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Access to Broadband Networks: Net Neutrality

The move to place restrictions on the owners of the networks that comprise and provide access to the internet, to ensure equal access and nondiscriminatory treatment, is referred to as “net neutrality.” 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.

Determining the appropriate framework to ensure an open internet is central to the debate over broadband access, and is an issue that the Federal Communications Commission (FCC) has been grappling with for decades. Some policymakers contend that more proscriptive regulations, such as those contained in the FCC’s 2015 Open Internet Order (2015 Order), are necessary to protect the marketplace from potential abuses which could threaten the net neutrality concept. Others contend that existing laws and the current, less restrictive approach, contained in the FCC’s 2017 Restoring Internet Freedom Order (2017 Order), provide a more suitable framework. There is also a growing consensus that Congress should amend the 1934 Communications Act, as amended, (Communications Act) to address the debate.

The FCC 2015 Open Internet Order

The FCC in February 2015, adopted the Open Internet Order to establish a regulatory framework to address access to broadband internet access service (BIAS), that is, the retail broadband service Americans buy from cable, phone, satellite, and wireless providers. The 2015 Order which applies to both mobile as well as fixed BIAS included provisions that reclassified BIAS as a telecommunications service under Title II of the Communications Act; placed a ban on blocking, throttling, and paid prioritization; created a general conduct standard; enhanced transparency requirements; permitted providers to engage in “reasonable network management” and provide “specialized services” (e.g., heart or energy consumption monitors); and in general did not apply the rules to internet interconnection.

The FCC 2017 Restoring Internet Freedom Order

In December 2017 the FCC vacated the 2015 Order and adopted a new framework (2017 Order) that reclassifies BIAS and embraces a less proscriptive approach. The 2017 Order, which went into effect on June 11, 2018, among other things: restores the classification of BIAS as an information service under Title I and Federal Trade Commission (FTC) authority; removes the no blocking, no throttling, and no paid prioritization rules; eliminates the general conduct standard; removes FCC authority over

internet interconnection; expands the public transparency rules by requiring internet service providers to publicly disclose information about their network management practices including blocking, throttling, paid prioritization, and commercial terms of service; and preempts local and state laws that conflict with this framework.

Selected Policy Issues

As Congress continues to debate what the appropriate framework should be for broadband access, some of the major policy issues focus on: the regulatory classification of BIAS; the role of the FCC versus the FTC; the impact of paid prioritization; and the role of the states.

Regulatory Classification—Title I versus Title II. The FCC derives its authority to establish its policies and regulations from the Communications Act. The Telecommunications Act of 1996 added the definitions of information service and telecommunications service to the Communications Act and applied the law 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 are defined under Title I, but may not be regulated as common carriers, and the FCC’s authority over those services is more circumscribed. There is no provision in the current statute defining BIAS, but most agree that BIAS arguably could be interpreted as a telecommunications or an information service. This had led to one of the most contentious issues surrounding the net neutrality debate: Under which definition should BIAS fall?

The FCC chose, when adopting the 2015 Order, to classify BIAS as a telecommunications service placing it under the extensive regulatory framework, originally established to regulate monopoly voice telephone service, of Title II. On the other hand, the FCC, when it adopted the 2017 Order, reversed that classification and reclassified BIAS as an information service, effectively limiting the FCC’s authority to regulate BIAS directly. The FCC’s change in the classification of BIAS in less than a three-year period, has reopened the debate over whether congressional action is needed to provide clarity and stability. There is increasing agreement that legislation to outline regulatory authority and provide a stable framework for BIAS is desirable, but the specifics remain elusive.

Role of the FCC versus the FTC. The FCC, an independent regulatory agency, regulates interstate wire and radio communications as delineated in the Communications Act. The FCC generally promulgates and enforces rules/regulations using its public interest standard, to establish regulatory frameworks as applied to the communications sector. The FTC has broad authority to

oversee the trade practices of entities across numerous market sectors under Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition and unfair and deceptive trade practices. The FTC generally enforces Section 5 by examining particular factual circumstances and bringing enforcement actions on a case-by-case basis against practices the FTC believes violate Section 5. In contrast to the FCC, the FTC rarely issues prescriptive rules, unless specifically directed to do so by Congress.

