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## THE WALKING DEAD: “OPEN INTERNET” RULES LIVE AGAIN

On May 7, 2024, the Federal Communications Commission (“FCC”), led by Democratic Chairwoman Jessica Rosenworcel, released a Declaratory Ruling, Order, Report and Order, and Order on Reconsideration (collectively, “Order”) to classify and adopt “open Internet” rules for providers of mass-market retail broadband Internet access service (“BIAS”).<sup>1</sup> The Order was adopted by a 3-2 vote, with the Republican commissioners dissenting. The new rules will take effect July 22, 2024, except for certain changes to the transparency rule, which must first be approved by the Office of Management and Budget (“OMB”).

These rules represent a reclassification of BIAS as a “telecommunications service” subject to Title II of the federal Communications Act of 1934, as amended (“Communications Act”). The FCC first took this step in 2015 when the FCC, led by then Chairman Tom Wheeler, adopted the *2015 Open Internet Order*, which reclassified BIAS as a telecommunications service. This order included rules to prevent specific practices harmful to Internet openness (blocking, throttling, and paid prioritization), to implement a standard of conduct designed to prevent new practices that would harm Internet openness, and to make enhancements to the transparency rule. In 2016, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) upheld the *2015 Open Internet Order* in full.<sup>2</sup>

In 2018, the FCC, led by then Chairman Ajit Pai, eliminated the majority of the rules adopted in 2015. The *2018 Restoring Internet Freedom Order* maintained the transparency rule but reclassified BIAS as an “information service.” On review, the D.C. Circuit remanded certain aspects of the 2018 order to the FCC but upheld the classification of BIAS as an information service.<sup>3</sup> In response to the remand, the FCC issued the *2020 Restoring Internet Freedom Remand Order*, which found there were no grounds to depart from the determinations made in the 2018 order. Our firm memorandum dated October 31, 2023 provides more detail on the FCC’s Notice of Proposed Rulemaking, the history of this proceeding, and the FCC’s prior “open Internet” actions.<sup>4</sup>

The rules adopted in the Order will have a significant impact on all providers of BIAS. However, it is important to recognize that the FCC found that a number of requirements that typically apply to a telecommunications service are not appropriate or required when it comes to BIAS, so the regulatory implications are not quite as bleak as it might first appear. In addition, the rules will face inevitable and lengthy court challenges. Between that and a

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<sup>1</sup> WC Docket Nos. 23-320, 17-108, *Safeguarding and Securing the Open Internet; Restoring Internet Freedom*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52 (rel. May 7, 2024), <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

<sup>2</sup> *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh’g denied*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 453 (2018).

<sup>3</sup> *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

<sup>4</sup> <https://www.cahill.com/publications/firm-memoranda/2023-10-30-new-fcc-rules-proposed-for-broadband-internet-access-service-providers>.

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potential change in administration, it remains to be seen when - and if - the rules will actually take effect and, if they do take effect, whether they will endure.

Ongoing monitoring of these developments will be required. For now, this memorandum outlines the actions taken by the FCC in the Order and its legal and regulatory rationale for those actions. For further information and clarification, please do not hesitate to contact the authors, whose contact information appears at the end of this memorandum.

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## Open Internet Rules

In the Order, the FCC finds open Internet rules are needed to: promote free expression; encourage innovation, competition, and consumer demand; and protect public safety. The FCC concludes BIAS providers have the economic incentive and technical ability to engage in practices that pose a threat to Internet openness, and because providers have engaged in such practices in the past, adoption of clear, bright-line rules is needed.

First, the FCC reinstates the rules prohibiting providers from blocking, throttling, or engaging in paid or affiliated prioritization arrangements. These rules prohibit providers from the blocking or throttling of lawful content, applications, services, or non-harmful devices. The rules also ban arrangements in which a provider accepts consideration (monetary or otherwise) from a third-party to manage its network in a manner that benefits particular content, applications, services, or devices. Providers may seek a waiver of the prioritization rule in certain circumstances, and the Order includes specific guidance on how it would evaluate such requests.

Second, the FCC reinstates the general conduct standard, which prohibits practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers.<sup>5</sup> The general conduct standard is necessary to ensure providers do not find a technical or economic means to evade the bright-line bans to wield their power as gatekeeper in a way that would compromise the open Internet. The FCC will enforce this standard on a case-by-case basis considering the totality of the circumstances and a review of certain factors. The FCC will assess zero-rating programs under the general conduct standard to determine whether such practices cause harm to the open nature of the Internet. The FCC also will evaluate data caps under the general conduct standard but makes no blanket determination regarding the use of data caps.

