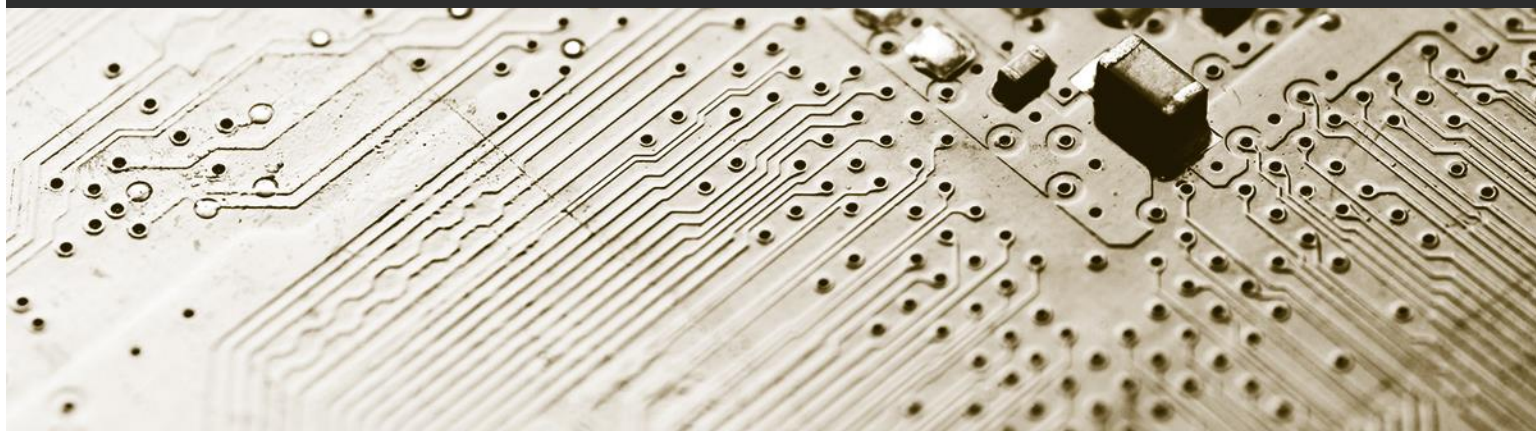


**Alert | Technology, Media & Telecommunications**

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## FCC Votes to Undo ‘Net Neutrality’ Rules – Now What?

As expected, on Dec. 14, the Federal Communications Commission (FCC) voted by 3-2 (along party lines) to undo the so-called “Net Neutrality” rules adopted in 2015 (also by a 3-2 party line vote) by the prior FCC (See GT Alert – “[FCC Announces Plans to Repeal Open Internet \(Net Neutrality\) Rules,](#)” November 2017). In legal terms, what the FCC did was reclassify Broadband Internet Access Service (BIAS) as an Information Service subject only to Title I of the Communications Act rather than as a Telecommunications Service which rendered providers of BIAS common carriers subject to the common carrier provisions of Title II of the Communications Act – provisions which are similar to public utility laws.

Leaving aside the legal niceties of Title I vs. Title II regulation, this reclassification enabled the FCC to rescind rules which prohibited internet service providers (ISPs) from: i) blocking access to internet websites; ii) throttling (*i.e.*, limiting the speed of access to websites); and iii) paid prioritization (charging providers of internet content and apps more for their traffic to be carried to consumers at higher speeds). ISPs are those entities which provide consumers with access to the internet. These include wireline telephone companies, wireless carriers, and cable television system operators. The FCC left in place a modified transparency rule. That rule allows for blocking, throttling, and paid prioritization by ISPs, provided that those practices are disclosed to consumers, entrepreneurs (such as website operators and application providers), and the FCC. In addition, the FCC order declares BIAS to be an interstate service and preempts the states from imposing their own Net Neutrality-type rules.

