

THE FCC'S RESTORING INTERNET FREEDOM ORDER

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A Summary and Outlook

Anthony S. Mendoza, Esq.



Glossary

- ▶ BIAS - Broadband Internet Access Service; acronym coined by 2016 Open Internet Order.
- ▶ Caching - facilitates access to third-party web pages by offering consumers the ability to store, or 'cache', popular content on local computer servers.
- ▶ DNS - DNS translates human language (e.g., the name of a website) into the numerical data (i.e., an IP address) that computers can process.
- ▶ Edge Provider - Internet content providers such as Facebook, Netflix, Microsoft, Mozilla, Tumblr, etc.
- ▶ ISP - Internet Service Provider such as Comcast, Charter, CenturyLink, AT&T, Verizon, etc.
- ▶ Universal Service - Policy goal that affordable telecommunications services should be available to all regardless of geographic location or income level.
- ▶ Virtuous Cycle - A central tenet of the 2015 Open Internet Order that holds that innovations by edge providers drive consumer demand for BIAS services, which leads to more deployment and investment in broadband, which leads to more new innovation at the edge of the network.

Context

Classification of Broadband Service - Information or Telecommunications Service?

- ▶ Following a line of FCC decisions known as the *Computer Inquiries*, in which the FCC made a critical regulatory distinction between “enhanced services” (data processing services) and “basic services” (the transmission component underlying enhanced services), Congress codified the distinction in the Telecommunications Act of 1996 (the “1996 Act”). The 1996 Act equated “telecommunications services” to “basic services” - the transmission component, and “information services” to “enhanced services” - the data processing component.
- ▶ A “telecommunications service” is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153
- ▶ An “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §§ 153(24).

Context

Why does the classification of the service matter?

Information Services (Title I)

- ▶ “Information services” are regulated under Title I of the Communications Act of 1934.
- ▶ Title I is often referred to as “light touch” regulation.
- ▶ State regulation of Title I services is generally preempted.

Telecommunications Services (Title II)

- ▶ Telecommunications services are regulated under Title II of the federal Communications Act.
- ▶ Common carrier regulation
- ▶ Title II is the Chapter under which telephone services have historically been regulated.
- ▶ Dual federal and state regulation.
 - ▶ Regulation of market entry and exit
 - ▶ Merger and acquisition approvals
 - ▶ Rates
 - ▶ Service quality
 - ▶ Interconnection
 - ▶ Universal service subsidy programs
 - ▶ Non-discrimination

Context (cont.)

▶ **FCC's *Cable Modem Declaratory Ruling* (2002)**

- ▶ FCC classified cable modem internet service as an “information service”.
- ▶ Cable modem service is a “single, integrated service that enables the subscriber to utilize Internet access service” with a telecommunications component inseparable from data processing elements of the service.

▶ ***Brand X Internet Services v. FCC*, 545 U.S. 967 (2005).**

- ▶ Reversed 9th Circuit ruling that cable modem service was an information service.
- ▶ Upheld *Cable Modem Declaratory Ruling* applying *Chevron* deference to expertise of regulatory agency.

Context (cont.)

- ▶ **FCC's *Wireline Broadband Classification Order* (2005)**

Extended “information service” classification to other wireline based broadband services, such as DSL.

- ▶ **FCC's *Wireless Broadband Application Order* (2007)**

Extended “information service” classification to wireless broadband providers.

- ▶ **FCC *Internet Policy Statement* (2005)**

4 Guiding Openness Principles

Context (cont.)

- ▶ **Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010)**

Struck down *Internet Policy Statement*, holding FCC could not rely solely on ancillary authority to enforce *Internet Policy Statement* rules against Comcast.

- ▶ ***Open Internet Order (2010) - 3 Rules***

- ▶ No blocking
- ▶ No unreasonable discrimination
- ▶ Transparency - Requires accurate disclosure of information about network management practices, performance, and commercial terms and conditions.

Context (cont.)

- ▶ ***Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2010).**
 - ▶ Upheld the 2010 *Open Internet Order*'s transparency rule under section 706 of the federal Communications Act.
 - ▶ Invalidated 2010 *Open Internet Order*'s “no blocking” and “no unreasonable discrimination” rules as unauthorized common carrier regulation.
 - ▶ FCC's previous classification of broadband services as an “information service” precluded common carrier style regulation.

