC accomplished this reclassification by exercising its express statutory authority to define “public switched network”—a term integral to the commercial mobile service definition.<sup>144</sup> While the FCC previously defined public switched network to cover networks using the North American Numbering Plan, it broadened this definition to include networks using public IP addresses.<sup>145</sup>

With these new classifications, the 2015 Open Internet Order proceeded to impose three “bright-line” rules<sup>146</sup> that banned BIAS providers from: (1) “blocking” lawful content, applications, services, or non-harmful devices; (2) “throttling” (i.e., impairing or degrading) lawful internet traffic on the basis of content, applications, service, or non-harmful devices; and (3) engaging in “paid prioritization”—defined as favoring some internet traffic over others—in exchange for consideration.<sup>147</sup> The 2015 Open Internet Order also imposed a more flexible standard referred to as the “General Conduct Rule,”<sup>148</sup> which prohibited BIAS providers from “unreasonably interfer[ing] with or unreasonably disadvantage[ing]” both end users’ ability to access or select and content providers’ ability to provide lawful content, applications, services, or devices.<sup>149</sup> The 2015 Open Internet Order likewise built on the transparency rule of the 2010 Order upheld in *Verizon*.<sup>150</sup> The new transparency rule retained the three basic disclosure categories established in the 2010 Order—network management practices, performance, and commercial terms<sup>151</sup>—and specified additional information that BIAS providers must disclose regarding these categories, including pricing details, fees, data caps, packet loss, and network practices applied to traffic associated with a particular user or user group.<sup>152</sup>

To ensure a “light touch” regulatory regime facilitating investment and innovation, the Commission used its authority under Section 10 of the Communications Act to forbear from applying the “vast majority” of Title II provisions to BIAS providers.<sup>153</sup> It did not, however, forbear from applying Title II’s prohibition of unjust and unreasonable rates and its complaint and

<sup>140</sup> *Id.* at 5773.

<sup>141</sup> *Id.* at 5766–71.

<sup>142</sup> *Id.* at 5778–90.

<sup>143</sup> *Id.* at 5788.

<sup>144</sup> *Id.* at 5783–88; *see also* 47 U.S.C. § 332(d)(2) (stating that “interconnected service” means “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission . . . .)”).

<sup>145</sup> 2015 Open Internet Order, 30 FCC Rcd. at 5779–80.

<sup>146</sup> *Id.* at 5646–47.

<sup>147</sup> *Id.* at 5647–58.

<sup>148</sup> *Id.* at 5659–64.

<sup>149</sup> 2015 Open Internet Order, 30 FCC Rcd. at 5660.

<sup>150</sup> *Id.* at 5672.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 5672–77.

<sup>153</sup> *Id.* at 5616–17, 5805–68.



enforcement procedures.<sup>154</sup> The 2015 Open Internet Order also applied a handful of other Title II provisions to BIAS providers, such as certain requirements relating to privacy, disability access, and universal service.<sup>155</sup> To preserve this “carefully tailored regulatory scheme,” the FCC “announced [its] firm intention” to preempt any state regulations that conflicted with the order.<sup>156</sup> It noted, however, that it would proceed on a “case-by-case basis in light of the fact specific nature of particular preemption inquiries.”<sup>157</sup>

The 2015 Open Internet Order was not unanimous, with commissioners Ajit Pai and Michael O’Rielly dissenting.<sup>158</sup> These commissioners viewed the order’s neutrality rules as unnecessary because, in their view, there was little evidence of BIAS providers disfavoring lawful internet traffic.<sup>159</sup> They also contended that reclassifying BIAS as a Title II telecommunications service would create significant regulatory costs and would slow broadband investment and innovation.<sup>160</sup>

The following year, in *USTA v. FCC*, the D.C. Circuit upheld the FCC’s 2015 Open Internet Order in its entirety.<sup>161</sup> The court applied the *Chevron* framework to uphold the Commission’s reclassification of BIAS as a telecommunications service.<sup>162</sup> Following *Brand X*, it concluded that “offering” was ambiguous and that the relevant question was the extent to which information and transmission services were integrated.<sup>163</sup> On this issue, the court held that the Commission reasonably concluded that BIAS providers were “offering” a standalone transmission service.<sup>164</sup> The court credited extensive evidence in the record that consumers perceived the transmission service as separate from any information services like email and cloud storage.<sup>165</sup> The court further upheld the FCC’s conclusion that DNS and caching fell under the telecommunications management exception.<sup>166</sup> The Commission had relied for that conclusion on the test for the adjunct-to-basic standard under the *Computer II* regime.<sup>167</sup> Under this test, a service would be deemed adjunct-to-basic if it facilitated the use of the network and did not alter the “fundamental

<sup>154</sup> *Id.* at 5809–16. While the Commission did not forbear from applying Sections 201 and 202 to BIAS providers, it also stated that it could not envision using Sections 201 and 202 to adopt “new ex ante rate regulation of broadband internet access in the future,” and consequently forbore from applying those provisions “to that extent.” *Id.* at 5814.

<sup>155</sup> *Id.* at 5820–38.

<sup>156</sup> *Id.* at 5804.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 5921, 5985 (statements of commissioners Ajit Pai and Michael O’Rielly, dissenting).

<sup>159</sup> *Id.* at 5933 (“The Internet is not broken. There is no problem for the government to solve. . . . The evidence of these continuing threats [to internet openness]? There is none; it’s all anecdote, hypothesis, and hysteria.”); *id.* at 5987 (“Even after enduring three weeks of spin, it is hard for me to believe that the Commission is establishing an entire Title II/net neutrality regime to protect against hypothetical harms. There is not a shred of evidence that any aspect of this structure is necessary.”).

<sup>160</sup> *Id.* at 5927–28 (“The record is replete with evidence that Title II regulations will slow investment and innovation in broadband networks. . . . “[The Order] goes even further and injects tremendous uncertainty into the market. . . . [A] thick regulatory haze—rules that are unclear with the overhang of more rules to come—should make any rational business hold back on investment and start returning any free cash back to their shareholders.”).

<sup>161</sup> 825 F.3d 674 (2016).

<sup>162</sup> *Id.* at 701–06.

<sup>163</sup> *Id.* at 701–02.

<sup>164</sup> *Id.* at 704–05.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 705–06.

<sup>167</sup> *Id.* at 705.

character” of the service.<sup>168</sup> According to the court, the Commission reasonably concluded that DNS and caching satisfied this test, as the petitioner challenging the 2015 Open Internet Order did not give any reason to believe otherwise.<sup>169</sup>

The court also rejected the petitioner’s contention that the Commission’s reclassification of BIAS as a telecommunications service was “arbitrary and capricious” in violation of the APA.<sup>170</sup> Under this standard, the court explained, agencies must provide reasoned explanations for their decisions, including good reasons for policy changes.<sup>171</sup> The court held that the agency met this standard, as it had explained that it could not legally establish the three bright-line rules (anti-blocking, anti-throttling, and anti-paid-prioritization rules) without the reclassification, given the *Verizon* decision.<sup>172</sup> The court also upheld the 2015 Order’s reclassification of mobile broadband as a commercial mobile service.<sup>173</sup> The court reasoned that the statute expressly gave the Commission authority to define the “key definition components” of the commercial and private mobile service categories.<sup>174</sup> It further concluded that the Commission’s reclassification was reasonable, since the record evidence demonstrated that mobile broadband use had grown rapidly and was nearly universal.<sup>175</sup>

## RIF Order

Although the *USTA* decision upheld the 2015 Open Internet Order, the FCC again changed course a few years later. Under new leadership, the Commission issued a declaratory ruling, report, and order titled “Restoring Internet Freedom” (RIF Order), which the Commission adopted in December of 2017 and released in January of 2018.<sup>176</sup> The RIF Order once more classified fixed BIAS as an information service and mobile BIAS as a private mobile service.<sup>177</sup> The Order also eliminated the 2015 Open Internet Order’s bright-line rules and General Conduct Rule.<sup>178</sup> While the RIF Order retained a transparency rule, it removed many of the 2015 Order’s additional disclosure obligations and reverted to a transparency rule similar to the one set forth in the 2010 Order.<sup>179</sup>

The Commission explained its change in position by characterizing the 2015 Open Internet Order as an “abrupt shift” to “heavy-handed utility-style regulation” of BIAS.<sup>180</sup> The FCC stated that the “balance of evidence in the record” indicated that the 2015 Open Internet Order’s Title II reclassification had reduced broadband providers’ investment in networks because of regulatory uncertainty.<sup>181</sup> The FCC further characterized the “utility-style regulation” of Title II classification

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 705–06.

