



The Federal Communications Commission recently adopted a [Notice of Proposed Rulemaking](#) (NPRM) to reestablish its authority over broadband internet access service (BIAS) by reinstating its net neutrality rules.

The NPRM largely follows the framework set out in an [order](#) adopted by the FCC in 2015 during the Obama administration (the 2015 Order), which was [repealed](#) by the FCC in 2017 during the Trump administration (the 2017 Order). The FCC is now seeking comment on how developments since the 2015 and 2017 orders may affect that framework and the need for such rules. Public comments are due on **December 14, 2023**, and reply comments are due on **January 17, 2024**.

### **History of Net Neutrality at the FCC**

The FCC's efforts to establish net neutrality principles began in 2005 with its adoption of voluntary guidelines known as the [Internet Policy Statement](#), which established that consumers are entitled to access lawful online content and services and to benefit from competition among BIAS providers. After the U.S. Court of Appeals for the District of Columbia Circuit vacated the FCC's attempt to enforce the Internet Policy Statement against a BIAS provider during the Bush administration, the FCC adopted binding net neutrality rules in 2010 during the Obama administration, following the notice-and-comment procedures for rulemakings. At the time, BIAS was classified as an unregulated "information service" under Title I of the Communications Act, and the D.C. Circuit found that the rule improperly treated BIAS providers as "per se common carrier[s]," as if they were classified as such under Title II of the Communications Act. The D.C. Circuit noted that the FCC had the authority to reclassify BIAS as a Title II telecommunications service, but until it did so properly, it was without authority to regulate them as such.

This decision prompted the FCC to adopt its 2015 Order, which reclassified BIAS as a common carrier service regulated under Title II. This shift in classification enabled the FCC to implement the net neutrality rules and the principles it had been aiming to enforce since the 2005 Internet Policy Statement. The FCC also adopted a more lenient level of common carrier treatment, similar to what it had previously employed for the mobile wireless industry, for BIAS providers.

But in 2017, the FCC reversed course by reclassifying BIAS as a Title I information service. Adopted in a partisan 3-2 vote, the reclassification generated the forceful dissent of Jessica Rosenworcel, who was then a commissioner and is now chair of the FCC. As a result, all the net neutrality rules from the 2015 Order were repealed except for the transparency requirements (which the FCC effectively gutted by revising them substantially). The decision was marred by a [scandal](#) in which, according to settlement agreements entered into between the New York attorney general and three advocacy organizations with ties to the broadband industry, certain broadband industry opponents spent \$4.2 million to create and submit to the FCC over 8.5 million fake comments that were designed to give the FCC's then-chair, Republican Ajit Pai, "volume and intellectual cover" for repealing net neutrality.

## Key Elements of the FCC's Proposals

The FCC's proposals in the NPRM include the following highlights:

- **Net neutrality rules.** The FCC proposes essentially the same net neutrality rules it adopted in 2015. These rules prohibit blocking, throttling, and paid prioritization and impose a general standard of conduct prohibiting BIAS providers from unreasonably interfering with or disadvantaging end users' or edge providers' lawful use of BIAS. Although these protections are mainly discussed from the end user's perspective, they would also protect edge providers. For instance, BIAS providers would be unable to charge edge providers a fee to avoid having their content blocked, throttled, or deprioritized.
- **Transparency rules.** The FCC is also continuing its work on transparency requirements under this rulemaking, seeking comments on what to bring over from its 2015 Order and the interplay with the [consumer-friendly broadband labels that it adopted last year](#), which require ISPs to display critical broadband-related information such as prices, speeds, and fees at the point of sale.
- **National security and public safety.** The FCC has framed this NPRM as advancing national security and public safety because it would provide a stronger basis for working proactively to address weaknesses in the provision of BIAS instead of waiting to address failures after a cybersecurity incident or other emergency. For instance, foreign BIAS providers would require authorization under Section 224 of the Communications Act to provide services in the United States. The FCC has used this authority to revoke Chinese telecom companies' ability to provide telecommunications services in the United States. This framing signifies a new basis for reclassification and comes after the D.C. Circuit initially remanded a

portion of the 2017 repeal over concerns that it did not adequately address the effect of reclassification on public safety and national security.

- **Privacy and data protection.** The FCC seeks comments on the application of customer proprietary network information (CPNI) regulation to BIAS providers and if reclassification would help combat illegal robocalls and robotexts that are transmitted via voice over internet protocol (VoIP) networks or over-the-top (OTT) messaging services.
- **Infrastructure.** The FCC hopes that reclassification would provide a stronger basis for facilitating broadband deployment, as it could extend pole attachment rights to broadband-only providers and better address concerns related to digital equity, accessibility, multitenant environments, and programs such as the Lifeline Program in the context of BIAS.
- **Forbearance.** The FCC proposes to reinstate the more lenient version of Title II regulation (based on the mobile wireless industry precedent) but is seeking comment on how best to approach forbearance.
- **Preemption of state laws.** The FCC believes this rulemaking will address the patchwork of state laws that have been passed since the 2017 Order rolled back open internet rules at the federal level. It seeks comments on how to use its preemption authority to create a national framework and whether the proposed net neutrality rules should serve as a nationwide floor, providing a minimum level of protection to all or a ceiling indicating the FCC's conclusion on how to balance the relevant policy considerations. This proceeding is expected to clarify the scope of the federal preemption relative to existing state net neutrality laws such as California's, which presumably would be allowed to coexist peacefully, provided that they do not conflict with the federal net neutrality rules.

## **FCC Authority To Restore Net Neutrality**

The proposals in the NPRM require the FCC to reclassify BIAS under Title II, which governs common carriers that provide telecommunications services. The FCC asserts that BIAS is properly classified under Title II because BIAS operates as a stand-alone service providing telecommunications. It also asserts that the COVID-19 pandemic, which occurred after the 2017 Order, warrants revisiting the topic because it demonstrated the extent to which consumers rely on BIAS as an economic and educational lifeline.

A looming question is how the U.S. Supreme Court's increasingly skeptical view of deference to federal agency decision-making could affect this proposed reclassification of BIAS. In [\*West Virginia v. EPA\*](#), the Supreme Court adopted a new "major questions" doctrine that requires an agency to have "clear congressional authorization" when claiming that its organic act statute authorizes it to assert regulatory jurisdiction. With few cases applying this new doctrine, it sets up a potentially long battle over the FCC's final rulemaking.

## **Takeaways**

This NPRM is the first step in reimplementing net neutrality rules and applying certain Title II obligations to BIAS providers. This would require BIAS providers to comply with the blocking, throttling, and paid prioritization prohibitions that they followed prior to the FCC's repeal in 2017, which they continue to follow in states like California and Washington.

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