The Open Internet Order of 2015

- ▶ **Reclassified Broadband Internet Access Service (BIAS) as a telecommunications service subject to common carrier regulation under Title II of the federal Communications Act.**
- ▶ **Reversed FCC's earlier decisions that broadband service is an information service.**
- ▶ **“Information services” offered in conjunction with broadband connectivity (e.g. email and on-line storage) are sufficiently independent of BIAS so as to not transform BIAS into an information service.**

2015 Open Internet Order

3 “Bright Line” Rules

- ▶ **No Blocking** - BIAS providers may not block access to lawful content, applications, services, or non-harmful devices.
- ▶ **No Throttling** - BIAS providers may not impair lawful internet traffic based on content, application, service, or use of a non-harmful device.
- ▶ **No Paid Prioritization** - BIAS providers may not accept payment to provide an “edge provider” a “fast lane” of connectivity between ISP and end user.

2015 Open Internet Order

“General Conduct Standard”

- ▶ **BIAS providers may not “unreasonably interfere” with:**
 - ▶ Consumer’s ability to select, use, or access lawful content, applications, services, or lawful devices.
 - ▶ Ability of edge providers to make lawful content, apps, services, or devices available to end users.
 - ▶ Case by case enforcement.

2015 Open Internet Order Enhanced Transparency

- ▶ **Adds to 2010 transparency requirements upheld in *Verizon*, including:**
 - ▶ Disclosure of promotional rates
 - ▶ Disclosure of all fees and surcharges
 - ▶ Disclosure of all data caps
 - ▶ Adds packet loss to list of measures of network performance to be disclosed
 - ▶ Requires notification that a “network practice” is likely to significantly impact service

2015 Open Internet Order

Title II Forbearance

- ▶ Contributions to universal service programs
- ▶ Tariffs
- ▶ Rate regulation
- ▶ Certain reporting requirements
- ▶ Section 214 Discontinuance, Transfer of Control, and Network Reliability
- ▶ The Title II Interconnection Regime (sections 251 and 252)
- ▶ Slamming - unauthorized carrier changes (section 258)

2015 Open Internet Order

Title II Provisions That Apply to BIAS

- ▶ “Just and Reasonable” Terms and Conditions (47 U.S.C. § 201).
- ▶ No unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services (47 U.S.C. section 202).
- ▶ Complaints to FCC (47 U.S.C. § 208).
- ▶ Enforcement Provisions (penalties, attorneys fees, damages) (47 U.S.C. §§ 206-206, 209, 216, 217).
- ▶ Privacy of Customer Data. (47 U.S.C. § 222).
- ▶ Access to poles and conduit (47 U.S.C. § 224).
- ▶ Access to Persons with Disabilities (47 U.S.C. § 225).

2015 Open Internet Order

Title II Provisions That Apply to BIAS (cont.)

- ▶ Universal Service Requirements (except for contributions).
 - ▶ 47 U.S.C. § 254 (a)-(c) - Establishment of USF rules and process.
 - ▶ 47 U.S.C. § 254(e)-(f) - USF limited to eligible telecommunications carriers (ETCs), federal and state authority to establish regulations to advance universal service. However, the Order specifically preempts state authority to adopt state specific universal service contributions on BIAS providers.
 - ▶ 47 U.S.C. § 254 (h)-(i) - E-Rate discount program for schools, libraries, and rural health care facilities.
 - ▶ 47 U.S.C. §214(e) - process for certifying ETCs.

2018 Restoring Internet Freedom (RIF) Order

▶ Reclassifies Internet Service as a Title I Information Service

- ▶ *“Return to Title I classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.”* ¶20
- ▶ Broadband service has “capability” for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” ¶30
- ▶ Broadband integrates information processing and telecommunications into a singular service (e.g. DNS and caching). ¶33
- ▶ Applies to fixed and mobile broadband.

Telecommunications Management Exception Does Not Apply

- ▶ Definition of “information service” excludes any use of information processing capability for the “management, control, or operation of a telecommunications network.
- ▶ DNS does not assist ISP to manage network, rather it is a tool to help end users navigate the web. ¶36
- ▶ Caching is more than a “network management” tool. It predominately benefits the user, not the network owner. ¶42

Policy Justification for Reclassification

- ▶ On balance, research shows Title II regulation adversely affects broadband investment. ¶¶88-102
- ▶ Regulatory uncertainty about how Open Internet Order would be implemented dampened enthusiasm. ¶99
- ▶ Utility-style regulation inapt for industry built on innovation and disruption. ¶100
- ▶ ISPs have incentives not to block or interfere with content because they are dependent on it to provide service to customers. ¶117
- ▶ Problems identified in Open Internet Order with ISP “gatekeeper” function overstated and not backed by empirical evidence. ¶121
- ▶ Competition will restrain anti-competitive behavior by ISPs. ¶¶123-130
- ▶ Moderately concentrated ISP market power is not great enough to distort edge provider market conduct. ¶134

Existing Consumer Protection Laws Adequate to Protect Open Internet

▶ Federal Trade Commission (FTC)

- ▶ Section 5 power to police deceptive trade practices and unfair competition.
- ▶ FTC empowered to enforce ISP commitments on open internet principles. ¶141
- ▶ ISPs cannot sell consumers one product and delivering another.
- ▶ Voluntary commitments enforceable by FTC.
- ▶ Disclosure of ISP open internet policies is required.
- ▶ Unilateral changes in consumer contracts can be an unfair trade practice.
- ▶ States also have deceptive trade practice statutes.

