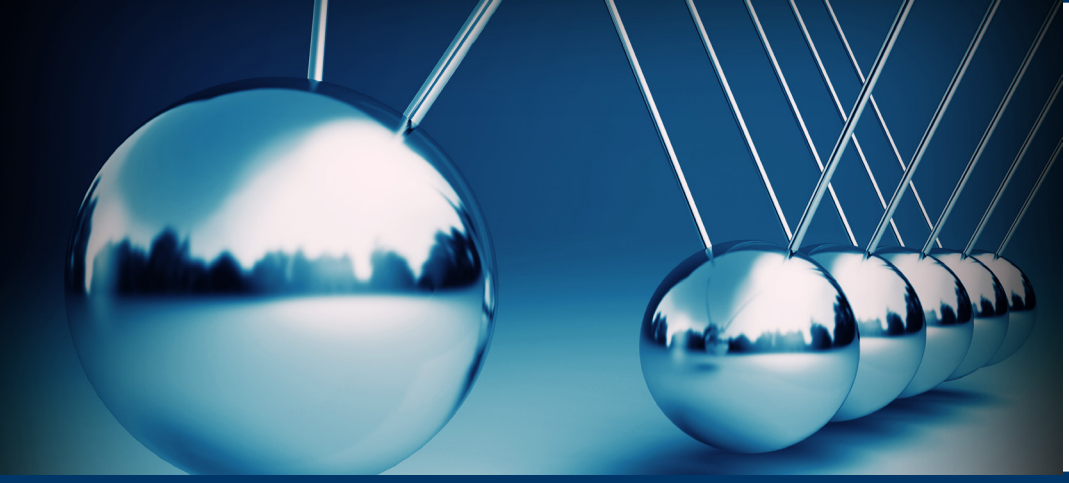

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Non-Neutral Thoughts About the FCC's Recent "Open Internet" Order

Quick thoughts came to mind after reading the 400 page Order resolving the Federal Communications Commission ("FCC" or "Commission") "Open Internet" or "Net Neutrality" investigation that arose from a judicial reveral of 2011 FCC Internet conduct rules in the Verizon v. FCC case.

1. **Back to the Future**. The Order was far more regulatory than had been expected or hoped for by broadband providers and reversed a deregulatory trend seen across most communication services since passage of the 1996 Telecom Act. Among other things, the Order:

   a. Abandoned the Title I-only roadmap supported in Verizon and relied instead on Title I, Section 706 and, for the first time ever, portions of Title II to ban providers of mass market retail broadband Internet services (ironically referred to in the Order as BIAS") from (1) "blocking" and "throttling" of broadband Internet services (subject to an exception for "reasonable network management practices"); (2) engaging in any "paid prioritization" of services; and (3) unreasonably interfering with or disadvantaging end users or edge providers (with no network management exception);

   b. Applied the new prohibitions to wireless broadband providers for the first time;

   c. Imposed additional transparency-oriented reporting obligations on BIAS providers, subject to a carve out for smaller (<100,000 customers) providers; and

   d. Deferred to later proceedings issues such as whether to modify Universal Service, Telecommunications Relay Services and other disabilities access statutes, and CALEA law enforcement obligations to reflect the expansion of telecommunication service regulation to BIAS.

2. **Goodfellas**. The 80 pages of dissenting opinions by Commissioners Pai and O'Rielly highlight significant flaws in the Order, including (but not limited to) the near-total absence of (i) sound analytical support for the Title II reclassification of BIAS; (ii) evidence of harms that would justify the extraordinary decision to impose Title II; (iii) notice as to the specific form of Title II regulation to be imposed on providers (i.e., Title II but linked with forbearance of most provisions beyond Sections 201, 202 and 208 of the Communications Act); and (iv) evidence

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showing the legal and factual basis for extension of regulation to wireless BIAS providers. All create a strong potential for reversal during the inevitable appeals by ILEC, cable, wireless and State utility commission interests.

