

Legal Sidebar

Net Neutrality: Back to the Future (Part One)

05/30/2017

This Sidebar is the first in a series discussing the Federal Communication Commission's proposal to reclassify broadband Internet access services and modify or eliminate "net neutrality" regulations. The second Sidebar is available [here](#).

On May 18, 2017, the Federal Communications Commission (FCC) [voted](#) to seek comment on a Notice of Proposed Rulemaking ([NPRM](#)), captioned, "In the Matter of Restoring Internet Freedom." The NPRM proposes to [reverse](#) the FCC's decision in its 2015 [Open Internet Order](#) to reclassify broadband Internet access service (BIAS) from an [information service](#) to a [telecommunications service](#) under the Communications Act of 1934 (Communications Act). The NPRM, if adopted, would change the classification of these services for the second time in two years and would limit the extent of the FCC's authority to regulate BIAS providers. The [proceeding](#) also could alter or eliminate regulations concerning the management of BIAS (commonly referred to as "net neutrality" regulations).

Whether BIAS is classified as an information service or a telecommunications service is [important](#) because those two types of services are regulated quite differently by the Communications Act. Telecommunications service providers [must be](#) regulated as [common carriers](#) under Title II of the Act. In general, entities providing telecommunications services subject to Title II can be required to offer [nondiscriminatory access](#) to their services and may not employ [unjust or unreasonable practices](#) in the provision of those services. [Other](#) statutory obligations, including requirements for the protection of the [privacy](#) of customer data, exist as well. The FCC may [forbear](#) from applying some, but not all, Title II regulations if the FCC determines that such restraint is, among other things, in the public interest.

By contrast, providers of information services [cannot](#) be regulated as common carriers and are not specifically regulated by the Communications Act, generally [limiting](#) the FCC's authority to impose obligations on providers of those services. However, according to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), the FCC [can impose](#) some regulations on these services as long as it does so to further a specific grant of statutory authority in the Communications Act. For example, the D.C. Circuit [upheld](#) the FCC's authority to impose disclosure and transparency requirements related to the management of BIAS even when those services were classified as information services.

As will be discussed in more detail in a subsequent [Sidebar](#), BIAS was classified as an information service until 2015, when the FCC adopted the [Open Internet Order](#), which reclassified all BIAS as telecommunications services. Using its authority to regulate telecommunications services as common carriers, the Order also imposed bright-line net neutrality rules for BIAS. The rules prohibit the [blocking](#) of legal content, the [throttling](#) (i.e., the degradation or slowing down) of legal content, and [paid prioritization](#) (i.e., agreements to favor the delivery of content for a fee or to benefit an affiliated entity). The Order further amended existing [transparency](#) standards. Lastly, the Order created a [general conduct standard](#) intended to prohibit any future conduct that might cause the types of harm the Order intended to address.

The [2017 rulemaking proceeding](#) is in its nascent stages, but the FCC's Chairman has [indicated](#) that addressing net neutrality is one of his top priorities. The [NPRM](#) proposes to make significant changes to the regulation of BIAS. Most importantly, it would propose to [change](#) the classification of BIAS once again to an information service, and to make changes having a similar effect to the classification of [wireless](#) BIAS. The NRPM posits that such classifications are, among other things, a better reading of the statute and [argues](#) that, based on the Supreme Court's decision in [National](#)

[*Cable Telecommunications Association v. Brand X Internet Services \(Brand X\)*](#), which involved an earlier FCC determination as to how to classify certain categories of BIAS providers, the FCC could reasonably interpret BIAS to be properly classified as an information service. The FCC further argues that its 2015 decision to reclassify BIAS as telecommunications services has harmed investment and deployment of BIAS, and the agency has asked for comment on this perception. Lastly, the FCC [proposes](#) to allow the FTC to oversee the privacy practices of BIAS providers.

The [NRPM](#) also asks for comments on whether and how the net neutrality regulations should be changed assuming that BIAS is classified as an information service, over which the FCC has more limited regulatory authority. Specifically, the NPRM proposes to [eliminate](#) the general conduct rule, which had been adopted to prohibit practices not otherwise subject to the net neutrality rules that the FCC determined to have unreasonably interfered with or disadvantaged the ability of BIAS customers to reach the legal content or services of their choice. The NPRM further [asks](#) whether the other existing rules (e.g., those against [blocking](#), [throttling](#), and [paid prioritization](#)) are needed and if other statutory obligations, such as the antitrust laws, might alleviate some of the competitive concerns the rules sought to address. If the rules are needed, the [NRPM](#) inquires whether they should be modified to provide more flexible standards for compliance in light of the potentially more limited scope of the FCC's authority to regulate information services.

In sum, the NPRM indicates that the FCC is considering a substantial change in its policies toward the regulation of BIAS. If adopted, it could limit the FCC's authority to regulate BIAS. It could also significantly change the net neutrality rules. The rules could be eliminated or modified in light of the change in the FCC's authority over BIAS that the NPRM proposes. Congress also could weigh in on this debate by enacting legislation that would address the government's role in regulating BIAS management practices. The FCC's authority to make the NPRM's proposed changes and Congress's ability to provide clarity to that authority are discussed in more detail in this related [Sidebar](#).

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Legal Sidebar

Net Neutrality: Back to the Future (Part Two)

05/30/2017

This Sidebar is the second in a series discussing the Federal Communication Commission's proposal to reclassify broadband Internet access services (BIAS) and modify or eliminate "net neutrality" regulations. While the [first](#) Sidebar in this series discussed the substance of the FCC's proposal, this Sidebar provides context for the proposed reclassification by discussing the FCC's historical treatment of BIAS and accompanying court decisions upholding such treatment.

