

FCC Adopts Net Neutrality Regulations — Judicial Challenges Lie Ahead

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Earlier today, the Federal Communications Commission (FCC or Commission) voted 3-2 along party lines to approve revised network neutrality regulations that, if allowed to stand, will have far-reaching implications for the telecommunications, media, content, Internet and technology industries. The complicated regulatory action is the culmination of nearly 10 years of highly charged political debate and fractious regulatory and judicial proceedings, and follows President Obama's public endorsement last fall of stringent net neutrality regulations.

The specific regulations adopted today prohibit broadband service providers from engaging in certain actions that the FCC determined may harm Internet openness and innovation. To impose the regulations, the FCC took the controversial step of extending Title II of the Communications Act of 1934, as amended (Communications Act), to broadband Internet access services. The new rules prohibit both wired and wireless broadband providers from blocking or throttling lawful Internet traffic on the basis of content, or favoring certain content or providers. In addition, providers may not favor one provider of lawful Internet traffic over another for any form of consideration by, for example, entering into so-called paid prioritization deals with online content providers or distributors. By prohibiting or restricting certain actions by broadband providers that might permit differentiated levels of service or Internet "fast lanes," the new rules represent the most significant federal regulatory intervention in the broadband and Internet industries to date.

A number of parties have suggested that they will appeal the newly issued rules in federal court. Some members of the Republican-controlled Congress have also indicated that they may seek to enact legislation that would strip the FCC of its ability to implement the regulations. Whatever the outcome, today's action is only the end of the first chapter in the net neutrality battle, and will not likely bring the regulatory certainty that many industry participants claim they need to raise capital, enter commercial agreements and provide services to customers.

Background

Adopted in 2010, the FCC's prior network neutrality regulations imposed a series of obligations on broadband Internet service providers (ISPs) such as Comcast and AT&T. These regulations included an antidiscrimination rule applicable only to wireline broadband providers that prevented them from engaging in unreasonable discrimination in the transmission of lawful Internet traffic. The regulations also included an anti-blocking rule that prohibited all broadband providers — wireline and wireless — from blocking or degrading lawful Internet content and applications. A transparency rule also required all broadband providers to publicly disclose information regarding their network management terms and practices.

The FCC order implementing these rules was struck down in a January 2014 decision by the U.S. Court of Appeals for the District of Columbia Circuit. The court found that the FCC had authority to impose the regulations under Section 706 of the Telecommunications Act of 1996, which directs the FCC to encourage the deployment of broadband telecommunications capabilities. However, the court vacated the anti-blocking and antidiscrimination regulations, finding that the Commission had improperly attempted to impose these common carrier obligations without expressly reclassifying broadband

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services as common carrier services. The D.C. Circuit's action commenced a contentious year-long regulatory debate at the Commission about whether the Commission should proceed to clearly make broadband a common carrier service by reclassifying it as a telecommunications service under Title II.

Analysis of Order

While the text of the order adopted today (the Order) has not yet been released, the FCC has issued other materials summarizing the substance of its action. Based on these materials, and the statements made by the commissioners during the meeting, it appears that the FCC has adopted a number of regulations that will apply to the services that all broadband providers, wireline and wireless, offer to end-user customers, as well as the services that they provide to upstream content and “edge providers” (e.g., certain Internet application companies). In providing these services to certain customer segments, broadband providers are prohibited from engaging in the following conduct:

- **Blocking any lawful Internet content.** The rules adopted by the FCC forbid any broadband provider from blocking any legal Internet traffic, including applications or services, on the basis of the content it contains. In effect, broadband providers will not be allowed to block any provider of content, including those that compete with the ISP's own content services, or prevent customers from accessing any lawful Internet website, application or service. This aspect of the regulatory debate did not receive much attention, as all broadband providers now recognize that they may not block legal traffic transiting their networks.
- **Throttling any lawful Internet content.** Under the regulations, broadband providers may not impair or degrade legal Internet traffic on the basis of content. The FCC has increasingly frowned upon any throttling activities undertaken by carriers — especially wireless carriers. Last fall, the FCC and the Federal Trade Commission sued AT&T for allegedly violating its service terms by throttling the traffic of customers with unlimited data plans. Chairman Tom Wheeler also has publicly criticized any reports of throttling by carriers, even if consistent with service terms. (Verizon Wireless recently abandoned efforts to limit the data speeds of heavy users of its wireless LTE services after Chairman Wheeler publicly criticized the plans.) The regulations adopted today are aimed at establishing a bright-line rule prohibiting carriers from throttling services to end users.
- **Discriminating against any lawful Internet content.** The newly issued regulations prohibit broadband providers from

