Free Press

The Draft Net Neutrality Order Is a Stable, yet Flexible Path Towards Restoring Internet Freedom

By Yanni Chen and Matt Wood

After the initial excitement over the FCC's announcement on Net Neutrality, Free Press settled in for a closer read of the draft Order released Thursday, April 4th. We're excited that it reflects the Commission's stated objectives. The FCC is slated to vote on the order at its meeting next Thursday, April 25th.

While the draft Order is long and comprehensive, the effect is simple: the Commission's 2015 *Open Internet Order* framework will be restored and broadband internet access service ("BIAS") will once again be a telecommunications service subject to Title II oversight. In doing so, the draft harmonizes the Commission with its 60-year precedent for distinguishing computer processing from the transmission of data over communications lines, and fulfills Congress's intent when it updated the Communications Act for the internet era.

The bulk of the draft is a comprehensive breakdown of the Commission's rationale, policy objectives, historical and legal analysis, and the scope of the new regulation—as well as an explanation of where the 2017 *Restoring Internet Freedom* ("*RIF*") *Order* went wrong. We cover the key points below.

Restoring BIAS under Title II will protect consumers from unjust and unreasonable practices and discrimination, and ensure that broadband networks are resilient and more competitive. Returning to Title II is also the correct interpretation of the law, tested in court.

Reclassification Reinstates Consumer Rights and the Commission's Ability to Protect Them

Restoration of Title II Classification

The Commission first explains why mass-market BIAS is a telecommunications service, as opposed to an information service, as defined in the Communications Act. Telecommunications services provide "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." The Commission establishes that BIAS is best classified under this definition based on both (1) how consumers understand and perceive the service; and (2) a technological understanding of how the technology works.

The Commission also explains why the previous classification of BIAS as an information service was a product of flawed analysis and simply inaccurate from both a consumer and technical standpoint. Free Press has written extensively on this point, including in the 2015 proceeding that got Title II back, the 2017 proceeding opposing its repeal, and in this current push to set the framework right again.

The reclassification of BIAS is important because telecommunications services fall under Title II of the Communications Act, which imposes certain obligations on its providers. Under Sections 201 and 202 of the Communications Act, internet users can access broadband services on reasonable terms, without any unjust or unreasonable discrimination from their provider. These core protections as well as many others are only available under Title II, as courts reviewing earlier FCC attempts to adopt Net Neutrality rules outside of a Title II framework explained.

Legal Authority & Broadband Investment Realities

The draft goes on to explain that the Commission can make this reclassification decision because Congress authorized it to do so when it enacted the Communications Act in 1934 and updated it in 1996, because doing so would be consistent with the goals of the Communications Act more broadly, and because revisiting the classification of BIAS is permissible under administrative law principles. The draft also discusses how the Commission has the authority to reclassify BIAS under newer legal principles like the major-questions doctrine, and if that doctrine should even apply.

In addition to explaining other defects of the 2017 *RIF Order*, this section of the draft also debunks an empirical study heavily relied upon by the Trump FCC that issued that repeal. The draft identifies several flaws of the George Ford regulation and investment study—which claimed that Net Neutrality regulation and Title II classification had a harmful effect on broadband investment. The current Commission's proposed decision describes Ford's improper methodology, overbroad measure of investment, and use of outdated data. The Commission affords the study no probative value, concluding that the *RIF Order* was not based on sound empirical analysis and that nothing in the current record supports its conclusion.

Most important on this point, however, is what Free Press focused on in our comments in this latest round: no policy argument or claim about the impacts of FCC action changes the proper interpretation of the definitions in the Communications Act. We've shown dozens of times that Ford's claims, and those made by the industry lobbying groups that hire him, are completely false and irrational. But even if they had a shred of truth to them, they don't change the law that Congress wrote on the legal treatment of communications transmission services.

The Commission's findings about impact on investment are consistent with our long-running research and our recently-filed ex parte. Free Press found that broadband investment was cyclical and not causally related to the presence or absence of Net Neutrality policy or broader Title II oversight. In fact, having monitored major ISPs' investor calls and conference appearances, we found that Title II and Net Neutrality were not mentioned once—underscoring the policy's non-effect on broadband investment.

