

## FCC Launches Broad Network Neutrality Rulemaking

*If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.*

**Ivan A. Schlager**

Washington, D.C.  
202.371.7810  
ivan.schlager@skadden.com

**John M. Beahn**

Washington, D.C.  
202.371.7392  
john.beahn@skadden.com

**Joshua F. Gruenspecht**

Washington, D.C.  
202.371.7316  
joshua.gruenspecht@skadden.com

**David H. Pawlik**

Washington, D.C.  
202.371.7044  
david.pawlik@skadden.com

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1440 New York Avenue, NW,  
Washington, D.C. 20005  
Telephone: 202.371.7000

Four Times Square, New York, NY 10036  
Telephone: 212.735.3000

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Earlier today, the Federal Communications Commission (FCC or Commission) launched a proceeding to develop new network neutrality regulations that would prohibit Internet Service Providers (ISPs) from blocking or discriminating against legal content flowing through their networks. Today's action follows a January 2014 decision by the U.S. Court of Appeals for the District of Columbia Circuit, which vacated and remanded most of the operative portions of the Commission's prior network neutrality regulations.<sup>1</sup> As discussed below, the Commission may now be on target to issue regulations that may finally withstand judicial scrutiny by year's end.

Adopted in 2010, the FCC's prior network neutrality regulations prohibited all network operators from blocking or degrading lawful Internet content and applications — *i.e.*, an anti-blocking rule — and barred fixed network operators from engaging in unreasonable discrimination in the transmission of lawful Internet traffic — *i.e.*, an anti-discrimination rule. The regulations excepted reasonable network management practices from the prohibitions only if such practices were narrowly tailored to further a legitimate objective, such as fighting network congestion, spam or malicious network activity. The FCC also required that broadband providers publicly disclose information regarding their network management terms and practices — *i.e.*, a transparency rule. The regulations were quickly appealed by a number of telecommunications carriers, who argued that the Commission exceeded its authority under the Communications Act of 1934 (Communications Act) in regulating the activities of ISPs.

In its January decision, the D.C. Circuit found that the Commission had run afoul of Communications Act provisions that prohibited the FCC from imposing common carrier regulation on services the Commission previously had classified as non-common-carrier services.<sup>2</sup> Specifically, the court struck down the anti-blocking and anti-discrimination portions of the FCC regulations. The D.C. Circuit agreed, however, that the Commission had adequate statutory authority under a separate Communications Act provision (Section 706) to issue net neutrality regulations.<sup>3</sup> Section 706 directs the FCC to take immediate action to remove barriers to infrastructure investment and promote competition in the telecommunications market if it finds that advanced telecommunications capabilities have not been deployed to all Americans on a reasonable and timely basis. The court reasoned that a 2010 FCC determination that broadband deployment to all Americans was lacking had triggered Section 706's mandate that the Commission take immediate action. The court also upheld the Commission's transparency rule.

In its action today, the Commission voted 3-2 along party lines to issue a Notice of Proposed Rulemaking (NPRM)<sup>4</sup> seeking comment on a set of proposed revised network neutrality regulations. The proposed regulations track those that the D.C. Circuit vacated in January in certain respects, but vary in others. For example, the proposed

1 *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir. January 14, 2014).

2 47 USC §§ 153(51) and 332.

3 47 USC § 1302.

4 *In re: Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (2014).

regulations largely track the anti-blocking rule from the 2010 regulations. However, where the previous network neutrality anti-discrimination regulations prohibited “unreasonable discrimination” in the carriage of traffic, the new regulations propose instead to prohibit “commercially unreasonable practices.” The NPRM explains that the new proposed rule would “permit broadband providers to engage in individualized practices” while still protecting openness.<sup>5</sup> Practices that might challenge Internet openness would be evaluated by the Commission pursuant to a series of factors on a case-by-case basis. At the same time, the NPRM asks whether certain practices, such as paid prioritization, should be banned outright. The Commission also proposes to enhance the transparency regulations by requiring ISPs to provide specific information about their practices affecting consumers and over-the-top content providers. The NPRM asks whether broadband providers should be required to disclose specific network practices, performance characteristics (*e.g.*, effective upload and download speeds, latency and packet loss) and/or terms and conditions of service to end users (*e.g.*, data caps).

The NPRM relies on the Commission’s legal authority under Section 706 of the Communications Act to adopt net neutrality regulations, and specifically highlights the D.C. Circuit’s approval of Section 706 as a “blueprint” for adopting permissible regulations. Nevertheless, the NPRM also states that the Commission will seriously consider categorizing certain ISP activities as regulated common carrier telecommunications services under Title II of the Communications Act. Any attempt to reclassify broadband services as regulated telecommunications services will draw significant protest from broadband services providers because of the host of other requirements that such a decision would entail.

While issuance of the NPRM will commence a significant legal battle, the Commission still could issue final regulations by the end of the year. Under the timeframe included in the NPRM, initial comments on the proposed rules are due July 15 with reply comments due September 10. That being said, broadband services providers likely will appeal any final regulations, arguing that the Commission again has exceeded its authority under the Communications Act.

If implemented and allowed to stand, the new FCC rules may finally resolve the uncertainty that has plagued the Commission’s four-year effort to implement binding regulations. If so, the regulations may permit, on a case-by-case basis, the efforts of broadband access providers to develop new revenue streams through the prioritization of provider-specific traffic to end users. In addition, because the NPRM suggests that FCC rules should not apply to non-mass-market broadband service, broadband providers likely would increase their current widely reported experimentation with agreements that prioritize certain content providers’ traffic over the traffic of competitors as part of inter-network transmission. Providers of online services, in turn, would have incentives to pay for priority and improved service to customers. New entrants into the online services marketplace, meanwhile, might face corresponding challenges. Residing on the edges of the network, they would possess equal access to customers but not necessarily the ability to provide services at the same speed as established providers with additional resources.

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5 NPRM at ¶111.