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Title II or Bust: The FCC Wrestles With Net Neutrality

Over the past few weeks, a number of significant developments have impacted the Federal Communication Commission's (FCC) ongoing proceeding regarding network neutrality. On November 10, President Barack Obama surprised many by personally and publicly endorsing an ambitious and controversial plan to implement net neutrality regulations. His unprecedented statement adds yet another level of complexity and intrigue to an issue that has preoccupied the FCC for the better part of a decade.

The crux of the current debate centers on the appropriate regulatory classification of broadband service providers like Comcast and AT&T. Advocates for more stringent net neutrality regulations, which now include President Obama along with a broad swath of public advocacy groups and content providers, want the FCC to reclassify broadband services as "telecommunications services" under Title II of the Communications Act of 1934 (Communications Act). These advocates expect that legal reclassification under Title II would prohibit broadband providers from discriminating against any Internet content — for example, by entering into paid prioritization deals with certain content providers and distributors — which they view as harmful to Internet openness and innovation.

Opponents of Title II reclassification, which include cable operators and wireline broadband providers, have argued that reclassification of broadband services as telecommunications services under Title II would impose onerous government regulations on broadband services, chilling investment in broadband networks. Instead of pursuing Title II legal reclassification, these entities have requested that the FCC continue to regulate broadband services under less burdensome sections of the Communications Act. In their view, this "light touch" regulatory approach is more appropriate in the current environment and would better serve customer needs and promote much-needed infrastructure investment. The FCC's previous attempt at light-touch regulation, however, was struck down in court because it attempted to impose Title II-type nondiscrimination requirements on companies that had not first been found subject to Title II.[1]

What Is Title II?

Many net neutrality commentaries have characterized Title II as a sort of statutory monolith. In fact, Title II actually comprises nearly 50 different sections of the Communications Act, spanning more than 100 pages of statutory text. Over the years, the FCC has implemented these different sections of the law through hundreds of different regulations. Many of these sections stem from the original 1934 version of the Communications Act, which imposed a wide range of obligations on traditional telephone carriers operating in a monopoly environment.

These sections include obligations to file terms and prices for service with the FCC (Section 203), procedures governing market entry and exit (Section 214), requirements

1 *Verizon v. FCC,* 740 F.3d 623 (D.C. Cir,. 2014).

covering telecommunications services for disabled individuals (Section 255) and even restrictions on alarm-monitoring services provided by certain entities (Section 275). Of particular importance for net neutrality, however, Title II also contains restrictions (Section 202) that forbid entities offering telecommunications services from engaging in "unjust or unreasonable discrimination" in their charges, practices and services. As discussed below, this section of Title II has drawn the most attention in the ongoing net neutrality debate.

While Title II still governs the offering of telecommunications services in the United States, the FCC has slowly deregulated certain aspects of the industry during the last 20 years. This deregulation was undertaken pursuant to specific authority granted to the FCC in the Communications Act, which allows it to forbear from (or decline to enforce) any aspect of the law that it concludes to be no longer in the public interest, necessary to protect consumers or needed to ensure that telecommunications services are offered on just and reasonable rates and terms of service. In these various forbearance actions, the FCC has determined that certain Title II sections no longer applied to the offering of telecommunications services by a specific class of carriers.

In proposing new net neutrality regulations in May, the FCC noted that one of the ways in which it could impose net neutrality obligations on broadband services would be pursuant to its legal authority under Title II. This action would result in the imposition of the entire set of Title II regulations on broadband service providers. In its May notice, however, the FCC stated that it would likely forbear from applying a number of Title II sections to broadband providers to minimize the resulting regulatory burden on these providers. In his recent statement supporting Title II, President Obama also noted that the FCC should forbear from those sections of Title II that are "less relevant to broadband services." In fact, of the almost 50 different Title II sections, the Commission indicated in May that it would forbear from application of almost all of them, except for the following:

- Section 201 (requirement for just and reasonable service and charges);
- Section 202 (prohibition against unreasonable discrimination);
- Section 208 (processes governing complaints filed with the Commission);
- Section 222 (requirements governing customer privacy);
- Section 254 (universal service fund obligations of telecomm carriers);
- Section 255 (access by persons with disabilities).

Significant forbearance in this manner would require a legal two-step by the FCC. It would first have to issue an order reclassifying broadband services as telecommunications services under Title II, and then undertake — in the same order — a lengthy series of forbearance measures to explain which sections of Title II would not apply to broadband services. The FCC has never attempted the level of forbearance that would be needed in any such action. To ensure that its forbearance actions withstood subsequent judicial review, the FCC would need to include detailed legal and factual justification covering each Title II section. Needless to say, the effort required to achieve this level of forbearance in one FCC action would be considerable.