Forbearance

While Title II places more requirements on common-carrier telecommunication services than the last administration's information services classification and regulatory abdication did, the Commission forbears from applying most of its provisions to broadband providers in its light-touch framework. Forbearance means that the Commission will not apply provisions of the Communications Act that it

identifies as unnecessary to prevent unjust or unreasonably discriminatory conduct from providers and to ensure consumer protection, and where refraining from applying the provision is consistent with the public interest.

The Commission rightly plans to retain for BIAS its broad authority under Sections 201, 202, and 208; provisions protecting national security (Section 214, with respect to entry certification); customer privacy (Section 222); broadband providers access to utility poles and other rights-of-way to encourage network deployment (Section 224); provisions advancing access for people with disabilities (Sections 225, 255, and 251); and some universal service provisions (Section 254), among others.

The draft reveals that it plans to forbear from many other sections that would impose requirements on BIAS providers. For example, the Commission plans to forbear from any tariff requirements that would obligate providers to file their rates with the FCC, and from any ratemaking based on Section 205 of the Communications Act. That's the right decision. The FCC dictating the typical prices for broadband providers would be a burdensome process unlikely to save people money. But in one of the few proposed decisions Free Press opposes in the draft order, the Commission also proposes to forbear in part from Sections 201 and 202 to the extent they would allow for what the draft describes as "*ex post* rate regulation."

This is a subtle distinction, but the wrong way to go. We've often described Sections 201 and 202 as the "heart" of the consumer protections in the Communications Act. While Free Press agrees that the Commission should not decide in advance the rates that broadband providers should charge, there is and must be a role for the Commission to investigate concerns about internet service junk fees, price gouging, consumer disconnections, or other kinds of monopoly abuses in areas where there is no real competition. That's why Free Press advocated in our comments for no forbearance at all from Sections 201 and 202.

Additionally, Free Press applauds the Commission's plans to forbear from Section 254(d) of the Communications Act, even though some commenters have called for it to apply. Section 254 in general is the foundation of the Commission's universal service fund ("USF"). But applying subsection (d) of that statutory section would immediately require BIAS providers to contribute to USF. And those "contributions" are passed through to customers directly, meaning that internet customers would see a dramatic increase in their bills.

USF's objectives are crucially important, but we need to make sure that it's funded with progressive revenue-raising measures instead of increasing regressive taxes that hurt the very same people who qualify for affordability subsidies. Immediately injecting BIAS providers into the USF contribution base would create a $4 billion dollar annual wealth transfer from consumers to big companies, according to Free Press estimates. That's because, as the FCC has noted, residential customers make up approximately 75 to 85 percent of BIAS customers. That shift would have tremendous regressive impacts on individuals and families, and according to FCC analysis could increase monthly broadband and phone bills anywhere from $2 to $18 per month depending on how much weight is added to USF. Particularly in

light of [the potential congressional failure to renew funding for the Affordable Connectivity Program](), shifting these additional costs onto individual consumers and consumers as a class would be unacceptable.

Specific Rules of the Road Stop BIAS Providers from Engaging in Harmful Conduct

Bright-Line Rules

The draft re-adopts each of the 2015 bright-line rules for both mobile and fixed broadband services. These rules ban throttling, blocking, and paid prioritization. The Commission noted that "[w]ithout rules in place to safeguard and secure the open Internet, the incentives BIAS providers have to act in ways that are harmful to investment and innovation threaten both broadband networks and edge content, as the D.C. Circuit has recognized." The draft identifies these three practices once again as "inherently unjust and unreasonable, in violation of section 201(b)" of the Communications Act.

With respect to blocking, the Commission reiterated that "the need to protect a consumer's right to access lawful content, applications, services, and to use non-harmful devices is as important today as it was when the Commission adopted the first no-blocking rule in 2010."

In its rule against throttling, the new Order will prohibit impairing or degrading lawful internet traffic on the basis of content, application, service, or use of a non-harmful device. Throttling is conduct that does not block content, but otherwise inhibits the delivery of certain content, applications, or services, or classes of content, applications, or services. The Commission explained that throttling could also include favoring certain applications or classes of applications—that differentiating among Internet traffic in either direction could violate the rule, rather than just slowing down traffic.

Finally, the draft includes a reinstatement of its 2015 prohibition on paid or affiliated prioritization practices, finding that such practices harm consumers, competition, and innovation, and create disincentives to promote broadband deployment. The Commission expressed concerns about the disproportionate harm paid prioritization arrangements could have on small edge providers in particular. BIAS providers still can seek a waiver to engage in paid prioritization, granted only where evidence is shown that the practice does not harm the open internet.