favoring or discriminating against any lawful Internet traffic by, for example, entering into agreements with upstream content and edge providers to provide them with “fast lanes” to end-user customers. Net neutrality advocates have hoped to implement a binding rule that prohibits broadband providers from engaging in discriminatory conduct. While there is limited on-the-record evidence of discriminatory conduct by broadband providers, the FCC has long held the view that broadband providers have strong economic and competitive incentives to discriminate against certain traffic. Recent reporting on “pay for play” transactions in which over-the-top video services such as Netflix pay ISPs such as Verizon and Comcast to avoid degradation of services to consumers has reinforced that view. In the Commission's opinion, deals between broadband providers and content owners and distributors in which the broadband provider offers some form of enhanced service to the content owner (e.g., prioritized transmission, more stable network connections, or other advantages) discriminate against all other traffic and content. While other provisions of the Commission's new rules are subject to reasonable exceptions for network management, discrimination such as paid priority will not be given any leniency. This section of the Order will require very detailed review to understand the precise arrangements that the FCC has prohibited. For instance, the new rules are expected to permit the use of certain technical arrangements to reduce the distance traffic travels from content providers to end users, such as content delivery networks (CDNs) that store content near end-user customers to deliver the content more quickly.

Separately, the FCC indicated that it will extend its jurisdiction for the first time to cover interconnection between ISPs and online service providers. In particular, it plans to define “broadband internet access service” to include the provision of access to edge providers and other providers of applications, content and services online. This definition is expected to cover ISPs' interconnection practices to the extent they impact end-user consumer access to service providers. These provisions of the Order can be expected to be particularly controversial and will again require detailed review to understand how far the regulations extend.

The FCC also adopted a revised and enhanced transparency rule, which was the one prior regulation the D.C. Circuit left in place in its January 2014 decision. According to the FCC, broadband providers must now offer specific information about network management practices affecting consumers and over-the-top content providers, including certain network maintenance practices (e.g., technical and engineering traffic prioritization), performance characteristics (e.g.,

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effective upload and download speeds, latency and packet loss) and/or terms and conditions of service to end users (e.g., data caps).

Title II Forbearance

One of the most contentious aspects of the net neutrality proceeding was the regulatory classification that would apply to broadband services. Advocates for stringent net neutrality regulations, including President Obama, pressed the FCC to reclassify broadband services as “telecommunications services” under Title II of the Communications Act. These advocates argued that reclassification under Title II would provide the strongest legal protections for Internet openness and innovation, particularly in light of the legal problems that had emerged with prior attempts to regulate under the authority of other provisions. Opponents of net neutrality vehemently objected to Title II reclassification, noting that many sections of Title II 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.

The FCC today took the momentous step of extending Title II to broadband services, both fixed and wireless. It reclassified the broadband services provided to end-user customers and the broadband services provided to edge providers as telecommunications services. To the extent interconnection agreements between edge providers or other service providers impact end-user consumer access to services, those agreements also can be expected to be considered end-user consumer broadband services now subject to Title II. The FCC has determined that Title II provides it with the strongest legal authority for implementing the net neutrality regulations — particularly its prohibition of unjust or unreasonable discrimination. Certain data services, such as facilities-based Voice over Internet Protocol services, will not be considered broadband services under the new regulations, but the Commission has suggested that it will police those claiming exceptions carefully.

All of these services will be subject to a new general conduct rule, which the Commission also adopted today. According to the Commission, this rule will prohibit conduct that unreasonably disadvantages consumers and edge providers from reaching one another. Exceptions will be granted for reasonable network management practices, including slowing down traffic for security reasons. According to the Commission, this general conduct rule will use a broad, multifactor test to determine which practices are harmful. This approach provides the Commission with broad leeway to determine what activities will be prohibited, and guarantees that the scope of its review will ultimately be

defined through many rounds of highly fact-based administrative proceedings and litigation.

Although the FCC relied on Title II as its primary legal justification for the regulations, it also stated that Section 706 of the Telecommunications Act of 1996 serves as a secondary authority supporting its issuance of the rules. In its January 2014 decision, the D.C. Circuit cited Section 706 as one of the statutory authorities the Commission might attempt to use in adopting net neutrality regulations. In using both Title II and Section 706, the Commission clearly hopes to increase its chances of having the new regulations withstand the expected judicial review.

While the Commission chose to extend Title II to broadband services, it refrained from applying the full breadth of the statutory requirements to broadband providers. It did so pursuant to specific authority granted to the FCC under the Communications Act, which allows it to forbear from application of any section that it concludes to be (i) no longer in the public interest, (ii) necessary to protect consumers or (iii) needed to ensure that telecommunications services are offered on just and reasonable rates and terms of service. According to the FCC, application of many statutory requirements to broadband providers was not necessary for net neutrality purposes. While Title II comprises nearly 50 different sections of the Communications Act, the Commission stated today that it was forbearing from applying 27 of those sections and approximately 700 Commission rules, while retaining provisions such as:

- Section 201 (requirement for just and reasonable service and charges);
- Section 202 (prohibition against unreasonable discrimination);
- Sections 206-209, 216-217 (processes governing complaints filed with the Commission and related enforcement provisions);
- Section 222 (requirements governing customer privacy);
- Section 224 (requirement that providers of telecommunications services be granted fair access to poles and conduits);
- Section 254 (universal service fund obligations of telecom carriers); and
- Sections 225 and 255 (access by persons with disabilities).

In addition, with certain of these provisions, the FCC has stated that it will take a middle path even as it refuses to forbear entirely. For example, while the Commission has extended

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Section 254, which imposes universal service fees, it stated that it will refrain from imposing those fees on broadband providers immediately. However, the Order is expected to refer the question of the imposition of Section 254 fees to the Federal-State Joint Board on Universal Service, suggesting that universal service obligations for ISPs may yet be forthcoming.

A close review of the Order will be necessary to understand the extent of the applicability of each provision and to ensure that the FCC's forbearance actions include the necessary legal and factual justifications covering each Title II section.

Possible Litigation Scenarios

Several broadband providers and industry associations already have suggested that they will challenge the regulations in federal court. One of the first decisions that net neutrality opponents will need to make is whether to seek a judicial stay of the Order and the regulations. To obtain a stay, opponents would have to convince a reviewing court that they are likely to succeed on the merits of their appeal of the regulations and that they would be irreparably damaged by imposition of the regulations. Judicial stays of FCC actions are not unprecedented. In fact, the D.C. Circuit recently stayed the effectiveness of an FCC order in the Comcast/Time Warner merger review. At the same time, judicial stays are not automatic and depend on the court's evaluation of the showing made by those who have sought the stay.

Whether or not a stay is granted, several possible litigation scenarios could unfold when a reviewing court issues its decision on the net neutrality challenge. The outcomes of these scenarios will depend heavily on the legal justification and reasoning the Commission used in its Order, the text of which has not yet been released. The scenarios also depend on which court ultimately reviews the FCC's Order. The U.S. courts of appeals have exclusive jurisdiction to review FCC orders, with the United States Court of Appeals for the District of Columbia Circuit reviewing many FCC orders (including the prior net neutrality regulation) pursuant to specific authority granted to it under the Communications Act. If multiple appeals of the Order are made in different circuits, however, a system of random selection — a lottery — will be used to determine which appellate court will review the Commission's Order.

With this in mind, a few of the noteworthy litigation scenarios include the following:

First, a reviewing court could overturn the entire Order and the full set of regulations, sending them back to the FCC for further

review. Depending on the specific findings of the court, the FCC would have to decide whether to begin an entirely new regulatory proceeding to issue revised regulations or simply change its articulated justifications or legal authorities in hopes of obtaining the court's blessing for the vacated regulations.

Second, instead of vacating the entire Order, a court could find that reclassification of broadband services was insufficiently grounded under Title II, but still uphold the regulations under Section 706. In effect, this action would leave the net neutrality regulations in place, but invalidate the extension of Title II to broadband services. Were this to occur, the FCC would be left in the awkward position of having to decide whether to appeal the court's action even though the net neutrality regulations were upheld. The FCC would then have to decide how necessary Title II reclassification is to effective implementation of the net neutrality regulations.

Third, a court could affirm the Title II reclassification and the net neutrality regulations, but overturn the FCC's forbearance decisions — in whole or in part. In this scenario, a court could uphold the Title II reclassification and the net neutrality regulations, but remand the forbearance decisions to the FCC for a more reasoned explanation of its action.

Finally, a court could reject the challenges to the Order, finding that the FCC had adequately justified its authority and reasoning. This action would leave the regulations and the Title II reclassification in place.

Any judicial decision, of course, could be subject to efforts at further review, including by the United States Supreme Court.

Marketplace Impacts

If allowed to stand, the net neutrality regulations could have far-reaching marketplace effects on the telecommunications, cable, Internet and technology industries. While many of these may take years to materialize, a few near-term effects are likely.

One of the key impacts of the regulations could be the elimination of new revenue models for cable providers and other multichannel video distributors. Much of the public discussion surrounding the net neutrality debate has centered on the practical consequences, especially the impact of the extension of Title II to cable and other broadband providers. Cable operators have been searching for new revenues to replace those lost as more and more end users disconnect from traditional cable services in favor of video services delivered over the Internet.

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In some providers' eyes, the delivery of video programming over the Internet provides an opportunity to turn the traditional cable financial model on its head. Currently, cable operators pay content providers for the right to deliver content to cable subscribers. In a world where over-the-top video services predominate, however, cable operators might charge content providers for delivering video programming to end users through paid prioritization deals or other similar arrangements through which content companies receive enhanced services from ISPs. Under the net neutrality regulations, these arrangements would be prohibited. Without these anticipated revenues, cable operators presumably would be forced to find other ways to monetize their existing infrastructure in the online video environment.

The net neutrality regulations may also drive investments in technologies, such as content delivery networks, that allow

content owners to better manage the delivery of their content to end users. Large-scale content providers already use CDNs to ensure fast, consistent delivery of content. Content providers may increasingly come to rely on these third-party distributed data centers in close physical proximity to users. These data centers, which may purchase services from ISPs as edge providers or may have more complicated service agreements, could be poised to experience growth as a result of the prohibitions on certain arrangements between broadband operators and edge providers.

Whatever the specific impacts, the net neutrality regulations will require close review in the coming months as the litigation, legislative and marketplace scenarios unfold.