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ANALYSIS OF A CHANGING INDUSTRY

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U.S. COURT OF APPEALS GIVES THE FCC A SWEEPING VICTORY, NET NEUTRALITY RULES LIKELY TO STICK THIS TIME

On June 14, the U.S. Court of Appeals for the D.C. Circuit—arguably the second most influential court in the nation—upheld the Federal Communications Commission's (FCC's) latest attempt to establish regulation on broadband Internet service providers (ISPs). The court's 2-1 opinion allows the FCC to claim a significant victory in classifying broadband Internet access service (BIAS) as a utility governed under Title II of the Communications Act of 1934, as amended. The 100+ page decision also vexes the ISPs that hoped less onerous Title I classification would be restored.

The review of the recent court decision requires a brief review of the history of net neutrality at the U.S. Court of Appeals for the D.C. Circuit. The FCC order under review was the 2015 Open Internet Order that established a set of regulations designed to ensure ISPs would not restrict the flow of information over the Internet. This review was the third time in seven years where the court has examined the FCC's rationale for regulating ISPs.

Recall the Halcyon days preceding the FCC's 2005 policy statement? Comcast didn't appreciate the FCC's enforcement of its policy statements, and in 2008 the court agreed with Comcast and vacated the FCC's order "because the Commission had failed to identify any grant of statutory authority to which the order was reasonably ancillary." Subsequent to this decision, the FCC tried again using Section 706 of the Telecommunications Act as its authoritative hook. In its 2010 order, the FCC established three rules identified as transparency, no blocking, and no discrimination. In addition, the FCC distinguished between wireline and wireless providers for some of its rules. This time Verizon took umbrage at the FCC's rules and filed its appeal at the court. In its second visit to the court, the FCC largely won as the court upheld the FCC's attempt to use Section 706 as its authority. However, the court ruled against the FCC in part because it found that the no blocking and no discrimination rules were too close to Title II common carriage regulation for ISPs that, by the FCC's own classification, were classified as Title I

providers. This is now seen as a Pyrrhic victory for Verizon because while winning this small victory, the FCC was emboldened to try to establish net neutrality a third time with its 2015 order.

The 2015 order reclassified BIAS offered by both fixed and mobile providers as a telecommunications service. BIAS is a mass-market retail service that sends or receives data from most all Internet endpoints, but excludes dial-up service. The order also identified interconnection arrangements between content (edge-providers) and ISPs as subject to Title II regulation, reclassified mobile broadband service as a commercial mobile radio service, and changed the definition of the public switched network to include IP addresses. After reclassification, the FCC forbore from applying many of the Title II common carriage regulations on ISPs. Lastly, the order establishes five open Internet rules: "enhanced transparency," no blocking, no throttling, no paid prioritization, and a "general conduct rule," which allows the FCC to consider on a case-by-case basis whether or not a given practice harms consumers or edge providers. These rules apply to ISPs and govern their activity with end-user customers, as well as with content or edge providers.

In this latest review, the court gave wide latitude to the FCC's approach and rationale. Two of the three judges determined that the FCC's explanation for changing its view regarding the classification of BIAS was satisfactory. The third judge, Senior Circuit Judge Williams, disagreed. He said the FCC's "justification…fails for want of reasoned decisionmaking." The Williams partial dissent gives ISPs a roadmap if they decide to take the matter forward. Currently there are two options for further legal review. The petitioners, USTA, *et al.*, may ask for an *en banc* review by the appellate court within 45-days of the June 14th decision. This track provides for an 11-judge appellate panel to review the matter. The second option, which can happen after or in lieu of the *en banc* review, is to appeal directly to the U.S. Supreme Court. It isn't clear whether the Supreme Court would accept the appeal since the matter up for review has evolved — or devolved, depending upon your viewpoint — into a common case where the court has given an agency discretion to apply its authority under the law. There are no court opinions in other Circuits that conflict with this recent opinion, so likely there is little interest for the Supreme Court to take up the matter.

A discussion about next steps naturally leads to a discussion involving Congress. With limited legal challenges available, the ISPs have the option to focus on a Communications Act rewrite. But don't hold your breath for this one. Yet, there is some support from the ISPs to rewrite the law starting with the next Congressional session (2017). Who knows where net neutrality will end? For now, at least, it seems like the FCC's 2015 order will stick.

