ACC DOCKET
INFORMED. INDISPENSABLE. IN-HOUSE.

Network Neutrality: A Quick Compliance Guide to the Open Internet

Compliance and Ethics

Government

Technology, Privacy, and eCommerce

CHEAT SHEET

- ***Gone is the 'light touch'.*** In February, the FCC ruling reclassified broadband, deeming Internet service providers common carriers.
- ***Old rules for new tech.*** The FCC's rules regulate broadband providers under Title II of the Communications act of 1934, traditionally used to regulate telephone utilities.
- ***Stringent provisions.*** The Open Internet Order bars broadband companies from blocking, impairing or degrading lawful Internet traffic on the basis of Internet content, application, service or use of a non-harmful device.
- ***An ongoing saga.*** The FCC is facing multiple legal challenges over these latest rules. In-house counsel would do well to monitor news on Capitol Hill and the DC Circuit.

Have you ever experienced a drop in Internet speeds when streaming video or music and thought the delays were occurring on your Internet access provider's network? Have you ever typed in a browser search or website address only to find that you've been redirected to a different website?

On February 26, 2015, the US Federal Communications Commission ("FCC" or "Commission") adopted modified "open Internet" rules intended to protect the ability of consumers and content producers to send and receive legal information on the Internet, a concept also known as "network neutrality." This article helps explain the US regulatory landscape and practical implications for counsel and clients.

In order to strengthen its authority to adopt the rules, the FCC reclassified fixed broadband Internet access services (BIAS) under Title II of the Communications Act of 1934, and mobile BIAS as a commercial mobile service or its functional equivalent. These actions subjected these services to Title II, traditionally used to regulate telephone utilities. Nevertheless, the agency refrained from adopting the full range of utility regulation, forbearing from applying numerous statutory provisions. This article explains which sections of Title II will and will not apply to broadband Internet access services.

The Commission's action was heralded and followed by a firestorm of controversy. Approximately 3.7 million public comments largely showed "support for the reclassification of broadband Internet access under Title II, opposition to fast lanes and paid prioritization, and unease regarding the market power of broadband Internet access service providers." Many service providers said Title II reclassification would unacceptably increase their costs and burdens of doing business. Others announced that they did not anticipate significant adverse impacts. The White House released a video of President Obama strongly supporting Title II reclassification.

What is BIAS?

- Broadband Internet access service (BIAS) is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service; and
- Any service that provides a functional equivalent of such a service, or is used to evade the protections of the open Internet rules.

BIAS DOES NOT INCLUDE:

- Virtual private network (VPN) services (to the extent separate from BIAS);
- Content delivery networks (CDNs) (to the extent separate from BIAS);
- Hosting or data storage services (to the extent separate from BIAS);
- Internet backbone services (to the extent separate from BIAS);
- Dial-up Internet access services;
- Use of a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network not intentionally offered for the benefit of others;
- Services offered by premises operators — such as coffee shops, bookstores, airlines and private end-user networks (e.g., libraries and universities) to patrons in their locations;
- Enterprise services: typically offered to sophisticated, large organizations through customized

or individually negotiated arrangements;
- Special access services; and
- Non-bias data services: services, even if offered by broadband providers, that are not themselves the service of providing Internet access. Examples may include voice or video over Internet Protocol (VoIP), e-readers, heart monitors, energy consumption sensors, vehicle telematics and services that provide schools with certain applications and content. Nevertheless, non-BIAS data services may still be subject to enforcement action if a service is "providing a functional equivalent of broadband Internet access service, or . . . is [being] used to evade the protections set forth in these rules," or "undermining investment, innovation, competition and end-user benefits."

The FCC introduced the item with a video of support from Tim Berners-Lee, known as the creator of the World Wide Web. Republican Commissioner Ajit Pai dissented at length and held a press conference denouncing the order and circumstances of its adoption. US House and Senate committees opened investigations into whether FCC Chairman Tom Wheeler was unduly influenced by US President Obama. Lawmakers worked on bills to override the new framework. Trade associations and interested parties filed appeals that will be heard by the DC Circuit Court of Appeals.

Open Internet rules: in brief

The network neutrality aspects of the 294-page Report and Order and its eight pages of rule changes require that broadband Internet access service (BIAS) providers:

Report & Order, "In the Matter of Protecting and Promoting the Open Internet," GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) (*Report & Order*).