3. **Clear and Present Danger**. The Order delegates to the FCC's Enforcement Bureau new and wholly unprecedented authority to review and, potentially, sanction, any and all BIAS provider business arrangements with end users or edge providers brought to their attention by the Commission, affected or interested parties or the providers themselves (through an advisory opinion process). The Order assumes that additional regulation through the purportedly "bright line" prohibitions will be only minor and incremental or "light touch" and free of rate regulation and tariffing obligations (for now), but the paid prioritization and broad interference/disadvantage bans in particular afford the Enforcement Bureau and, ultimately, the FCC Commissioners, significant opportunities for interpretation and policy making on a case by case basis. Indeed, less than a week after issuance of the Order, some content providers are already discussing delivery options that may raise Enforcement Bureau concerns under the Order. Click here for article. Further, the Order (at ¶ 452) does not expressly preclude the potential for rate regulation at a future date.

4. **Postcards from the Edge**. The Order (at ¶ 513) tries to keep its reclassification of BIAS as an interstate federal law issue, via an express preemption of inconsistent state and local laws and a holding that interconnection disputes involving BIAS are to be addressed using the Commission's general Sections 201 and 202 authority rather than the telecom specific interconnection provisions in Sections 251 and 252 where states share jurisdiction. Nevertheless, it appears likely that BIAS providers still will face many state or local issues, including the following:

   a. *Taxes*. BIAS providers in every state may face increased state and local tax assessments caused by the Order's reclassification of broadband Internet from internet services (which are usually either free from tax or treated as a general business item) to telecommunications service (which often are subject to specific state law tax structures). The Order (at ¶ 430) points to the Internet Tax Freedom Act as a potential bar to such changes, but the ITFA is at best an imperfect shield. For example, if state law taxes personal property of telecommunications services providers, it is far from clear that the IFTA would shield broadband personalty from such taxes as the property is classified under the Order.

   b. *Pole Attachment Rights/Fees*. Internet Service Providers (ISPs) not qualifying as cable or telecommunications carriers should gain rights to attach to poles and conduit under the Order, to the extent not authorized previously. The Order seeks to make clear its opposition to any local utility efforts to use the reclassification to raise pole attachment rates, but this will have to be tested in the field and the Order itself states that the FCC will be "monitoring marketplace developments" so that it can take action as needed.

   c. *Certified Providers*. The Order (at ¶ 433 & n. 1285) makes clear that if a BIAS provider is a cable system with a franchise or telephony certificate holder, no new certificate is required to offer broadband Internet services and no additional franchise fees should be paid. The express forbearance on tariffing in the Order also makes clear that Internet services are not required to be locally tariffed. To the extent that State PUCs require annual or quarterly quality of service compliance filings for telecommunications services providers, it should be expected that comparable data for broadband Internet services will eventually be rolled up into such reports.

   d. *Free-standing Broadband ISPs*. If an ISP has no cable or telephony authorization, the reclassification of BIAS Internet services to telecommunications service should lead to the conclusion that the ISP must obtain a State telecommunications certification. This would be fully consistent with ISPs receiving authority to attach to poles and conduit as well. States are bound in the Order not to enforce any provision from which the FCC has granted

forbearance, but certifications should not fall within such prohibition or merit preemption as long as the certification requirement is equally applied and not intended to limit the provision of competitive Internet services. Similarly, one would think that the ISP would need to comply with competitively neutral requirements for telecommunications providers that remain in place, such as annual reports, periodic quality of service reporting, and assessments on telecommunications providers to support State Commission finances. Notwithstanding, as with certified providers, the Order makes clear that Internet services need not be tariffed.

e. *Municipal Broadband ISPs*. State law issues easily could arise with respect to municipal broadband Internet providers who have to act within limits of existing authorization statutes. For example, Connecticut limits municipal electric companies thatoffer telecommunications services from serving outside of their established geographical service areas, which could render unlawful any extra-territorial Internet service offerings. Even though such provisions may well be preemptable by the FCC, in line with the principles in the Order and the recent February 26, 2015 North Carolina and Tennessee preemption order, they presumably could remain in force until legally challenged.

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