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The Rise and Fall of Net Neutrality

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The Rise and Fall of Net Neutrality
(A Short History - 2017 Edition)

Preface[1]

[The following was our preface dated March 2, 2015 to the prior, 2015 Edition of this Publication]

As expected, following a partial reversal of its Open Internet rules by the D.C. Circuit Court of Appeals in January 2014, the Federal Communications Commission (FCC) has adopted new ones that, among other things, impose utility type regulations on broadband Internet providers. The FCC's decision, some say the most important in decades, reverses the agency's long standing treatment of Internet access as an unregulated information service. Instead, both landline and mobile broadband providers will now be treated as common carriers under so-called "Title II" regulation. Large broadband providers will certainly appeal the decision, while many Internet content providers and consumer groups applaud it. With President Obama's involvement, net neutrality and Title II regulation have become politically divisive, splitting Congressional support and opposition along party lines - with a legislative response to the decision possible.

The FCC adopted the new rules by a 3-to-2 vote on February 26, 2015. To assist practitioners in understanding these complicated developments, we have compiled a number of client alerts that track the history of this contentious proceeding - along with the FCC's public notice of what to expect next. If you have any questions or comments, please contact us at info@www.wstelecomlaw.com or at 770 399-9100.

The following is our updated preface dated December 12, 2017 to the new, 2017 Edition of this Publication.

It is expected, following refusal by the D.C. Circuit Court of Appeals for *en banc* review of a June 2016 decision by its panel (USTA v. FCC) upholding the Federal Communications Commission (FCC)'s 2015 Open Internet Rules, the FCC will adopted new ones that, among other things, reverse utility type regulations on broadband Internet providers. The FCC's decision, some say (once again) the most important in decades, will reinstate the agency's long standing treatment of Internet

[1] THIS COMPLIMENTARY CLIENT ALERT IS PROVIDED TO CLIENTS AND FRIENDS OF SAPRONOV & ASSOCIATES, P.C. FOR TUTORIAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS A LEGAL OPINION OR LEGAL ADVICE. PLEASE CONTACT US AT 770-399-9100 OR AT info@wstelecomlaw.com IF YOU HAVE SPECIFIC QUESTIONS ABOUT THIS ALERT – OR IF YOU WISH TO BE REMOVED FROM OUR MAILING LIST.

access as an unregulated information service. Instead, both landline and mobile broadband providers will no longer be treated as common carriers under so-called "Title II" regulation. Large broadband providers will applaud the decision, while many Internet content providers and consumer groups will likely appeal it. With first, President Obama's – and now President Trump's - involvement, net neutrality and Title II regulation have become politically divisive, splitting Congressional support and opposition along party lines - with a legislative response to the decision possible.

We expect that the FCC will adopted the new rules by a 3-to-2 vote on December 14, 2017. To assist practitioners in understanding these complicated developments, we have compiled a number of client alerts that track the history of this contentious proceeding - along with the FCC's public notice of what to expect next. If you have any questions or comments, please contact us at info@www.wstelecomlaw.com or at 770 399-9100.

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CLIENT ALERT[1]

FCC's Net Neutrality Proceeding

November 5, 2009

On October 22, 2009, the Federal Communications Commission ("FCC" or "Commission") issued a Notice of Proposed Rulemaking ("Notice") in the matter of Preserving the Open Internet Broadband Industry Practices,[2] better known as "Net Neutrality."

The topic is a controversial one. Two competing viewpoints quickly followed the Notice in the Wall Street Journal, with "free market" proponents opposed to the FCC's proposal and consumer advocates largely supportive.[3] Nor is the Notice a surprise. During last year's election campaign, the then presidential candidate Barak Obama supported Net Neutrality principles, John McCain did not.[4]

But the FCC's endorsement of Net Neutrality actually began with the prior administration under then Chairman Kevin Martin. Now, the new Commission chaired by Chairman Julius Genachowski seeks comment on draft language to codify the four

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[1] This client alert, while accurate to the best of our knowledge, is provided on a complimentary basis to clients and friends of Sapronov & Associates, P.C. for tutorial purposes only and is not to be construed as a legal opinion or legal advice. Please contact us at 770-399-9100 or 202-223-0646 or at info@wstelecomlaw.com if you have specific questions about this alert – or if you wish to be removed from our mailing list.

[2] *In re: Preserving the Open Internet, Broadband Industry Practices,* Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, (Rel. October 22, 2009) (*"Notice"*).

[3] *Compare* Mitchell Barnes and John Lilly, Editorial, *Net Neutrality: Spur to Entrepreneurship…*, WSJ.com, Oct. 29, 2009 at http://online.wsj.com/article/SB10001424052748703573604574490441027049518.html to Orrin Hatch and Jim Demint, Editorial, *…Or Barrier to Broadband Investment?*, WSJ.com, Oct. 29, 2009 at http://online.wsj.com/article/SB10001424052748703363704574503331828238574.html

[4] *See* Sapronov & Associates, P.C. Legislative Alert, *"Legislative Alert American Recovery and Reinvestment Act of 2009: Broadband Provisions,"* originally distributed February 24, 2009 and available upon request.

principles in its FCC's 2005 Internet Policy Statement released in 2005,[5] as well as two new ones[6]

The FCC' Internet Policy Statement has already created controversy. Following Comcast Corporation's alleged refusal to provide Bit-Torrent with non-discriminatory access to its Internet backbone, the prior FCC administration took the unusual step of raising a complaint against the cable company for violation of an uncodified principle – one that had not yet been adopted as a rule.[7]

The Notice also proposes draft language clarifying that the Internet access providers are subject to reasonable network management and that the principles apply to all platforms for broadband Internet access. But the Commission also seeks comment on how, when and to what extent the principles should apply to non-wireline forms of Internet access. In addition, it seeks comment on how "managed" or "specialized" services should be defined and what rules, if any, should apply to them. Finally, the FCC seeks comment on what enforcement procedures it should use to ensure compliance with the proposed principles.

Meanwhile, the battle lines are already drawn. Cable companies and telcos such as AT&T and Verizon, vigorously oppose "Net Neutrality" – viewing the FCC's proposals as anything but "neutral." Internet Content providers 9notably Google) predictably support them. These divergent viewpoints were recently presented at a Law Seminars International's Telebriefing moderated by David Baker of our Firm.[8] For a copy of the remarks, please contact us at www.wstelecomlaw.com (or our telephone number above) or visit www.lawseminars.com. For a more detailed discussion of the Net Neutrality principles and how the FCC proposes to implement them, read on.

I. Codifying the Existing Internet Principles

At the time the Commission adopted the existing four principles, it stated that they were not rules but that it would "incorporate the…principles into its ongoing

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[5] In 2005, the FCC adopted a policy statement outlining four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.

[6] In a September 21, 2009 speech to the Brookings Institution, FCC Chairman Genachowski proposed adding two new principles: (1) preventing Internet access providers from discriminating against particular Internet content or applications, while allowing for reasonable network management and (2) ensuring that Internet access providers are transparent about the network management practices they implement.

[7] *See* Sapronov & Associates, P.C. Client Alert, "The 'New FCC' and Its Agenda: National Broadband Plan, Net Neutrality and Recovery Act Broadband Funding" originally sent October 9, 2009, available upon request.

[8] Law Seminars International, *"FCC's Proposed Net Neutrality Rules, Benefits and Challenges for Businesses,"* held November 3, 2009. Information available at: http://www.lawseminars.com/detail.php?SeminarCode=09NNRTB

policymaking activities,"[9] which have included a broadband practices proceeding,[10] two public field hearings,[11] and an enforcement action.[12] The Commission now believes it is appropriate to codify the four principles, at their current level of generality as obligations of broadband Internet access service providers in order to make it clear who must comply and it what way. Specifically, the FCC affirms that these principles apply to all providers of Internet access service, other then dial-up, regardless of the technology used to deliver the service. The proposed rules are:

1. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user's choice over the Internet.*
2. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice.*
3. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.*
4. *Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.*

The Commission seeks comment in general on these principles and specifically on the likely costs and benefits of each rule individually as well as whether codifying them will promote free speech, civic participation, democratic engagement and the preservation of the Internet as an overall open platform.

II. Codifying a Principle of Nondiscrimination

While the Commission recognizes that Internet traffic is rapidly increasing and service providers must be able to manage their networks while experimenting with new technologies, the agency is aware that network operators have the ability to discriminate in price or service quality among different types of traffic or providers, resulting in significant social costs. The key issue facing the agency is distinguishing socially beneficial discrimination from socially harmful discrimination. The FCC therefore proposes a general rule prohibiting a broadband Internet access service provider from

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[9] *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 5.
[10] *See Notice of Inquiry*, 22 FCC Rcd 7894.
[11] The Commission held a public hearing at Harvard Law School in Cambridge, Massachusetts, *see* FCC, Broadband Network Management Practices En Banc Public Hearing I (Feb. 25, 2008), http://www.fcc.gov/broadband_network_management/hearing-ma022508.html, and at Stanford Law School in Palo Alto, California, *see* FCC, Broadband Network Management Practices En Banc Public Hearing II (Apr. 17, 2008), http://www.fcc.gov/broadband_network_management/hearing-ca041708.html.
[12] *See Comcast Network Management Practices Order*, 23 FCC Rcd 13028.

discriminating, either against or in favor of, any content, application, or service, subject to reasonable network management. Specifically:

> *Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.*

The Commission understands the term "nondiscriminatory" to mean that a broadband Internet access service provider may not charge a content, application or service provider for enhances/prioritized access to subscribers, but that the rule would not prevent the service provider from charging subscribers different rates for different services. It seeks comment on this understanding and whether the language best serves the public interest. The FCC also seeks comment on the effects of such prohibition would have on end users, *i.e.* higher costs, or greater social welfare. Would such a nondiscrimination rule affect service providers' pricing and practices and would it discourage innovation or network deployment?

III. Codifying a Principle of Transparency

The Commission states that transparency discourages inefficient and socially harmful market behavior and would benefit several constituencies, including (i) enable users to understand and take advantage of technical capabilities/limitations of the purchased service, (ii) benefit content, application and service providers/investors by increasing access to information needed to create/market new Internet offerings and (iii) policy makers could more easily evaluate the effectiveness and necessity of ongoing policies. It seeks comment on how service providers should disclose relevant network management practices in a minimally burdensome manner. Specifically, the proposed rule is:

> *Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.*

The FCC seeks comment on the specific wording of the proposed rule, particularly how it should interpret what information is "reasonably required." Additionally, it would like comment on what information should be disclosed to users (*i.e.* actual rates, capacity, times of day network congestion is highest, etc.) and how such information should be disclosed. It also seeks comments on what information is currently available to content, application and service providers, what, if any, additional information should be made available and how it should be make available. Also, should the Commission have access to this information and in what form (reports, how often, etc.). Finally, the FCC seeks comment on whether the proposed transparency rule raises any privacy issues, or whether any other legal limitations on what can be disclosed.

IV. Reasonable Network Management

While these proposed rules are intended to encourage investment and innovation, promote competition and protect the rights of users, the Commission realizes there will be times when their strict application may will conflict with these goals (*.e.g.*, failure to prioritize certain traffic in an emergency situation could impair efforts of first responders). The FCC therefore proposes all six proposed rules be subject to reasonable network management, the needs of law enforcement and the needs of public safety, homeland and national security.

A. Reasonable Network Management

The proposed definition of reasonable network management is:

> *Reasonable network management consists of: (a) reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices.*

The Commission proposes that service providers be permitted to take reasonable steps to reduce the adverse effects of congestion and seeks comment on what approaches to addressing congestion would be reasonable. Second, it wishes that harmful or unwanted traffic, such as blocking spam or malware, be addressed. Next, it proposes to allow service providers to address unlawful conduct on the Internet (*i.e.* refusing to transmit copyrighted works). Finally, the Commission proposes that providers be allowed to take reasonable steps to maintain proper network functionality. It seeks comment on all of these conditions as well as the definition of reasonable network management.

B. Law Enforcement

The Commission acknowledges that service providers, in certain circumstances, may be required to meet the needs of law enforcement in conflict with the proposed rules. The following new rule proposes an exception, and the FCC seeks comment sought on the wording, as well as examples of instances where the absence of this exception would cause conflict with the other proposed rules:

> *Nothing in this part supersedes any obligation a provider of broadband Internet access service may have—or limits its ability—to address the needs of law enforcement, consistent with applicable law.*

C. Public Safety, Homeland and National Security

In cases of emergency, government agencies may need guaranteed access to reliable communications over the Internet in order to coordinate disaster relief, other

response efforts, or other emergency communications, which could conflict with the proposed rules. Here too the Commission proposes an exception and seeks comment on its wording, as well as how its absence would cause conflict with the other proposed rules:

> *Nothing in this part supersedes any obligation a provider of broadband Internet access service may have—or limits its ability—to deliver emergency communications, or to address the needs of public safety or national or homeland security authorities, consistent with applicable law.*

V. Managed or Specialized Services

The Commission uses the term "managed" or "specialized" services to describe Internet-Protocol-based offerings. Such services are often provided over the same networks used for Broadband Internet access service, but have yet to be classified by the Commission. It recognizes that these services may provide customer benefits (greater competition, increased deployment, etc.) but may also negatively affect the open Internet. The FCC seeks comment on whether or not the same rules proposed here should apply to managed or specialized services. It also wishes comments on how to define such a category, what policies should apply and what impact they may have on the open Internet.

VI. Applicability of Principles to Various Broadband Technology Platforms

While the Commission confirms that all rules and principles proposed apply to all platforms for broadband Internet access, it seeks comment on the application of these principles to non-wireline forms of Internet access, including terrestrial mobile wireless, unlicensed wireless, licensed fixed wireless and satellite. It would like comments addressing how and to what extent the principles should apply and in what time frame or phases.

