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Expert Analysis

So Long, 'Net Neutrality'?

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When Donald Trump won the U.S. presidency, the entire world began to speculate as to what regulatory changes the Trump administration would advance. The administration's January appointment of Republican Ajit Pai to Chairman of the Federal Communications Commission (FCC) signaled a clear and present threat to the Obama FCC's net neutrality rules. In 2015, Pai voted against his predecessor's proposal for the net neutrality rules and has been outspoken about his disapproval of them since his fellow commissioners overruled him. On April 26, 2017, Pai explicitly confirmed what we all presumed, all but declaring war on the regulation that enabled the FCC to adopt the net neutrality rules.[1] Pai released a proposal for his plan of action the next day. On May 18, 2017, the three FCC commissioners, two of whom are Republicans, including Pai, will vote on the proposal. If it succeeds, the proposal still faces months of comments, widespread public debate, and potential revisions. But for all practical purposes, practitioners and their clients should prepare themselves for a world without net neutrality regulatory framework—i.e., one in which antitrust and the courts will police the Internet highway.

The Rise of Net Neutrality

Tim Wu coined the term "net neutrality" in 2003. The term refers to the principle that, in an ideal world, the Internet should be "open": that is, one in which Internet service providers (ISPs) do not block, slow, prioritize, or otherwise unfairly favor or discriminate against any legal online content, services, or content providers. ISPs include firms like Comcast, Verizon Communications, and AT&T, which provide broadband services for accessing and using the Internet. Content providers are Internet-based companies that may be tech giants like Google, Netflix, and Facebook or smaller blogs or websites.

In actuality, the Internet has been "open" since its creation. Indeed, the Internet emerged in a way that ISPs had little or no control over how customers used the network to ensure no type or source of data receives priority or extra bandwidth.[2] A few widely-cited examples of ISPs arguably acting inconsistently with the notion of net neutrality in the early 2000s, however, lead to a concern that ISPs would use their positions to adopt a so-called "pay-to-play" system. And increased consolidation in the broadband industry over the last decade or so heightened

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that concern. Consumer groups and some content providers (of all sizes) feared that ISPs would begin offering "fast lanes" for companies willing to pay for extra bandwidth, or worse, would block consumer access to content or services supplied by content providers unwilling or unable to pay.

Despite Commissioner Pai's (and likeminded advocates') insistence that contractual relationships between ISPs and content providers consistently benefited consumers and that the market was functioning properly, Obama's FCC reclassified ISPs as common carriers under Title II of the Communications Act of 1934 in 2015. The most contentious consequence of this reclassification was that it stripped the Federal Trade Commission (FTC) of its authority over ISPs. Critically, the reclassification also brought ISPs under the FCC's authority, thereby enabling the FCC to adopt the strictest-ever net neutrality rules.

On the surface, the net neutrality rules adopted by the FCC operate under an antitrust-like framework—albeit a rigid one. The rules classify certain conduct inherently anticompetitive, and therefore subject to per se-like condemnation, and reserve the right to challenge other types of potentially anticompetitive conduct on a case-by-case basis. Specifically, the net neutrality rules include three bright-line rules aimed at preventing ISPs from "playing favorites." One, ISPs cannot block customers from accessing certain legal content, applications, or services. Two, ISPs cannot intentionally slow or degrade lawful Internet traffic on the basis of content, application, or service. Three, ISPs cannot prioritize or otherwise favor certain Internet traffic over other lawful Internet traffic for consideration or their affiliates.

Two Sides of the Debate

While FCC Chairman Pai may have now officially declared Title II a target, the debate over the regulatory underpinnings of the net neutrality rules has been festering for years. Proponents of the net neutrality rules include former FCC Chairman Tom Wheeler, FCC Commissioner Mignon Clyburn, some tech giants, and small Internet companies. These advocates maintain that the current regime is necessary to ensure an open Internet and to protect equal access to content on the Internet. Opponents of the current regime include current FCC Chairman Pai, FTC Commissioner Maureen Ohlhausen, former FTC Commissioner Joshua Wright, and many leaders in the telecommunications and cable industries. They criticize the rules for unfairly favoring one group of companies over another, and argue that the federal government has no business interjecting itself into a dynamic marketplace in which there has been no identifiable market failures.

Notably, there is a common thread running through the debate. Opponents and proponents alike agree that the core of net neutrality—the principle of an "open" Internet—is valuable. The main source of disagreement, however, is the classification of ISPs as "common carriers," which subjects ISPs to potential "utility-style" regulation.

