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CLIENTS & FRIENDS ALERT[1]

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

I. Background, Summary, and Recent Events.

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 ones that discussed first, the draft of the FCC's Open Internet order[2] (some 434 pages) that was adopted in its entirety by a 3–2 vote along party lines, and second, a preview of our Thomson Reuters webinar (recorded last week, June 28, 2024) where a panel of experts discussed the new rules, the underlying policies (both pro net neutrality and con), and predictions about whether they will survive. (Excerpts from our webinar are available by separate cover.)

Meanwhile, with the ink on the April 25 Order hardly dry, opponents had petitioned the FCC to stay the effectiveness of the rules pending appellate review by the Sixth Circuit Court of Appeals (randomly selected by the United States Judicial Panel on Multidistrict Litigation).[3] The FCC and one pro-net neutrality petitioner petitioned the Sixth Circuit Court, a conservative one with a number of Republican appointed judges, to transfer the case to the (more FCC friendly) D.C. Circuit Court of Appeals.

Serendipitously, even as we were discussing, first, whether the Sixth Circuit Court would accept the transfer petition and second, whether the Open Internet rules would survive appeal, two major decisions were released deciding the first and (probably) the second.

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[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] https://www.jpml.uscourts.gov/sites/jpml/files/MCP-185-Consolidation_Order-6-6-2024.pdf

First, the Sixth Circuit Court denied the transfer petition.[4] Second, the U.S. Supreme Court struck down the "Chevron Deference" doctrine,[5]

Here are a brief historical background, some highlights of the April 25 Order, the recent U.S. Supreme Court decision striking down Chevron Deference, and our webinar panelist' observations about what happens next - have so far proven correct. A copy of our webinar recording will soon be available on demand by Thomson Reuters.

1. Historical Background.

Following its 2016 election victory, the Republican controlled Congress issued a resolution of disapproval that repealed the 2015 Open Internet Rules.[6] 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,[7] and returning broadband internet access (BIAS) to its previous classification as unregulated information service. Affirmed in large measure by the D.C. Circuit Court in *Mozilla*, the RIF Order[8] 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.[9]

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 authority[10] - 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")[11] 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

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[4] In Re: MCP No. 185, United Sates Court of Appeals for the Sixth Circuit (Order No. 24-7000, Filed Jun 28, 2024) (denying motion to transfer) ("Transfer Denial Order"). See https://www.law360.com/publicpolicy/articles/1853071/6th-circ-won-t-move-net-neutrality-challenges-to-dc

[5] Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et. al. No.22-451, 603 U.S. ____ (2024) https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf. ("Loper v. Raimondo"). See https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/

[6] 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

[7] 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)

[8] 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)

[9] 47 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).

[10] April 25 Draft (FCC Fact Sheet). Paragraph ("Par.") references below are to numbered paragraphs of the April 25 Draft.

[11] 47 U.S.C. Chapter 5 –Subchapter II – Common Carriers, Sections 201- 276 ("Title II")

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.[12]

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).[13]

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:

> "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"[14] - with fellow Republican Commissioner Brendan Carr's dissent to the April 25 Order, describing it as an old "power grab" by

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[12] See https://broadbandbreakfast.com/akamai-wants-fcc-to-fill-a-gap-in-net-neutrality-draft-order (*Ex parte* comments of Akami, 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.)

[13] Pars. 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).

[14] https://www.fcc.gov/document/five-facts-about-net-neutrality-protections

the Democratic Executive Branch. Several lawmakers have also weighed in on the debate, Republican ones predictably opposing the new rules; Democratic ones supporting them.[15]

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 (as mentioned above) overruling *Chevron v Natural Resources Defence Council*,[16] until now 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*,[17] 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.

The now Chevron Deference doctrine, on the other hand, had stood 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.[18] In its April 25 Order, the FCC anticipating the likely objection to its broadband access reclassification under the Major Questions doctrine, argued in reliance on *Chevron* that the U.S. Supreme Court had already found that the FCC has authority make such a classification.

On June 28, 2024, *Loper v. Raimondo* put an end to that argument.[19] The U.S. Supreme Court expressly overruled *Chevron*, holding that the Administrative Procedures Act (APA) requires courts to exercise independent judgement in deciding whether an agency acted within its statutory authority, and may not defer to an agency interpretation simply because the statute is ambiguous. The Court clarified that *stare decis*, the doctrine supporting judicial adherence to precedent, does not require it here to support *Chevron*, which it described as "fundamentally misguided" and "unworkable". *Brand X*, meanwhile, the Court cited as an example of how government officials, under *Chevron*'s analysis, may change their mind as to what is a "reasonable" interpretation of a statute from one Administration to the next (Presidents George W. Bush, Obama, and Trump)

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[15] *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

[16] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

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

[18] *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")

[19] *See Infra* Note 5.

without a change in the law itself. And without *Chevron*'s support, the FCC will be hard pressed to convince that U.S. Supreme Court, with its conservative majority, that its' Open Internet rules should survive Major Questions review.[20]

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 Latest Webinar.

Which brings us to our recent webinar "Net Neutrality Part III: What's Next?" (Soon to be available – along with our last one - on demand.) As in previous net neutrality discussions our expert panelists addressed 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.[21] What types of network management are "reasonable"; which ones are not? [22]

- "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 "Tile 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. 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.[23] 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?

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[20] See generally https://broadbandbreakfast.com/can-the-fccs-net-neutrality-rules-survive-the-major-questions-doctrine/

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

[22] 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.)

[23] FCC Fines Verizon, T-Mobile and AT&T $200 Million for Sharing Customer Location Data - CNET

- 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 discuss enhanced "Transparency" rules (whose adoption is postponed indefinitely) and other noteworthy details of the Open Internet Order.

- Judicial Review: As indicated, the Sixth Circuit Court of Appeals had been randomly selected to hear appeals to the April 25 Order. Our panelists correctly predicted that this Court would deny the transfer motion to the D.C. Circuit Court of Appeals)?

Finally, please let me take this opportunity to express my thanks to my stellar panelists below for their excellent, informative presentations.

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