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Net Neutrality Is Back, for Now



With the recent circulation of the Federal Communications Commission's (FCC) draft version of its highly anticipated net neutrality order, [Promoting a Fast, Open, and Fair Internet](#) (the 2024 Order), Chairwoman Jessica Rosenworcel is making good on her promise to reinstate the net neutrality rules first [adopted in 2015](#) during the Obama administration (the 2015 Order) and [repealed in 2017](#) during the Trump administration (the 2017 Order).

The draft 2024 Order, if adopted as expected at the FCC's next open meeting on April 20, 2024, would reestablish the FCC's authority over broadband internet access service (BIAS) (i.e., the provision of mass-market internet access on a retail basis) and BIAS providers, such as Verizon Fios, while continuing to exclude dial-up, enterprise, and non-mass-market internet service providers, consistent with the 2015 Order. We previously explored the FCC's complicated history with net neutrality [here](#).

What's the Same?

The draft 2024 Order states that the new net neutrality rules are "materially identical" to those promulgated in the 2015 Order. Closely tracking both the 2015 Order's analysis and rules, the 2024 Order:

- Reclassifies BIAS from a largely unregulated Title I information service to a regulated Title II telecommunications service.
- Prohibits blocking (i.e., access restriction), throttling (i.e., content degradation), and paid prioritization (i.e., fast lanes) of internet traffic.
- Employs the same FCC definition of BIAS in use since 2010.
- Excludes non-BIAS data services from its rules.
- Establishes tailored forbearance of certain FCC rules otherwise applicable to Title II services, such as rate regulation, tariffing, unbundling of last-mile facilities, and cost accounting rules.

- Reinstates transparency requirements regarding a BIAS provider's network practices, performance characteristics, and commercial terms.
- Reinstates general conduct standards that prohibit BIAS providers from unreasonably interfering with or disadvantaging consumers or edge providers.
- Allows BIAS providers to seek advisory opinions from the FCC on proposed conduct.
- Permits the FCC to review BIAS providers' sponsored data programs and similar practices on a case-by-case basis.

What's New?

While substantially similar to the 2015 Order, the 2024 Order adds two new developing policy areas: alleged national security threats posed by foreign-owned service providers and the proliferation of state net neutrality laws passed in response to the 2017 Order's repeal.

National Security

Over the past several years, the FCC has taken an increasingly severe approach with foreign-owned service providers, particularly those under the direction or control of the Chinese government. For example, in 2019, the FCC [took the rare step](#) of denying a Chinese-owned telecom service provider's application for international Section 214 authorization, which permits the provision of international telecommunications service in the United States as a regulated provider. Then, in 2021 and 2022, the FCC [placed importation and use restrictions](#) on telecommunications equipment and services provided in the United States by nearly a dozen Chinese companies that the FCC determined posed an unacceptable risk to national security. Around the same time, the FCC [revoked the Section 214 authority](#) (both domestic and international) of several other Chinese companies on national security grounds.

Even with these actions, the current FCC expressed concern that its lack of oversight of BIAS after net neutrality's repeal created loopholes threatening national security that were exploitable by foreign-owned service providers. As a result, while the 2024 Order grandfathers most BIAS providers' Section 214 authority, it expressly requires Chinese BIAS providers whose Section 214s had been previously denied or revoked for their Title II services to cease provision of BIAS in the United States within 60 days of the effective date of the order, while reserving the right to revoke the Section 214 authority of other BIAS providers in the future.

Preemption of State Law

As in 2015, the FCC determined that it has the authority to preempt any state law that interferes or is incompatible with the federal regulatory framework. However, the FCC decided to leave existing state net neutrality laws intact, determining that such laws do not conflict with the 2024 Order. In particular, the FCC stressed that California's Internet Consumer Protection and Network Neutrality Act of 2018 largely parallels its own rules, though it left the door open to revisit this or any other state net neutrality law should that state attempt to enforce regulations more onerous than the regulatory framework adopted in the 2024 Order.

What's Next?

The 2024 Order is unlikely to be the final word in the net neutrality debate. In the 2016 case [U.S. Telecom v. FCC](#), the FCC's 2015 Order survived judicial scrutiny. There, the U.S. Court of Appeals for the D.C. Circuit upheld the FCC's reclassification of BIAS as a Title II service, holding that the FCC "acted 'within the limits of [Congress's] delegation' of authority." But there has been an important shift in the Supreme Court jurisprudence since 2016. In the Supreme Court's landmark 2022 decision [West Virginia v. EPA](#), the [Court heralded](#) a new rule of statutory interpretation: the "major questions" doctrine. There, the Court determined that any "transformative

expansion" of regulatory authority pursuant to (in the Court's opinion) archaic and vague statutory language raised "major questions" for which agency action requires "clear congressional authorization."

In the 2024 Order, the FCC anticipated how the major questions doctrine could undermine its legal foundation. The FCC argued that the major questions doctrine is inapplicable and, even if it does apply, would not ultimately meet the threshold of a "major question" as a factual matter since reclassification of BIAS as a Title II service does not have the "extraordinary economic and political effect required to implicate the major-questions doctrine." In reaching that conclusion, the FCC noted that BIAS has previously been regulated as a Title II service (between 2015 and 2017) and that, as a communications service, whether and how to regulate BIAS "falls squarely within the [FCC's] wheelhouse." The FCC's ranking Republican commissioner, Brendan Carr, disagreed in his dissenting statement, warning that the 2024 Order is destined to be struck down by the Supreme Court, if not overturned by Congress.

While the FCC will almost certainly adopt the 2024 Order later this month, challenges in the courts are just as likely. Ultimately, net neutrality is primed for a final showdown—either in the courts or through federal legislation following the results of the 2024 elections. Either way, the 2024 Order appears to be another chapter, but not the end, of net neutrality's complicated journey.

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