Third, the FCC reaffirms its transparency rule and disclosure requirements from 2015, which require providers to disclose information about performance characteristics, commercial terms, and network practices sufficient for consumers to make informed decisions. BIAS providers must maintain the accuracy of all disclosures and update the disclosure in a timely manner when there is a material change. The Order includes guidance on the items that providers should disclose: congestion management, user-based practices, prioritization, zero rating, application-specific behavior, device attachment rules, security, service description, impact of non-BIAS data services, pricing, privacy policies, and redress options. Such information must be disclosed on a publicly-available, easily-accessible website in a machine-readable format. Providers also are required to directly notify end users if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the end user's use of the service. However, providers that have 100,000 or fewer broadband subscribers (aggregated over all provider affiliates) have a temporary exemption from the direct consumer disclosure requirement.

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<sup>5</sup> "Edge providers" offer information service platforms. BIAS is necessary for consumers to access the information services offered by edge providers.

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Reasonable network management is not considered a violation of the open Internet rules. 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 service. Reasonable network management is a practice that has a primarily technical network management justification but does not include other business practices. The FCC will evaluate whether a practice is reasonable network management on a case-by-case basis.

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## BIAS Is a Telecommunications Service Once Again

The Order reinstates the telecommunications service classification of BIAS under Title II of the Communications Act (“Title II”). According to the FCC, classification of BIAS as a telecommunications service represents the best reading of the text of the Communications Act in light of how the service is offered and perceived today, as well as the factual and technical realities of how BIAS functions. The FCC determines reclassification is fully and sufficiently justified under the FCC’s longstanding authority and responsibility to classify services subject to the FCC’s jurisdiction, as necessary.

The FCC finds BIAS connections are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression. The FCC determines that the reclassification enhances the FCC’s ability to address the following areas:

*Internet Openness.* The FCC finds reclassification enables the FCC to more effectively safeguard the open Internet, which protects free expression, encourages competition and innovation, and is critical to public safety.

*Defending National Security and Law Enforcement.* The reclassification enhances the FCC’s ability to protect the nation’s communications networks from entities that pose threats to national security and law enforcement. Reclassification enables the FCC to exercise its authority under Section 214 of the Communications Act with respect to BIAS providers (although the FCC forbears from entry certification requirements). The FCC grants blanket authority under Section 214 for the provision of BIAS (subject to some exceptions), while reserving power to remove such blanket authority. The FCC excludes from blanket Section 214 authority the provision of BIAS by those entities whose applications for international Section 214 authority were denied or revoked by the FCC based on national security and law enforcement concerns, *i.e.*, China Mobile, China Unicom, China Telecom, and Pacific Networks. Reclassification also will allow the FCC to obtain information from BIAS providers and safeguard BIAS providers, networks, and infrastructure from equipment and services that pose national security threats.

*Promoting Cybersecurity.* The FCC has an important role in addressing cybersecurity in communications networks, and reclassification gives the FCC additional authority to address cybersecurity incidents and vulnerabilities in broadband networks. Reclassification also places the FCC in a stronger position to address vulnerabilities threatening the security and integrity of the Border Gateway Protocol. Although the FCC may not be able to address all significant cybersecurity vulnerabilities, the availability of Title II authority meaningfully enhances its ability to address significant cybersecurity threats.

*Safeguarding Public Safety.* Advancing public safety is one of the FCC’s fundamental obligations. Reclassification allows the FCC to ensure BIAS meets the needs of public safety entities and individuals when they use those services for public safety purposes. Public safety officials’ reliance on BIAS has become integral to their essential functions and services, including how they communicate with each other and how they convey information to and receive information from the public. Reclassification gives the FCC the ability to ensure that BIAS is reliable and secure during emergencies, and a lack of regulatory authority over BIAS would pose public safety risks.

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*Monitoring Network Resiliency and Reliability.* Reclassification allows the FCC to take more effective regulatory actions to protect the resiliency and reliability of broadband networks and infrastructure, such as expanding the scope of outage reporting requirements to cover BIAS (similar to Title II-regulated voice service providers). The FCC currently is considering in another proceeding the extent to which outage reporting requirements should apply to BIAS providers.