BIAS Versus WBIAS

With the foregoing, JSI now turns its attention to what this order means for rural incumbent local exchange carriers (ILECs). The typical rural ILEC offers its ISP affiliate a common carriage tariffed or detariffed transmission service called wireline broadband Internet access service (WBIAS). This has been the standard approach since the WBIAS order was released in 2005. JSI observes that WBIAS transmission service is not the BIAS that is the subject of the net neutrality order. WBIAS is a wholesale transmission service used by an ISP in order to offer BIAS to customers. Recall that BIAS is a mass-market retail service—very distinct from the WBIAS transmission service. Perhaps to keep these two services separated in our minds, we should consider replacing the term "wireline" for the "W" in WBIAS with "wholesale."

While one may think this is just semantics, the FCC's Lifeline Order, adopted in April, brings the difference between WBIAS and BIAS into focus. In its Lifeline Order, the FCC changed the definition of eligible services for purposes of federal universal service support. The change to 47 CFR 54.101, to be effective no earlier than December 1, 2016, identifies the services that must be offered to be eligible for federal universal service support. The change includes BIAS as a required service for Lifeline support. Specifically, an eligible telecommunications carrier subject to a high-cost public interest obligation for high-cost support must offer BIAS within the areas where it receives high-cost support. In discussing this matter, the FCC confirms that rural ILECS may use an affiliate to offer a retail mass-market BIAS in order to satisfy this obligation. JSI observes that whether a rural ILEC accepts the A-CAM or remains on legacy support, it will be subject to a high-cost public interest obligation as expressed in 47 CFR 54.308 and will be subject to the change in Section 54.101. Thus, it is very important to recognize the difference between WBIAS and BIAS.

ISP Obligations

Given the court's recent opinion, the five rules established by the FCC have been upheld. Rural ILEC affiliates should pay close attention to what the five rules require. Here we observe that some of the rules are not entirely clear. The transparency rules are clear since they have been effective since round two of the court battle. The no blocking, no throttling, and no paid prioritization rules appear somewhat clear. Yet, the big question before the FCC is how to address "zero rating," offered for example by T-Mobile, for certain edge-provider content. (Zero rating is where the ISP does not count data usage against an end-user's data plan.) Recently the FCC received a large package containing 100,000 complaints regarding zero rating. The FCC hasn't indicated when it will address whether zero rating is allowed under its rules. And lastly, the "general conduct rule," as noted by the court dissent, lacks guidance for ISPs. JSI agrees with Judge Williams that this rule could be a problem. The majority opinion suggests that the advisory

process established by the FCC provides sufficient guidance to ISPs. However, the advisory process is prospective and is not binding. Currently, JSI cannot see that it will be much help for ISPs.

The bottom line is that BIAS service is now subject to Title II common carriage rules whether offered by the rural ILEC itself or offered through an affiliate whose service satisfies the rural ILEC's ETC obligation. One question that JSI has received since the court opinion is, "Why should a rural ILEC continue to have an affiliate offer the service when the rural ILEC could offer the service as a regulated service in the company?" Guidance on this issue seems to rest on a footnote within the Lifeline order. In footnote 76, the FCC describes the high-cost program and explains that the program "does not support other costs associated with the provision of BIAS." And that "[i]n making BIAS a supported service, we [the FCC] do not intend to change our current rules regarding what specific costs are supported under the high-cost program." JSI recommends rural ILECs carefully consider how they offer BIAS. Perhaps further guidance from the FCC and state commissions will be required before taking actions that change current offerings.

BIAS in Your Future

Although the FCC's Open Internet Order seems all encompassing regarding Internet services, the FCC has clearly defined what is BIAS and what is not BIAS. JSI expects that many future services offered to the public will be non-BIAS as they will not be designed to access all or nearly all Internet endpoints—instead they will be designed to access only one or a small set of Internet endpoints. The FCC has expressed its policy on how these non-BIAS offerings can be provisioned. It turns out that the FCC envisions that the transmission link to an end user may consist of BIAS and non-BIAS offerings. This "shared pipe" policy will allow the ISP greater flexibility for its future non-BIAS offerings. One certainty for the future is that most everyone—and everything—will be interconnected. Rural ILECs are meeting the challenge to be the communications solution for their service areas. This commitment to rural America provides opportunities to individuals and communities that would not be possible without the dedicated work of rural ILECs. The future looks bright for BIAS and non-BIAS despite the current regulatory fog surrounding the Internet and federal universal service.

If you have questions or comments about net neutrality, please contact your JSI consultant, John Kuykendall in our Maryland office at 301-459-7590, or Douglas Meredith in Utah at 801-294-4576.

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