- Treat all Internet traffic equally, in general;
- Publicly disclose how they treat Internet traffic;
- Not block, impair or degrade lawful Internet traffic on the basis of Internet content, application, service or use of a non-harmful device; and
- Not accept compensation in exchange for preferential treatment of certain traffic.

In general, this means a BIAS provider, such as Comcast or Verizon, may not manage its network in a way that favors certain traffic in exchange for compensation, or favors its affiliates' content, applications, services or devices. Nevertheless, see the "Interconnection Exception" in the sidebar.

What do the open Internet rules require?

Except to the extent managing latency-sensitive traffic through "reasonable network management," a BIAS provider may not:

- Block lawful content, applications, services or non-harmful devices;
- Impair or degrade lawful Internet traffic on the basis of Internet content, application or service, or use of a non-harmful device;
- Engage in "paid prioritization," meaning management of the provider's network to directly or

indirectly favor certain traffic in exchange for consideration; or
- Unreasonably interfere with or unreasonably disadvantage use of the Internet.

BIAS providers must provide transparency by publicly posting certain disclosures about their services and network management practices.

Interconnection exception: The open Internet requirements do not apply to commercial arrangements for traffic exchange between edge providers, or intermediaries such as CDNs or transit providers, and a BIAS provider. The rules extend only to transmission of data between a BIAS provider and its broadband end user customers. Thus, the rules do not hinder “peering” arrangements to speed up Internet content delivery. A CDN may transport content close to a BIAS provider and its customers, and may agree to charges from or to the BIAS provider, for the benefit of such arrangements to the end users of both entities.

- The agency noted: “to the extent that provisions or regulations apply to an entity by virtue of other services it provides besides broadband Internet access service, the forbearance in this Order does not extend to that context.”
- The FCC provided a “regulatory backstop” by stating: “As a telecommunications service, [BIAS] implicitly includes an assertion that the broadband provider will make just and reasonable efforts to transmit and deliver its customers’ traffic to and from ‘all or substantially all Internet endpoints’ under sections 201 and 202 of the Act.” Disputes regarding interconnection will be heard under Sections 201 and 202, prohibiting unjust and unreasonable practices, and will be subject to antitrust enforcement by the US Department of Justice.

The agency decided it may issue advisory opinions regarding a requestor’s prospective conduct. It is establishing an ombudsman to assist with complaints. Parties may file informal complaints through an online Consumer Help Center and must file formal complaints through the agency’s electronic filing system (“Submit a Non-Docketed Filing” module). The Commission offers mediation services free of charge. Separately, it will monitor compliance through review of press reports and other public information, and take enforcement action where applicable. Violations may be addressed with penalties ranging from citations and notices to monetary forfeitures, refunds, cease and desist orders, revocations and referrals for criminal prosecution.

Detail: Open Internet requirements

To start with the exception to most of the rules, “reasonable network management” means practices with:

> 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.

For example, mobile carriers may block traffic that can pose a security or reliability risk, threaten public safety or injure the consumer experience, such as unwanted spam or malware. In addition,

carriers may “alleviate congestion without regard to the source, destination, content, application, or service.” Conversely, the FCC has stated, slowing the speeds of customers on mobile “unlimited” data plans is not “reasonable network management.”

No blocking

Except to the extent managing latency-sensitive traffic through “reasonable network management,” a BIAS provider may not block lawful content, applications, services or non-harmful devices. In other words, BIAS services must give subscribers access to, and not block the use of, all lawful destinations on the Internet. The order states that BIAS providers may not block any lawful traffic transmitted to or from end users, even if it does not seem to fall within the categories “content, applications, services, or non-harmful devices.” BIAS providers may refuse to transmit unlawful material, such as child pornography or copyright-infringing materials. While the rule generally “entitles end users to connect, access, and use any lawful device of their choice,” the provider has a right to require that “the device does not harm the network” and “may require that devices conform to widely accepted and publicly-available standards applicable to its services.” Finally, BIAS providers may not charge “edge” providers (creators or other sources of Internet content, applications or services) a fee in exchange for agreeing to not block their content, applications or services from reaching the broadband provider’s end user customers.