The Federal Communications Commission (FCC) has issued a Notice of Proposed Rulemaking ([NPRM](#)) that, if adopted, would change the classification of broadband Internet access service (BIAS) under the Communications Act of 1934 (Communications Act) from its current status as a [telecommunications service](#) to an [information service](#). As discussed in a previous [Sidebar](#), this proposed change and the FCC's related proposals to amend the rules that apply to the management of BIAS (also known as net neutrality rules) could have broad implications for the regulation of BIAS. To provide context for the current NPRM, and the FCC's authority to change the regulatory status of BIAS under the Communications Act, a brief review of the FCC's treatment and classification of BIAS and related court decisions upholding the FCC's actions is instructive.

The [Telecommunications Act of 1996](#) added the definitions of information service and telecommunications service to the Communications Act. The Communications Act applies to these services in different ways. Telecommunications service providers [must](#) be treated as common carriers under Title II of the Act, which [grants](#) the FCC broad regulatory powers. Information service providers may not be regulated as common carriers, and the FCC's authority over those services is more [circumscribed](#).

In the years following the passage of the Telecommunications Act, BIAS became more widely available, and the FCC began to examine how the Communications Act applied to BIAS. In 1998, the FCC first [decided](#) that digital subscriber line (DSL) BIAS providers were required to abide by some common carrier obligations under Title II. For example, DSL providers that owned infrastructure (e.g., telephone lines) were required to allow competing Internet service providers to access that infrastructure to provide DSL service. In 2002, the FCC appeared to make a different decision when it issued a [declaratory ruling](#) classifying BIAS delivered over cable systems. In that ruling, the FCC decided that cable BIAS was an information service, effectively limiting the FCC's authority to regulate providers of cable BIAS and treating providers of cable BIAS differently from DSL BIAS providers. The decision to classify cable BIAS in this manner was ultimately reviewed by the Supreme Court in [National Cable Telecommunications Association v. Brand X Internet Services \(Brand X\)](#).

The central question before the Court in [Brand X](#) was whether the FCC's interpretation of "telecommunications service" under the Act was permissible. The Court [found](#) that the statutory definition of telecommunications service was ambiguous and deferred to the agency's construction of the statute as reasonable under the standard announced in [Chevron U.S.A., Inc. v. Natural Resources Defense Council](#). According to *Chevron*, where a statute's meaning is clear, the language of the statute controls, but where the statutory language is ambiguous and an agency's interpretation of that ambiguous language is reasonable, courts defer to the interpretation of the agency. In *Brand X*, the Court held that the FCC's interpretation was reasonable and deferred to its classification of cable BIAS as information services. The Court also [rejected](#) arguments related to the FCC's inconsistent treatment of DSL and cable broadband and made clear that the same level of deference is owed to changed agency policies, as long as a reasoned explanation for the change is

provided. The Court found that the FCC had adequately explained its decision to treat cable BIAS differently from DSL BIAS.

Almost immediately after *Brand X* was decided in 2005, the FCC went on to classify [DSL BIAS](#) as an information service. The FCC further classified [all other](#) types of BIAS delivery methods (e.g., broadband over power lines, and wireless broadband) as information services thereafter.

BIAS was classified as an information service until 2015, when the FCC adopted the [Open Internet Order](#). The 2015 Order reclassified all BIAS as telecommunications services, effectively changing their classification from information services, and made changes to the classification of wireless BIAS to similarly change their regulatory regime. The decision brought these services under the ambit of Title II, though, in the Order, the FCC also forbore from applying many aspects of Title II to BIAS. The Order also imposed bright-line net neutrality rules for BIAS, discussed in more detail in this [CRS Report](#).

Some opponents of the 2015 Order brought a legal challenge claiming that FCC did not have the statutory authority to reclassify BIAS, and, even if it did, the FCC had not properly justified its decision to reclassify those services. However, this challenge was rejected and the Order was [upheld](#) by the U.S. Court of Appeals for the D.C. Circuit. The court [applied *Brand X*](#) and found that the FCC had reasonably interpreted ambiguous statutory language in its decision to reclassify BIAS and had adequately explained its reasons for making the change, leading the court to defer to the FCC's interpretation. The court further [upheld](#) the FCC rules to implement the 2015 Order and [rejected](#) challenges to the FCC's use of its forbearance authority in deciding not to apply certain aspects of Title II to BIAS. On May 1, 2017, the D.C. Circuit [denied](#) petitions for a rehearing en banc, in part because the FCC is set to reconsider some of the decisions made in the 2015 Order.

The FCC's [2017 NPRM](#) proposes to classify BIAS as an information service rather than a telecommunications service again and argues that, under *Brand X*, it has the authority to do so. The fact that the FCC may have the ability to change the regulatory status of BIAS, so recently after the 2015 Order, is due to the ambiguity in the existing statute (i.e., the lack of clarity surrounding whether BIAS should be defined as a telecommunications service or an information service). This ambiguity arguably permits the agency to change the classification of BIAS from telecommunications services to information services as long as the agency's interpretation is reasonable and adequately explained. Congress could remove this ambiguity through legislation. Congress also may provide clarity to the regulatory status of BIAS by enacting legislation to define the scope of the FCC's authority in this space, as well as the degree to which the agency may regulate the network management practices of BIAS providers.

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