

22 Million Comments Tell FCC Battle Over Net Neutrality Is Not Over

The Debate Continues

Last year, the contentious net neutrality debate appeared to be finally settled when the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FCC's [2015 Open Internet Order](#).^[1] But in May, the FCC launched a [rulemaking proceeding](#) to rollback the FCC's net neutrality rules. In response, more than 22 million comments have been filed to date, demonstrating the intensity of interest among consumers, edge providers, broadband internet access service (BIAS) providers and other stakeholders in this public debate. As summarized below, the arguments put forward by the commenters and the uncertainty created by the FCC's rollback proposal suggests the regulation of the internet ecosystem will could remain unsettled for years to come.

As discussed in our [previous updates](#), the FCC's current net neutrality rules are intended to protect consumers, edge providers, app developers and connected device manufacturers by prohibiting BIAS providers from providing online access in a discriminatory manner. The legal foundation for the current FCC rules followed the roadmap of prior D.C. Circuit decisions by reclassifying BIAS as a telecommunications service under Title II of the Communications Act of 1934. The 2015 Open Internet Order also moderated the effects of Title II by essentially waiving several of its statutory provisions for BIAS providers under a regulatory doctrine known as forbearance, which resulted in a regulatory structure for BIAS providers very similar to what has governed the mobile wireless industry since 1993. The 2015 Open Internet rulemaking proceeding generated an FCC-record four million public comments that overwhelmingly supported the FCC's rules to prevent BIAS providers from throttling down online speeds, blocking access to websites and charging certain edge providers more for "fast lane" access.

As with many public policy issues in recent years, net neutrality has become swept up in partisan politics, with Republicans generally siding with many large incumbent BIAS providers in arguing the FCC's 2015 rules were excessive and unnecessary, while Democrats generally siding with edge providers, consumer advocates and some of the leading wireless carriers in support of the new rules. Importantly, the current proposal to reverse the classification of BIAS as a Title II service would make the privacy-related provisions of the Communications Act, 47 U.S.C. § 222, inapplicable to BIAS providers. Although the broadband privacy rules were overturned by Congress earlier this year, Section 222 continues to govern BIAS providers while the 2015 Open Internet Order's Title II classification remains in effect.

Title II: Should It Stay or Should It Go?

Among the recent commenters on the proposed rollback, most large BIAS providers and the Federal Trade Commission (FTC) called for the reversal of Title II common carrier classification of BIAS in favor of a more lenient regulatory regime, while consumer and minority advocates, public interest groups, online content creators, technology and media companies, and certain nationwide wireless carriers continued to support the current net neutrality rules.

Several large BIAS providers supported FCC Chairman Ajit Pai's proposal to backtrack and revert BIAS to a Title I unregulated "information service" because they claim that certain [disputed studies](#) show that broadband infrastructure spending has decreased under the net neutrality rules. They also argued that competition from

wireless broadband and, in certain markets, wired broadband makes the FCC's net neutrality regulations unnecessary. These commenters also expressed dissatisfaction with the ongoing uncertainty over the regulation of BIAS services, and asserted that Congress should pass new legislation in order to formally enshrine BIAS as a Title I service. The opponents' request for new legislation is effectively a concession that the D.C. Circuit's recent decisions limit the FCC's ability to adopt rules similar to the net neutrality rules without maintaining the classification of BIAS as a Title II common carrier service.

Finally, several BIAS providers supportive of the FCC's rollback proposal maintained that the FTC is better suited to enforce net neutrality than the FCC. Comments from FTC Chairman Maureen Ohlhausen and the FTC staff agreed with the BIAS providers' sentiments. However, [as we have previously noted](#), the full U.S. Court of Appeals for Ninth Circuit has recently agreed to rehear an earlier decision by a three-judge panel on that court determining that the FTC lacks jurisdiction over non-common carrier activities performed by common carriers, so the FTC's ability to ensure net neutrality remains uncertain.

Conversely, a wide swath of net neutrality beneficiaries firmly opposed the FCC's proposal. According to [one analysis](#) (commissioned by a BIAS provider lobbying group), 98.5% of the unique comments in the FCC docket supported the net neutrality rules and opposed the proposed deregulatory measure. These comments opposed lifting the current rules' ban on paid prioritization in order to prevent BIAS providers from favoring one provider's content or services (or the BIAS provider's own online content or services) over other online content or services. They also questioned FCC Chairman Pai's frequently stated factual predicate for the proposed reversal, i.e., the claim that broadband investment has dwindled since the net neutrality rules were adopted in 2015. Commenters noted that BIAS providers invested billions since 2015 on new wireless spectrum at FCC spectrum auctions and in capital improvements to broadband networks resulting in increased speeds for a lower price to consumers, as touted in BIAS providers' marketing and as disclosed in their securities filings.

Next Steps for the FCC

The FCC must now consider the record developed by millions of commenters to decide whether to reverse or otherwise modify the current net neutrality rules. If the FCC decides to pursue this route, a vote on a final order is expected by the end of the year. The process was initiated by Chairman Pai when the FCC leadership was comprised of only two Republicans and one Democrat, and the subsequent Senate confirmations of Commissioners Jessica Rosenworcel (D) and Brendan Carr (R) adds important policy voices to the FCC's deliberative process without necessarily upsetting the balance of a party-line vote.

The newly composed FCC will need to filter out comments that appear to have been generated by spambots without discounting bona fide comments. As [noted by a former FCC official](#), "[t]he FCC's failure to ensure the legitimacy of th[e] public comment system could be a violation of the Administrative Procedure Act, which requires federal agencies to allow for public participation in regulatory decisions." This concern over the record's legitimacy will be brought to the forefront in any challenge of the FCC's ultimate order, which will face judicial review over whether the proposed reversal of the BIAS classification as a Title II service is arbitrary and capricious. These concerns are feeding an emerging consensus among opponents and proponents alike that any lasting change to the net neutrality rules will likely require an act of Congress. Yet the prospect of Congress reaching a bipartisan consensus seems increasingly remote.

Endnotes

[1] See [U.S. Telecom Association v. FCC](#). This decision was later affirmed *en banc* by the full D.C. Circuit, and certain opponents of net neutrality have indicated a desire to file petitions for certiorari with the Supreme Court to appeal the D.C. Circuit's *U.S. Telecom Association* decision. The Supreme Court [granted an extension](#) of the petition deadline until September 28, 2017.

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