*Protecting Consumer Privacy and Data Security.* Reclassification will support the FCC's efforts to protect consumers' privacy and data security. BIAS providers will now be under the privacy and data security framework of Section 222 of the Communications Act. Privacy and data security issues are discussed further below.

*Supporting Consumer Access to Broadband.* Reclassification will support the FCC's efforts to provide access to BIAS in three ways. First, reclassification improves the FCC's ability to foster investment in and deployment of infrastructure by restoring statutory protections for pole attachments for BIAS-only providers. The FCC finds that application of Sections 224, 253, and 332 of the Communications Act to BIAS-only providers will ensure those providers have the same statutory protections as providers of cable and telecommunications services. These statutory protections also give BIAS-only providers the ability to seek FCC assistance with state or local permitting processes that effectively prohibit the deployment of BIAS networks.

Second, reclassification allows the FCC to regulate BIAS-only providers that serve multi-tenant environments ("MTEs") to ensure they do not engage in unfair, unreasonable, and anticompetitive practices, such as exclusive contracts. The FCC will now have the authority to require BIAS-only providers to abide by the same rules that other telecommunications and cable providers must follow with respect to MTEs. The FCC gives BIAS-only providers 180 days to bring pre-existing contracts into compliance with the FCC's existing MTE rules.

Third, reclassification will put the FCC "on the firmest legal ground" to promote the universal service goals of the Communications Act and allow the FCC and the states to designate BIAS-only providers as eligible telecommunications carriers. Reclassification also will strengthen the FCC's policy initiatives to support the availability and affordability of BIAS through universal service fund programs. The FCC, however, declines to designate BIAS as a supported service at this time, finding the record is insufficient to properly and effectively address all of the concerns raised by designating BIAS as a supported service.

*Improving Disability Access.* Reclassification will enhance the FCC's authority and ability to ensure that people with disabilities can communicate using BIAS. The FCC will be able to use its authority under Sections 225, 251(a)(d), and 255 of the Communications Act, and the newly adopted open Internet rules, to ensure accessibility. The FCC will also be able to ensure equipment used for BIAS is accessible to and usable by people with disabilities. BIAS is not an "advanced communications service" and thus the FCC cannot rely on other statutory provisions to address disability access.

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## Legal Support for Reclassification and Open Internet Rules

The FCC concludes that both a reasonable reading and the best reading of the statutory definitions support classifying BIAS as a telecommunications service.<sup>6</sup> The FCC finds BIAS is best understood as making available high-speed access to the Internet (that may be bundled with other applications and functions), and therefore it provides telecommunications to the public for a fee. BIAS is not unique or distinguished from the processing and intelligent routing used by traditional telecommunications services. BIAS transmits the form of the information to and

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<sup>6</sup> See 47 U.S.C. §§ 153(24) (defining "information service"), 153(50) (defining "telecommunications"), and 153(53) (defining "telecommunications service").

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from an end user as it is sent. The FCC also relies on the “consumer perception” of the offering and finds consumers perceive BIAS as a standalone offering of telecommunications.

The FCC finds BIAS is not an information service under the best reading of the Communications Act. Companion services, such as the Domain Name System and caching, when provided with BIAS, fit within the telecommunications systems management exception and do not convert BIAS into an information service. Other information-processing capabilities also do not convert BIAS into an information service because they are not inextricably intertwined with BIAS, which turns on whether users view the offering as a bundle of telecommunications service and one or more information services or instead as a single integrated offering that is an information service.

The FCC assigns “limited value” to many of its past decisions and finds its classification of BIAS as a telecommunications service is fully and independently supported by an evaluation of the statutory text of the Communications Act. However, on balance, the FCC finds that FCC and court precedent also support the classification of BIAS a telecommunications service.

The FCC finds its authority and responsibility to classify BIAS is not supplanted by the major-questions doctrine. The FCC concludes that the major-questions doctrine - the notion that in certain extraordinary cases, a court will not lightly find that Congress has delegated authority to an agency - is no obstacle to the classification of BIAS as a telecommunications service. The FCC finds the major-questions doctrine does not come into play in this context at all, and even if it did, it does not apply to the FCC’s actions. To determine whether the major-questions doctrine applies, courts weigh several factors, including (1) “the economic and political significance” of the agency action, (2) whether the agency is “claim[ing] to discover in a long-extent statute an unheralded power,” (3) whether the action falls within the agency’s “comparative expertise,” and (4) whether Congress “has consistently rejected” similar efforts. The rules adopted by the FCC do not have the extraordinary economic and political effect required to implicate the major-questions doctrine.

