

ALERT

FCC Opens Notice of Inquiry on the Use of Data Caps

October 21, 2024

Introduction

On October 15, 2024, the Federal Communications Commission (FCC or Commission) released a Notice of Inquiry (NOI) seeking information about the use of data caps by Broadband Internet Access Service (BIAS) providers for both fixed and mobile broadband internet service and the impact of the use of data caps on consumers and competition. In the NOI the Commission states that “access to the Internet is not a luxury,” and cites the rapid growth of consumer data usage during and after the COVID-19 pandemic as the impetus for renewing the FCC’s focus on the usage of data caps by BIAS providers. Initial comments are due **Thursday, November 14, 2024**, and reply comments are due **Monday, December 2, 2024**.

Prior FCC Action on Data Caps

Data caps, also sometimes referred to as “usage allowances” or “usage limits,” are limits set by BIAS providers on the amount of data a subscriber may use in a given time period (typically monthly). When this limit is exceeded, BIAS providers may implement either “hard caps,” which incur additional fees based on excess data usage, or “soft caps” which reduce the upload or download speeds of a subscriber (the FCC refers to this practice as “throttling”).

The NOI is the latest in a series of Commission actions on data caps dating back to the *2015 Open Internet Order*, which implemented transparency and disclosure requirements for BIAS providers’ “network management practices,” including the use of data caps. More recently in 2022, the Commission adopted the *Broadband*

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Labels Order, requiring fixed and mobile BIAS providers to display, at the point of sale, information about monthly data allowances and related fees, in addition to establishing the Affordable Connectivity Program (ACP) Transparency Data Collection to gather information from the internet service offerings of ACP-participating providers, including information about data caps.

NOI Focuses on Consumers and Competition

The Commission seeks information on a variety of issues relating to data caps, with a clear focus throughout the NOI on the impact of data caps on BIAS consumer experience and the competitive impact of data caps. In particular, the NOI seeks comment on five broad categories of information relating to the use of data caps, including (1) consumer data usage trends, (2) the impact of data caps on consumers, (3) the impact of data caps on the consumer experience, (4) the impact of data caps on competition, and (5) the Commission's legal authority to promulgate rules on data caps.

Some of the questions asked in the NOI include:

- Whether the Commission should consider requiring additional disclosures from BIAS providers relating to their usage of data caps;
- If the Commission should take steps to “encourage BIAS providers to refrain from imposing data caps” during emergency situations (referencing the voluntary decision of some BIAS providers to waive data usage allowances during the COVID-19 pandemic); and,
- Whether the Commission has the authority to promulgate rules on data caps under Section 257 of the Communications Act, or if there is some other source of statutory authority for the FCC to impose regulations on the use of data caps.

Key Takeaways

The NOI comes at a time where the FCC's authority to implement regulations under the Communications Act and other authorizing statutes is under increased scrutiny. For example, the *Safeguarding and Securing the Open Internet order (2024 Net Neutrality Order)*, reclassifying BIAS as a telecommunications service under Title II of the Communications Act of 1934, is currently under review in the Sixth Circuit, and lingering questions hang over the FCC's authority to impose certain net neutrality-style regulations on broadband in the aftermath of the U.S. Supreme Court's decision in *Loper Bright*.

In dissenting statements, Commissioners Simington and Carr describe this NOI as an attempt to impose the type of rate regulation the Commission specifically promised to forbear from in the *2024 Net Neutrality Order*. The specter of rate regulation, a historically controversial topic for the FCC's internet regulatory authority, in addition to the heightened attention on the FCC's regulatory efforts in general, portends an active comment period. Given the NOI's clear focus on issues of consumer protection and competition, interested stakeholders should take advantage of the opportunity to comment during the NOI period.

Wiley's Telecom, Media & Technology attorneys are experienced in advocating for our clients' interests before the FCC. For more information about the NOI, or if you would like assistance in preparing comments, please contact any of the authors listed on this alert.

Jackson McNeal, a Law Clerk in the Telecom, Media & Technology practice, contributed to this alert.