No impairment

A BIAS provider may not impair or degrade lawful Internet traffic on the basis of Internet content, application or service, or use of a non-harmful device, again with the exception of “reasonable network management.” Impairment includes inhibiting “the delivery of particular content, applications, or services, or particular classes of content, applications, or services,” or “impairs or degrades lawful traffic to a non-harmful device or class of devices” or slows or “renders effectively unusable” Internet traffic, except in the case of reasonable network management. BIAS providers may not charge edge providers for agreement to not impair or degrade their Internet content. Nevertheless, they need not accord similar treatment to unlawful Internet traffic.

A network management practice that would otherwise violate the no-throttling rule must be used reasonably and primarily for network management purposes, and not for business purposes. The order states that “the slowing of subscribers’ content on an application agnostic basis, including as an element of subscribers’ purchased service plans, will be evaluated under the transparency rule and the no-unreasonable interference/disadvantage standard.” In other words, any slowing of all content without regard to application, because subscribers did not purchase a plan for faster transmissions, will be permitted only if set forth in the provider’s open Internet disclosures and if it passes the no-unreasonable interference/disadvantage analysis.

No paid prioritization

BIAS providers may not engage in “paid prioritization,” meaning network management to directly or indirectly favor certain traffic, such as by traffic shaping, prioritization or resource reservation, either in exchange for consideration or to benefit an affiliated entity.

Three exceptions exist. One permits “reasonable network management,” defined above. Another allows providers to seek FCC waivers in exceptional cases, by showing that paid prioritization “would provide some significant public interest benefit and would not harm the open nature of the Internet.”

Finally, see the sidebar for “interconnection exception.”

Zero Rating and Usage Allowances

Sponsored data plans, also known as “zero rating,” permit broadband providers to exclude content from end users’ usage allowances.

Example: T-Mobile’s Music Freedom program lets customers use music streaming programs without counting against their data plans.

FCC decision: the Commission will consider these plans under the nounreasonable interference/disadvantage standard and take action as necessary.

Usage allowances limit the volume of data downloads during a period of time. After reaching a usage cap, downloading speeds may be reduced or excess data charges may kick in.

FCC decision: Usage allowances will be assessed under the no-unreasonable interference/disadvantage standard.

No unreasonable interference or disadvantage

This catch-all “general open Internet conduct” rule provides that the FCC may “address questionable practices on a case-by-case basis.” BIAS providers, except in the case of reasonable network management, may not unreasonably interfere with or unreasonably disadvantage:

- End users’ ability to select, access and use the broadband Internet access service or the lawful Internet content, applications, services or devices of their choice; or
- Edge providers’ ability to make lawful content, applications, services or devices available to end users.

The Commission will consider the totality of the circumstances, on a case-by-case basis, when considering whether conduct satisfies this standard. It will analyze practices based upon factors including, although not limited to, the extent to which the conduct or practice:

- Allows end-user control and is consistent with promoting consumer choice;
- Has negative effects on competition; the agency will also consider the extent of an entity’s vertical integration and its relationships with affiliates;
- Has negative effects on consumers, such as unfair or deceptive billing practices, failure to protect the confidentiality of customer proprietary information, “cramming,” or “slamming;”
- Stifles innovation, investment or broadband deployment;
- Threatens the use of the Internet as a platform for free expression;
- Conforms to “best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organization[s];”
- Is application-agnostic (use-agnostic), meaning it does not differentiate in treatment of traffic, or differentiates without reference to content, application or device. It is not applied to traffic

with a “particular source or destination … generated by a particular application or by an application that belongs to a particular class of applications, that uses a particular application- or transport- layer protocol, or that has particular characteristics (e.g., the size, sequencing, and/or timing of packets).”

Disclosures / transparency rule

The 2010 “transparency” rule provides that each BIAS provider must publicly disclose accurate information on its BIAS network management practices, performance and commercial terms 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. All disclosures must be made timely and prominently, in plain language, and essentially in a publicly accessible place. The 2010 Order stated that disclosures must at a minimum include, where applicable:

- Descriptions of congestion management practices;
- Application-specific behavior such as blocking or rate-controlling specific protocols or ports, any restrictions on types of devices, and approval procedures for devices to connect to the network;
- Practices that ensure security of the network or end users, including triggering conditions;
- A general service description including technology, expected and actual access speed and latency, and suitability for real-time applications;
- Any specialized services offerings and how they may affect last-mile capacity and performance;
- Pricing, such as monthly prices, usage-based fees, and fees for early termination or additional network services;
- Privacy policies such as whether network management entails inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes; and
- Practices for resolving end-user and edge provider complaints and questions.