However, certain entities and activities are exempted from Section 5's coverage. These exemptions include one for common carriers regulated under the Communications Act, such as landline or wireless telephone services. The classification of BIAS, therefore, has a major impact not only on the regulatory role of the FCC but the FTC as well. The FTC has no authority over BIAS if it is classified as a telecommunications service, as it was in the 2015 Order, because telecommunications services are common carriers under the Communications Act. On the other hand, the FTC does have authority to enforce Section 5 against BIAS providers when BIAS is an information service, because information services cannot be regulated as common carrier services under the Communications Act.

In the 2017 Order, the FCC argued that classifying BIAS as an information service and returning authority to the FTC was the preferable course of action due to, among other considerations, the FTC's extensive experience overseeing data security and privacy practices across numerous sectors. The FTC supported the FCC's decision. Other stakeholders disagreed, arguing that the FTC's practice of case-by-case adjudication lacked certainty, and the establishment of a regulatory framework would better serve the public interest.

Network Management and Paid Prioritization. In the past most internet traffic was delivered on what is known as a "best efforts" basis, a quality standard that does not guarantee that the traffic will be delivered by a certain time or speed. Under best efforts some data packets arriving at congestion points will be dropped and held until a future date while others will be forwarded in real time. Earlier common applications (e.g., email) are not time sensitive and the use of best efforts will not degrade the user experience. Newer applications (e.g., telemedicine) are sensitive to interruption and latency making network management practices that affect how packets travel over the network of greater concern. Content providers offering congestion-sensitive services may be given the option to pay a fee, to network managers, to ensure quality of service by being given priority of transit at network congestion points. This practice is known as *paid prioritization*.

Whether a BIAS regulatory framework should contain provisions to address the practice of paid prioritization has become a major discussion point in the net neutrality debate. Some see paid prioritization as a reasonable management tool to ensure that time-sensitive applications get priority over non-sensitive applications. Such prioritization may be necessary, they state, given the growth in such applications and may be needed to spur innovation. Others feel that paid prioritization is anticompetitive and

should be prohibited. Paid prioritization, they state, could have a negative impact on small, nascent companies that cannot afford to pay such fees, may be used to discriminate among content, and could thwart innovation. Whether paid prioritization is necessary to accommodate the growth of time-sensitive applications or is a practice that, absent regulation, will cause marketplace or consumer harm remains a contentious issue.

State Activity. The controversy over net neutrality is also playing out in the states as they take three approaches: issuing executive orders; promulgating laws; and/or filing legal challenges. Some states are using their financial power and procurement policies to regulate internet service provider (ISP) behavior by issuing executive orders that require ISPs that conduct business with the state to adhere to various net neutrality rules. Many ISPs, not wishing to forgo state procurement contracts, may adhere to executive order requirements. In other cases, states are promulgating laws establishing specific net neutrality regulations that would apply to all ISP activity within their states. Individual legislation varies, with certain states embracing all or some of the regulations contained in the 2015 Order, while others address issues that go beyond its scope.

How successful states will be in achieving their objectives is subject to question. The FCC's 2017 Order states that BIAS is an interstate service and contains provisions that preempt state or local requirements that are inconsistent with the Order leaving the authority of the states to enforce these actions unclear.

State attorneys general from 22 states and the District of Columbia are among the petitioners challenging the legality of the 2017 Order. Petitions have been consolidated in the U.S. Court of Appeals, D.C. Circuit (*Mozilla v. FCC, et al.*, No. 18-1051). Oral arguments were held February 1, 2019.

Congressional Activity—116th Congress

Debate over what the appropriate regulatory framework should be for broadband access has continued in the 116th Congress. Three bills (H.R. 1006, H.R. 1096, H.R. 1101) to provide a regulatory framework to outline FCC authority over BIAS by amending Title I of the Communications Act have been introduced.

Two additional measures (H.R. 1644, S. 682) add a new title to the Communications Act that overturns the 2017 Order and restores the 2015 Order and its subsequent regulations. The bills would, among other things, reclassify both mobile and fixed BIAS as a telecommunications service under Title II of the Communications Act. H.R. 1644 was approved (18-11) by the House Communications and Technology Subcommittee on March 26, 2019, and forwarded to the House Energy and Commerce Committee.

For More Information

CRS Report R40616, *The Net Neutrality Debate: Access to Broadband Networks*.

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