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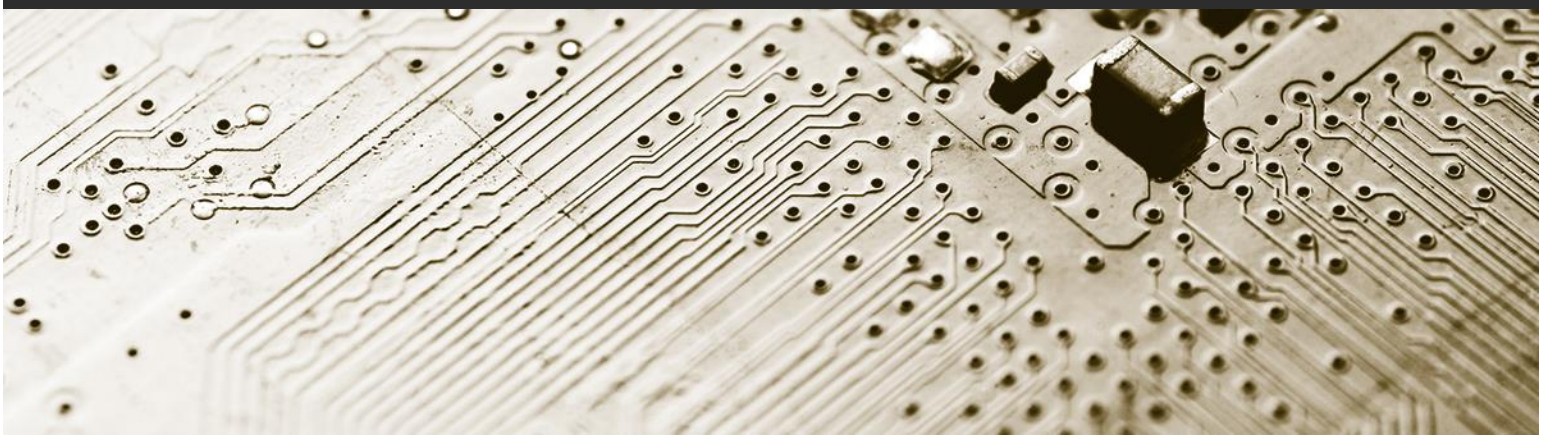

November 2017

FCC Announces Plans to Repeal Open Internet (Net Neutrality) Rules

On Nov. 20, Federal Communications Commission (FCC) Chairman, Ajit Pai, announced that on Dec. 14 his agency will vote on a plan to eliminate the FCC's 2015 rules regulating internet access. (See GT Alert – "FCC to Revisit Whether and How to Regulate Internet Access," May 2017). On the day that Chairman Pai announced his plan, his two Republican colleagues issued statements in support and the two Democratic FCC commissioners announced their opposition to the plan. Thus, it seems virtually certain that the FCC will approve the rollback of the 2015 "Open Internet" rules by a 3-2 vote.

The FCC Chairman's plan would repeal the rules established by the FCC in 2015 during the Obama Administration and would reclassify Broadband Internet Access Service (BIAS) as an "information service." The FCC's 2015 Open Internet rules and reclassification of BIAS as a telecommunications service were vigorously defended by the FCC, and were affirmed by the United States Court of Appeals for the District of Columbia Circuit in June 2016. BIAS refers to services which enable consumers to access the internet at high (broadband) speeds. BIAS providers include wireline telephone companies, wireless carriers, and cable television service providers.

In 2015, the then-Democrat-controlled FCC voted (also by a 3-2 vote along party lines) to declare BIAS as a telecommunications service subject to Title II of the Communications Act (the portion of that act authorizing the FCC to regulate the rates and practices of telecommunications common carriers). It also established rules which prohibit internet access providers from: 1) blocking access to internet content and applications; 2) throttling the speeds of accessing internet content; and 3) engaging in what the FCC calls

paid prioritization (charging providers of internet content money for having their content delivered to consumers at higher speeds).

Under the proposed plan, the blocking, throttling, and paid prioritization rules would be eliminated. A modified version of a "transparency" rule established in 2010 would be retained. That rule would allow BIAS providers to engage in blocking, throttling, and paid prioritization, provided that they disclose those practices to their customers, to so-called "edge" providers (that is, providers of internet content and applications) and to the FCC. Perhaps more important than the rule repeals, BIAS will no longer be considered to be a telecommunications service subject to the public utility style legal requirements applicable to common carriers. In addition, the FCC plan would preempt states from regulating BIAS.

In abandoning its regulation of BIAS services, the FCC is leaving to the Federal Trade Commission (FTC) the responsibility to protect consumers from unfair, deceptive, and anticompetitive practices in connection with internet service. It will also be the FTC's responsibility to protect consumer privacy. This transfer of responsibility to the FTC could be problematic as it is uncertain whether the FTC has jurisdiction to enforce consumer protection and privacy requirements against BIAS providers. The Federal Trade Commission Act explicitly precludes the FTC from enforcing that act against "common carriers." Whether or not BIAS is a common carrier service, it is indisputable that many providers of BIAS are common carriers. Telephone companies, cellular (wireless) carriers, and even cable companies, offer voice telephone service and do so on a common carrier basis subject to Title II of the Communications Act's common carrier provisions. In 2016, a three judge panel of the U.S. Court of Appeals for the Ninth Circuit held that the FTC Act's common carrier exclusion was not limited to common carriers' common carrier activities. Rather, the exclusion extends to all activities of those companies which are common carriers. In other words, that court held that the FTC Act's common carrier exclusion was a status-based exclusion, not an activity-based exclusion. As of this writing, that case is still before the full Ninth Circuit on rehearing and it is unknown whether the court will affirm the panel's earlier conclusion. Until that question is resolved, it will remain uncertain whether the FTC will be allowed to engage in enforcement activities against such BIAS providers.

Supporters of the Net Neutrality or Open Internet rules being repealed have argued to the FCC that such rules are necessary to ensure an open internet and to ensure that consumers will be able to access the content and applications of their choice. Opponents of the 2015 Title II regime, including the current FCC majority, have asserted that those rules have stifled investment in broadband network deployment and that they are antithetical to the policy of light handed regulation of the internet contemplated by the 1996 Telecommunications Act and embraced by prior FCCs.

Much is uncertain about how the FCC's action will impact the broadband services market. It is likely that the FCC's decision, like each of its prior decisions involving regulation of internet access service, will be appealed. Federal appeals courts tend to afford agencies, including the FCC, broad deference on matters within their expertise and jurisdiction. However, that deference is not unlimited and the FCC will have to carry a heavy burden in order to persuade a federal appeals court that the very legal conclusion which it adopted only two years ago and which it successfully defended last year no longer is appropriate.

Author

This GT Alert was prepared by **Mitchell F. Brecher**. Questions about this information can be directed to:

- Mitchell F. Brecher | +1 202.331.3152 | brecherm@gtlaw.com
- Or your Greenberg Traurig attorney