The 2015 Order “enhanced” the rule with significant new requirements, such as disclosure of promotional rates, all fees and surcharges, all data caps or data allowances, and packet loss as a measure of network performance; and notifying consumers when a “network practice” is likely to significantly affect their use of the service.

Disclosures must be displayed prominently on a publicly available website. Information enabling consumers to make an “informed choice” regarding purchase or use must be disclosed at points of sale. As another 2015 “enhancement,” providers must directly notify end users if their network demand before a period of congestion will trigger a network practice expected to significantly affect the end user’s use of the service.

The Commission adopted a temporary exemption from the “enhancements” for providers of fixed or mobile BIAS that, together with their affiliates, have 100,000 or fewer broadband subscribers. This exemption lasts until December 15, 2015, and may be extended.

Title II reclassification: A brief history

In its February 2015 Order, the FCC reclassified fixed BIAS as a telecommunications service under Title II of the Communications Act, and mobile BIAS as a commercial mobile service or its functional

equivalent. At the same time, the agency exempted these services from 27 of the 40 sections of Title II, resulting in “Light Touch” common carrier regulation. Litigants have targeted the Title II reclassification, stating that it was not in accordance with law.

The Commission’s decision to use Title II stemmed from its desire to adopt network neutrality rules. In January 2014, the DC Circuit Court of Appeals struck down most of the FCC’s first set of such rules. Judge David Tatel’s opinion for the majority stated:

> Given that the commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the commission from nonetheless regulating them as such. Because the commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the open Internet order.

Verizon v. F.C.C. **, 740 F.3d 623 (D.C. Cir. 2014).**

Judge Tatel noted that the Commission had previously decided, in a series of orders starting in 2002, that broadband providers would not be treated as common carriers. Title II of the Communications Act states that common carriers shall “furnish . . . service upon reasonable request,” charge “just and reasonable” rates, and refrain from “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services.” The FCC had decided broadband providers were offering “information services” under Title I of the Communications Act, rather than “telecommunications services” under Title II.

Common carrier jurisprudence, derived from nineteenth century expectations of those who served the public, such as innkeepers, blacksmiths, ferries and railroads, requires that certain carriers “hol[d themselves] out to serve the public indiscriminately.” The Verizon court said the FCC had not shown its open Internet rules were not common carrier obligations. The court in effect said the rules were common carrier obligations or the equivalent, and the FCC could not impose common carrier obligations on companies unless they were common carriers. The court said the FCC had the statutory authority to decide whether broadband providers were common carriers, and since the agency had previously decided they were not, it could not then impose common carrier open Internet requirements upon them.

At the same time, the court affirmed that the FCC had some authority to regulate broadband providers based upon ancillary jurisdiction under section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302(a). Section 706 requires the agency to encourage “the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The court said this gave agency authority to encourage broadband infrastructure deployment, and found reasonable the FCC’s purpose of “preserving unhindered the ‘virtuous circle of innovation’ that had long driven the growth of the Internet.”

After deciding not to appeal, Chairman Wheeler and his advisors considered how to adopt rules that would be sustained by the courts. The FCC remained strongly committed to network neutrality. Its most recent effort was led by Chairman Wheeler, “an unabashed supporter of competition,” although “not interested in protecting competitors from competition.”

Chairman Wheeler has written extensively on the beneficial characteristics of new networks, noting in his e-book, “Net Effects,” their tendency to decentralize economic and creative network activity.

While stating that the government will not “gratuitously interfer[e]” with “the organic evolution of the Internet,” he also said the agency bears “responsibility to oversee that broadband networks operate in the public interest” and “we will not disregard the possibility that exercises of economic power or of ideological preference by dominant network firms will diminish the value of the Internet to some or all segments of our society.”

In an April 29 FCC blog post, Chairman Wheeler made clear that “all options for protecting and promoting an open Internet are on the table.” The difficulty was that the court indicated ancillary authority alone could not sustain the invalidated rules, because the FCC had exempted broadband providers from treatment as common carriers.

Interested parties joined in vigorous debate over whether network neutrality rules could be upheld by the courts only if broadband Internet access was regulated under Title II, or whether some “third way” existed. Many companies were concerned about the effects Title II regulation and open Internet rules would have on their businesses. At the same time, Sprint, T-Mobile, Frontier and hundreds of small businesses said they did not expect it would significantly alter their businesses. Public interest advocates and consumers advocated reclassification under Title II.