Antitrust Laws Protect Competition

- ▶ “Rule of reason” is a consumer welfare test. ¶147
- ▶ Horizontal agreements to block, throttle or interfere with content likely per violations of Sherman Act. ¶144.
- ▶ Case by case enforcement of anti-trust laws minimizes cost of overregulation, avoids painting entire industry with one brush. ¶149
- ▶ Real world effects vs. ex ante predictions. ¶149

Effect of Reclassification

- ▶ **Internet interconnection agreements no longer subject to common carrier regulation. ¶163**
 - ▶ In absence of Title II regulation internet transit prices decreased 99% from 2005-2015.
 - ▶ No evidence that ISPs possess undue market power enabling supra-competitive pricing.
 - ▶ Open Internet Order created asymmetrical regulation favoring edge providers.

Effect of Reclassification (cont.)

- ▶ Regulation of Broadband Privacy Returned to FTC. ¶181
- ▶ FTC brought over 500 enforcement actions prior to Title II reclassification against biggest companies in Internet ecosystem. ¶182
- ▶ Consistent regulation across internet industry.

Effect of Reclassification (cont.)

▶ **Broadband Deployment Programs**

- ▶ Because broadband is provided over the same infrastructure as other “covered services”, FCC maintains authority to promote broadband deployment.
- ▶ Pole attachment regulation.
- ▶ Limits on state and local right-of-way regulation.

Effect of Reclassification (cont.)

▶ Universal Service

- ▶ Reclassification does not affect FCC universal service programs (i.e. Connect America Fund).
- ▶ Lifeline - FCC's authority to support broadband not dependent on regulatory classification of service. ¶193
- ▶ Extent of FCC's ongoing authority will be addressed in ongoing USF dockets.

State Preemption

- ▶ **FCC preempted** *“[a]ny state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.”*¶195
- ▶ **“Public utility style” or “economic” regulation preempted.**
 - ▶ Rate regulation
 - ▶ Accounting requirements
 - ▶ Market entry/exit requirements
 - ▶ Interconnection Obligations
 - ▶ Unbundling/network access requirements

What's Not Preempted?

- ▶ **Traditional State Roles**
 - ▶ Fraud
 - ▶ Taxation
 - ▶ General commercial dealings
- ▶ **ETC Designation**
- ▶ **Pole attachment regulation** (if state is certified)
- ▶ **State universal service policies consistent with FCC regulations** (i.e. 47 U.S.C. §254)

Legal Authority for Preemption

▶ **Impossibility Exception**

- ▶ Impossible to regulate intrastate aspects without impacting interstate aspects of regulation.
- ▶ Interference with federal objectives.

▶ **FCC has independent authority to preempt state and local regulation.**

¶202

- ▶ *Pulver and Vonage Orders.*

Transparency Rule Enhancements Repealed

- ▶ **Enhanced Transparency Requirements Under Open Internet Order Repealed**
 - ▶ Detailed disclosures on commercial terms
 - ▶ Detailed information regarding network practices
 - ▶ Detailed information regarding performance characteristics
- ▶ **Costs were not outweighed by benefits.**
¶215

Transparency Rule

- ▶ **Network management practices**
 - ▶ Blocking
 - ▶ Throttling
 - ▶ Paid Prioritization
 - ▶ Affiliated Prioritization
 - ▶ Congestion Management
 - ▶ Application-Specific Behavior
 - ▶ Device Attachment
 - ▶ Security

Transparency Rule (cont.)

▶ Performance Characteristics

- ▶ Service Description
- ▶ Impact of Non-Broadband Data Services on performance

▶ Commercial Terms

- ▶ Price
- ▶ Privacy Policy
- ▶ Redress Options

Open Internet Rules Repealed

- ▶ **3 “Bright Line” Rules Repealed**
 - ▶ No blocking
 - ▶ No throttling
 - ▶ No paid prioritization

- ▶ **General conduct rule repealed**

Questions?



1000 University Ave., W. Suite 222
Saint Paul, MN 55104
651-330-8062 (Main)
www.mendozalawoffice.com