<sup>170</sup> *Id.* at 706–10.

<sup>171</sup> *Id.* at 706–07.

<sup>172</sup> *Id.* at 707.

<sup>173</sup> *Id.* at 716–24.

<sup>174</sup> *Id.* at 717.

<sup>175</sup> *Id.* at 716, 723–24.

<sup>176</sup> RIF Order, 33 F.C.C. Rcd. 311.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 312–13, 450–69.

<sup>179</sup> *Id.* at 435–50.

<sup>180</sup> *Id.* at 312.

<sup>181</sup> *Id.* at 364

as a “solution in search of a problem”<sup>182</sup> and said that the benefits of Title II and the conduct rules were either small or “approximately zero.”<sup>183</sup> The Commission also pointed out that removal of the Title II classification would restore the Federal Trade Commission’s (FTC) ability to enforce consumer protection and antitrust laws against BIAS providers, since the FTC has no jurisdiction over common carriers.<sup>184</sup> The FCC maintained that this enforcement, in combination with the disclosures required under the transparency rule, would mitigate the harms the 2015 Open Internet Order intended to address.<sup>185</sup>

Beyond these policy reasons, the agency put forward a number of legal arguments supporting its reclassification of fixed and mobile BIAS. With respect to the information service classification, it maintained that fixed BIAS providers “offer” an information service because DNS and caching are functionally integrated with broadband service.<sup>186</sup> It relatedly concluded that DNS and caching are information services because, contrary to the 2015 Open Internet Order, they do not fall under the telecommunications system management exception.<sup>187</sup> To reach this conclusion, the FCC drew on the judicial precedent interpreting the Modification of Final Judgement (MFJ), a consent decree governing the breakup of the AT&T Monopoly.<sup>188</sup> The MFJ incorporated the telecommunications management exception that Congress later largely adopted in the 1996 Act. According to the Commission, the MFJ precedent construed this exception as directed only at “internal operations” rather than services for customers or end users.<sup>189</sup> The FCC maintained that DNS and caching did not meet this exception because they are not simply internal management functions but are useful to end users, allowing users to navigate the internet and quickly retrieve information.<sup>190</sup>

The Commission also reclassified mobile BIAS as a private mobile service by removing the reference to public IP addresses from the “public switched network” definition, which had been added by the 2015 Open Internet Order.<sup>191</sup> With this phrase removed, the Commission concluded that mobile BIAS did not meet the definition of a commercial mobile service because it is not interconnected with the public switched network.<sup>192</sup>

Finally, to ensure BIAS providers are governed by uniform regulations rather than a “patchwork” of state and local laws, the RIF Order preempted state and local requirements inconsistent with the RIF Order’s deregulatory approach.<sup>193</sup> Specifically, the Commission preempted any state or

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<sup>182</sup> *Id.* at 375.

<sup>183</sup> *Id.* at 493–95.

<sup>184</sup> *Id.*; *see also* 15 U.S.C. § 45(a) (removing common carriers from the FTC’s jurisdiction under the Federal Trade Commission Act).

<sup>185</sup> RIF Order, 33 FCC Rcd. at 493–95.

<sup>186</sup> *Id.* at 325.

<sup>187</sup> *Id.* at 326–28.

<sup>188</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (MFJ Initial Decision), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>189</sup> RIF Order, 33 FCC Rcd. at 328.

<sup>190</sup> *Id.* at 328–29, 332–33.

<sup>191</sup> *Id.* at 354–56. The 2018 Order also reverted back to the prior definition of “interconnected service” by reinserting the word “all”—defining it as a service “that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.” *Id.* at 56. The Commission explained that this change would reflect the Commission’s view that interconnected service “is one that enables communication between its users and all other users of the public switched network.” *Id.*

<sup>192</sup> *Id.* at 357–58.