VII. Enforcement

Finally, the FCC proposes to enforce the proposed rules on a case by case basis through adjudication and has the authority to issue citations and impose forfeiture penalties for violations. This is accomplished either by the Commission's own motion, or in response to a complaint. It seeks comment on this procedure.

In conjunction with this rulemaking, the FCC has launched a new website, www.openInternet.gov, to encourage public participation. Comments are due on or before January 14, 2010. Should you have any questions or comments – or perhaps wish to get involved in this proceeding, please do not hesitate to contact us.

2. Update on Net Neutrality Developments (January 12, 2011)

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CLIENT ALERT[1]

To: Clients and Friends

From: Sapronov & Associates, P.C.

Date: January 12, 2011

Subject: The Federal Communications Commission's Network Neutrality Order: From "Third Way" to Preserving the Open "Broadband" Internet

I. Network Neutrality: The FCC's New Rules

Shortly before the Christmas holidays, the Federal Communications Commission ("FCC") voted 3-2 along party lines to adopt "net neutrality" regulations for broadband Internet providers. This represents the agency's latest effort to establish rules for Internet access, an effort that began with "non-discrimination principles" articulated during former FCC Chairman Kevin Martin's tenure, continued with a ruling by the current FCC against Comcast, which was struck down last April by the U.S. Court of Appeals for the D.C. Circuit,[2] and was followed by Chairman Julius Genachowski's recent "Third Way" proposal for broadband Internet classification and regulation.[3]

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[2] *Comcast Corporation v. Federal Communications Commission*, D.C. Cir., No. 08-1291 (April 6, 2010).

[3] *See* Sapronov & Associates, P.C. Client Alert *"The Federal Communications Commission's ("FCC") New Approach to Broadband Regulation: "Third Way" or 'Third Rail?'"* (May 26, 2010), available upon request.

Much is at stake with the FCC's current Order.[4] While it differs considerably from Chairman Genachowski's "Third Way" proposal, the Order codifies - for the first time - regulations on use of the Internet. The Net Neutrality Order prescribes new rules of the road for broadband providers – both landline and (to a lesser degree) mobile ones. Among other things, the rules require broadband providers to provide access with transparency, no blocking and no unreasonable discrimination. Usage based pricing is permitted, but frowned upon. It also hints at future regulation of other Internet services, including "IP," "specialized services," and "edge" varieties (see discussion below).

The FCC's stated goals are to provide regulatory certainty and encourage broadband investment. Whether it will realize these goals is by no means certain. Investors may or may not wish to invest in a government regulated infrastructure. Removing the uncertainty surrounding broadband Internet's regulatory status would no doubt be welcome. But does the Order accomplish this?

The problem, according to the D.C. Circuit in *Comcast v. FCC*, is lack of jurisdiction. Previously, the FCC had attempted (unsuccessfully) to enforce net neutrality rules on Comcast's network management practices in reliance on the agency's so-called "ancillary jurisdiction" under Title I of the Communications Act. In the Net Neutrality Order, it now relies on one of the 1996 legislative amendments to the Communications Act, "Section 706,"[5] which directs the FCC to encourage the deployment of "advanced telecommunications capability. Again, whether Section 706 authority will fare better than ancillary jurisdiction in supporting net neutrality rules remains to be seen.

The FCC faces another obstacle: political controversy. As the *Economist* recently noted:

> Democrats, who are in favor of net-neutrality rules, insist regulation is needed to prevent network operators discriminating in favor of their own services…Republicans, meanwhile, worry that net neutrality will be used to justify a takeover of the internet by government bureaucrats, stifling innovation…"[6]

The Wall Street Journal also notes that the Order may face significant Congressional opposition.[7] With a new Republican majority occupying the House of Representatives, this opposition will likely stiffen. Whether Congressional dislike will

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[4] *In re: Preserving the Open Internet, Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, (Rel. Dec. 23, 2010) (*"Net Neutrality Order" or "Order"*). Citations to specific sections of the *Net Neutrality Order* referenced herein are available upon request.

[5] 47 U.S.C. §1302.

[6] The Economist, "Network Neutrality, A Tangled Web, America's new internet rules are mostly sensible - but the country's real web problem is far more basic," December 29, 2010, available at: http://www.economist.com/node/17800141?story_id=17800141&CFID=158484844&CFTOKEN=60991850.

[7] *"www.internet.gov: The FCC's new Web power grab deserves a vote under the Congressional Review Act,"* WSJ.com, Dec. 30, 2010.

affect the survival of new Net Neutrality rules is questionable: but it certainly does not help. So the uncertainty surrounding net neutrality is by no means gone.

II. In Lieu of a "Third Way," a "Free and Open" Internet

As previously discussed,[8] the FCC, following its setback in the *Comcast* decision this past April, went back to the drawing board in its effort to devise network neutrality rules for broadband Internet access. It compiled an extensive record, drawing responses from over 100,000 commentators, thus arguably complying with Federal administration procedures[9] - and hoping no doubt to insulate the decision from procedural challenges.

The Order effectively jettisons Chairman Julius Genachowski's "Third Way," the agency's informal proposal to subject broadband Internet providers to somewhat relaxed Title II common carrier regulations, through a messy application of "forbearance."[10] Further, the Order does not change the classification of broadband Internet access, thus avoiding a "third rail" result.

Instead, adding a Part 8 to Title 47 of the Code of Federal Regulations ("C.F.R."),[11] the Net Neutrality Order separates broadband providers into two separately regulated categories: fixed broadband and mobile broadband, with slightly differing rules for each.[12] The following summarizes (i) the authority relied upon the FCC to adopt these rules, (ii) what they are intended to do, and (iii) how they will affect broadband providers and others.

III. The Order: Free and Open Broadband Internet

A. Authority and Effective Date

In the *Comcast* decision, the D.C. Circuit ruled that the FCC, in order to exercise its ancillary jurisdiction under Title I, must link any regulations promulgated thereunder to specific regulatory authority granted to the FCC under one of the other substantive provisions (*e.g.*, common carrier regulation, cable regulation) of the Act. In response, the Commission cites several sections of the Telecommunications Act of 1996 as authority for the Order: §§ 154(k), 201, 251(a)(1), 616(a), 628, and 706.

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[8] *See* Sapronov & Associates, P.C. Client Alerts, *"FCC Broadband Regulation Gets Underway"* (July 2, 2010) and *"The Federal Communications Commission's ("FCC") New Approach to Broadband Regulation: "Third Way" or 'Third Rail?'"* (May 26, 2010), available upon request.

[9] 5 U.S.C. § 553; 47 C.F.R., Part I, Practice and Procedure, Subpart C, Rulemaking Proceedings.

[10] *See Net Neutrality Order*, para 79. The Commission explains that, under §3(51) of the Communications Act, broadband providers and end users have the antithesis of a common carriage relationship since broadband providers make individualized decisions based on every end user.

[11] A copy of the new regulations are attached hereto at Attachment "A."

[12] *See Net Neutrality Order*, para 50-52. The *Net Neutrality* Order declines to directly require edge provider activities, dial-up providers, or premise operators to adhere to the specific regulations found in 47 C.F.R, Part 8. However, premise operators are encouraged to disclose relevant restrictions on broadband service they make available to their patrons.

The reliance on Section 706 is particularly noteworthy. Much like the ancillary jurisdiction of Title I, Section 706 provides a broad policy mandate to the Commission - specifically to deploy an "advanced telecommunications capability." Whether Section 706 is a "substantive" provision of the Act is debatable, but that too remains to be seen.

These rules do not go into effect until 60 days after the date of the Federal Register notice announcing the decision of the Office of Management and Budget ("OMB") regarding approval of the information collection requirements.

B. Fixed Broadband Providers[13]

The Order requires all fixed broadband providers to comply with the following regulations, all designed to preserve an "open Internet": transparency, no blocking, no unreasonable discrimination, and reasonable network management.

1. Transparency

The transparency rules impose a disclosure obligation on broadband providers (either on their websites or at the point of sale). The Order provides recommended "guidelines" for what type of information needs to be disclosed.[14] These are only a starting point, not a safe harbor. Competitively sensitive information that would compromise network security or undermine reasonable network management practices need not be publicly disclosed. More generalized transparency rules may be forthcoming, as a separate and ongoing transparency proceeding is slated to follow soon.

2. No blocking

As an extension of the Commission's existing *Internet Policy Statement*, the "no blocking" rules are designed to let users send and receive lawful broadband content, applications and services without fear of blocking. They also establish a *Carterphone* like protection for end users to connect and use any lawful devices that do not harm the network.[15] No blocking also means no degrading - a practice where broadband providers impair end user network usage and devices so as to render them effectively unusable.

All this is qualified, as the "no blocking" rules are subjected to reasonable network management principles, a compromise for the broadband providers.

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[13] *Net Neutrality Order*, para 49 ("We define 'fixed broadband Internet access service' as a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. This term encompasses fixed wireless broadband services (including services using unlicensed spectrum) and fixed satellite broadband services.")

[14] *Id.*, para 56. The guidelines suggest that the following be disclosed: (1) Network Practices, which includes congestion management, application specific behavior, device attachment rules, and security; (2) Performance Characteristics, which includes service description, and impact of specialized services; and (3) Commercial Terms, which includes pricing, privacy policies, and redress options.

[15] *Id.*, para 62. *See also Net Neutrality Order,* para 65 (allowing broadband providers to require that end user devices conform to widely accepted and publicly available standards applicable to its services).

3. No unreasonable discrimination

Here again, the Commission seeks to strike a balance between a network provider's need to reasonably manage its network with a congressional mandate under 47 U.S.C. §230(b) that calls for end user control of their Internet experience. The "no discrimination" rule is closely linked to the transparency rule: the more transparent a broadband provider's broadband practices, the more likely any discrimination will be deemed "reasonable."

But not all discrimination is forbidden. Broadband providers may charge end users based on their usage. Use-agnostic discrimination is also reasonable and thus likely permitted.[16] Still, the Commission frowns upon "pay-for-priority" arrangements - but leaves open the possibility, however unlikely, that they could be found lawful.[17]

4. Reasonable Network Management

Broadband providers must still manage their networks. To help them do so, the Order includes a non-exclusive list of reasonable network management practices.[18] Others the FCC will review case-by-case and what is reasonable may well vary from platform to platform. The Order also allows considerable leeway to maintain network security or to combat network congestion.

Even so, broadband providers beware: before blocking or even prioritizing network traffic, be prepared to explain to the FCC why this is necessary.

C. Mobile Broadband Providers[19]

The Order recognizes mobile broadband to be in an earlier stage of development than the fixed variety. Mobile broadband speeds, capacity, and penetration are much lower than fixed broadband and greater operational constraints exist on mobile networks. Mobile broadband providers, in short, get a break: they have to comply with the open internet rules but not quite as strictly.

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[16] *See Id.,* para 73 ("Differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses is likely reasonable. For example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users.")

[17] *Id*., para 76 ("it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard.") (emphasis added).

[18] *Id.*, para 82. Legitimate network management practices include: ensuring network security and integrity, including addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users; and reducing or mitigating the effects of congestion on the network.

[19] *See Id*., para 49 ("We define 'mobile broadband Internet access service' as a broadband Internet access service that serves end users primarily using mobile stations. Mobile broadband Internet access includes services that use smartphones as the primary endpoints for connection to the Internet.")

1. Transparency

Mobile broadband providers are required to follow the same transparency rule as fixed providers with one important caveat: mobile providers do not have to allow third party devices or all third party applications onto their networks.

Even so, mobile broadband providers must disclose their third party device and application procedures.

2. No Blocking

Mobile broadband providers may not block consumers from accessing lawful websites, subject to reasonable network management. Additionally, the Order prevents mobile broadband providers from blocking applications that compete with the provider's voice or video telephony services, subject to reasonable network management. Degrading a website or application is also prohibited.

Importantly, however, the rule does not apply to a mobile broadband provider's operation of an application ("app") store.

Recognizing that each mobile broadband network is unique, the Commission will apply reasonable network management principles on a case-by-case basis.

3. Reasonable Network Management

See discussion in Section II.B.4., *supra.*

IV. We've Only Just Begun

The net neutrality rules adopted by the Order are only the beginning of the FCC's agenda. More will soon follow, including:

A. Open Internet Advisory Committee

The Order creates an Open Internet Advisory Committee, a "transparent" body that will hold public meetings, track developments, and give recommendations to the Commission as to the openness of broadband Internet.[20]

[20] The Committee is to be comprised of consumer advocates, Internet engineering experts, edge providers, business leaders, investors, broadband service providers and other parties the Commission may deem appropriate.

B. Specialized Services - "Last Mile Offerings"

Specialized services[21] continue to be an area of regulatory uncertainty. These generally IP-based services differ from broadband Internet access service and, for now, are not subject to the broadband rules. For the time being, the Commission and the Open Internet Advisory Committee will simply monitor them.

C. Upper 700 MHz C Block Monitoring

Recently, the Commission licensed upper 700 MHz C Block spectrum and imposed newly created openness standards as a licensing requirement. The Commission will continue to monitor how well the licensees, who include Verizon Wireless 4G, implement these openness standards before creating any greater constraints on mobile broadband providers.

All this, to repeat, is only the beginning. Broadband Internet access may not be a regulated telecommunications service, but it is now not entirely free from government supervision. We will keep you posted and as always, should you have any questions or comments, please do not hesitate to contact us. For specific questions about this alert, please contact Walt Sapronov (wsapronov@wstelecomlaw.com), David Baker (dbaker@wstelecomlaw.com), or Isaac Dolgovskij (isaac@wstelecomlaw.com).

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[21] See *Net Neutrality Order*, para 112. Specialized services are provided where "broadband providers offer services that share capacity with broadband Internet access service over providers' last-mile facilities, and may develop and offer other such services in the future."

APPENDIX A
Substantive Rules

Part 8 of Title 47 of the Code of Federal Regulations is added as follows:

PART 8 – PRESERVING THE OPEN INTERNET

Sec.

AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302

§ 8.1 Purpose.

The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.

§ 8.3 Transparency.

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

§ 8.5 No Blocking.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

§ 8.7 No Unreasonable Discrimination.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

§ 8.9 Other Laws and Considerations.

Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

§ 8.11 Definitions.

(a) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

(b) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(c) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(d) Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

3. Net Neutrality: Battle for the Last Mile (2011)

Atlanta Telecom Professionals (ATP) Presents:
Net Neutrality: Battle for the Last Mile

When: Tuesday February 8, 2011
Where: Crowne Plaza Ravinia
Networking: 5:30PM

On December 21, 2010 in a 3-2 vote, the FCC adopted a Report and Order on Preserving the Open Internet. Commonly referred to as "Net Neutrality", this Order adopts rules requiring transparency and banning blocking of and unreasonable discrimination by broadband providers. Proponents of this Order point out that it merely safeguards against abuses, expands on open Internet principles adopted by a previous FCC administration and that it is generally consistent with broadband providers' current practices, therefore requiring little change in their day-to-day operations.

However, opponents of this Order (including 2 of the current FCC Commissioners) see net neutrality as a "solution in search of a problem." They note that the Internet has flourished with minimal governmental regulation and that over 60% of American homes have gained broadband access in just the past 10 years. Furthermore, the April, 2010 federal appeals court decision in *Comcast v. FCC* calls into question the FCC's ability to impose regulations on broadband providers.

Come join us as our panel brings years of policy and operational experience in examining the biggest regulatory decision to affect the Internet in many years and, potentially, for years to come.

SPONSOR THIS EVENT

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- Recognition at the event

Moderating:

David N. Baker, Managing Director
Sapronov & Butler Government Affairs

David N. Baker, Firm counsel, is Managing Director of the Firm's government affairs affiliate, Sapronov & Butler Government Affairs. Mr. Baker, formerly Vice President, Law and Public Policy for Earthlink, is an attorney and former elected official with extensive experience representing Internet,

communications and technology companies before federal, state and local legislators, regulators and courts. As Commissioner and Chairman of the Georgia Public Service Commission, Mr. Baker was appointed by the Federal Communications Commission (FCC) to serve on the Federal-State Joint Board on Universal Service. Mr. Baker subsequently served on the Georgia Governor's Task Force on Telecommunications and Technology, the Georgia legislature's Advisory Panel in Emerging Communications Technologies, and the Board of the Universal Service Administrative Company which oversees the $7.5 billion Federal Universal Service Fund.

Speakers:

Walt Sapronov, Managing Partner
Sapronov & Associates

Walt Sapronov, Firm managing partner, is AV Peer Review Rated and has been named in the International Who's Who of Telecom Lawyers. He has represented enterprise, carrier and service provider clients - including some of the largest in the United States - in telecommunications deals and regulation for over twenty (20) years. AVVO, a law firm rating agency, recently gave Walt Sapronov its highest rating ("superb") among telecommunications lawyers in the Atlanta area. Please see www.avvo.com/business-telecommunications-law/ga/atlanta.html for more information. Born in Kempton, West Germany, November 10, 1947; admitted to bar, 1983, Georgia; 1986, Georgia Supreme Court and U.S. District Court, Northern District of Georgia; 2010, U.S. Supreme Court.

Sandra Sheets Gardiner, Partner
Morris, Manning & Martin, LLP

Sandra Sheets Gardiner is a partner at Morris, Manning & Martin, LLP. Ms. Gardiner counsels manufacturing and technology companies and large end users in complex technology transactions. She advises these clients in a variety of mission-critical transactions, including outsourcing matters, joint ventures, strategic alliances, technology procurement and acquisition, management of intellectual property assets and privacy and security issues.

Ms. Gardiner's clients represent a variety of industries, ranging from mobile, wireless, telecommunications, new media, clean energy, healthcare and traditional manufacturing.

Jennifer Hightower, Vice President Regulatory Affairs
COX

As vice president of regulatory affairs for Cox Communications, Jennifer Hightower oversees all telephone regulatory functions including compliance with rules and regulations, and relationships with other telecommunications providers. She also assists with policy making and strategic initiatives related to Cox's telecommunications business.

Hightower joined Cox in 1997 as legal counsel and, prior to her current role, she oversaw all transactional and operational legal support. Previously, she served as assistant general counsel for regulatory affairs. Prior to joining Cox, she served in various legal positions at BellSouth Corporation, RaceTrac Petroleum, Inc. and Drew, Eckl & Farnham.

In 2005, Hightower was honored as one of the Rising SuperStar Attorneys in Georgia and in 2007 was named SuperStar Attorney by the Georgia Corporate Counsel magazine. She served as chair of the Georgia Federal Bar Association from 2003 to 2005. An active member of the Women in Cable Telecommunications, she served as membership chair of the Atlanta chapter from 2004 through 2006. She also has served on the boards of Callanwolde School of Fine Arts, Piedmont Park board of young members and Junior League of Atlanta.

NET NEUTRALITY:
Battle for the Last Mile

Presentation to

Atlanta Telecom Professionals
February 8, 2011
Atlanta, Georgia

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Contents

Net Neutrality Basics

- Policy principle is a neutral and open Internet
- Consumers should be entitled to:
  - Access lawful Internet content of their choice;
  - Run applications and services of their choice subject to the needs of law enforcement;
  - Connect to their choice of lawful devices that do not harm the network; and
  - Enjoy the benefits of competition among providers (network, applications, services and content)
- Internet Service Providers (ISPs) should:
  - Balance customers' needs with reasonable network management practices; and
  - Have transparent ISP network management practices

FCC Authority

- Federal Communications Act
  - Title I (Ancillary Jurisdiction)
  - Title II (Common Carrier)
  - Title III (Wireless)
  - Title VI (Cable)
- Title I (Ancillary Jurisdiction)
  - General FCC policy making authority
  - Used for unregulated (enhanced) information services
- Title II (Common Carrier)
  - Used for regulated (basic) telecommunications services

Origins of the FCC Comcast Order

- FCC investigation -- Comcast blocked access to BitTorrent
- FCC subsequently required Comcast to:
  - Disclose details of its network management practices;
  - Submit a compliance plan by end of year (2008); and
  - Present new, non-discriminatory network management practices to customers and the Commission
- Comcast appealed – challenging FCC jurisdiction

Comcast v. FCC - D.C. Circuit Court Reversal

- D.C. Circuit Court Holding (April 2010):
  - FCC has no jurisdiction over Comcast network management practices
  - Ancillary jurisdiction must be “ancillary” to other statutory authority
    - *e.g.* Title II (Telecom), or Title VI (Cable)
    - Not a stand-alone grant of authority
  - Reversed and vacated FCC Comcast decision
  - Did not reach other issues *e.g.*, whether FCC may enforce a policy and not just its own rules

FCC Open Internet Order (December 2010)

- Scope of the Order: Applies to "Broadband Internet Access Service," defined as:
  - A mass-market retail service
  - By wire or radio
  - That provides the capability to transmit and receive data from substantially all Internet endpoints
- Services that are "likely" not covered by the Order include:
  - Services that provide limited Internet connectivity for a particular device, *e.g.* e-readers, heart monitors, to "the extent the service relates to the functionality of the device"
- Other services, like "premise operators" (*e.g.* Starbucks), are not covered under the Order

FCC Open Internet Order (December 2010)

- Fixed vs. Mobile Broadband Service Rules
  - Fixed: Transparency, No Blocking, and No Unreasonable Discrimination
  - Mobile: Transparency, No Blocking (more narrow)
  - Blocking and Unreasonable Discrimination are both subject to Reasonable Network Management (case-by-case)
- Specialized Services (*e.g.* VoIP and IP video offerings)
  - Order does not adopt specific policies; FCC will monitor
- Enforcement Mechanisms
  - Informal Complaints; Formal Complaints; FCC-initiated Actions

Recent Developments

- *Verizon v. FCC* (January 2011)
- Third party challenge of MetroPCS's new tiered service plan as a violation of open Internet rules (January 2011)
- Third parties have alleged peering arrangements that constitute "paid prioritization" or "blocking" in violation of the open Internet rules
  - Zoom/Comcast dispute
  - Voxel dot Net/Comcast dispute
  - Level 3/Comcast dispute

Recent Developments

- Congressional Net Neutrality Legislation
  - Republican controlled House of Representatives
  - Political opposition to Net Neutrality
- Pending Bills
  - Internet Freedom, Broadband Protection, and Consumer Protection Act of 2011 (Senate)
  - Internet Freedom Act (House of Representatives)

Final Thoughts

If you would like a comprehensive summary of the Net Neutrality saga prepared by our Firm, please contact us at:

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4. The FCC's New Open Internet Rules (November 14, 2011)

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CLIENT ALERT[1]

To: Clients and Friends

From: Sapronov & Associates, P.C.

Date: November 14, 2011

Subject: The Federal Communications Commission's ("FCC") Network Neutrality Rules ("Order" or "Open Internet Order"[2])

I. Network Neutrality: The FCC's New Rules

On November 20, 2011, the FCC's Open Internet Order goes into effect. With limited exceptions, the Open Internet Order affects all broadband providers - both fixed and mobile - and requires each provider to examine, disclose and, in some instances, alter their network practices in order to comply.

The Order faces significant legal challenges in the months ahead. Verizon and others have sued the FCC[3] in the U.S. Court of Appeals to overturn the Order for acting in excess of the FCC's statutory authority and attempting to circumnavigate last year's Comcast decision.[4] Also, on November 9, 2011, the Senate debated whether to overturn the Order and a vote is pending.

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[2] *In re: Preserving the Open Internet, Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, (Rel. Dec. 23, 2010) (*"Open Internet Order"* or *"Order"*).

[3] *Verizon v. FCC, et al*, D.C. Cir., Nos. 11-1355, 11-1356, and 11-1404 (docketed September 30, 2011).

[4] Comcast Corporation v. Federal Communications Commission, D.C. Cir., No. 08-1291 (April 6, 2010).

In the absence of congressional or judicial overrule, however, providers must comply with the Order. To that end, this Client Alert updates our prior alert[5] by breaking down the Order to its essentials and explaining (a) who is a broadband provider and (b) how each broadband provider must comply. Failing to comply could expose offending companies to several risks, including statutory penalties[6] and third-party complaints.[7]

A. Who Must Comply?

The Order applies to "broadband Internet access services," which are defined as "mass-market retail service(s) by wire or radio that provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."[8] This definition is both ambiguous and extremely broad, especially as it relates to mobile broadband, because it is not dependent upon the speed of the service. Rather, the definition facially covers any data service offered to retail consumers that provides ubiquitous or near-ubiquitous ("all or substantially all") Internet access. Excluded from the definition is dial-up Internet access – but apparently not much else.

With regard to mobile broadband providers, the Order singles out Internet access via smartphones as a clear example of mobile broadband Internet access service. The Order also applies to any service that, with or without a Smartphone, provides access to substantially all Internet endpoints. In other words – to just about any mobile phone service that offers a data plan.

B. How Must Broadband Providers Comply?

The Order breaks down broadband Internet access service into two categories: fixed[9] and mobile.[10] Fixed providers must comply with the following regulations: transparency, no blocking, no unreasonable discrimination, and reasonable network

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[5] *See* Sapronov & Associates, P.C. Client Alert "The Federal Communications Commission's Network Neutrality Order: From "Third Way" to Preserving the Open "Broadband" Internet" (January 12, 2011), available upon request.

[6] *See* 47 U.S.C. §§ 501, 502, 503(b)(1)(B), 504. *See also* 47 C.F.R. § 1.80.

[7] *Re: Notice of Ex Parte Presentation (Free Press et al letter to Chairman Julius Genachowski) In re Preserving the Open Internet, Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, (January 10, 2011).

[8] Order, para 44-47. "A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part."

[9] *Id*., para 49: "We define 'fixed broadband Internet access service' as a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. This term encompasses fixed wireless broadband services (including services using unlicensed spectrum) and fixed satellite broadband services."

[10] *Id.*, para 49. "We define 'mobile broadband Internet access service' as a broadband Internet access service that serves end users primarily using mobile stations. Mobile broadband Internet access includes services that use smartphones as the primary endpoints for connection to the Internet."

management. Mobile broadband providers, for a variety of reasons,[11] must comply with a reduced set of regulations: "transparency" and "no blocking", although the latter may perhaps be occasionally permitted if it fits within "reasonable network management."

1. Transparency: Disclosure Obligations.

The "transparency" rule reads as follows:

> "A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[12]

The transparency rule imposes a disclosure obligation on broadband providers at two points: on their website and at the point of sale. The Order also recommends "guidelines" for the types of information that must be disclosed. Specifically:

i. "Network Practices," which include congestion management, application specific behaviors, device attachment rules, and security policies;
ii. "Performance Characteristics," which include service descriptions and the impact of "specialized services;"[13] and
iii. "Commercial Terms," which include pricing, privacy policies, and redress options.[14]

Note, however, that these "guidelines" are expressly stated to be only a starting point, not a safe harbor, leaving the test of whether a broadband provider's compliance measures are adequate somewhat uncertain. The broad "including but not limited to" type language in the FCC's discussion of these guidelines suggests that the true measure of compliance may lie in the eye of the beholder and, worse still, might vary on a case by case basis.[15] Here, that would be the Commission itself - or perhaps a disgruntled customer turned plaintiff. If so, compliance with such amorphous rules might provide difficult at best.

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[11] *See Id.*, para 94-95. The Order recognizes mobile broadband to be in an earlier stage of development than the fixed variety. Mobile broadband speeds, capacity, and penetration are much lower than fixed broadband and greater operational constraints exist on mobile networks.

[12] *Id.* , para 54.

[13] *Id.*, para 112-114. "Specialized services" are services offered by broadband providers over their last-mile facilities that share capacity with broadband Internet access service. These specialized services, such as some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service and may drive additional private investment in broadband networks.

[14] *See Attachment "A.."*

[15] *See* discussion of the "No Blocking" rule at Section III.A.2. below.

Happily, there are some important carve outs to the broad disclosure requirements. Competitively sensitive information that would compromise network security or undermine reasonable network management practices need not be made public. In addition, mobile providers need not allow third party devices or all third party applications onto their networks. Even so, mobile providers must nonetheless (i) disclose their third party device and application certification procedures; (ii) clearly explain their criteria for any restrictions on use of their network; and (iii) inform device or application providers of decisions to deny access to their network.[16]

2. "No Blocking" – Unless It's "Reasonable" Network Management.

The blocking rule reads as follows:

> "A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management."[17]

In other words, mobile broadband providers may neither block consumers from accessing lawful websites, nor block applications that compete with the provider's own voice or video telephony services - all subject to "reasonable network management." Degrading access to or use of a particular website or application that competes with a provider's voice or video telephony so as to render it unusable is likewise prohibited;[18] however, the rule does not apply to a mobile broadband provider's operation of an application ("app") store.[19]

The blocking prohibitions are subject to exceptions: one is a provider's right to "reasonably" manage its network. A network management practice is "reasonable" if it

> "is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[20]

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[16] Order, para 98. "Further, although we do not require mobile broadband providers to allow third-party devices or all third-party applications on their networks, we nonetheless require mobile broadband providers to disclose their third-party device and application certification procedures, if any; to clearly explain their criteria for any restrictions on use of their network; and to expeditiously inform device and application providers of any decisions to deny access to the network or of a failure to approve their particular devices or applications."

[17] *Id*., para 99.

[18] *See Id.*

[19] *Id*., para 102.

[20] *Id*., para 82.

Aside from this platitude, the Order provides a more helpful, non-exhaustive list of such reasonable network management practices.[21] It also expressly permits providers to maintain network security, to combat network congestion, to provide end-users with mechanisms to eliminate unwanted traffic,[22] and to take other steps necessary to operate their networks efficiently and safely.

Most worrisome, however, is the FCC's statement that, because each mobile broadband network is unique, the agency will evaluate the reasonableness of each provider's network management practices on a case-by-case basis. Again, this "eye of the beholder" standard makes compliance measures all the more difficult.

3. "No Unreasonable Discrimination" for Fixed Broadband Providers.

Here, the FCC seeks to strike a balance between a network provider's need to reasonably manage its network with a congressional mandate under 47 U.S.C. §230(b) that calls for end user control of their Internet experience. The "no discrimination" rule is closely linked to the transparency rule: the more transparent a broadband provider's broadband practices, the more likely any discrimination will be deemed "reasonable."

But not all discrimination is forbidden. Broadband providers may charge end users based on their usage. Use-agnostic discrimination is also reasonable and thus permitted.[23] Still, the Commission frowns upon "pay-for-priority" arrangements - but leaves open the possibility, however unlikely, that they could be found lawful.[24]

We will keep you posted and as always, should you have any questions or comments, please do not hesitate to contact us at info@wstelecomlaw.com.

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[21] *Id.*, para 82. Legitimate network management practices include: ensuring network security and integrity, including addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users; and reducing or mitigating the effects of congestion on the network.

[22] *Id.*, para 90 ("We note that, in some cases, mechanisms that reduce or eliminate some forms of harmful or unwanted traffic may also interfere with legitimate network traffic. Such mechanisms must be appropriate and tailored to the threat; should be evaluated periodically as to their continued necessity; and should allow end users to opt-in or opt-out if possible. Disclosures of network management practices used to address network security or traffic a particular end user does not want to receive should clearly state the objective of the mechanism and, if applicable, how an end user can opt in or out of the practice.")

[23] *Id.*, para 73 ("Differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses is likely reasonable. For example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users.")

[24] *See Id.*, para 76, ("it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard.") (emphasis added).

ATTACHMENT "A"

"Despite broad agreement that broadband providers should disclose information sufficient to enable end users and edge providers to understand the capabilities of broadband services, commenters disagree about the appropriate level of detail required to achieve this goal. We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models. We expect that effective disclosures will likely include some or all of the following types of information, timely and prominently disclosed in plain language accessible to current and prospective end users and edge providers, the Commission, and third parties who wish to monitor network management practices for potential violations of open Internet principles:

Network Practices

- *Congestion Management*: If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.
- *Application-Specific Behavior*: If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
- *Device Attachment Rules*: If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network. (For further discussion of required disclosures regarding device and application approval procedures for mobile broadband providers, see paragraph 98, *infra*.)
- *Security*: If applicable, practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics

- *Service Description*: A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.
- *Impact of Specialized Services*: If applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms

- *Pricing*: For example, monthly prices, usage-based fees, and fees for early termination or additional network services.
- *Privacy Policies*: For example, whether network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes.
- *Redress Options*: Practices for resolving end-user and edge provider complaints and questions.

We emphasize that this list is not necessarily exhaustive, nor is it a safe harbor - there may be additional information, not included above, that should be disclosed for a particular broadband service to comply with the rule in light of relevant circumstances. Broadband providers should examine their network management practices and current disclosures to determine what additional information, if any, should be disclosed to comply with the rule."

5. D.C. Circuit Court Reverses FCC Open Internet Rules (January 27, 2014)

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CLIENT ALERT[1]

To: Clients and Friends

From: Sapronov & Associates, P.C.

Date: January 27, 2014

Subject: D.C. Circuit Court of Appeals' Partial Reversal of the FCC's "Net Neutrality" Rules: Internet Content May Now Come at a Price

On January 14, 2014, in a landmark decision,[2] the Court of Appeals for the District of Columbia Circuit partially reversed the Federal Communications Commission's ("FCC") Open Internet Order[3] - the second reversal of FCC Internet service provider ("ISP") regulation by that court in four years.[4]

This is the latest setback for the agency to its Sisyphean attempts to establish "net neutrality" rules for broadband Internet access. Previously unsuccessful efforts began under

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[2] *Verizon v. F.C.C.*, D.C. Cir. No.11-1355 (Jan. 14, 2014), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf.

[3] *In re: Preserving the Open Internet, Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, 25 FCC Rcd 17905 (2010) (*"Net Neutrality Order" or "Order"*).

[4] *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC failed to show that it had authority under the Communications Act to bar Comcast, an ISP from interfering with its customers' use of peer-to-peer networking). See *infra* note 19 and accompanying discussion.

former FCC Chairman Kevin Martin,[5] continued under Chairman Julius Genachowski, and now leave the new agency Chairman, Tom Wheeler, with a major setback of a policy championed by the Obama Administration since the early days of the President's first campaign.[6]

This preliminary alert briefly discusses the D.C. Circuit Court's decision, its near term implications, what's left of the Open Internet Rules, and a brief glimpse of what might happen next.

I. Background

The D.C. Circuit Court's decision in *Verizon v. FCC* is arcane. To understand it, some familiarity with the jurisdictional scheme underlying the FCC's regulatory authority over Internet access providers is required. Here is a brief synopsis:

Since the 1970's, the FCC has sought to craft different regulations for telephone and for computer communications. Voice conversations, historically provided by telephone companies, are somehow inherently different from data transmissions, or so the FCC thought in a series of decisions that came to be known as the Computer Trilogy.[7] The result, subsequently codified in the 1996 federal telecommunications legislation,[8] is a dichotomy that remains good law today. Briefly:

(i) Telecommunications services[9] - or in FCC parlance, "basic" services - are subject to traditional common carrier regulations under so-called "Title II" of the Communications Act.[10]

(ii) Information services - a/k/a "enhanced" services - are not subject to common carrier regulations under Title II. But the FCC has so-called "ancillary" authority (under so-called "Title I" of the Communications Act)[11] to impose various restrictions on how they are

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[5] *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13, 28 (2008).

[6] A compendium of client alerts and other discussion materials on the history of Net Neutrality is available upon request from our Firm at info@wstelecomlaw.com.

[7] See generally, H.E. Marks, "The Computer Inquiry Trilogy", TELECOMMUNICATIONS LAW, REGULATION AND POLICY (1998 Sapronov & Read ed.)

[8] The Telecommunications Act of 1996 substantively amended the Communications Act of 1934 (as amended, the Communications Act"). 47 USC 151 et. seq.

[9] "Telecommunications service", is defined under the Communications Act as a traditional "holding out to the public for hire, 47 U.S.C. § 153(44)(46); see also NARUC v. FCC, 725 F.2nd 630, [pg] (D.C. Cir. 1976) . It is distinguishable from "telecommunications" a broader reference to an offering that may be provided by private entities, not just common carriers. See 47 U.S.C. § 153(44)(defining "telecommunications" as ".. transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

[10] 47 U.S.C. §§ 201-276.

[11] 47 U.S.C. §154(i) (providing that the FCC "may perform any and all acts, make such rules and regulations, and issue such order, not inconsistent with this chapter, as may be necessary in the execution of its functions." See generally *Comcast Corp. v. F.C.C.*, 600 F.3d at 648-10 (citing *e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

provided by common carriers, cable providers, or mobile providers,[12] entities that are subject to FCC regulation under other substantive provisions of the Communications Act.

With the emergence of the Internet, the FCC had to classify various types of Internet access, especially the broadband variety. The agency concluded that broadband Internet access provided through cable modems was an unregulated information service. The U.S. Supreme Court affirmed and, as importantly, confirmed in dicta that the FCC's determinations over the regulatory classification of broadband internet access were entitled to "deference".[13] Soon after the U.S. Supreme Court's *Brand X* decision, the FCC determined that DSL, mobile and other forms of broadband Internet access are unregulated information service.[14]

But even as it classified broadband Internet access as unregulated information service, the FCC still concluded that such access must be "open" or "neutral", and adopted "Title II" style regulations (discussed below) over the way broadband providers may sell it. One way to read *Verizon v. FCC* is that the agency cannot have it both ways.

Another reading, however, is that the FCC does have some authority over broadband Internet access - but not as much as over common carriers under Title II. It arises under so-called "Section 706" of the Communications Act.[15]

II. The Court's Decision.

1. The FCC's Open Internet Rules.

Originally a footnote to the 1996 amendments, Section 706 gives the FCC authority to:

> "... encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local

[12] The taxonomy quickly gets complicated. Commercial mobile service providers (CMRS), broadcasters, private mobile service providers, are all subject to FCC jurisdiction under "Title III", the spectrum licensing provisions of the Communications Act, 47 U.S.C. §§ 3011-350). Some of these spectrum licensees (e.g., CMRS providers such as Verizon Wireless, T-Mobile USA, Sprint, and AT&T Mobility) are also subject to Title II (common carrier regulation). However, mobile broadband service is treated by the FCC as private mobile service that is information service. *Verizon, supra* note 2, at 46. Cable communications is subject to "Title VI" (47 U.S.C. §§ 521-573) but cable broadband ("cable modem") service is unregulated information service. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975 (2005).

[13] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[14]. Verizon *supra* note 2 at 10 (citing, *e.g.*, *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14862 ¶ 12 (2005) (classifying DSL Internet access as unregulated information services); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5901–02 ¶ 1(2007) (classifying wireless broadband Internet access as unregulated information service) (other citations omitted)

[15] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, at § 706 (subsequently codified at 47 U.S.C. § 1302).

> telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[16]

The statute also requires the FCC to annually inquire "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion[.]" [17] If not, the FCC must take "action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[18]

This was a second attempt by the FCC to assert net neutrality authority: the previous one had been the FCC's enforcement action against Comcast for throttling the downloading of BitTorrent content by Comcast subscribers. That enforcement action, in which the FCC relied unsuccessfully on its "ancillary jurisdiction" to punish Comcast, was also reversed by the D.C. Circuit,[19] - but the Court did suggest in dicta that Section 706 might provide the authority that the FCC was seeking. Relying thus largely on Section 706, the Open Internet Order imposed three sets of Internet access regulation on "fixed" broadband providers - transparency, no-blocking, and non-discrimination - and two of these (transparency and non-discrimination) on mobile ones.[20]

2. The Court's Decision.

On appeal of the Open Internet Order, the *Verizon* Court vacated the FCC's blocking and non-discrimination rules, with the following explanation:

> [E]ven though the [FCC] has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.[21]

Importantly, the Court did not vacate the transparency rule, essentially requiring both fixed and mobile broadband providers to disclose their network management practices. Disagreeing with Verizon, the D.C. Circuit Court, in a 2–1 decision, (Chief Justice Silberman

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[16] 47 U.S.C. § 1302(a).
[17] 47 U.S.C. § 1302(b).
[18] *Id*.
[19] *Comcast Corp. v. F.C.C.*, 600 F.3d at 645 (finding that FCC failed to show that its action was "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities" (citing *Am.Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)); *Id*. at 664-665 (stating that exercise of ancillary authority must be tied to express statutory grants of regulatory authority, not just to congressional policy)
[20] The Open Internet Rules were codified in Section 8 of the Code of Regulations (attached, with strikeouts showing effect of D.C. Circuit Court's vacature, at Attachment "A"). A detailed discussion of the FCC's (now partially vacated) Open Internet Rules is provided in our prior alert attached hereto as Attachment "B".
[21] *Verizon*, *supra* note 2, at 4.

dissenting) held that the FCC "reasonably interpreted" section 706 as empowering it to promulgate rules governing broadband providers' treatment of Internet traffic. However, all three judges concluded that Section 706 did not authorize the FCC to impose the specific non-discrimination and "no blocking" rules because those rules were essentially common carrier regulations that could only be imposed on entities that were classified as "telecommunications carriers" under Title II of the Communications Act.[22] As noted above, the FCC earlier in the decade had reclassified providers of broadband services so that they were no longer "telecommunications carriers"; so, the Court said, the agency could not now impose common carrier regulations on them.

III. What's Next?

In our prior alert,[23] we questioned whether the FCC would fare better in relying on Section 706 for net neutrality authority than on ancillary jurisdiction. The answer from the D.C. Circuit Court is: a little. The transparency rule has survived appellate review and the Court agreed that the FCC's interpretation of Section 706 deserves deference. For net neutrality proponents, this aspect of the *Verizon* decision paves the way for the FCC to continue its efforts. Viewed with that spin, the decision is a victory for net neutrality proponents. [24]

If so, it may be a Pyrrhic one. Few communications policies create such partisan divide, even as the "net neutrality" concept itself remains murky. Resurrecting the vacated net neutrality rules (thou shalt not block Internet traffic nor discriminate against your fellow provider) - whether through judicial review or by an administrative reclassification of broadband access into "Title II" - will take monumental agency effort. Opposition, both from Congressional Republicans and from the largest broadband providers in the U.S., is a given. A legislative solution in today's fractious government is a non-starter.

That said, the Court's decision strongly suggests that the FCC would have authority to adopt the now vacated non-discrimination/no blocking rules under its Title II authority had the agency not previously reclassified broadband providers as providers of information services, not telecommunications services. One possible FCC response to the Court's decision would be to reverse its fixed and mobile broadband access reclassifications and "move" the broadband providers back to Title II. This would be consistent with the FCC's original classification of dial-up DSL[25] and other broadband services. Obviously, the approach would require an extensive refreshing of the record and invite inevitable staunch opposition and judicial appeal. Still, the discussion in *Verizon* appears to be an invitation to do exactly that.

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[22] *Id*. at. 63. For a discussion of the Court's decision, please attend our upcoming LSI telebriefing on January 29, 2014: http://www.lawseminars.com/detail.php?SeminarCode=14NETNTB.

[23] See Attachment "B".

[24] Predictably, there were partisan reactions to the decision on the Hill. *Compare* comments of Rep. M. Blackburn (R. Tenn) (applauding the decision striking down "socialistic regulations" *with* those of Senate Commerce Committee Chairman Jay Rockefeller (D. W.Va.) (urging the FCC to use "...the authority [that it has] to protect consumers and preserve an open Internet — as acknowledged by the D.C. Circuit Court." Reported in: http://thehill.com/blogs/hillicon-valley/technology/195360-court-strikes-down-net-neutrality-rules .

[25] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24012, (1998).

The debate is not just academic. Netflix's stock fell following the decision's announcement (although it has now largely recovered). Blocking and throttling Internet transmissions may cause Internet streaming to slow, unless content providers agree to pay to protect it. AT&T, Verizon and other broadband providers may now cut Internet access deals with large content providers, much as they have done with enterprises for decades. Small Internet companies may well have to settle for lower speeds (an Internet "slow lane"). On a broader scale, tiered pricing and subsidized premium pricing may soon become commonplace.

There is another perspective. The political landscape – and stakeholder involvement - have changed substantially since the years (2008-10) when the FCC's Open Internet proceeding led to its adoption of net neutrality rules. Video streaming is now a highly popular broadband service, and there's an engaged generation of consumers using it. Once there is evidence of substantial blocking or slowing, there could be a social media rebellion - one already threatened by Netflix and no doubt supported by many of its 32 million subscribers.[26] A type of "crowd regulation," perhaps?

All this suggests that our domestic Internet policy remains at war with itself, largely due to strongly held policy differences between the Obama administration and fellow Democrats supporting net neutrality and their Republican opponents on the Hill that do not. *Verizon v. FCC* does not settle the debate, inviting instead further probing of the limits of FCC "706" authority. Whether that leads to further appeals, a regulatory reclassification of broadband, or other action remains to be seen. Under any circumstances, Chairman Wheeler has his hands full.

The fallout from *Verizon v. FCC* has only just begun and this alert merely scratches the surface. So let the discussions begin. It is our privilege to host a national telebriefing on this topic for Law Seminars International on January 29, 2014 from 3:00 to 5:00 PM EST. See http://www.lawseminars.com/detail.php?SeminarCode=14NETNTB for details. We hope to see you there. P.S. Clients and friends of Sapronov & Associates, P.C. receive a discount off the registration price. Just mention SAPC upon registration.

And as always, should you have any questions or comments, please do not hesitate to contact us. For specific questions about this alert, please contact Walt Sapronov (wsapronov@wstelecomlaw.com), Andrew Glazier (aglazier@wstelecomlaw.com), or Mark DelBianco (mdelbianco@wstelecomlaw.com).

[26] *See* Miriam Gottfried, *Netflix Looks Toward Its Field of Streams*, WALL ST. J. (Jan. 23, 2014), at C8; Brian Fung, *Netflix's Secret Weapon in the Net Neutrality Fight*, WASH. POST. (Jan. 22, 2014), *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/22/netflixs-secret-weapon-in-the-net-neutrality-fight/.

Attachment "A"

FCC Open Internet Rules - Vacature Shown in Redline

Part 8 of Title 47 of the Code of Federal Regulations is added as follows:

Sec.
8.1 Purpose.
8.3 Transparency.
8.5 No Blocking. [Vacated]
8.7 No Unreasonable Discrimination. [Vacated]
8.9 Other Laws and Considerations.
8.11 Definitions.

AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302

§ 8.1 Purpose.

The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.

§ 8.3 Transparency.

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

§ 8.5 No Blocking. [Vacated]

~~A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.~~

~~A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.~~

§ 8.7 No Unreasonable Discrimination [Vacated].

~~A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.~~

§ 8.9 Other Laws and Considerations.

Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

§ 8.11 Definitions.

(a) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

(b) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(c) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(d) Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

Attachment "B"

Client Alert:

"The Federal Communications Commission's Network Neutrality Order"

January 12, 2011

*****

[OMITTED]

6. What's Left of Net Neutrality? (2014)

What's Left of "Net Neutrality" ?

Law Seminars International
Tele-briefing
on the
D.C. Circuit Court's
Net Neutrality Decision
February 12, 2014
(Excerpts)

Walt Sapronov
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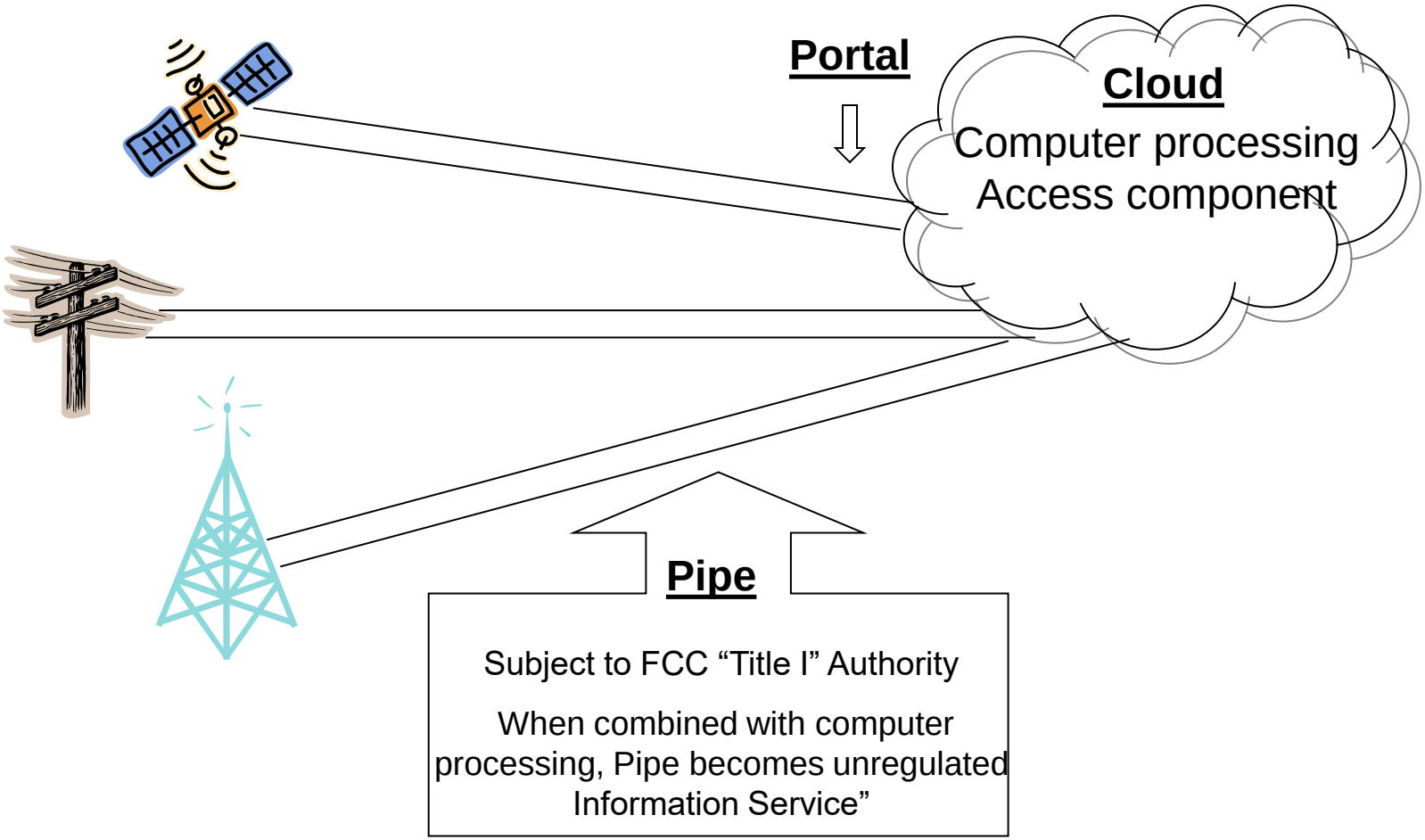
Overview

Historically:

- Federal Communications Commission (FCC)
  - Has asserted regulatory authority over:
    - Telecommunications
    - Wireless
    - Cable
  - BUT NOT OVER:
    - Information Services
    - Although subject to FCC “Title I” Authority
  - What about Internet?

Current Internet Regulation



Net Neutrality Basics

- Neutral and open public network (the “Internet”)
- No restrictions on equipment or modes of communication
- Principles do not permit discrimination, either in pricing or access, of the type, quantity, content, sites, or applications
  - - But must balance against provider’s reasonable network management practices

FCC Authority

- Federal Communications Act
  - Title I (Ancillary Jurisdiction)
  - Title II (Common Carrier)
    - Telecommunications Carriers
    - Rate, Entry, Complaint Procedures
  - Title III (Wireless)
    - Broadcast
    - Commercial Mobile Service
  - Title VI
    - Cable Companies

FCC Authority (cont'd)

- Ancillary Jurisdiction
  - Subject Matter Jurisdiction over Wire and Radio - Title I
  - Used by FCC to Deregulate Enhanced Services
    - Computer Inquiry II, III
    - Must be "ancillary to" a substantive provision of the Act
- Basic (Regulated – Title II) v. Enhanced (Unregulated)
- 1996 Telecom Act amendments:
  - Telecommunications Service/Information Service
    - (Same as Basic/Enhanced)
  - Gave FCC Forbearance Authority
    - FCC may forbear from regulating under certain conditions

FCC Authority (cont'd)

- Section 706
  - Originally a footnote to the 96 Act
  - Subsequently codified at 47 U.S.C. § 1302
    - "... encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

A Brief History of Net Neutrality Litigation

- *Comcast v. F.C.C. (2010)*:
- D.C. Circuit Court Holding:
  - FCC Did Not Demonstrate That It Had Jurisdiction Over Comcast Network Management Practices
  - Ancillary Jurisdiction Must Be "Ancillary" to Other FCC Statutory Authority
    - *e.g.* to Title II (Telecom), or Title VI (Cable)
    - Not a Standalone Grant of Authority
    - Nor did FCC rely on Section 706 for enforcement authority

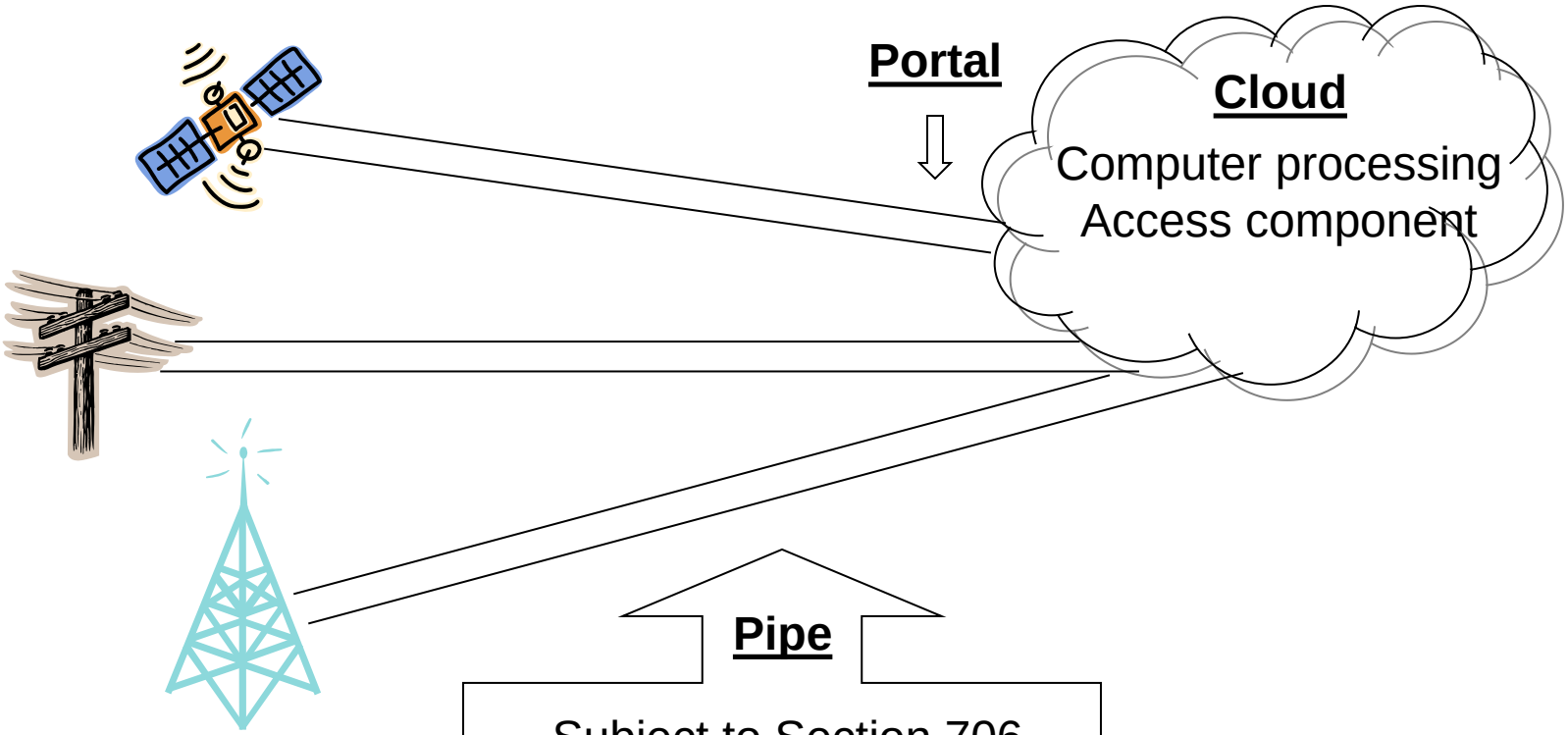
D.C. Circuit Court Reversal (Again)

- *Verizon v. F.C.C.*, D.C. Cir. No.11-1355 (Jan. 14, 2014)
  - "[E]ven though the [FCC] has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order* "

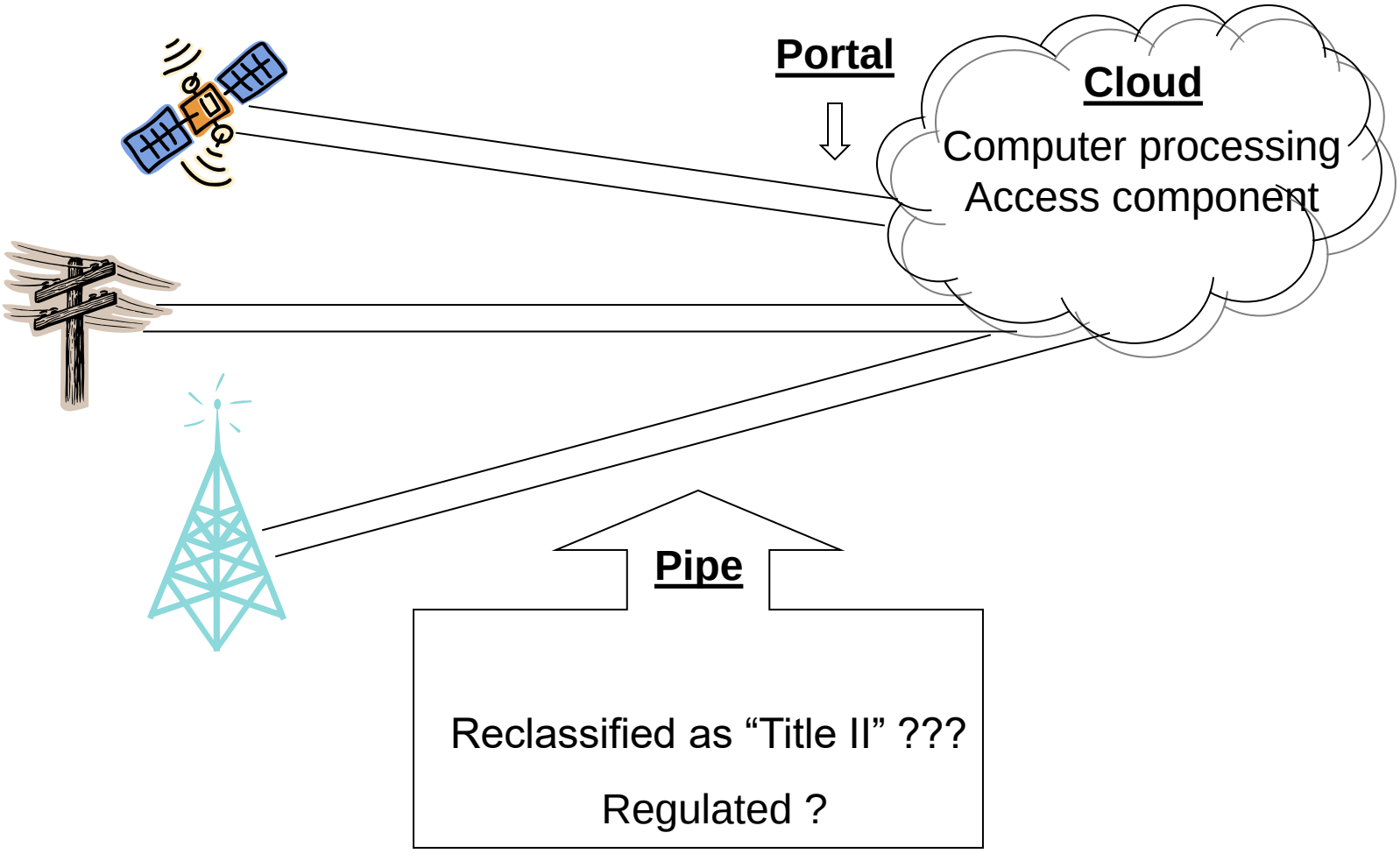
FCC Net Neutrality Rules: What's Left?

- FCC Open Internet Rules (After Verizon v. FCC)
  - 47 C.F.R. Part 8
    - 8.1 Purpose.
    - 8.3 Transparency.
    - 8.5 No Blocking. [Vacated]
    - 8.7 No Unreasonable Discrimination. [Vacated]
    - 8.9 Other Laws and Considerations.
    - 8.11 Definitions.

Internet Regulation after Verizon v. FCC
"Section 706"



Internet Regulation after Verizon v. FCC - Reclassification ?



Final Thoughts

All of this is very complicated – and we now turn to our panel discussion …

BUT… DO REMEMBER:

WHEN IN DOUBT – ASK YOUR LAWYER!

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7. LSI FCC New (2015) Open Internet Rules - Opening Remarks March 2015

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Net Neutrality: The FCC's New Internet Regulations

Law Seminars International

http://www.lawseminars.com/detail.php?SeminarCode=15NETTB

Tuesday, March 3, 2015
3:00 P.M.

Walt Sapronov

Introductory Remarks

Welcome to the program and, as always, thank you for attending. For those of who are repeat visitors, you know the drill. For new attendees, again, welcome and we will begin with a brief introduction, then turn the discussion over to our distinguished panelists. You will all have an opportunity for questions and answers after the discussions.

So as expected, following the D.C. Circuit Court of Appeal's partial reversal of its Open Internet rules, the Federal Communications Commission (FCC) voted last Thursday to adopt new ones. This widely publicized decision, according to FCC Chairman Wheeler, was the most important that he has ever taken. Depending upon your point of view, the decision can be read as either as the Internet's Emancipation Proclamation - or its control grab and unlawful seizure by the government. We will discuss both points of view.

But first - why such an apocalyptic reaction? What's all the fuss about? In large part, because the new rules - that we of course have not yet seen - will include (among other things) some measure of utility regulation of broadband internet access providers - sometimes referred to as "Title II" regulation. You all know what the internet is and most if not all of you have some form of broadband access (cable, DSL, wireless). So what is the significance of Title II ?

Here is a very brief synopsis and a bit of history.

Title II regulation refers to a concept of "common carriage" - one that goes back to the early days of Anglo American jurisprudence. In medieval times, the ferryman who used to take passengers across the Thames river for a fee did so because the King let him. Effectively, this was the first utility franchise. As a condition for granting the franchise, the ferryman had to carry all passengers indiscriminately. The talismanic phrase is "to the public for hire" and the ferryman - a CARRIER - had to CARRY all who wished to cross the river. In other words, he was a COMMON carrier - and he gave up his right to pick and choose his passengers because he was now "cloaked with the public interest". The choice was no longer his alone - but also that of the crown.

Fast forward to 19th Century U.S., where the common carrier / public interest concept is carried forward to utilities - those companies whose services are so essential to society that to offer them, they too must be cloaked with the public interest. In other words, as a CONDITION for an EXCLUSIVE franchise (*i.e.*, a REGULATED MONOPOLY), the utility must submit to government entry regulation and rate control. Such utilities eventually come to include railroads, motor carriers, telephone and telegraph companies. Meanwhile, the common carriage concept is enshrined under both state and federal laws - notably under the Interstate Commerce Act. Telephone service, in other words, is now treated as a form of interstate commerce - just like wagon trains and railroad cars.

Fast forward again to 1934: Congress enacts the Communications Act and, in doing so, adopts the legislative purpose of the Interstate Commerce Act. The FCC assumes certain powers of the Interstate Commerce Commission. The (somewhat circular) definition of common carrier - one that holds itself out to the public for hire - is codified. So are entry, rate, complaint and regulations - all of which now apply to common carrier communications by "wire and radio" under the Communications Act, 47 USC Sections 201 - 276, also known as "Title II". And as World War II is just around the corner, Congress, for national security reasons, also gives the FCC more or less exclusive control of the airwaves under "Title III" - what today is known as wireless regulation..

For the remainder of the century, policy makers grapple with the difference between electronics that are regulated under Title II and those (variously labeled as "enhanced or information services") that are not.

Data processing, protocol conversion, modems, e-mail, voice-mail, database interaction and today most types of Internet traffic are all information service. Most types of packet switching (but not all, for example, frame relay) are also treated as unregulated information services. So too, the FCC decides, are cable modems, DSL and broadband wireless Internet access. In a 2005 decision known as "Brand X", the U.S. Supreme Court agrees. Importantly, the majority says that if the FCC decides that internet access is an unregulated information service, then - with some exceptions - the FCC's decision enjoys so-called "Chevron" deference.

Last week, the FCC changed its mind. Internet access - at least the broadband variety - is now a Title II service. Broadband access providers, as they are now common carriers, must submit to at least some utility type regulation. All Internet traffic, like mankind itself, is created equal. Broadband providers, like the Ferryman of old, must offer such carriage to the public for hire and carry it without discrimination.

There is a bit of irony. In 1996, Congress added a footnote that came to be known as "Section 706" essentially giving the FCC authority to promote broadband service - a topic we discussed at length in our last telebriefing. The FCC's original Open Internet rules had relied on Section 706. Some folks said they could live with them. Others said they could not. So on appeal, the D.C. Circuit struck most of FCC's open internet rules, finding that they were Title II regulations in disguise. But it upheld the FCC's authority under Section 706 to adopt a network disclosure rule known as "transparency". The Court also gave the FCC a roadmap, suggesting that (hint, hint) if the FCC were to reclassify broadband Internet access as a Title II service, those rules might have a better chance of surviving appeal. Last week, the FCC did just that. Broadband providers now have BOTH Section 706 and Title II to deal with. With that somewhat oversimplified explanation of what happened, let's now turn to our panel discussion.

[For a copy of "A SHORT HISTORY OF NET NEUTRALITY", please contact us at 770 399-9100 or at info@wstelecomlaw.com. The remainder of the discussion was conducted by the following participants.]

Introduction & Overview

Walt Sapronov, Esq., Moderator, Partner
Sapronov and Associates / Atlanta, GA

Broadband access a utility; Is that a good or bad thing?

Thomas J. Navin, Esq., Partner
Wiley Rein LLP / Washington, DC

How have the markets responded and why?

Timothy K. Horan, Managing Director
Oppenheimer & Co. Inc. / New York, NY

Net Neutrality Proponents Perspective

Michael Weinberg, Vice President
Public Knowledge / Washington, DC

NEWS

Federal Communications Commission
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Washington, D. C. 20554

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FOR IMMEDIATE RELEASE:
February 26, 2015

NEWS MEDIA CONTACT:
Mark Wigfield, 202-418-0253
E-mail: mark.wigfield@fcc.gov

FCC ADOPTS STRONG, SUSTAINABLE RULES TO PROTECT THE OPEN INTERNET

Rules Will Preserve the Internet as a Platform for Innovation, Free Expression and Economic Growth

Washington, D.C. – Ending lingering uncertainty about the future of the Open Internet, the Federal Communications Commission today set sustainable rules of the roads that will protect free expression and innovation on the Internet and promote investment in the nation's broadband networks.

The FCC has long been committed to protecting and promoting an Internet that nurtures freedom of speech and expression, supports innovation and commerce, and incentivizes expansion and investment by America's broadband providers. But the agency's attempts to implement enforceable, sustainable rules to protect the Open Internet have been twice struck down by the courts.

Today, the Commission—once and for all—enacts strong, sustainable rules, grounded in multiple sources of legal authority, to ensure that Americans reap the economic, social, and civic benefits of an Open Internet today and into the future. These new rules are guided by three principles: America's broadband networks must be fast, fair and open—principles shared by the overwhelming majority of the nearly 4 million commenters who participated in the FCC's Open Internet proceeding.

Absent action by the FCC, Internet openness is at risk, as recognized by the very court that struck down the FCC's 2010 Open Internet rules last year in *Verizon v. FCC*.

Broadband providers have economic incentives that "represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment," as affirmed by the U.S. Court of Appeals for the District of Columbia. The court upheld the Commission's finding that Internet openness drives a "virtuous cycle" in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.

However, the court observed that nearly 15 years ago, the Commission constrained its ability to protect against threats to the open Internet by a regulatory classification of broadband that precluded use of statutory protections that historically ensured the openness of telephone networks. The Order finds that the nature of broadband Internet access service has not only changed since that initial classification decision, but that broadband providers have even more incentives to interfere with Internet openness today. To respond to this changed landscape, the new Open Internet Order restores the FCC's legal authority to fully address threats to openness on today's networks by following a template for

sustainability laid out in the D.C. Circuit Opinion itself, including reclassification of broadband Internet access as a telecommunications service under Title II of the Communications Act.

With a firm legal foundation established, the Order sets three "bright-line" rules of the road for behavior known to harm the Open Internet, adopts an additional, flexible standard to future-proof Internet openness rules, and protects mobile broadband users with the full array of Open Internet rules. It does so while preserving incentives for investment and innovation by broadband providers by affording them an even more tailored version of the light-touch regulatory treatment that fostered tremendous growth in the mobile wireless industry.

Following are the key provisions and rules of the FCC's Open Internet Order:

New Rules to Protect an Open Internet

While the FCC's 2010 Open Internet rules had limited applicability to mobile broadband, the new rules—in their entirety—would apply to fixed and mobile broadband alike, recognizing advances in technology and the growing significance of wireless broadband access in recent years (while recognizing the importance of reasonable network management and its specific application to mobile and unlicensed Wi-Fi networks). The Order protects consumers no matter how they access the Internet, whether on a desktop computer or a mobile device.

Bright Line Rules: The first three rules ban practices that are known to harm the Open Internet:

- **No Blocking**: broadband providers may not block access to legal content, applications, services, or non-harmful devices.

- **No Throttling**: broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.

- **No Paid Prioritization**: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.

The bright-line rules against blocking and throttling will prohibit harmful practices that target specific applications or classes of applications. And the ban on paid prioritization ensures that there will be no fast lanes.

A Standard for Future Conduct: Because the Internet is always growing and changing, there must be a known standard by which to address any concerns that arise with new practices. The Order establishes that ISPs cannot "unreasonably interfere with or unreasonably disadvantage" the ability of consumers to select, access, and use the lawful content, applications, services, or devices of their choosing; or of edge providers to make lawful content, applications, services, or devices available to consumers. Today's Order ensures that the Commission will have authority to address questionable practices on a case-by-case basis, and provides guidance in the form of factors on how the Commission will apply the standard in practice.

Greater Transparency: The rules described above will restore the tools necessary to address specific conduct by broadband providers that might harm the Open Internet. But the Order recognizes the critical role of transparency in a well-functioning broadband ecosystem. In addition to the existing transparency rule, which was not struck down by the court, the Order requires that broadband providers disclose, in a consistent format, promotional rates, fees and surcharges and data caps. Disclosures must also include packet loss as a measure of network performance, and provide notice of network management practices that can affect service. To further consider the concerns of small ISPs, the Order adopts a temporary

exemption from the transparency enhancements for fixed and mobile providers with 100,000 or fewer subscribers, and delegates authority to our Consumer and Governmental Affairs Bureau to determine whether to retain the exception and, if so, at what level.

The Order also creates for all providers a "safe harbor" process for the format and nature of the required disclosure to consumers, which the Commission believes will lead to more effective presentation of consumer-focused information by broadband providers.

Reasonable Network Management: For the purposes of the rules, other than paid prioritization, an ISP may engage in reasonable network management. This recognizes the need of broadband providers to manage the technical and engineering aspects of their networks.

- In assessing reasonable network management, the Commission's standard takes account of the particular engineering attributes of the technology involved—whether it be fiber, DSL, cable, unlicensed Wi-Fi, mobile, or another network medium.

- However, the network practice must be primarily used for and tailored to achieving a legitimate network management—and not business—purpose. For example, a provider can't cite reasonable network management to justify reneging on its promise to supply a customer with "unlimited" data.

Broad Protection

Some data services do not go over the public Internet, and therefore are not "broadband Internet access" services (VoIP from a cable system is an example, as is a dedicated heart-monitoring service). The Order ensures that these services do not undermine the effectiveness of the Open Internet rules. Moreover, all broadband providers' transparency disclosures will continue to cover any offering of such non-Internet access data services—ensuring that the public and the Commission can keep a close eye on any tactics that could undermine the Open Internet rules.

Interconnection: New Authority to Address Concerns

For the first time the Commission can address issues that may arise in the exchange of traffic between mass-market broadband providers and other networks and services. Under the authority provided by the Order, the Commission can hear complaints and take appropriate enforcement action if it determines the interconnection activities of ISPs are not just and reasonable.

Legal Authority: Reclassifying Broadband Internet Access under Title II

The Order provides the strongest possible legal foundation for the Open Internet rules by relying on multiple sources of authority including both Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996. At the same time, the Order refrains – or forbears – from enforcing 27 provisions of Title II and over 700 associated regulations that are not relevant to modern broadband service. Together Title II and Section 706 support clear rules of the road, providing the certainty needed for innovators and investors, and the competitive choices and freedom demanded by consumers, while not burdening broadband providers with anachronistic utility-style regulations such as rate regulation, tariffs or network sharing requirements.

- First, the Order reclassifies "broadband Internet access service"—that's the retail broadband service Americans buy from cable, phone, and wireless providers—as a telecommunications service under Title II. This decision is fundamentally a factual one. It recognizes that today broadband Internet access service is understood by the public as a transmission platform through which consumers can access third-party content, applications, and services of their choosing. Reclassification of broadband Internet access service also addresses any limitations that past classification decisions placed on the ability to adopt strong open Internet rules, as interpreted by the D.C. Circuit in the *Verizon* case. And it supports the Commission's authority to address

interconnection disputes on a case-by-case basis, because the promise to consumers that they will be able to travel the Internet encompasses the duty to make the necessary arrangements that allow consumers to use the Internet as they wish.

- Second, the proposal finds further grounding in Section 706 of the Telecommunications Act of 1996. Notably, the *Verizon* court held that Section 706 is an independent grant of authority to the Commission that supports adoption of Open Internet rules. Using it here—without the limitations of the common carriage prohibition that flowed from earlier the "information service" classification—bolsters the Commission's authority.

- Third, the Order's provisions on mobile broadband also are based on Title III of the Communications Act. The Order finds that mobile broadband access service is best viewed as a commercial mobile service or its functional equivalent.

Forbearance: A modernized, light-touch approach

Congress requires the FCC to refrain from enforcing – forbear from – provisions of the Communications Act that are not in the public interest. The Order applies some key provisions of Title II, and forbears from most others. Indeed, the Order ensures that some 27 provisions of Title II and over 700 regulations adopted under Title II will not apply to broadband. There is no need for any further proceedings before the forbearance is adopted. *The proposed Order would apply fewer sections of Title II than have applied to mobile voice networks for over twenty years.*

- ***Major Provisions of Title II that the Order WILL APPLY:***

    - The proposed Order applies "core" provisions of Title II: Sections 201 and 202 (e.g., no unjust or unreasonable practices or discrimination)

    - Allows investigation of consumer complaints under section 208 and related enforcement provisions, specifically sections 206, 207, 209, 216 and 217

    - Protects consumer privacy under Section 222

    - Ensures fair access to poles and conduits under Section 224, which would boost the deployment of new broadband networks

    - Protects people with disabilities under Sections 225 and 255

    - Bolsters universal service fund support for broadband service in the future through partial application of Section 254.

- ***Major Provisions Subject to Forbearance:***

    - Rate regulation: the Order makes clear that broadband providers **shall not** be subject to utility-style rate regulation, including rate regulation, tariffs, and last-mile unbundling.

    - Universal Service Contributions: the Order **DOES NOT** require broadband providers to contribute to the Universal Service Fund under Section 254. The question of how best to fund the nation's universal service programs is being considered in a separate, unrelated proceeding that was already underway.

    - Broadband service will remain exempt from state and local taxation under the Internet Tax Freedom Act. This law, recently renewed by Congress and signed by the President,

bans state and local taxation on Internet access regardless of its FCC regulatory classification.

Effective Enforcement

- The FCC will enforce the Open Internet rules through investigation and processing of formal and informal complaints
- Enforcement advisories, advisory opinions and a newly-created ombudsman will provide guidance
- The Enforcement Bureau can request objective written opinions on technical matters from outside technical organizations, industry standards-setting bodies and other organizations.

Fostering Investment and Competition

All of this can be accomplished while encouraging investment in broadband networks. To preserve incentives for broadband operators to invest in their networks, the Order will modernize Title II using the forbearance authority granted to the Commission by Congress—tailoring the application of Title II for the 21st century, encouraging Internet Service Providers to invest in the networks on which Americans increasingly rely.

- The Order forbears from applying utility-style rate regulation, including rate regulation or tariffs, last-mile unbundling, and burdensome administrative filing requirements or accounting standards.
- Mobile voice services have been regulated under a similar light-touch Title II approach, and investment and usage boomed.
- Investment analysts have concluded that Title II with appropriate forbearance is unlikely to have any negative on the value or future profitability of broadband providers. Providers such as Sprint, Frontier, as well as representatives of hundreds of smaller carriers that have voluntarily adopted Title II regulation, have likewise said that a light-touch, Title II classification of broadband will not depress investment.

Action by the Commission February 26, 2015, by Report and Order on Remand, Declaratory Ruling, and Order (FCC 15-24). Chairman Wheeler, Commissioners Clyburn and Rosenworcel with Commissioners Pai and O'Rielly dissenting. Chairman Wheeler, Commissioners Clyburn, Rosenworcel, Pai and O'Rielly issuing statements.

Docket No.: 14-28

-FCC-

News about the Federal Communications Commission can also be found on the Commission's web site www.fcc.gov.

What is “Net Neutrality” -and why do we care?

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Contents

I. Introduction

Historically:

- Federal Communications Commission (FCC)
  - Has asserted regulatory authority over:
    - Telecommunications
    - Wireless
    - Cable
  - BUT NOT OVER:
    - Information Services
    - What about Internet?

Introduction

“Net Neutrality” – a/k/a “Open Internet” Issue

- Issue Goes Far Beyond FCC Policymaking
  - Politically Divisive
    - Predates First Obama Administration
      - Partisan Divide Over “Open Internet”
    - Democrats strongly support:
      - Keep Internet control away from gatekeepers
    - / Republicans oppose:
      - Keep Internet control away from Government
    - So what Is “Open Internet”?

II. Net Neutrality Basics

FCC 2008 Policy Statement

- Consumers are entitled to:
  - Access the lawful Internet content of their choice;
  - Run applications and services of their choice
    - - Subject to law enforcement needs;
  - Connect to their choice of legal devices
    - - That do not harm the network;
      - and
  - Enjoy benefits of competition among network, application, service, and content providers

Net Neutrality Basics

FCC Policy Statement (cont'd)

- Neutral and open public network (the "Internet")
- No restrictions on equipment or modes of communication
- No discrimination,
  - Either in pricing or access
    - Of the type, quantity, content, sites, or applications
  - - But must balance against provider's reasonable network management practices

Net Neutrality Basics

"Net Neutrality" - Plain English Version:

- Equal treatment of all Internet packets on Internet
  - "All bits are created equal"
  - Internet should be "open"
- Broadband Providers
  - e.g., carriers/cable companies/wireless providers
  - Now (confusingly) called "ISPs"
  - Should not discriminate among services
  - " " among providers (including affiliates)
    - But what about "network management" ?
- Examples of net neutrality abuses:
  - Throttling, paid prioritization ("fast lanes")
    - But what about packet scheduling ?

Net Neutrality Basics

- Net Neutrality Litigation History: *
- 2008 – Public Knowledge complaint against Comcast for blocking "P2P" Internet applications (*e.g.* BitTorrent)
  - FCC investigation and enforcement action vs. Comcast
  - FCC announces "policy statement"
- 2010 - *Comcast Corp. v. F.C.C.,*
  - D.C. Circuit reverses and vacates FCC enforcement action
- 2010 (Dec. 23) – FCC adopts *2010 Open Internet Order*
  - GN Docket No. 09-191, Codified at 47 C.F.R. Part 8

- [* For "Brief History of Net Neutrality" contact us at info@wstelecomlaw.com]

Net Neutrality Basics

- 2014 (Jan. 14) - *Verizon v. F.C.C.*, No.11-1355
  - D.C. Circuit partially vacates *2010 Open Internet Order*
    - But Affirms FCC Section 706 Authority
    - Does not Vacate Transparency (Disclosure) Rule
    - Says Other Rules are Disguised Title II Regulations
- 2015 (Mar. 16) FCC Releases new Open Internet Order
    - Reclassifies Broadband Internet Access as "Title II"
    - Adopts New Open Internet Rules
- 2015 (April 13) Rules Published in Federal Register (13, 2015)
    - Effective June 12, 2015
    - Except "new" transparency (disclosure) rules
      - Subject to Office of Management and Budget (OMB) review
- 2015 - Appeals Filed by USTA, Alamo Broadband – more to follow

III. FCC Authority

- Federal Communications Act (Title 47 USC)
  - Title I (Ancillary Jurisdiction)
  - Title II (Common Carrier)
    - Generally Applicable to Telecommunications Carriers
    - Pole Attachment Rules Also Apply to “Utilities”
  - Title III (Wireless)
    - Broadcast
    - Commercial Mobile Service (CMRS)
    - Satellite
  - Title VI
    - Cable Companies

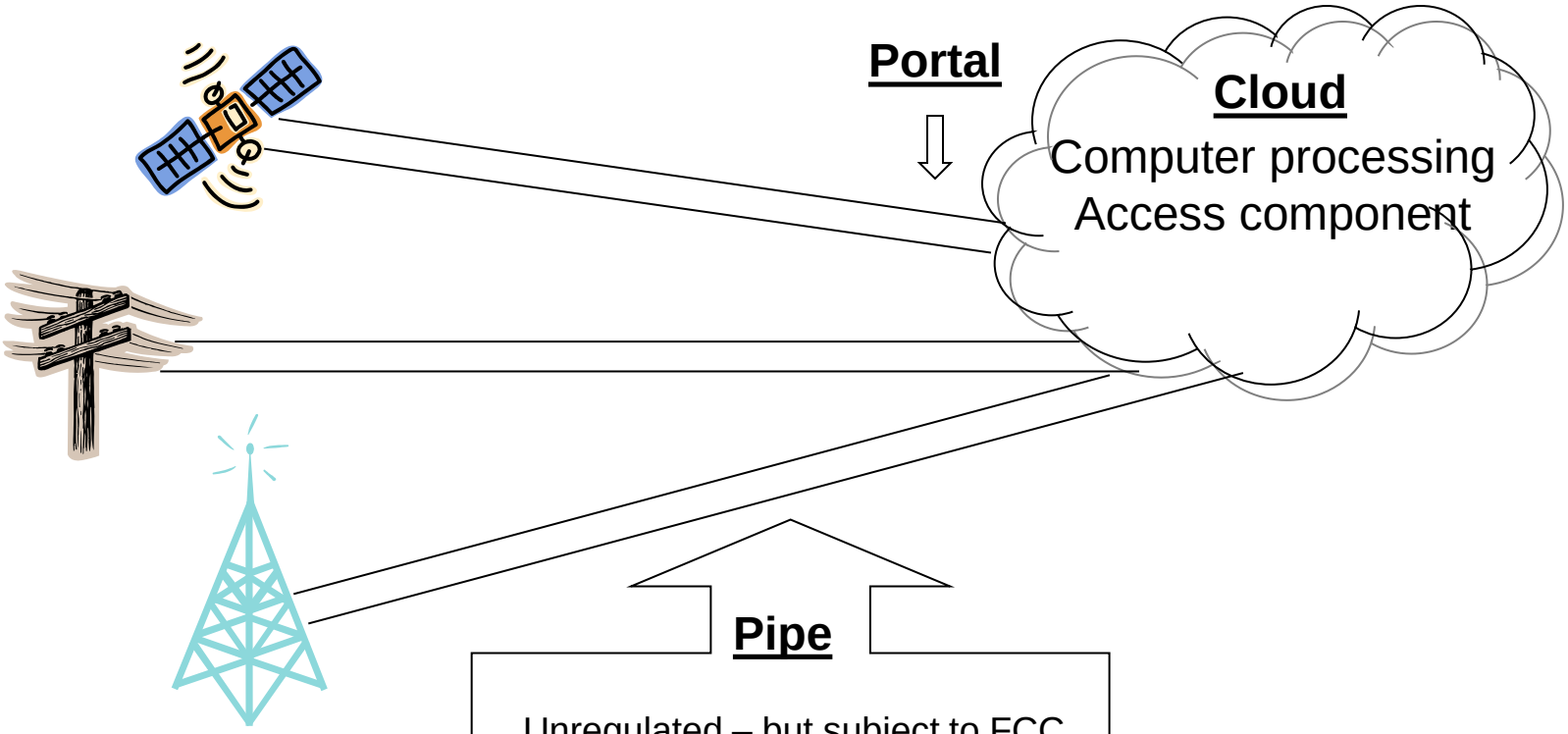
FCC Authority

- “Section 706”
  - Originally a footnote to the 96 Act (Amending 47 USC)
  - Subsequently codified at 47 U.S.C. § 1302
    - "... encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

FCC Authority

- Over the Internet ?
  - Internet Backbone (Peering and Transit), Storage and Content
    - Including “Clouds”
    - Historically treated as an unregulated service
  - Internet Access (the “Broadband Pipes”)
    - Classification not so clear
      - Broadband Cable, DSL, Wireless
    - DSL was originally a regulated (“Title II”) service
    - But other broadband access pipes unclear
  - And when combined with Internet content -
    - They create an Information Service
      - (U.S. Supreme Court “Brand X” Decision)

Traditional Internet ("Information Services") Regulation



FCC Authority

- Other:
  - Ancillary Jurisdiction - Title I
    - Subject matter jurisdiction over Wire and Radio
    - Must be “ancillary to” a substantive provision of the Act
    - “Basic” (regulated) v. “Enhanced” (unregulated)
      - - 47 CFR 64.702
  - 1996 Telecom Act Amendments - Added new definitions:
    - “Telecommunications Service” (f/k/a “Basic Service”)
    - “Information Service” (f/k/a “Enhanced Service”)
    - “Telecommunications Carriers” (f/k/a “Common Carriers”)
    - And Gave FCC Forbearance Authority
      - i.e. to “forbear” from regulation under certain conditions

IV. "So What is Title II Regulation"

- 47 U.S.C. Title II – Sections 201 et. seq.
  - Traditionally applicable to "common carriers"
  - - that include "CMRS" / Wireless Carriers (47 USC 332(d)(2))
    - But NOT Wireless Broadband Access Providers
  - Internet historically treated as "information/enhanced services"
    - Not Subject to Title II
    - Subject to
      - FCC Ancillary Jurisdiction and
      - "Section 706" (Following *Verizon v. FCC*)
    - And Wireless Internet Access NOT treated as CMRS

So What is “Title II” Regulation ?

- Common Carrier (Title II”) Regulation
  - 47 U.S.C. Sections (201 et. seq.) such as:
    - Just and Reasonable practices (201)
    - Non-discrimination (202)
    - Rate regulation – tariffs (Section 203)
    - Entry regulation (214)
    - Complaints and remedies (206 – 209)
    - Pole Attachment (224)
    - Universal service fund (USF) (254)
    - Privacy (222)
    - Disability access (255)

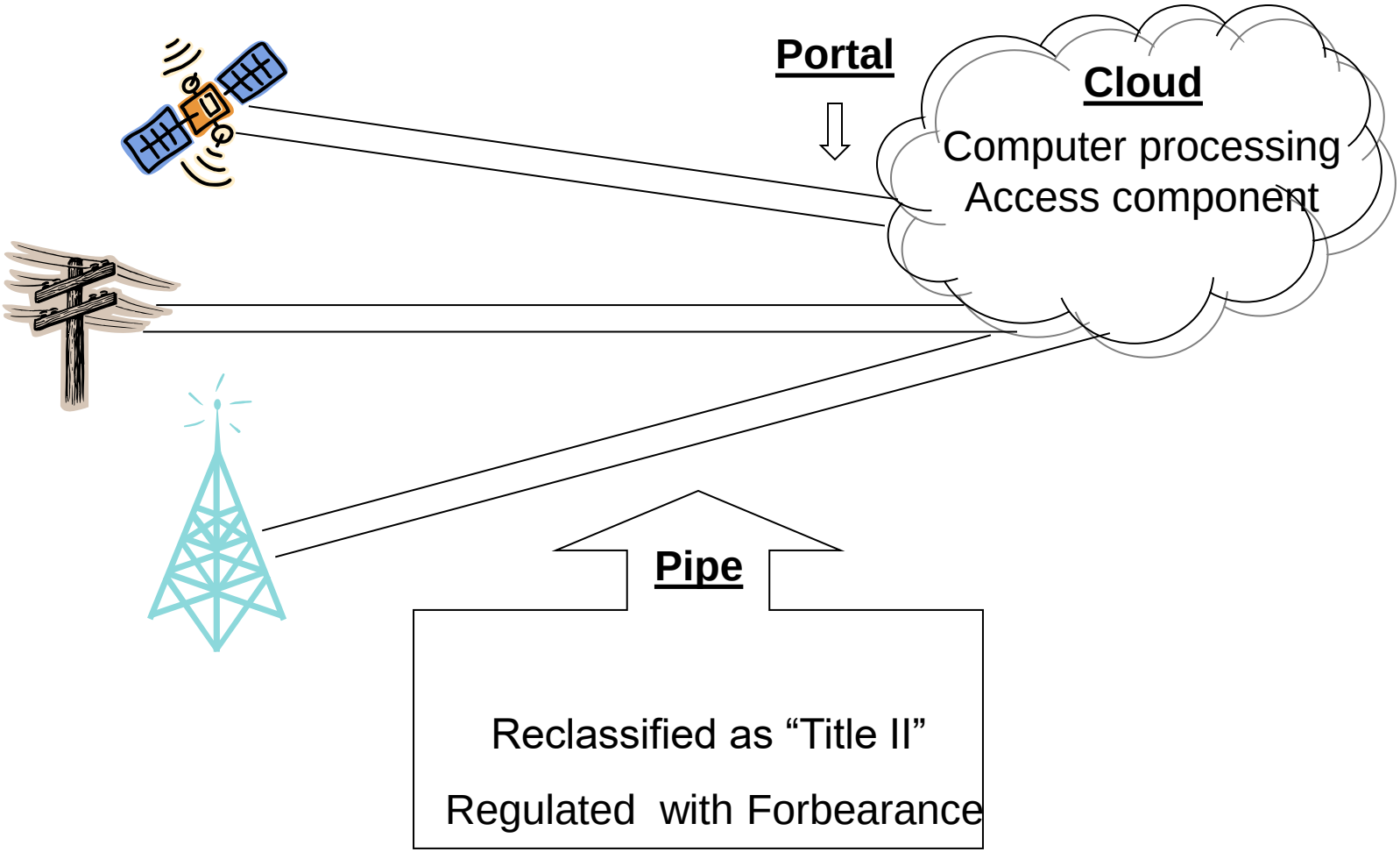
So What is "Title II" Regulation ?

- **What About the States ?**
  - FCC Authority Does Not Preempt State Regulation
    - With Some Exceptions
  - Title II - 47 USC 152(b):
    - Expressly denies FCC Authority over intrastate rates, etc. *Louisiana PSC v. FCC* (476 U.S. 355 (1986)
    - But FCC May preempt state regulation upon showing it's:
      - Inseparable / "thwarts or impedes" valid federal purpose
        - Computer Inquiry III regulations (e.g., privacy)
        - Vonage Decisions ("Nomadic VOIP")
  - Title III Preempts State entry and rate regulation of CMRS
    - But Not "Other Terms and Conditions…"

V. The FCC Open Internet Order

- Reclassification of Broadband Internet Access (BIA)
  - So now subject to Title II
  - Plus Section 706
  - Applies to **Both** Mobile and Fixed BIA
  - Forbearance applied to Many – but not ALL – Title II Sections
  - And Mobile BIA Now Reclassified as CMRS
    - So now subject to Title II, 706
    - And Title III (Wireless)

Broadband Internet Access after FCC Title II Reclassification



FCC Open Internet Order

- Reclassification (cont'd)
  - Forbearance Applied to Many Provisions of Title II
  - So BIA is NOT subject to following Title II Sections/Regs:
    - 203 (Rate Regulation)
    - 214 (Entry Regulation)
    - 254 (No USF contributions – for now)
      - Other USF provisions do apply
    - Privacy (CPNI) Regulations (47 C.F.R. Subpart U)
      - (but not from Privacy /CPNI Statute - 222)

FCC Open Internet Order

- Reclassification (cont'd)
  - But BIA is subject to e.g., following Title II Sections:
    - 201 - 202 (Reasonableness, Non-discrimination)
    - 206-209 (Statutory complaints and remedies)
    - 222 (Privacy (CPNI) Statute – but not FCC CPNI Regs.)
    - 224 (Pole Attachments)
    - 254 (USF - but for now no contribution obligations)
    - 255 (Disability access – except for TRS)

FCC Open Internet Order

- New FCC Open Internet Rules: 47 C.F.R. Part 8
  - 8.1 Purpose.
  - 8.3 Transparency [Enhanced]
    - Old Transparency rule was not vacated by *Verizon v. FCC*
  - 8.5 No Blocking
    - – subject to "reasonable network management"
  - 8.7 No Throttling.
    - - subject to " reasonable ….
  - 8.9 No Paid Prioritization
    - - Per Se unlawful: no "network management" qualification
  - 8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct.

FCC Open Internet Order

- New FCC Open Internet Rules
- 47 C.F.R. Part 20 (Commercial Mobile Service ("CMRS"))
  - Amended Definitions
    - CMRS now includes "Functional Equivalent"
    - "Interconnected Service" and "Public Switched Network" now defined to included "any common carrier switched network …. that uses …. public IP addresses …"

FCC Open Internet Order

- FCC Open Internet Rules
  - 47 C.F.R. Part 8 – Complaint Procedures (Amended)
    - 8.13 General pleading requirements.
    - 8.14 Formal complaint procedures.
    - 8.16 Confidentiality of proprietary information.
    - 8.18 Advisory opinions.
- Violations Also Actionable Under:
    - Sections 206 – 209
    - Alternative Remedies / Primary Jurisdiction Issue
    - Private Right of Action; Damages; Attorneys Fees

VI. Implications for Enterprises, Cloud and Mobility (Why do We Care?)

- For Broadband Internet Access (BIA) Providers:
  - Include All Fixed and Mobile (Including Satellite)
  - Sections 201 - 202 (Reasonableness, etc.)
    - Apply to contracts with “Edge” (Content) Providers
    - Apply to Internet traffic exchange
      - With Transit Providers, Content Delivery (CDNs)
      - But not subject to Sections 251-252 (interconnection)
    - Sections 206-209 (Complaint Procedures)
      - Traffic exchange / Edge provider disputes now subject to Statutory Complaints /FCC Remedies

VI. Implications for Enterprises, Cloud and Mobility (Why do We Care?)

- For BIA Providers (cont'd):
  - