

SAPRONOV & ASSOCIATES, P.C.
ATTORNEYS AT LAW

info@wstelecomlaw.com
www.wstelecomlaw.com

1300 I STREET, NW, SUITE 400
WASHINGTON, D.C. 20005
TEL. 770.309.0462

5555 GLENRIDGE CONNECTOR SUITE 200
ATLANTA, GEORGIA 30342
TEL. 770.399.9100

CLIENTS & FRIENDS ALERT¹

(Updated) June 7, 2024

**Reinstatement of the FCC's 2015 Open Internet Rules:
What's Next?**

I. Background and Summary

On April 25, 2024, as anticipated, the FCC's brought back to life the 2015 "Obama Era" net neutrality ("Open Internet") rules. This alert follows up on our prior one discussing the draft of the FCC's Open Internet order² (some 434 pages) that was adopted in its entirety by a 3–2 vote along party lines. As with previous net neutrality alerts, this one is a preview of our upcoming Thomson Reuters webinar where a panel of experts will discuss the new rules, the underlying policies (both pro net neutrality and con), and predictions about whether they will survive. Opponents have petitioned the FCC to stay the effectiveness of the rules pending appellate review by the 6th Circuit Court of Appeals (randomly selected). Here are a brief historical background, some highlights of the April 25 Order, and observations about what happens next.

1. Historical Background.

Following its 2016 election victory, the Republican controlled Congress issued a resolution of disapproval that repealed the 2015 Open Internet Rules.³ The Republican FCC Chairman, Ajit Pai, then introduced the 2017 Restoring Internet Freedom (RIF) Order, replacing the 2015 Open Internet Rules with a single set of Transparency rules,⁴ and returning broadband internet access (BIAS) to its previous classification as unregulated information service. Affirmed in large measure by the D.C.

¹ While accurate to the best of our knowledge, this alert is for tutorial purposes only, not a legal opinion and is not to be treated as legal advice. Please contact us if you have any questions regarding this disclaimer.

² <https://docs.fcc.gov/public/attachments/DOC-401676A1.pdf> ("April 25 Order"). Paragraph references below are to paragraphs of the April 25 Order.

³ For more on the tortured history of Net Neutrality preceding the 2015 Open Internet Rules, see <https://wstelecomlaw.com/news/brochures/The-Rise-Fall-of-Net-Neutrality.pdf>

⁴ Currently codified at 47 C.F.R. 8.1 Transparency (<https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-8/section-8.1>)

Reinstatement of the FCC's 2015 Open Internet Rules: What's Next?

Circuit Court in *Mozilla*, the RIF Order⁵ reduced the 2015 Rules to a single transparency obligation, tellingly titled “Part 8-Internet Freedom,” that required BIAS providers to publicly (and accurately) disclose their “network management practices, performance characteristics, and commercial terms” of their BIAS offering.⁶

The pendulum has now swung back to a Democratic FCC, controlled by a 3-2 majority. The agency's first order of business was to reverse the RIF Order - contemptuously calling it an abdication of FCC authority⁷ - and then replacing it with the April 25 Order and its new Open Internet rules.

2. Highlights of the April 25 Order.

By its ordering clauses in the April 25 Order, the FCC (with voluminous explanation) adopted Open Internet rules substantially identical to the 2015 ones. They include expanded common carrier (“Title II”)⁸ type obligations such as privacy, universal service contributions, disability access, rate regulation, complaint and enforcement procedures (U.S.C. Sections 206 -208), pole attachment and other utility style rules that will now apply to both fixed and mobile BIAS providers. Among these are BIAS specific rules, including “bright line” ones (no blocking throttling, or prioritization of BIAS traffic), and a general catch-all, non-discrimination rule. There is also nebulous discussion of “non-BIAS data” such as network “slicing” and content management leaving their permissibility unclear.⁹

Importantly, the Open Internet Order reclassifies both fixed and mobile BIAS from their current classification as unregulated information services to “telecommunications services” and “commercial mobile service (CMRS)” both subject to Title II (common carrier); mobile BIAS, now reclassified as CMRS is also subject to Title III (radio licensing regulation).¹⁰

Mindful of criticism that net neutrality is a steppingstone to rate regulation, the FCC will “forbear” from enforcing common carrier rate regulation (tariffs). Addressing the administrative Open Internet compliance burdens on small carriers, the FCC has at least temporarily exempted those with 100,000 or fewer customers from complying with some of the more burdensome transparency requirements.

As for transparency, the April 25 Order greatly expands the scope of required disclosure, adding a new rule (restated as 47 CFR 8.2.) as follows:

⁵ Restoring Internet Freedom, WC Docket No. 17-108, 33 FCC 311 (2017) (“RIF Order”), *aff'd in part, remanded in part, sub. Nom Mozilla Corp. v FCC*, 940 Fed. 1 (D.C. Cir. 2019) (“Mozilla”) (subsequent history omitted)

⁶47 C.F.R. 8.1(a). <https://www.ecfr.gov/current/title-47/chapter-I/subchapter-A/part-8>. Additional disclosures obligations through so-called “broadband labels” were added to the transparency rule later. 47 CFR 8.1(a)(1)(2).

⁷ April 25 Draft (FCC Fact Sheet). Paragraph (“Par.”) references below are to numbered paragraphs of the April 25 Draft.

⁸ 47 U.S.C. Chapter 5 –Subchapter II – Common Carriers, Sections 201- 276 (“Title II”)

⁹ See <https://broadbandbreakfast.com/akamai-wants-fcc-to-fill-a-gap-in-net-neutrality-draft-order> (*Ex parte* comments of Akamai, a content delivery network CDN provider) seeking “clear statement” from the FCC that provision of CDN temporary storage to BIAS providers is not paid prioritization.)

¹⁰Pars. 213, 229 (classifying mobile BIAS as CMRS and as a telecommunications service avoids the inconsistency of making it a both a regulated telecommunications service and an unregulated private mobile service). *See also* 2015 Draft at note 1349 (Title III licensing authority over facilities-based mobile BIAS providers gives FCC additional authority to advance national security and public safety).

Reinstatement of the FCC’s 2015 Open Internet Rules: What’s Next?

“A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and *for content, application, service, and device providers* to develop, market, and maintain Internet offerings.” Par. 541. (emphasis added)

Anticipating the complexity of the new rules, the FCC has included procedures for seeking advisory opinions to help understand them. Whether from the FCC or otherwise (an appellate court perhaps), help in understanding the April 25 Order’s labyrinthian maze of Internet “do’s and don’ts” will no doubt be welcome.

3. The Political Divide.

The agency’s split along party lines over net neutrality’s return could not be more pronounced. Compare FCC Chairwoman Jessica Rosenworcel’s impassioned defense of the new rules for broadband access - “we need it fast, open and fair”¹¹ - with fellow Republican Commissioner Brendan Carr’s dissent to the April 25 Order, describing it as an old “power grab” by the Democratic Executive Branch. Several lawmakers have also weighed in on the debate, Republican ones predictably opposing the new rules; Democratic ones supporting them.¹²

II. What Happens Next?

1. Major Questions Doctrine v. *Brand X*.

Much discussion is now focused on the Major Questions doctrine, according to which questions of national importance should be decided by the duly elected members of Congress, not by federal agencies. The debate, should it get that far, may well be decided by the U.S. Supreme Court, some of whose justices have already tipped their hand, outspoken in their approval of “Major Questions” and in criticism of so-called “Chevron Deference”, a well-established case precedent supporting the right of such federal agencies to interpret statutes.

Briefly, the “Major Questions” doctrine was first articulated by name in the U.S. Supreme Court’s decision in *West Virginia vs. Environmental Protection Agency*,¹³ holding that the EPA did not have Congressional authority to regulated carbon dioxide emissions. under the federal Clean Power Plan (also established under the Obama administration). Relying on this doctrine. the High Court stated that courts should not defer to agencies on matters of “vast economic or political significance” unless having express Congressional authority to do so.

¹¹ <https://www.fcc.gov/document/five-facts-about-net-neutrality-protections>

¹² Compare <https://www.commerce.senate.gov/2024/5/sen-cruz-federal-govt-must-prioritize-americans-prosperity-over-regulatory-control-of-the-internet> with <https://www.markey.senate.gov/news/press-releases/senators-markey-wyden-cantwell-eshoo-join-fcc-chair-rosenworcel-to-highlight-upcoming-fcc-net-neutrality-rule>

¹³ *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022)

Reinstatement of the FCC's 2015 Open Internet Rules: What's Next?