On November 10, 2014, President Obama urged the FCC to “take up the strongest possible rules to protect net neutrality.” The strongest rules would consist of common carrier regulation under Title II.

In February 2015, Chairman Wheeler announced that the FCC adopted a hybrid approach, including forbearance. The decisions were predicated on section 706, Title II and Title III of the Communications Act.

Congress took up arms, alleging that Wheeler and the FCC failed to act independently in deciding upon Title II reclassification. The chairman defended the decision in front of numerous committees. Before the House Oversight and Government Reform Committee on March 17, 2015, he said the decision was based on “a tremendous public record,” and he had spoken with consumers and innovators around the country. He said he became concerned that basing regulation of BIAS on a “commercial reasonableness” standard could result in reasonableness for ISPs, not for consumers. He said there was no instruction from the White House, but also said Obama’s announcement “had an impact on the open Internet debate.” He noted democrats in Congress had continually pushed hard for Title II reclassification.

Chairman Wheeler listed approaches the agency had explored: a bifurcated approach using Title II and Section 706; relying upon the same sections but without bifurcation (the approach ultimately taken); Title II without Section 706 (the approach supported by the president); and relying upon Title II in a manner patterned after its application to commercial mobile services (using forbearance).

He found interesting the absence of any adverse reaction from the capital markets to the President’s statement. He pointed to the success of the wireless voice industry years ago, after it was deemed a Title II service with forbearance from certain onerous provisions of Title II. Accordingly, he had become inclined to reclassify broadband providers under a pared-down version of Title II.

Which Title II requirements apply to BIAS?

Title II: What sections apply?

Provided the DC Circuit upholds the effectiveness of the agency’s decision, BIAS providers will be

subject to provisions of the Communications Act that:

- Ensure just and reasonable charges and practices and forbid unjust or unreasonably discriminatory charges, practices, facilities or services (sections 201 and 202, except ratemaking regulations adopted under those sections);
- Allow FCC investigation of consumer complaints (section 208, related enforcement provisions of sections 206, 207, 209, 216 and 217, and associated complaint procedures);
- Protect the privacy of customer proprietary network information (CPNI) (section 222);
- Provide telecommunications carriers with regulated access access to poles, ducts, conduits and rights-of-way (section 224);
- Ensure service is accessible to and usable by individuals with disabilities, if readily achievable, and support network deployments and services through the federal universal service fund (sections 225, 255, and 251(a) (2), except BIAS providers are not required to contribute to the Telecommunications Relay Service Fund at this time); and
- Support the Commission's ability to support broadband deployment and adoption (section 254 and the interrelated requirements of section 214(e)), except any immediate contributions requirements. In other words, broadband providers that were not previously subject to universal service fund contribution requirements are not now required to make contributions. The Order also states that BIAS providers will not be newly required to contribute to state universal service funds.

BIAS providers also will be subject to the rules implementing these sections of the Act, as well as the new network neutrality rules, and section 706, which authorizes the FCC to encourage the deployment of advanced telecommunications capability.

Title II: What sections do not apply?

The FCC forbore (refrained) from applying sections of the Act providing for tariffing, last-mile unbundling and other rate regulation (Sections 203, 204), enforcement-related provisions (Sections 205, 212), information collection and reporting (Sections 211, 213, 215, 218-20), discontinuance, transfer of control and network reliability approval (Section 214), interconnection and market-opening provisions (Sections 251, 252, 256), provisions regarding subscriber changes (Section 258), provisions concerning former Bell Operating Companies (Sections 271-276) to the extent newly arising from the classification of BIAS (except 276 and its accompanying rules, to the extent applicable to inmate calling services), and the truth-in-billing rules.