<sup>193</sup> *Id.* at 426–27.

local laws “that would effectively impose rules or requirements that [it] repealed or decided to refrain from imposing” or that imposed “more stringent requirements for any aspect of broadband service” addressed by the RIF Order.<sup>194</sup>

Similar to the 2015 Open Internet Order, the Commission divided over the RIF Order, with commissioners Mignon Clyburn and Jessica Rosenworcel dissenting.<sup>195</sup> Among other things, the dissenting commissioners cited to the 2015 Open Internet Order’s broad popularity with consumers;<sup>196</sup> faulted the majority for abdicating regulatory oversight over BIAS providers;<sup>197</sup> and criticized the majority’s legal reasoning and empirical analysis, such as disputing the evidence that the 2015 Open Internet Order led to decreased investment by BIAS providers.<sup>198</sup>

### *Mozilla Corp. v. FCC*

Several internet companies, non-profits, and state and local governments petitioned the D.C. Circuit to review the RIF Order, arguing that it exceeded the FCC’s statutory authority and violated the APA’s arbitrary and capricious standard.<sup>199</sup> In *Mozilla Corp. v. FCC*, the D.C. Circuit rejected most of these arguments and upheld the bulk of the Order.<sup>200</sup> Applying the usual *Chevron* framework, the court held the Commission’s reclassification of fixed BIAS as an information service was reasonable in light of the FCC’s reliance on DNS and caching.<sup>201</sup> The D.C. Circuit reasoned that the Supreme Court’s decision in *Brand X* supported this approach because it had upheld the Commission’s information service classification in light of the integrated nature of these services.<sup>202</sup> The D.C. Circuit also upheld the Commission’s conclusion that DNS and caching fell outside the telecommunications system management exception.<sup>203</sup> The court acknowledged that this issue was not directly addressed in *Brand X*, and that, in *USTA*, the D.C. Circuit had upheld the Commission’s contrary interpretation.<sup>204</sup> The court explained, however, that the exception was “an ambiguous statutory phrase” and, under *Chevron*, it is the FCC’s prerogative to change its interpretation of the exception as long as its new construction is reasonable.<sup>205</sup> The court held that the FCC had met this reasonability requirement, given its reliance on MFJ precedent and its view that the alternative approach would allow the exception to

<sup>194</sup> *Id.* at 427.

<sup>195</sup> *Id.* at 533, 579 (statements of commissioners Mignon Clyburn and Jessica Rosenworcel, dissenting).

<sup>196</sup> *Id.* at 362, 364 (“We have heard story after story of what net neutrality means to consumers and small businesses from places as diverse as Los Angeles’ Skid Row and Marietta, Ohio . . . I have been asking myself repeatedly, why the majority is so singularly-focused on overturning these wildly-popular rules?”).

<sup>197</sup> *Id.* at 363 (“We will be in a world where regulatory substance fades to black, and all that is left is a broadband provider’s toothy grin and those oh so comforting words: we have every incentive to do the right thing. What they will soon have, is every incentive to do their own thing.”);

<sup>198</sup> *Id.* at 365–66 (“[T]he majority’s reliance on broadband providers[’] assertions of reductions in investment is highly-flawed. Nothing in this item convinces me that investment has dropped as a result of our net neutrality policies. . . . To suggest that net neutrality rules shifted billions of dollars in capital beggars the imagination, and the record offers no proof that investment trends match the regulatory landscape.”).

<sup>199</sup> *Mozilla*, 940 F.3d at 17.

<sup>200</sup> *Id.* at 18.

<sup>201</sup> *Id.* at 20.

<sup>202</sup> *Id.* at 20–22.

<sup>203</sup> *Id.* at 23–32.

<sup>204</sup> *Id.* at 23–24.

<sup>205</sup> *Id.*

“swallow” the information service category.<sup>206</sup> Along with the information service reclassification, the court upheld the RIF Order’s reclassification of mobile broadband as a private mobile service.<sup>207</sup> Echoing its reasoning in *USTA*, the D.C. Circuit stated that the Commission had explicit statutory authority to modify its definition of the integral phrase “public switched network.”<sup>208</sup> The court concluded that the FCC also had “compelling policy grounds” for this change because, given its new information service classification of BIAS, it would ensure consistent treatment of fixed and mobile BIAS.<sup>209</sup>

