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D.C. Circuit Upholds FCC’s Net Neutrality Rules

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Regulatory Activity

D.C. Circuit Rules 2-1 to Uphold FCC Net Neutrality Rules

On June 14, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in a 2-1 decision upheld the ***FCC***’s “net neutrality” rules applicable to providers of ***broadband Internet access service (BIAS)***, which were released in a March 12, 2015 Report and Order on Remand, Declaratory Ruling, and Order (Order). In the Order, the FCC reclassified BIAS, previously classified as an information service, as a telecommunications service – that is, a service that “transmits messages unadulterated by consumer processing” – subject to common carrier regulation. The D.C. Circuit found that the FCC’s determination that BIAS is a telecommunications service because consumers view it as such had “extensive support in the [FCC’s] record and together justif[ied] the [FCC’s] decision to reclassify broadband as a telecommunications service.” Specifically, the D.C. Circuit stated that it was “hardly controversial” that consumers rely on BIAS to access third-party content, such as “Netflix and YouTube,” rather than to access BIAS “providers’ own add-on applications.”

In dissent, Senior Circuit Judge Williams stated that the FCC’s decision to reclassify BIAS “fails for want of reasoned decisionmaking” and that the FCC “relied on explanations contrary to the record before it and failed to consider issues critical to its conclusion.” BIAS providers are planning to appeal the decision to the full D.C. Circuit or to the Supreme Court.

FCC Releases Final Agenda for June 24 Open Meeting

The FCC has announced that the following items are on the agenda for its June 24 Open Meeting:

- **Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership:** The FCC will consider a Notice of Proposed Rulemaking that “seeks comment on changes to streamline and increase the transparency of the Executive Branch review of applications and petitions for national security, law enforcement, foreign policy and trade policy concerns.”

- **Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert**

System: The FCC will consider a Report and Order that would “revise the Emergency Alert System rules by adding new event codes covering extreme high winds and storm surges caused by Category 3 (and greater) hurricanes.”

- **Improving Outage Reporting for Submarine Cables and Enhanced Submarine Outage Data:** The FCC will consider a Report and Order to “require submarine cable licensees to report communications network outages to the FCC.”

FCC Chairman Tom Wheeler posted to the FCC Blog on June 3 discussing these agenda items. The FCC’s Open Meeting is scheduled to commence at 10:30 a.m. on June 24 in the Commission Meeting Room of the FCC’s headquarters at 445 12th Street S.W., and will be streamed live at fcc.gov/live.

Legislative Activity

Senate Commerce Committee Approves Five-Year Open Internet Transparency Exemption for Small ISPs

On June 15, the Senate Commerce, Science, and Transportation Committee (Senate Commerce Committee) approved S.2283, the *Small Business Broadband Deployment Act of 2015*, by voice vote. The bill, introduced by Sen. Steve Daines (R-MT), exempts Internet service providers (ISPs) with 250,000 or fewer subscribers from the enhanced transparency requirements of the Federal Communications Commission’s (FCC’s) March 2015 Open Internet Order for a period of five years after the enactment of the bill. The bill further requires the FCC to report to Congress within 180 days of its enactment on whether or not the exemption should be made permanent. The Open Internet Order, which was upheld by the U.S. Court of Appeals for the D.C. Circuit on June 14, requires ISPs to publicly disclose accurate information regarding their network management practices, performance, and the commercial terms of their Internet service. Recognizing that smaller ISPs would find the transparency requirements burdensome, the FCC established a temporary exemption for ISPs with 100,000 or fewer subscribers through December 15, 2015. On December 15, 2015, the FCC extended the exemption until December 15, 2016.

The Senate bill originally called for a permanent exemption from the FCC’s transparency requirements for ISPs with 1,500 or fewer employees or 500,000 or fewer subscribers. An amendment offered by Sens. Steve Daines (R-MT) and Joe Manchin (D-WV) proposed a five-year exemption for providers with 250,000 or fewer subscribers to align the bill with the terms of the House companion bill, H.R.4596, passed by the House on March 16. A subsequent amendment offered by Sen. Maria Cantwell (D-WA) attempted to change the exemption period to three years and lower the subscriber threshold to 100,000 subscribers. Sen Cantwell’s amendment failed and the final version of the bill contains a five-year exemption for ISPs with 250,000 or fewer subscribers. The bill now goes to the full Senate for consideration.

Senate Appropriations Committee Approves FY 2017 Appropriations Bill Decreasing FCC’s Budget

On June 16, the Senate Appropriations Committee approved S.3067, the *Fiscal Year (FY) 2017 Financial Services and General Government Appropriations Act, 2017*. The $22.4 billion measure, which funds numerous federal agencies for the FY ending September 30, 2017, contains appropriations for the FCC. Specifically, the bill recommends an appropriation of $341,315,000 for the FCC for FY 2017, a decrease from the $384 million the FCC received for FY 2016. Of that money, $16,866,992 is to be used to support moving expenses for the FCC's expiring lease on its current headquarters for either relocation to a new facility with "substantially reduced square footage and lower rental expenses or to significantly reduce the agency's leased space at its current location" according to the Committee Report.