The Argument for the Current Regime: Proponents for keeping the bright-line rules insist the rules are necessary regulation. They predict light-touch regulation would lead to a devastating domino effect, affecting everything from the online consumer's day-to-day experience to the broader economic landscape of the Internet. More specifically, they envision ISPs abusing their bargaining power in negotiations with content providers, the eventual demise of smaller content providers incapable of paying premiums for faster bandwidth to stay competitive, and increased centralization and harm to consumer welfare as a result.

Underlying these concerns is these advocates' belief that the incentives for ISPs to abuse their position are too strong for the government to rely on market forces to enforce net neutrality principles. They contend antitrust enforcement is not the right tool either. Proponents of the current regime worry the antitrust laws do not provide enough certainty to incentivize private entities to bring lawsuits, and that antitrust cases take far too long to thwart the ISPs' anticompetitive conduct before the damage is done. In short, they see

one option: keeping the current system intact.

The Argument for Change. Opponents of the current regime, on the other hand, are confident market forces will continue (as they did *before* net neutrality) to ensure an open Internet in the absence of the bright-line rules. They argue there is no evidence to support the claim that the net neutrality rules were ever necessary to preserve the free and open Internet that existed for decades before the FCC adopted them in 2015. Rather, they maintain that there is no evidence of any market failures in the first place, that, if anyone, content providers have the leverage in the broadband industry over ISPs, and that ISPs will follow voluntary commitments because they, too, have every incentive to follow the principles of net neutrality.

Moreover, even if a light-touch regulatory regime somehow fails to effectuate net neutrality principles, opponents of Title II argue that the antitrust enforcement regime would provide a safety net. Antitrust professionals are confident that the newly authorized FTC, the FCC, and private entities empowered to enforce the antitrust laws collectively would be exceedingly well-suited to defeat any realistic or sustained threats to consumer welfare. In fact, some argue antitrust laws are the more appropriate tool for protecting consumer welfare because, unlike the bright-line rules, antitrust enforcement is not a blanket prohibition on vertical agreements between ISPs and content providers and does not lead to false positives—i.e., mistaken over-enforcement. Explicitly, antitrust enforcement would guard against the anticompetitive conduct, while also minimizing prohibition of potentially procompetitive private activity. Indeed, for antitrust enforcement even to be necessary, there would have to be a material change in circumstances leading to a new market failure. For the opponents of net neutrality by rule, utility-style regulation is an unnecessary government intervention into the marketplace.

Back on the Main Stage

Soon the debate may be academic. In the proposal Pai released on April 27, 2016, Pai committed to reversing the classification of ISPs as common carriers, thereby bringing ISPs back under the FTC's general authority.[3] The proposal also suggested that Pai will seek comment on how to approach the 2015 bright-line net neutrality rules.[4] In the recent past, however, Pai expressed intent to eliminate the rules and adopt new regulations under which ISPs would voluntarily agree to the net neutrality principles in their terms of service.[5] Regardless, the proposal's success is likely. Republicans hold a 2-to-1 majority in the FCC, which has final say on the course of action in this arena.

The FCC's adoption of the proposal would likely result in the elimination of the bright-line net neutrality rules and an opportunity for the antitrust agencies to reevaluate their roles in the effort to maintain an open Internet. For practitioners and their clients, the importance is clear: Get ready for a world without net neutrality or brush up on antitrust theories that may be implicated if the Internet highway starts to clog up a bit.

1. See Ajit Pai, Remarks of FCC Chairman Ajit Pai at the Newseum: The Future of Internet Freedom (April 26, 2017), available at https://www.fcc.gov/document/chairman-pai-speech-future-internet-regulation.

2. See Brian Feldman, "Say Good-bye to the Last Pillar of the Free, Open Internet," SELECT ALL (Jan. 24, 2017, 11:59 AM), http://nymag.com/selectall/2017/01/say-goodbye-to-the-last-pillar-of-the-free-open-internet.html.

3. *In the Matter of Restoring Internet Freedom*, WC Doc. No. 17-108, Notice of Proposed Rulemaking (April 27, 2016).

4. Id.

5. See David Shepardson, "U.S. Net Neutrality Advocates Blast Pai Effort to Reverse Rules," REUTERS (April 7, 2017, 4:57 PM), http://www.reuters.com/article/us-usa-internet-idUSKBN17932E.