For the most part, the court also upheld the RIF Order against the petitioners’ claim that the Order violated the APA’s arbitrary and capricious standard.<sup>210</sup> Petitioners argued that the RIF Order was arbitrary and capricious because the Commission failed to adequately consider a number of issues, such as the Order’s impact on investment and innovation, and the reliance interests engendered by the 2015 Open Internet Order.<sup>211</sup> While the court rejected most of these arguments, it held the FCC had acted arbitrarily and capriciously with respect to three issues: public safety, utility pole attachments, and the Lifeline Program.<sup>212</sup> On public safety, the court concluded the FCC failed to address arguments that the RIF Order could imperil first responders’ ability to communicate with the public during a crisis. Specifically, the Commission failed to consider arguments that the RIF Order allowed BIAS providers to demand payment for top-rate speeds and prioritize internet traffic at their discretion, which could subject public safety communications to slower speeds.<sup>213</sup>

Regarding utility pole attachments, the court concluded the FCC did not adequately consider how the Order would impact the regulatory regime’s application to BIAS providers.<sup>214</sup> As the court explained, Section 224 of the Communications Act allows local governments to regulate the terms and conditions of utility pole attachments and requires utility companies to provide access to their poles on a nondiscriminatory basis.<sup>215</sup> This section, however, only expressly applies to cable television systems or telecommunications services—there is no reference to information services.<sup>216</sup> Despite Section 224’s seeming inapplicability to BIAS, as a newly reclassified information service, the court said the Commission “whistle[d] past the graveyard” and suggested without explanation that Section 224 would continue to apply.<sup>217</sup>

The court likewise held the Commission failed to adequately address how the RIF Order would impact the Lifeline Program, which subsidizes service to low-income customers.<sup>218</sup> The court explained, by way of background, that the Act requires entities receiving Lifeline funding to be eligible telecommunications carriers.<sup>219</sup> The Commission added broadband to the Lifeline

<sup>206</sup> *Id.* at 24–26.

<sup>207</sup> *Id.* at 35.

<sup>208</sup> *Id.* at 37–38.

<sup>209</sup> *Id.* at 39.

<sup>210</sup> *Id.* at 49–73.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 59, 65, 68.

<sup>213</sup> *Id.* at 59–62.

<sup>214</sup> *Id.* at 65–67.

<sup>215</sup> *Id.* at 65–66; 47 U.S.C. § 224(c), (f).

<sup>216</sup> *Mozilla*, 940 F.3d at 66; 47 U.S.C. § 224(a)(4), (f)(1).

<sup>217</sup> *Mozilla*, 940 F.3d at 66–67.

<sup>218</sup> *Id.* at 68–69.

<sup>219</sup> *Id.* at 68.

Program in 2016, which, the court said, “made sense” given BIAS’ designation as a telecommunications carrier.<sup>220</sup> The court held that the FCC failed, however, to consider in the RIF Order how its reclassification would impact broadband’s eligibility for the program.<sup>221</sup> The court remanded the case to the FCC for further consideration of all three of these issues.<sup>222</sup>

Finally, the court vacated the RIF Order’s “sweeping” preemption of any state or local requirements inconsistent with the Order’s deregulatory approach.<sup>223</sup> At bottom, the court faulted the Commission for failing to ground its preemption in any affirmative source of statutory authority. The court explained that the FCC no longer has affirmative regulatory authority over BIAS, now that it is classified as an information service, and the Commission could not preempt state law in an area over which it does not have regulatory authority, absent an express authorization from Congress.<sup>224</sup> For a detailed discussion of *Mozilla*’s preemption analysis, see CRS Report R46736, *Stepping In: The FCC’s Authority to Preempt State Laws Under the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

## 2020 Remand Order

As just discussed, although the court in *Mozilla* upheld the bulk of the RIF Order, it remanded three discrete issues for the FCC’s further consideration: the Order’s effect on public safety, pole attachments, and the Lifeline Program.<sup>225</sup> As a result, the FCC issued an order in 2020 (2020 Remand Order) with further analysis on these issues.<sup>226</sup> For each of the three matters, the 2020 Remand Order concluded that there was no basis to change the RIF Order’s conclusions.<sup>227</sup>

On public safety, the Commission concluded that the “light-touch” regulatory framework of the RIF Order would actually benefit public safety communications by incentivizing BIAS providers to invest in their networks, such as by upgrading their networks to 5G.<sup>228</sup> The Commission maintained that such upgrades would benefit public safety entities, as well as other users.<sup>229</sup> The agency further concluded that there is little evidence the RIF Order would cause harm to public safety communications. It pointed out, among other things, that all major BIAS providers have committed to maintaining internet openness and that there are strong business incentives for providers to ensure the integrity of public safety communications.<sup>230</sup> The Commission also discounted a handful of situations where commenters alleged that public safety communications were throttled, such as an incident in 2018 in which the Santa Clara fire department’s communications were allegedly throttled after the department exceeded its data cap.<sup>231</sup> The Commission reasoned that the facts in these situations “are heavily contested” and that, even if

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 69.