Congress authorized and expected the FCC to classify BIAS because Congress has routinely relied on the FCC to determine whether a particular service or provider falls within the statutory definitions. Provisions enacted as part of the Communications Act amply detail Congress’s expectation that the FCC would classify services and providers under the “telecommunications service” and “information service” statutory definitions.

The FCC finds it has multiple sources of independent, complementary legal authority for adoption of its open Internet rules, including Title II, Title III, and Section 706 of the Communications Act. The FCC also finds its rules fully comport with the First Amendment to the United States Constitution and do not unlawfully infringe any free speech rights. Neither do the rules unconstitutionally compel speech or amount to a taking in violation of the Fifth Amendment Takings Clause.

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## Scope of Reclassification

The FCC keeps its current definition of BIAS as a mass-market retail service and excludes non-BIAS data services from the telecommunications service classification. “Mass-market” means the service is sold on a standardized basis to residential customers, small businesses, and other end user customers such as schools and libraries. It also includes BIAS purchased with support from the E-Rate, Lifeline, and Rural Health Care programs as well as any BIAS offered using networks supported by the High Cost program and BIAS purchased with support from the Affordable Connectivity Program (or any successor program) or the Connected Care Pilot Program. Mass-market excludes enterprise service offerings that are typically offered to larger organizations through customized or individually negotiated arrangements and special access services such as Business Data Services that do not provide access to all, or substantially all, Internet endpoints. The FCC remains consistent with its prior conclusions

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that BIAS can be provided over any technology platform, including wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.

“Non-BIAS data services” are certain services offered by BIAS providers that share capacity with BIAS over providers’ last-mile facilities but are not BIAS or another type of Internet access service, such as enterprise services. Such services generally share the following characteristics: (1) are only used to reach one or a limited number of Internet endpoints; (2) are not a generic platform, but rather a specific “application level” service; and (3) use some form of network management to isolate the capacity used by these services from that used by BIAS. However, services with these characteristics will not always be considered non-BIAS data services. The exclusion of non-BIAS data services from the telecommunications service classification should not be used as a means to evade the rules.

The FCC declines at this time to categorize network slicing or the services delivered through network slicing as inherently either BIAS or non-BIAS data services or to opine on whether any particular use of network slicing or the services delivered through network slicing would be considered a reasonable network management practice. “Network slicing” is a technique that enables mobile network operators to create multiple virtualized subnetworks (each known as a “slice”) using shared physical wireless network infrastructure and common computing resources. Given the nascent nature of network slicing, the FCC concludes it is not appropriate to make a categorical determination at this time.

BIAS includes the exchange of Internet traffic by an edge provider or an intermediary with the BIAS provider’s network (*i.e.*, Internet peering, traffic exchange, or interconnection) to the extent that the exchange supports the capability to transmit data to and receive data from all or substantially all Internet endpoints and enable the operation of the communications service. The FCC’s treatment of Internet traffic exchange is based on the marketplace realities of how BIAS is offered today, not based on any compulsion that BIAS providers enter any arrangements on a common carriage basis.

By contrast, “edge service” is not itself BIAS. The FCC also excludes premises operators and end users who provide access to their BIAS connections but do not offer it on a mass-market, retail basis. The FCC also continues to view content delivery networks, virtual private network services, web hosting services, and data storage services as outside the scope of BIAS.

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## Mobile BIAS Also Reclassified

The FCC reclassifies mobile BIAS as a “commercial mobile service,” as it had in 2015. The FCC finds that mobile BIAS is the functional equivalent of a commercial mobile service and not a private mobile service. The FCC also finds that mobile BIAS is interconnected with the “public switched network.” The FCC concludes that reclassification of mobile BIAS is most consistent with Congressional intent to apply common carrier treatment to telecommunications services.

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## Preemption of State and Local Regulation

The FCC exercises its authority to preempt any state or local measures that interfere or are incompatible with the federal regulatory framework for BIAS. The FCC will proceed incrementally by considering such measures on a case-by-case basis as they arise in light of the fact-specific nature of particular preemption inquiries. The FCC declines to categorically preempt all state or local regulation affecting BIAS in the absence of any specific determination that such regulation interferes with its exercise of federal regulatory authority. Although the FCC has occasionally described the Internet as “jurisdictionally interstate” or “predominantly interstate,” the FCC cannot find it

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to be *exclusively* interstate. Where state or local laws do unduly frustrate, interfere, or create burdens for interstate communications, however, the FCC has ample authority to address and preempt those laws on a case-by-case basis. The FCC declines to address any particular state broadband affordability program (such as the one adopted by New York State) but states the mere existence of a state affordability program is not rate regulation.