Chevron Deference, on the other hand, stands for roughly the opposite proposition, at least where there is statutory ambiguity. In such circumstances, a reasonable construction of the statute by the agency charged with enforcing it (here, the FCC) should be given deference.¹⁴ In its April 25 Order, the FCC anticipates the likely objection to its broadband access reclassification under the Major Questions doctrine, arguing in reliance on *Brand X* that the U.S. Supreme Court had already found that the FCC has authority make such a classification. That said, the U.S. Supreme Court, with its conservative majority, will likely prove hard to convince on this point.¹⁵

That is if the inevitable appeal gets that far. As in 2016, the upcoming elections may well decide the outcome of this latest attempt at net neutrality's resurrection.

2. And Our Next Webinar.

Which brings us to our next webinar "Net Neutrality Part III: What's Next?" (Our last one is now available on demand.) As in previous net neutrality discussions our expert panel will address the merits (pro and con) of the new rules, as well as dissecting the April 25 Order and weighing in on some of the unclear "guidance". Here are some discussion topics.

- Congressional Review: Will Congress weigh in on the net neutrality debate as it did in 2017? How will the November election dynamics play out here?
- "Bright Line" Rules and General Non-Discrimination: The prohibitions on "blocking", "throttling" are qualified (as is the general non-discrimination rule) when "reasonable" network management so requires; the "no prioritization" rule is not.¹⁶ What types of network management are "reasonable"; which ones are not? ¹⁷
- "BIAS Only" Providers. Who are they? Much of the FCC's critique of the current RIF Order is that it fails to protect this class of unfortunates. All major BIAS providers provide both BIAS and regulated telecommunications service, thereby making their bundled offerings already subject to Title II regulation. Yet it is the beneficial interest of "BIAS only" providers that supports the FCC's return to "Title II". How do bundled BIAS and telecommunications service differ from "BIAS only" under the new rules?
- Privacy. BIAS providers must comply with the privacy statute: 47 USC, 222 (Privacy). But not with the Privacy CPNI Regulations (47 CFR 222), rules that were adopted precisely to help affected providers understand that "CPNI" is and how it must be protected.

¹⁴ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (relied upon by *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) ("Brand X") (holding that the FCC has lawful authority under *Chevron* to find that cable broadband was not a "telecommunications service")

¹⁵ See generally <https://broadbandbreakfast.com/can-the-fccs-net-neutrality-rules-survive-the-major-questions-doctrine/>

¹⁶ Erratum: An earlier version of this Alert incorrectly stated that the "general conduct (non-discrimination) rule was not qualified by a reasonable network management.

¹⁷ Revised Open Internet Rule 8.1(e) (A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband internet access service.)

Reinstatement of the FCC's 2015 Open Internet Rules: What's Next?

Compliance with 47 USC 222, at least as discussed in the April 25 Order, is a bit Kafkaesque. Privacy compliance is a must but how? Figure it out because the penalties are draconian. Just ask AT&T, Verizon, and T-Mobile.¹⁸ Also, both the FCC and the Federal Trade Commission (FTC) now exercise jurisdiction over broadband privacy practices? Do BIAS providers have to comply with FTC rules in addition to FCC privacy requirements?

- Enforcement: What are some of the enforcement measures available to the FCC and to third parties under the common carrier complaints procedures (47 USC 206-208)? Does the reclassification create a private right of action (including perhaps for "Big Tech" competitors) against BIAS providers under the Communications Act for violations of privacy protections and other net neutrality rules?
- Other Open Internet Rules: Speakers will discuss enhanced "Transparency" rules (whose adoption is postponed indefinitely), complaint procedures, FCC advisory opinions, and other noteworthy details of the Open Internet Order.
- Judicial Review: The 6th Circuit Court of Appeals has been randomly selected to hear appeals to the April 25 Order. How will the challenges to the rules in this venue (rather than the customary appellate review by the D.C. Circuit Court of Appeals) affect their survival?

For a discussion of these and other topics, please attend our webinar, sponsored by Thomson Reuters and scheduled for June 28, 2024. Speakers and additional details will soon be announced and posted on our website: www.wstelecomlaw.com. We live in interesting times. We hope you attend and enjoy the webinar. For more information on this event, please see www.wstelecomlaw.com/practice-areas/net-neutrality

¹⁸ [FCC Fines Verizon, T-Mobile and AT&T \\$200 Million for Sharing Customer Location Data - CNET](#)