General Conduct Standard

In addition to the three bright-line rules identified, the Commission also reinstated its general conduct rule from 2015, which prohibits BIAS providers from unreasonably interfering with or unreasonably disadvantaging (i) end users' ability to select, access, and use broadband internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Unlike the three bright-line rules, the general conduct standard operates on a case-by-case basis and applies a set of factors to determine whether a practice—even where it does not violate any bright-line rule—still harms the open internet.

As Free Press noted in 2015, we actually take a lot of comfort in the general conduct rule—or more generally, in the Commission's plenary authority under the Communications Act to prevent unjust, unreasonable, and unreasonably discriminatory practices and harms. As reflected in the current record, some fellow Title II proponents and Net Neutrality advocates have expressed concerns about relying on the general conduct rule to address harmful practices.

But make no mistake: the rule text in the current draft is identical to what it was in 2015. It's not "weaker," or filled with loopholes, as some advocates and even a couple of reporters have claimed. And as it always does, the Commission's Order language explains how the agency will analyze problems that arise and enforce its rules against practices that threaten the nature of the open internet. The draft does not and could not specify every possible future permutation or ISP practice. Yet the benefit and tradeoff of not specifying every unjust BIAS practice now is that it makes the Order more future-proof. New, unpredictable forms of harmful discrimination won't be able to escape the FCC and will be held to the standards of Title II. The flip side of this is also positive—technological innovations can evolve in this light-touch framework, and the Commission can determine whether they are beneficial or not. But the general conduct standard will not allow cable or phone companies to evade their obligations under Title II with unsupported claims and technical jargon.

Grounding the general conduct standard in Section 201(b)'s prohibition on unjust and unreasonable practices, and Section 202(a)'s non-discrimination language, gives the public a legal right to hold BIAS providers accountable—beyond conduct falling under the three bright-line rules. And this is what the Commission has stated is the objective of the general conduct standard: to serve as a "backstop" to the bright-line rules and ensure that harmful conduct can't evade the spirit of the rules.

Transparency Rule

The Commission also returns in this draft to the 2015 transparency obligations, which require BIAS providers to disclose certain network practices and performance characteristics, and to disclose them in specific ways. These publicly-accessible disclosures will empower consumers to make educated decisions about their BIAS subscriptions and providers.

The Draft Order Strikes a Balance of Clarity and Flexibility for the Future

One particular strength of the current draft is the balance it strikes between having clear and stable rules and creating a future-proof regulatory framework. As discussed above, the general conduct standard allows for technological development by applying the same rules to new services and practices, not categorically forbidding them, but in no uncertain terms prohibiting unreasonably discriminatory conduct over-and-beyond blocking, throttling, and paid prioritization.

The same approach appears in the Commission's treatment of so-called specialized services, which may make use of the same networks as typical open internet access services but do not fall under the definition of BIAS. The Commission's plan—to closely monitor the development and use of specialized services to ensure they aren't being used as functional equivalents of BIAS providers or to evade Title II

obligations for BIAS providers—will keep abusive, non-competitive behavior under the ambit of regulation. By taking a case-by-case approach, instead of creating an abstract definition or itemized list, the Commission leaves in flexibility to review future technology and its applications as they evolve rather than trying to predict all of them beforehand. Yet the Commission's draft stipulates that no supposed specialized service may "hinder consumers' access to or use of BIAS, or [ ] impede the ability of over-the-top services to compete."

Another aspect of the draft that maximizes the chances that this framework can last in the long-term is its strict adherence to the 2015 rules, definitions, and framework—and clarifications of how that older framework applies to technological developments that have evolved since the 2015 Order. The 2015 Order is court-tested, approved by the D.C. Circuit in *United States Telecom Association v. FCC*. Returning to a virtually identical framework strengthens the Order's case in court, after the broadband industry inevitably seeks review.

Finally, when it comes to questions about the relationship between these restored federal rules and strong Net Neutrality laws and rules that sprang up in states like California and New York after the Trump FCC's repeal of the federal rules, the new draft takes an appropriately narrow, careful, and protective approach toward those state efforts. Title II detractors carp that nothing terrible happened after Title II protections were taken away in 2017, but (to the extent that's accurate) that's in large part because the great California law and other local efforts that states and municipalities put on the books in the *RIF Order*'s wake helped to stave off ISPs' worst behavior as the market continued to develop after the landmark 2015 federal rules were put in place.