<sup>222</sup> *Id.* at 86.

<sup>223</sup> *Id.* at 74.

<sup>224</sup> *Id.* at 74–76.

<sup>225</sup> *Id.* at 86.

<sup>226</sup> *In the Matter of Restoring Internet Freedom*, 35 FCC Rcd. 12328 (2020).

<sup>227</sup> *Id.* at 12336.

<sup>228</sup> *Id.* at 12344–48.

<sup>229</sup> *Id.* at 12344.

<sup>230</sup> *Id.* at 12349–50.

<sup>231</sup> *Id.* 12353–55.

the allegations in the Santa Clara case were true, the conduct would have been permitted under the 2015 Open Internet Order, which did not prohibit data caps.<sup>232</sup>

Regarding pole attachments, the FCC concluded that the overall benefits of reclassifying BIAS as an information service outweigh any drawbacks of certain BIAS providers no longer being subject to Section 224's pole attachment provisions. The FCC reasoned that the "vast majority" of BIAS providers also offer cable services and would continue to be governed by Section 224.<sup>233</sup> While broadband-only providers would not benefit from Section 224's anti-discrimination protections, the Commission noted that these providers could still negotiate agreements with pole owners and that, since the RIF Order, there are only a small number of broadband-only providers who indicated they experienced increased costs related to pole attachments.<sup>234</sup> Consequently, the Commission concluded that there is "no question" the overall benefits of Title I reclassification outweighed any limited costs resulting from broadband-only providers losing their Section 224 pole-attachment protections.<sup>235</sup>

Finally, with respect to Lifeline, the FCC acknowledged that eligible recipients of Lifeline funding must be common carriers,<sup>236</sup> but it also pointed out that many BIAS providers offer voice telephony service and thus maintain common carrier status.<sup>237</sup> The Commission reasoned that Section 254 of the Communications Act gives it broad authority to designate the types of services or facilities supported through the Lifeline program,<sup>238</sup> citing as support a 2014 decision of the Tenth Circuit upholding an FCC order that required carriers to offer broadband capabilities in order to receive support under a separate Section 254 program.<sup>239</sup> The FCC thus concluded that, even under the RIF Order, it may continue to use Lifeline to support BIAS services provided by common carriers.<sup>240</sup>

## Next Steps

While the *Mozilla* decision left the RIF Order in place, it may not be the final chapter in federal net neutrality law. On July 9, 2021, President Biden issued an executive order urging the FCC to adopt net neutrality rules similar to those in the 2015 Open Internet Order.<sup>241</sup> FCC Chair Jessica Rosenworcel—whom the Senate confirmed on December 7, 2021, for another five-year term<sup>242</sup>—and Commissioner Geoffrey Starks may be open to this step, as they have both been critical of the RIF Order.<sup>243</sup> Gigi Sohn, whom President Biden has nominated to fill the existing vacancy on the

<sup>232</sup> *Id.* at 12354.

<sup>233</sup> *Id.* at 12371.

<sup>234</sup> *Id.* at 12373.

<sup>235</sup> *Id.* at 12376.

<sup>236</sup> *Id.* at 12382.

<sup>237</sup> *Id.* at 12381.

<sup>238</sup> *Id.* at 12380–81.

<sup>239</sup> *Id.* at 12381.

<sup>240</sup> *Id.* at 12380.

<sup>241</sup> Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (issued July 9, 2021).

<sup>242</sup> 167 Cong. Rec. S8,944 (daily ed. Dec. 7, 2021) (vote on Rosenworcel nomination).

<sup>243</sup> *See, e.g.*, 2018 Order, 33 FCC Rcd. at 846–48 (Statement of Jessica Rosenworcel, dissenting); Commissioner Starks Statement on the Passage of the Save the Internet Act, FCC.gov (April 10, 2019), <https://www.fcc.gov/document/commissioner-starks-passage-net-neutrality-legislation>.