Forbearance issues also would considerably complicate the FCC's effort to impose net neutrality regulations because it would open an entire new regulatory debate at the Commission. This has already begun with parties not only arguing over the general wisdom of imposing net neutrality regulations on the broadband industry but also about which specific sections of Title II the FCC must forbear from enforcing. In many respects, broadband providers may be more concerned with imposition of

certain existing aspects of Title II than with imposition of new, separate net neutrality regulations under Title II.

A number of these entities (especially AT&T and Verizon) have spent years and significant resources fighting for Title II deregulation of their traditional phone businesses. As such, they can be expected to continue to resist re-regulation of any part of their broadband service offerings under Title II. Other broadband providers, including the cable operators, are expressing doubts that the FCC would actually follow through and forbear from the more onerous Title II requirements. They also have raised concerns regarding the complexity of such an effort and highlighted their expectations of numerous subsequent legal battles over the scope of the forbearance actions.

Anti-Discrimination Under Title II

One of the key aspects in the decade-long debate over net neutrality is the desire of net neutrality advocates to implement a binding rule that prohibits broadband providers from engaging in discriminatory conduct. These advocates have limited concrete evidence of discriminatory conduct by broadband providers, relying on a couple of cases over the last few years in which providers throttled traffic from particular providers or used particular protocols. In the absence of specific claims, they generally have pointed to rumored paid prioritization deals between broadband providers and content providers as evidence of broadband providers' discriminatory motives.

Through these deals, which are still uncommon today, content providers or distributors pay broadband providers for some form of enhanced service to customers. Whether the enhanced service involves expedited transit through a provider's network or a more stable connection to end user customers, net neutrality advocates view the deals as a way for well-funded content companies to "cut to the front of the line" at certain congested parts of the Internet to ensure that their traffic is delivered first. Net neutrality advocates view these arrangements as discriminatory because they would favor certain Internet traffic at the expense of other traffic. Opponents of net neutrality argue that such deals would not be discriminatory because they would not slow or degrade the traffic of other content owners. They simply would provide a higher level of service to certain content customers.

In pushing for a Title II approach, net neutrality advocates have highlighted the fact that the FCC's prior attempts at implementing a binding anti-discriminatory rule have met bad endings in court. In their view, Title II provides the FCC with the requisite legal authority and support upon which the Commission can rest an anti-discrimination rule (along with the other proposed net neutrality rules) that will withstand judicial scrutiny.

Some Title II advocates have gone so far as claiming that the FCC would be free to impose blanket regulations under Title II to prohibit all discriminatory practices, including any sort of paid prioritization arrangements between broadband operators and content providers. In doing so, they generally point to Section 202(a) of Title II, which prohibits telecommunications carriers from engaging in "unjust or unreasonable discrimination" in their practices, charges and services.

Anti-Discrimination in the Courts

A closer review of how the courts have interpreted this section over the years confirms that certain paid prioritization arrangements between broadband providers and content owners likely would be permitted under Title II. The courts have established a threeprong test for determining unreasonable discrimination in violation of Section 202(a). The first prong requires a determination of whether the services at issue are like one another. If so, the second prong requires a determination of whether

there is disparate pricing or treatment between the like services. If such disparate treatment is found to exist, the third prong requires a determination as to whether the disparity is justified and therefore not unreasonable.

Under this analysis, the courts have issued a number of rulings permitting entities to offer telecommunications services on disparate terms and prices when there is an underlying "neutral, rational basis" for the discrimination.[2] Courts have approved of the following:

- *Differentiated prices* – Courts have concluded that Title II permits telecommunications carriers to offer specific customers on an individual basis pricing arrangements and discounts from standard pricing arrangements.[3]
- *Differentiated service levels* – Courts have noted that Title II authorizes telecommunications carriers to negotiate service level agreements with individual customers allowing the carrier to offer different levels and qualities of service.[4]

In addition, courts have also suggested that common carriers may be permitted to charge customers a premium for priority access services without violating their common carrier duty of nondiscrimination.[5]

These rulings strongly suggest that extending Title II to broadband providers would inevitably result not only in judicial wrangling over reclassification itself, but also in a series of case-by-case legal disputes at the FCC and in the courts as broadband providers attempt to fit new arrangements with content owners into the Title II judicial framework. In fact, the substantive case law on Title II's antidiscrimination rule could actually create unforeseen results or provide precedent for broadband providers seeking to pursue and structure individualized arrangements that provide differentiated service levels, tiered pricing arrangements, or even preferential access to customers or network access points.

Whether or not the FCC ultimately decides to extend Title II obligations to broadband service providers is not certain at this point. What is certain, however, is that the ongoing legal debates over net neutrality, Title II and antidiscrimination are sure to continue for some time at the FCC — and beyond.

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2 *See, Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 737 F.2d 1095, 1133 (D.C. Cir. 1984).

3 *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

4 *See, e.g.*, *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058 (D.C. Cir. 1993).

5 *See e.g., Sea-Land Serv., Inc. v. Interstate Commerce Comm'n*, 738 F.2d 1311 (D.C. Cir. 1984).