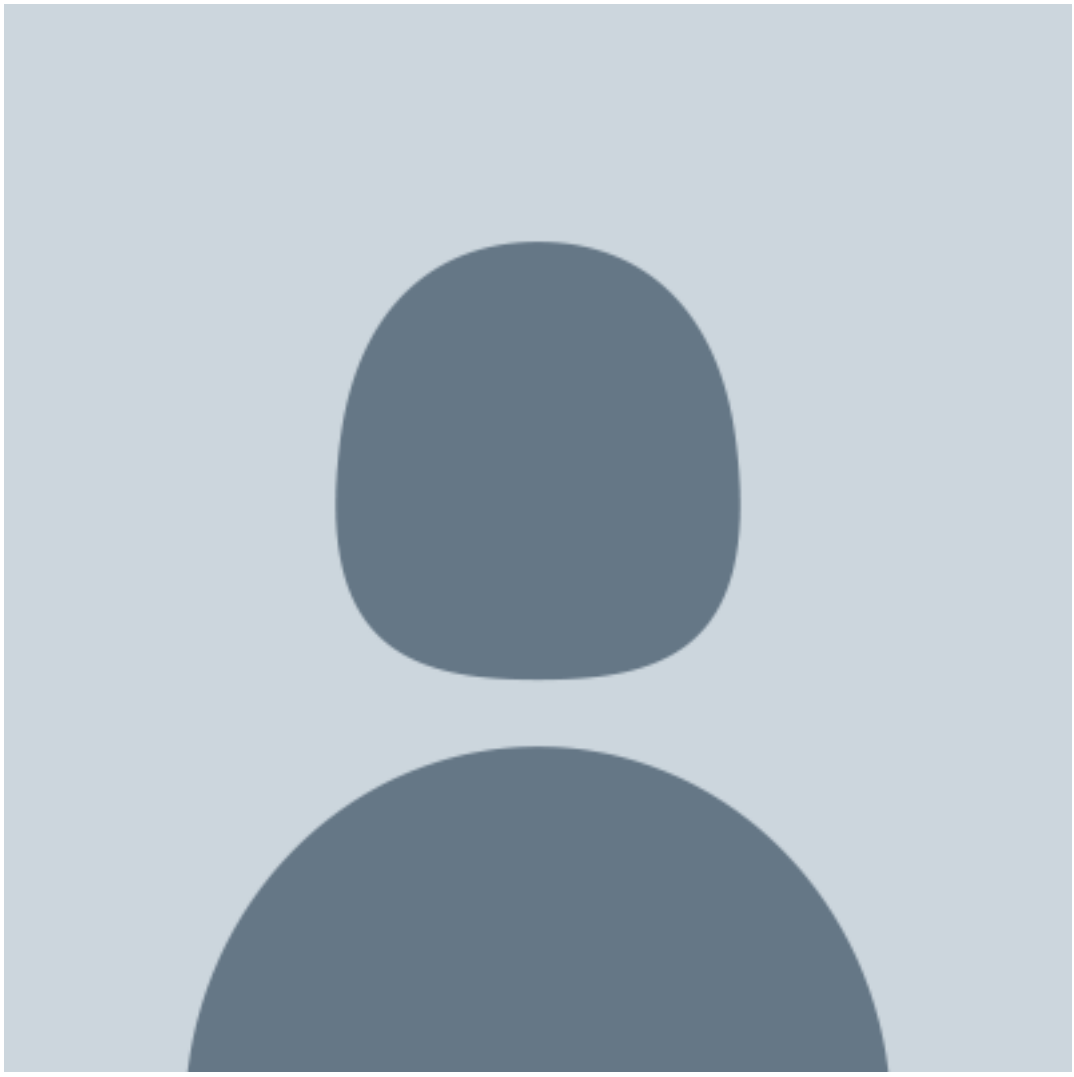
The agency also forbore from applying its CMRS roaming rule, section 20.12(d), to mobile BIAS providers that remain subject to obligations, process and remedies under its data roaming rule, section 20.12(e). The data roaming rule, rather than the automatic roaming rule or Title II, will govern conduct of such providers until any future rule changes.

The agency did not forbear from applying to BIAS the immunity from liability in section 230(c), and the restrictions on obscene and illicit content in sections 223 and 231 (to the extent enforced), as well as associated limitations on liability. Broadband Internet access service will remain exempt from state and local taxation under the Internet Tax Freedom Act.

Interested parties promptly appealed the FCC decision. They also sought a stay of the rules, which was denied by the DC Circuit Court of Appeals. Public interest groups have intervened. At the same time, Congress has considered several bills and riders to replace or avoid the effectiveness of the FCC's rules. Counsel would do well to monitor news on Capitol Hill and the DC Circuit for upcoming

chapters in the network neutrality saga.

Julia Tanner



General Counsel and Vice President of the MTPCS, LLC group

Cellular One wireless telecommunications companies