Commission, has also been critical of the RIF Order.<sup>244</sup> The remaining two commissioners—Brendan Carr and Nathan Simington—may be less inclined to change the FCC’s current policy. Commissioner Carr voted for the RIF Order and Commissioner Simington has expressed reservations about Title II net neutrality regulations.<sup>245</sup> Consequently, until all five seats on the Commission are filled, the FCC may be deadlocked on the issue of net neutrality.

Congress could decide to take the decision out of the FCC’s hands entirely, however, by enacting a federal net neutrality statute. On July 28, 2022, some Members of Congress introduced the Net Neutrality and Broadband Justice Act of 2022 in both the House and the Senate.<sup>246</sup> These bills would revise the Communications Act’s “telecommunications service” definition to include BIAS.<sup>247</sup> This definitional change would designate BIAS providers as telecommunications carriers subject to Title II and remove the FCC’s discretion to change this classification. In the 116th Congress, a number of net neutrality bills were introduced.<sup>248</sup> In 2019, the House of Representatives passed the Save the Internet Act, which would have repealed the RIF Order and restored the 2015 Open Internet Order.<sup>249</sup> Other bills introduced in the 116th Congress, such as H.R. 1101, H.R. 1006, H.R. 2136, and H.R. 1096, would have amended Title I to include net neutrality requirements, such as prohibitions on blocking or throttling, and would have given the FCC limited regulatory and enforcement authority to implement the requirements.<sup>250</sup>

Absent federal net neutrality requirements, states may increasingly fill the regulatory space with their own net neutrality laws. Some states, such as California and Washington, have already enacted net neutrality laws with requirements similar to the 2015 Open Internet Order.<sup>251</sup> While BIAS providers challenged California’s net neutrality law in court, arguing that federal law preempts it, the Ninth Circuit rejected these preemption arguments in the case *ACA Connects v. Bonta*.<sup>252</sup> For further discussion of these laws and the legal challenges, see CRS Report R46736, *Stepping In: The FCC’s Authority to Preempt State Laws Under the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes and CRS Legal Sidebar LSB10693, *ACA Connects v. Bonta: Ninth Circuit Upholds California’s Net Neutrality Law in Preemption Challenge*, by Chris D. Linebaugh.

<sup>244</sup> See *President Biden Announces Key Nominations*, WHITEHOUSE.GOV (Oct. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/26/president-biden-announces-key-nominations-8/> (nominating Gigi Sohn for FCC Commissioner); Gigi Sohn, *Statement of Gigi Sohn on the FCC’s December 14 Vote to Abdicate its Responsibility to Protect Consumers and Competition and Repeal the 2015 Net Neutrality Rules*, GIGISOHN.COM (Dec. 12, 2017), <http://gigisohn.com/media/statement-gigi-sohn-fccs-december-14-vote-abdicate-responsibility-protect-consumers-competition-repeal-2015-net-neutrality-rules/> (criticizing the RIF as a “complete abdication of the FCC’s oversight over broadband Internet access [that] will leave every American Internet user out in the cold”).

<sup>245</sup> See 2018 Order, 33 FCC Rcd. at 843 (Statement of Brendan Carr); Commissioner Nathan Simington Comments on Competition Executive Order, FCC.GOV (July 9, 2021), <https://www.fcc.gov/document/commissioner-simington-comments-competition-executive-order>.

<sup>246</sup> S. 4676, 117th Cong. (2022); H.R. 8573, 117th Cong. (2022).

<sup>247</sup> *Id.*

<sup>248</sup> H.R. 1644, 116th Cong. (2019); H.R. 1101, 116th Cong. (2019); H.R. 1006, 116th Cong. (2019); H.R. 2136, 116th Cong. (2019); H.R. 1096, 116th Cong. (2019).

<sup>249</sup> H.R. 1644.

<sup>250</sup> H.R. 1101; H.R. 1006; H.R. 2136; H.R. 1096.

<sup>251</sup> California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code §§ 3100–3104 (2018); Wash. Rev. Code § 19.385.020 (2018). California’s law in fact goes beyond the 2015 Open Internet Order by prohibiting zero rating practices. Cal. Civ. Code § 3101.

<sup>252</sup> 24 F.4th 1233 (9th Cir. 2022).



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