

The FCC Acts (Again) on Net Neutrality, Awaits Court Challenges

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The Federal Communications Commission (FCC or Commission) recently issued its long-awaited network neutrality regulations, which if allowed to stand will have far-reaching implications for media, content, broadband and the Internet. The complicated regulatory action is the culmination of nearly 10 years of fractious regulatory and judicial proceedings and follows President Barack Obama's public endorsement of stringent net neutrality protections. The regulations have yet to take effect, but a number of parties have stated their intentions to appeal the rules in federal court; some already have filed suit.

This is the FCC's third attempt at solving the net neutrality conundrum. The first two ended in 2010 and 2014 with the U.S. Court of Appeals for the District of Columbia Circuit vacating the FCC's attempts to implement and enforce net neutrality requirements. The FCC's recent action represents the Commission's most sweeping attempt to promulgate net neutrality regulations.

The new regulations include a number of specific rules applicable to providers of broadband Internet access services. These rules prohibit broadband providers from blocking or throttling (degrading) any lawful traffic, content or applications and from engaging in any paid prioritization of traffic, content or applications. A modified transparency rule compels broadband providers to disclose a host of information to customers.

In addition to these specific prohibitions, the FCC adopted a catch-all rule governing the conduct of broadband providers. Under the conduct standard, broadband providers may not unreasonably interfere with or disadvantage end users or "edge providers" (e.g., certain online service providers) with respect to Internet content, traffic or applications. Many net neutrality opponents have strongly objected to this standard, arguing that it enables significant FCC oversight of broadband provider activities. The FCC's use of the standard in monitoring marketplace developments and adjudicating disputes will be closely watched.

While the rules will apply to a broad swath of retail broadband services, the FCC specifically exempted certain IP data services. In doing so, however, the FCC stated that it will scrutinize any claimed use of the exemption and will apply the rules to any data service that is the "functional equivalent" of a covered broadband service or that is offered to evade the rules.

One of the most contentious aspects of the FCC's net neutrality proceeding was the statutory classification of broadband services. After vigorous debate, the FCC ultimately sided with net neutrality advocates, including President Obama, and reclassified broadband services as "telecommunications services" under portions of the Communications Act of 1934 (known as Title II). Reclassification under Title II is significant, as it extends the FCC's authority to broadband services not governed by the specific rules discussed above. In particular, certain services offered by broadband providers to edge providers may be subject to oversight by the FCC. While the Commission chose to reclassify broadband services under Title II, it declined to apply all of the Title II statutory requirements. The Commission justified this forbearance by concluding that the core set of

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statutory requirements it did apply, coupled with marketplace dynamics, was sufficient to protect consumers and Internet openness.

In seeking to overturn the rules, challengers likely will claim that the Commission lacked statutory authority to issue the rules and reclassify broadband services under Title II. Challenges focusing on compliance with administrative procedures will claim that the rules were not the product of reasoned decision-making by the FCC. Challengers likely will argue that the FCC acted arbitrarily and capriciously by failing to adequately explain its decision and by ignoring the factual record in its proceeding. Challengers also may assert that the Commission provided insufficient notice of the sweeping changes it ultimately enacted and that the president impermissibly interfered with the independent agency's rule-making process.

Mobile broadband providers, which faced only limited regulation in the last rulemaking, may argue that the FCC's approach was particularly flawed administratively as applied to their industry. The FCC stated in its 2010 order that mobile broadband was still a nascent service and did not subject it to the full set of net neutrality rules; some read the notice of proposed rulemaking leading to the instant order to suggest that the FCC would take the same approach in the current regulations. For that reason, mobile broadband providers may argue that they were not provided sufficient notice of the FCC's change in direction and the record on mobile broadband was not fully developed.

Lastly, challengers may make a number of constitutional arguments, including claiming First Amendment violations because the rules infringe on broadband providers' right to edit or control the information they transmit. They also may raise Fifth Amendment/takings claims, suggesting that the rules are not only a per se taking because they give edge providers an effective right of access to broadband provider property, but also a regulatory taking because they unjustifiably interfere with broadband providers' investment-based expectations.

All of the appeals to date have been filed in the D.C. Circuit, which means that the court will once again review the FCC's net neutrality regulations. Given that the FCC's order quotes extensively from selected passages of the D.C. Circuit's 2014 opinion, it will be interesting to see how the court views the commission's effort at addressing the concerns the court previously identified in vacating the prior rules. The D.C. Circuit's decision in the case also could be subject to further review, including by the U.S. Supreme Court. The FCC's newly issued regulations become effective on June 12 and, absent a judicial stay, will be in place for some time, at least until the judicial challenges are resolved.