The bill also contains several recommendations touching on the FCC's substantive work. First, the bill requires the FCC to notify the House and Senate Committees on Appropriations, the Senate Commerce Committee, and the House Committee on Energy and Commerce if additional money is needed to cover the repacking costs associated with relocating broadcasters to new channel assignments during the FCC's Broadcast Incentive Auction, which began on March 29. The Committee noted that it was "gravely concerned" with the impact that the auction will have on television broadcasters who will have to relocate during the repacking process. The Committee also expressed concern as to whether the $1.75 billion Broadcaster Relocation Fund would be sufficient to cover the repacking costs and whether the FCC could meet the current 39-month deadline established for stations to be repacked. To alleviate these concerns, the bill requires the FCC to submit a report to the Senate Appropriations Committee no later than 90 days after completion of the forward auction indicating, among other things, how many television stations will need to be repacked. The legislation also requires the FCC to submit a report no later than 240 days after completion of the forward auction that would include information relating to the construction schedule for relocating television stations and whether television viewers will face any service disruptions.

The bill also contains provisions relating to Joint Sales Agreements (JSAs), the financial arrangements between local television broadcasters that govern the sale of advertising between stations, and the FCC's set-top box proceeding. The JSA provision indicates that the FCC "may not require the termination or modification of such agreement[s] as a condition of the transfer or assignment of a station license or transfer of station ownership or control." The JSA provision further indicates that once a television station is sold, the FCC must allow stations to enter into new JSAs on substantially similar terms and conditions as the prior agreement. The set-top box provision states that the FCC cannot take action in that proceeding until 180 days after it has completed a study that "evaluates the availability of other market-based solutions."

Lawmakers Express Concern Regarding FCC's Lifeline Program Reform

On June 16, a group of 10 Republican Senators and 15 Republican Representatives wrote a letter to FCC Chairman Tom Wheeler expressing concern about the impact of the FCC's Third Report and Order, Further Report and Order, and Order on Reconsideration (2016 Lifeline Order), which made reforms to the Lifeline program, a government subsidy program administered by the FCC that provides discounted phone service to low income consumers. The 2016 Lifeline Order, discussed in further detail here, extended Lifeline subsidies for low-income households to mobile and fixed broadband access and also established an FCC-administered national provider certification mechanism as an alternative to existing state-administered programs. The lawmakers argued that the certification mechanism "drastically curtail[s] the important state role in preventing waste, fraud, and abuse." They argued further that the 2016 Lifeline Order "provides little guidance" as to how the national verification mechanism will coordinate with the more than 20 states that have implemented their own processes for determining eligibility for Lifeline. Because data regarding program eligibility is "typically housed at the state level," the lawmakers argued that it would be more cost-effective to allow the states to continue serving as the main eligibility verifiers. They urged the FCC to clarify whether states will be permitted to opt out of the federal certification mechanism and stressed the states' past role in preventing waste, fraud, and abuse in the program.

This Week's Hearings:

- Monday, June 20: The Subcommittee on Information Technology of the House Oversight and Government Reform Committee will hold a hearing entitled "Federal Efforts to Improve Cybersecurity." The purpose of the hearing is to obtain the view of the private sector regarding cyber threats, pressing issues for cybersecurity strategy, and implementation of the Cybersecurity Act of 2015, which establishes a mechanism for cybersecurity information sharing among private sector and federal government entities. The following witnesses will testify at the hearing: Dr. Eunice Santos, Chair, Department of Computer Science, Illinois Institute of Technology; Michael Carano, Executive Director, ChicagoFIRST; Gary Horn, Vice President, Technical Services & CTO, Advocate Health Care; and Patty Hatter, Vice President, Intel Security Group.

- Tuesday, June 21: The Communications, Technology, Innovation and the Internet Subcommittee of the Senate Commerce Committee will hold a hearing entitled "FirstNet Oversight: An Update on the Status of the Public Safety Broadband Network." The following witnesses will testify at the hearing: Michael Poth, Chief Executive Officer, FirstNet; Jeffrey McLeod, Director of Homeland Security and Public Safety Division, National Governors Association; Major General Arthur J. Logan, Single Point of Contact (SPOC), State of Hawaii, and Hawaii Adjutant General; and Andrew Katsaros, Assistant Inspector General for Audit, U.S. Department of Commerce. The hearing will focus on "the progress made since the Committee last held an oversight hearing in March 2015" and will focus on "FirstNet's progress in meeting benchmarks; the cost of deployment, particularly in rural areas; and the public safety broadband network's plans to become a self-funding entity" according to a press release.

- Thursday, June 23: The Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs will hold a hearing entitled "Customer Service and Billing Practices in the Cable and Satellite Television Industry." The following witnesses will testify at the hearing: Tom Karinshak, Senior Vice President, Customer Services, Comcast; John Keib, Former Executive Vice President and Chief Operating Officer, Residential Services, Time Warner Cable; Kathleen Mayo, Executive Vice President, Customer Operations, Charter Communications; Rasesh Patel, Senior Vice President, Product Management, AT&T; and Kathleen Schneider, Senior Vice President, Operation, Dish Network.

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