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## Impact of Reclassification on Investment

The FCC finds arguments that the reclassification of BIAS would lead to a substantial adverse impact on BIAS investment to be unsubstantiated. The record clearly shows the impact of reclassification on BIAS investment is uncertain. Regulation is but one of several factors that drive investment and innovation in the telecommunications and digital-media markets. The FCC finds its approach will foster a more competitive broadband marketplace, increase overall regulatory certainty, and provide a more level playing field for all market participants. While the FCC acknowledges that regulation generally, and open Internet regulations in particular, can affect market participants differently, on balance, its approach is unlikely to reduce, and would likely promote, overall investment and innovation in the Internet ecosystem. The FCC's prior conclusions that BIAS provider investment is closely tied to the classification of BIAS were not based on sound empirical analysis, and no new studies submitted in the current record support the FCC's prior conclusions.

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## Regulatory Framework for BIAS

The FCC exercises its forbearance authority to find certain Title II requirements do not apply to BIAS notwithstanding its classification as a telecommunications service. Those requirements have been outlined above. The FCC finds this balanced regulatory approach gives BIAS providers reasonable regulatory predictability about the obligations that will or will not be applied.<sup>7</sup>

The FCC finds the following requirements *apply to BIAS* based on its classification as a telecommunications service:

- Sections 201, 202, and 208, along with the related enforcement provisions of Sections 206, 207, 209, 216, and 217, and the FCC's associated complaint procedures. The FCC finds these provisions are necessary to ensure just, reasonable, and nondiscriminatory conduct by BIAS providers and to protect consumers, and ensure the FCC has enforcement authority. However, the FCC forbears from all ratemaking authority based on, or ratemaking regulations adopted under, Sections 201 and 202.
- Section 214 entry certification requirements, pursuant to which the FCC considers all aspects of the public interest associated with Section 214 authorizations, including national security, law enforcement, and other concerns. However, the FCC grants blanket Section 214 authority for the provision of BIAS to all current and future BIAS providers such that specific FCC approval to offer BIAS is not required (although the FCC reserves the ability to revoke this authority). The FCC specifically excludes certain Chinese-owned entities from its grant of blanket authority. The FCC also determines specific FCC approval to exit the BIAS market is not required.

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<sup>7</sup> BIAS remains subject to provisions of the Communications Act that apply irrespective of the Title II classification such as liability limitations, preemption provisions, and provisions that reserve state authority, in addition to the Foreign Intelligence Surveillance Act and the Electronic Communications Privacy Act.

- Sections 218, 219, and 220(a)(1) and (c)-(e), which enable the FCC to conduct inquiries and obtain information. These sections give the FCC additional tools necessary to ensure the nation's networks are reliable, secure, and protected from bad actors seeking to disrupt communications and access sensitive information.
- Section 222, which establishes core customer privacy protections. The FCC remains concerned that, absent statutory and regulatory requirements to do so, BIAS providers have minimal incentive to adopt adequate administrative, technical, physical, and procedural safeguards to protect their customers' data from improper or excessive uses by providers themselves, or from further disclosure and misuse by third parties. However, the FCC waives application of the FCC's current implementing rules to BIAS given many of those rules were adopted to address specific concerns in the voice context. This waiver, in conjunction with the application of Section 222, will give BIAS providers the flexibility to adopt practices that are effective and appropriate in the BIAS context.
- Section 224 and the FCC's implementing rules, which grant certain benefits that foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way. As explained above, applying Section 224 to BIAS will ensure that BIAS-only providers receive the same statutory protections as providers of cable and telecommunications services currently receive.
- Sections 225, 255, and 251(a)(2), and the FCC's implementing rules, which collectively advance access for persons with disabilities, except that the FCC forbears from the requirement that BIAS providers contribute to the Telecommunications Relay Service Fund at this time.
- Section 254, the interrelated requirements of Section 214(e) with respect to universal service, and the FCC's implementing regulations, which will strengthen the FCC's ongoing efforts to support broadband deployment and adoption. As discussed above, this action will strengthen the foundation of the FCC's universal service activities. However, the FCC finds it is appropriate to forbear from any requirement that BIAS providers contribute to universal service mechanisms because the record does not show that assessing new contribution obligations on BIAS is necessary for the universal service fund to fulfill its goals at this time. The FCC does not disclaim its authority to impose contribution obligations on BIAS in the future.
- Sections 223, 230(c), and 231, which address limitations on liability and could be viewed as a benefit to BIAS providers.
- Section 229, which implements the Communications Assistance for Law Enforcement Act.
- Wireless licensing requirements under Title III, including foreign ownership limits under Section 310(a) and (b). The FCC, however, finds that foreign ownership in excess of the statutory benchmarks in common carrier wireless licensees that are providing only BIAS is in the public interest under certain conditions. The FCC also waives the requirements for such a wireless licensee to request a declaratory ruling on foreign ownership until the adoption and application of these rules to BIAS.

The FCC declined to apply the following requirements to BIAS, although each of these normally applies to any service classified as a telecommunications service:

- Rate regulation under Sections 201 and 202.
- Tariffing under Sections 203 and 204.
- Enforcement-related provisions in Sections 205 and 212.
- Information collection and reporting under Sections 211, 213, 215, and 220(a)(2), (b), (f)-(j).



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- Interconnection and market-opening provisions under Sections 251, 252, and 256.
  - Subscriber changes under Section 258.
  - Market-opening provisions applicable to Bell Operating Companies under Sections 260 and 271-276.<sup>8</sup>
  - Property records and infrastructure-sharing requirements under Sections 221 and 259.
  - Operator services and Telephone Consumer Protection Act requirements under Sections 226 and 227.
  - Truth-in-billing rules. The FCC finds its requirement of just and reasonable conduct under Section 201(b) will provide important protections in this context even without specific rules.
  - Roaming-related provisions and regulations.
  - Terminal equipment rules.
  - Certain provisions of Titles III and VI (and associated FCC rules) that may apply by their terms to providers or services classified in particular ways. Title III applies generally to wireless and satellite providers utilizing FCC spectrum, and Title VI applies to cable operators, satellite providers, and other multichannel video programming distributors.
  - Contribution requirements to other support mechanisms or fee payment requirements not otherwise addressed above.

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## Exchange of Internet Traffic

The FCC also will oversee arrangements for the exchange of Internet traffic and disputes involving Internet traffic exchange to ensure they are not harming or threatening to harm the open nature of the Internet. The FCC will utilize a case-by-case review but declines to apply any open Internet rules to Internet traffic exchange given such agreements are typically negotiated commercially. However, providers may not engage in interconnection practices that circumvent the prohibitions contained in the open Internet rules.

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## Enforcement of Open Internet Rules

The FCC encourages parties to resolve disputes through informal discussion and private negotiations whenever possible but states it is prepared to enforce the rules as the need arises. The FCC will rely on a multifaceted enforcement framework comprised of advisory opinions, enforcement advisories, FCC-initiated investigations, and informal and formal complaints. When the FCC determines a violation has occurred, it will pursue remedies and penalties.

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## Conclusion

The FCC's reclassification of BIAS and the new open Internet rules will take effect July 22, 2024 (except for the changes to the transparency rule, which requires OMB approval). Publication of the Order in the Federal Register

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<sup>8</sup> However, the FCC clarifies that it does not forbear from applying Section 276 or its rules to the extent they apply to incarcerated people's communications services ("IPCS"). The FCC seeks to ensure forbearance is not misconstrued as a limitation on the FCC's authority with respect to any advanced IPCS (such as video visitation) that may replace or supplement traditional IPCS telephone calls. The FCC also confirmed it retains its full Section 201(b) authority in the context of IPCS.

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on May 22, 2024 also triggers the window for court appeals of the Order, which are widely expected. For now, the industry awaits a determination as to whether the FCC's reclassification decision and latest iteration of the open Internet rules will survive, or whether they will be overturned by the courts, by Congress, or by a future FCC.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email the authors Chérie R. Kiser (Partner) at [ckiser@cahill.com](mailto:ckiser@cahill.com) or 202.862.8950 or Angela F. Collins (Counsel) at [acollins@cahill.com](mailto:acollins@cahill.com) or 202.862.8930 or email [publicationscommittee@cahill.com](mailto:publicationscommittee@cahill.com).

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