Whether, how, and when the reclassification and resulting rule changes will impact use of internet services and provision of internet content is uncertain. Much is not known about this latest FCC ruling, but a few things are known:

- First, the most recent FCC ruling will be appealed. Already several state attorneys general have announced that they would be filing an appeal soon, and several consumer advocacy groups have indicated they would appeal. Most likely, that appeal will be heard in the U.S. Court of Appeals for the District of Columbia Circuit. Those challenging the FCC decision may assert that the decision was not supported by the record before the FCC; that the decision was arbitrary and capricious; and that its preemption of the states exceeds its authority. Some appellants may even raise First Amendment challenges. As for the record at the FCC, they will likely point out the existence of thousands of fake letters. The FCC will likely not deny the existence of such fake letters but may claim that they played no role in influencing the FCC's evaluation of the record or in reaching its conclusions. The D.C. Circuit Court has heard prior appeals of FCC cases involving internet rules and classification. Most recently, in 2016, that court affirmed the FCC's 2015 Open Internet rules, largely on the basis that courts afford broad deference to administrative agencies' interpretation of the statutes under which they operate.
- Second, Congress may address Net Neutrality. Several Democratic Members of Congress have indicated that they intend to introduce a resolution of disapproval of the FCC's action pursuant to the [Congressional Review Act](#). That act allows Congress to disapprove of regulatory rules and overturn them, provided that it acts within 60 legislative days (*i.e.*, days when Congress is in session) of the rule's adoption. That process has been rarely used since it was enacted in 1996 and is unlikely to be successful in this instance since the Republican majority is unlikely to disapprove of a rule promulgated by the Republican-controlled FCC. Although Congressional Review Act disapproval is unlikely, it is possible that Congress will attempt to forge a bipartisan compromise legislative solution. Legislation could establish access requirements applicable to BIAS services without regard to whether BIAS is a Title II Telecommunications Service or a Title I Information Service, which could be significant. In 2010, the FCC attempted to promulgate similar Net Neutrality rules, while retaining the Information Service classification for BIAS – a classification affirmed by the Supreme Court in 2005. However, those rules were vacated by the D.C. Circuit Court of Appeals on the basis that they were common carrier-type rules which could not be imposed on non-common carriers.
- Third, jurisdiction to enforce unfair and deceptive practices by ISPs as well as enforcement of consumer privacy protections will shift back to the Federal Trade Commission (FTC). In fact, on the same day the FCC voted to reclassify BIAS and rescind the rules, the FCC and FTC announced a Joint Memorandum of Understanding which describes the agencies' efforts to coordinate and to transfer the enforcement responsibility to the FTC. Prior to the FCC's now-rescinded 2015 reclassification, the FTC had authority to enforce the Federal Trade Commission Act (which prohibits unfair methods of competition and deceptive acts or practices in or affecting commerce) against providers of BIAS. The FTC was stripped of its jurisdiction over BIAS providers as a result of that reclassification. However, it remains uncertain whether the FTC will be allowed to take enforcement actions against BIAS providers. The Federal Trade Commission Act excludes common carriers (including telecommunications carriers) from FTC jurisdiction. In 2016, a three judge panel of the Ninth Circuit Court of Appeals held that the FTC Act's common carrier exclusion applies to all activities of common carriers, including their non-common carrier activities. In September, the Ninth Circuit reheard that case *en banc*. That review by the full Ninth Circuit remains pending. While many observers (including three FCC Commissioners) believe that the full Ninth Circuit will overturn the three judge panel, we know that three judges on that court construed the statutory language to apply to all activities of common carriers. Thus, reversal of the earlier decision remains uncertain.

How the FCC reclassification of BIAS and related rule changes will affect consumers of internet services and providers of internet applications and content is less certain. ISPs will be allowed to charge more for higher speeds and for access to certain websites. However, in the nearly 20 years of consumer internet usage prior to the 2015 reclassification and Net Neutrality rules, such incidents were rare. Most consumers have choices of ISPs – their phone company or cable company, and any of the four national wireless ISPs. That competition may limit ISPs’ ability to extract unreasonable prices for internet access or for preferred service. Rather, the rules will enable ISPs to market their services by offering free or discounted internet content to consumers. For example, several wireless ISPs have attempted to attract consumers by offering free unlimited access to popular services such as video, music, or social network websites. Such preferential access (sometimes referred to as Zero Rating) could have been deemed a violation of the prior rules.

The FCC’s decision, assuming it is affirmed, will enhance the importance of contractual agreements between ISPs and “edge” providers (providers of internet content). Terms and conditions of access to content, including speed of access, will now be matters for commercial negotiation between ISPs and edge providers. ISPs will have incentives to maximize revenues while also keeping their consumers satisfied with the speed and quality of their access to internet content. Edge providers will be incentivized to make their content available to consumers and easy to use, and may be willing to pay when necessary.

## Conclusion

An important result of the FCC’s new regime regarding broadband internet access will be to bring marketplace factors to the business relationships between ISPs and providers of internet content and services. Elimination of the blocking, throttling, and paid prioritization rules will create opportunities for contract-based commercial ventures between ISPs and providers of internet content and services.

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