It's also important to understand at the outset that none of those state laws are "stronger" than the FCC's entire Title II framework, because Net Neutrality rules are only one of the vital policy outcomes built on Title II. As we mentioned above and detail below, that portion of the Communications Act also lets the FCC promote and protect a wide range of broadband goals.

But when it comes to open internet rules themselves, the draft suggests that the state laws would only be tested if and when they are inconsistent with the new national framework. And importantly, the draft also says that the strong laws in California and elsewhere are compatible with the FCC's restored rules in this proceeding, even if those state guidelines cover different behaviors than the Commission's three bright-line rules do. That's a question that courts very likely would ultimately have to resolve, if and when a broadband provider tries to claim that there's a conflict between the federal and state standards, and argues that it can't possibly comply with both. But the Commission's attitude and approach in the draft Order are good, to the extent they help to set the stage for any such challenges. The legal doctrine of conflict preemption will help unify the standard, and there's little more the draft could do to shape that doctrine.

Title II Oversight Is More Important Now than Ever

By classifying broadband as a telecommunications service, the Commission will have greater power under Title II to accomplish its many policy goals in addition to Net Neutrality, like promoting national security, cybersecurity, public safety, reliable broadband access, network resiliency, broadband competition, and consumer privacy. While the drafters of the *RIF Order* argued that FCC oversight was extraneous because consumer protection and antitrust law are sufficient to protect the open internet, the current Chair of the Federal Trade Commission herself noted that the FCC "has the clearest legal authority and expertise to fully oversee internet service providers." And the D.C. Circuit noted in *Mozilla v. FCC* that those detractors' arguments were "anemic" and "no model of agency decisionmaking," and that they "fail[ ] to provide any meaningful analysis of whether these laws" would in practice prevent the harmful conduct this Order seeks to address.

Public safety officials heavily rely on broadband services during emergency situations such as natural disasters. They communicate with each other, 911, and emergency operations centers, they access databases, share data with emergency responders, and make public announcements to people in impacted areas using BIAS. By classifying BIAS under Title II, the Commission will have the authority to make sure these uses work properly, securely, and reliably. As climate change and natural disasters continue, reliance on this technology will only grow and disasters will only worsen, and FCC oversight to ensure these technologies are working properly will become even more important.

As mentioned above, Section 214 of the Communications Act helps the Commission protect national security. Under the provision, the Commission can have some say over which BIAS providers can operate in the United States, including by revoking authorization from those who raise national security or law enforcement concerns. But the Commission is not proposing to institute new approval requirements for all broadband providers. It's once again simply looking for a common-sense backstop when broadband providers act unreasonably.

Title II also empowers the Commission to collect more information to assess national security and public safety risks. It repairs a ridiculous gap in the Commission's authority to even monitor broadband outages, because placing BIAS outside of Title II creates all sorts of questions about whether the Commission has any jurisdiction at all over the essential communications network of this era. These gaps caused by the Trump FCC's repeal in the *RIF Order* are artifacts of a misguided attempt to deregulate broadband service by defining it as something other than what it is, instead of using the deregulatory tools baked right into Title II itself. But this isn't just some lawyerly puzzle with no real-world impacts. We saw clearly in the pandemic the dire results of FCC abdication, when the agency's chairman was powerless to do anything other than politely ask broadband providers not to disconnect millions of people in a time of national emergency and heightened need for remote connectivity.

A return to Title II oversight also gives the Commission power to increase choice and help more people access BIAS by granting protections to broadband-only providers. For example, applying Section 224 to all BIAS providers will preserve fair access to poles and rights-of-way for broadband providers other than

historical phone and cable companies. That means non-incumbent ISPs, including broadband-only providers, can deploy more efficiently. And where more providers can deploy broadband in more places, consumers can reap the benefits of competition.

What's Next

Advocacy on the draft order will continue until Thursday, April 18th, and after that the Commission enters its "sunshine" period when it is left alone to deliberate the final week before the vote without further lobbying from outside. While the details of the draft may still be getting worked out before and after that date—and Free Press and its allies will certainly continue to advocate for the public good until the FCC sunshine period starts—nothing should detract from this clear win. The return to Title II classification will promote a safe, secure, affordable, and open internet for all, and Free Press's priority now is ensuring that the FCC Order stands the test of time against opposition.