The Federal Communications Commission has established a new regulatory framework for broadband Internet access service (BIAS) offered by wireline facilities-based providers such as local exchange carriers (LECs). In essence, the FCC eliminated most distinctions between Internet access services provided through high-capacity wireline transmission platforms using facilities shared with regulated telecommunications services (i.e., telephone lines) and other platforms (e.g., cable). The Commission classified facilities-based wireline BIAS as an “information service,” and therefore its providers will not be regulated as common carriers. In addition, facilities-based providers of wireline BIAS transmission capability (such as digital subscriber line or “DSL”) are no longer required to provide that capability to unaffiliated Internet service providers (ISPs).

Definition of Wireline BIAS and Classification as an Information Service

BIAS is defined as broadband transmission service that is functionally integrated with Internet access and processing capabilities using wireline telephone network facilities to provide Internet access and information processing to subscribers. This is now classified as an “information service” which means LECs may offer BIAS on a non-common carrier basis regardless of who owns or provides the underlying transmission capability. While the FCC still is considering the full implications of this decision, it is clear that BIAS may be offered pursuant to a privately negotiated contract, just as cable model service is offered today, rather than under publicly-available tariffed terms.

Common Carrier or Private Offering of Wholesale Transmission Capacity Permitted

Significantly, the FCC ruled that federal law does not compel facilities-based providers of wireline BIAS to offer the transmission component to anyone. Providers may offer the underlying broadband Internet access transmission capability either on a common carrier basis (as a regulated telecommunications service provider) or on a non-common carrier basis. Different types of transmission capacity may be offered on a separate basis, but a company may not offer the same type of transmission capability on both a common carrier and a non-common carrier basis.
In a departure from its treatment of cable modem service, the FCC found the underlying transmission offering is “telecommunications.” Facilities-based wireline BIAS providers may offer this telecommunications, if they choose to offer it at all, either on a private, contractual basis, or on a common carrier basis, as a “telecommunications service.”

- If providers choose to offer private carriage, they need no longer offer access to unaffiliated ISPs (following the transition described below). Any such offering may be privately negotiated, and is not subject to non-discrimination requirements under Title II of the Communications Act.
- If they choose common carriage, permissive de-tariffing applies, and they may offer either a tariffed or non-tariffed telecommunications service. Carriers choosing to offer a non-tariffed telecommunications service must post their service rates, terms and conditions on their website in accordance with the FCC’s rules and retain physical copies of the terms of their offerings and make them available for public inspection at their place of business.

**Transition to Deregulation; Discontinuance of Common Carrier Offering**

Facilities-based providers of wireline broadband Internet access transmission capacity must continue to provide access to their current transmission services to existing customers at current locations for one year following the effective date of the Order. After this period, the Order grants a blanket certification to those entities that wish to discontinue their common carrier offerings of broadband Internet access transmission capacity to unaffiliated parties, provided they give sufficient advance notice to affected ISP-customers, as well as appropriate notice to the Commission. No public interest showing or additional action by the Commission will be required to discontinue this service. Facilities-based wireline BIAS providers are not required to offer service to new customers or to existing customers at new locations during the transition. Moreover, new wireline broadband Internet access transmission arrangements may be offered any time after the effective date of the order, on a non-common carrier basis, with no obligation to offer such arrangements to existing ISP customers.

The Order grants immediate relief to Bell Operating Companies from the separate subsidiary, open network architecture and comparatively efficient interconnection obligations under the FCC’s Computer Inquiry decisions with respect to wireline BIAS and the underlying transmission capability.

**Cost Allocation**

The non-common carriage arrangements for the provision of wireline broadband Internet access transmission capability using facilities shared with facilities for the provision of regulated telecommunications services will be treated as a regulated activity for purposes of the FCC’s cost allocation rules; Part 64 cost allocation, therefore, will not be required. This treatment may affect computations of the rate-of-return earned on regulated interstate telecommunications services. The FCC therefore invites carriers who seek to exclude non-common carrier broadband transmission capacity earnings from their regulated earnings computation to propose a way of removing the costs of any non-common carrier services from their regulated rate base.

As an information service, BIAS must continue to be accounted for as a non-regulated activity.

**Certain Existing Regulatory Obligations of LECs Offering BIAS Will Be Enforced**

Facilities-based wireline BIAS providers must continue to contribute to existing
universal service support and North American Numbering Plan Administration contribution mechanisms for a 270-day period after the effective date of the Order or until the Commission adopts new contribution rules, whichever is sooner.\textsuperscript{21} Access requirements for individuals with disabilities, under Section 255 of the Communications Act, also remain in force.\textsuperscript{22}

**Notice of Proposed Rulemaking**

Acting under its general authority under Title I of the Communications Act, the FCC seeks comment on applying certain consumer protections to BIAS providers. Specifically, the Commission seeks comments on extending to BIAS providers customer privacy requirements (similar to the customer proprietary network information rules), rules prohibiting “slamming” (unauthorized change of a customer’s chosen service provider), truth-in-billing requirements, outage notification requirements, discontinuance notification requirements and rate averaging requirements. Comments on these proposals will be due 90 days after Federal Register publication of the Order and NPRM.

**Endnotes**


\textsuperscript{2} The Commission’s order thus brings regulation of LEC-provided retail BIAS offerings substantially in-line with its treatment of cable-provided BIAS, recently affirmed by the US Supreme Court. See National Cable and Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688 (2005), affirming Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002). At the wholesale level, however, there remains some disparity in that the underlying transmission capability is treated as “telecommunications” when offered by a LEC, but not viewed as a separate offering by a cable system operator.

\textsuperscript{3} Common carriers offering interstate services such Internet access are subject to a wide range of regulations under Title II of the federal Communications Act of 1934, as amended, 47 U.S.C. §151 et seq.

\textsuperscript{4} Order ¶ 14.

\textsuperscript{5} Order ¶ 16 (regardless of who owns the transmission capability) and ¶ 86 (LECs may select the basis by which they offer their BIAS). The order also permits facilities-based wireline BIAS providers to offer the underlying transmission service to both affiliated and unaffiliated ISPs with no requirement that the affiliated ISP be established as a separate subsidiary or organization. Order ¶ 86.

\textsuperscript{6} Order ¶ 103.

\textsuperscript{7} Order ¶ 95.

\textsuperscript{8} Order ¶ 104.

\textsuperscript{9} Order ¶ 104.

\textsuperscript{10} See supra note 3.

\textsuperscript{11} Order ¶ 90.

\textsuperscript{12} Order ¶ 90.

\textsuperscript{13} Order ¶ 90.

\textsuperscript{14} Order ¶ 98. The “effective date” normally will be 30 days after publication of the Order in the Federal Register, unless the FCC designates a different period.

\textsuperscript{15} Order ¶ 101. Advance notice of discontinuance of a common carrier broadband transmission service must be provided to affected ISPs and any other customers of the LEC at least 30 days prior to discontinuance, and on or after that date but at least 30 days prior to discontinuance notice also must be provided to the FCC.

\textsuperscript{16} Order ¶ 98.

\textsuperscript{17} Order ¶ 98.

\textsuperscript{18} Order ¶ 42.

\textsuperscript{19} Order ¶ 135. See 47 C.F.R. § 64.901.

\textsuperscript{20} Order ¶ 135.

\textsuperscript{21} Order ¶ 113. Universal support mechanism obligations are configured based on the current level of reported revenue for the transmission component of the provider’s wireline BIAS.

\textsuperscript{22} Order ¶ 121. See 47 U.S.C. § 255.
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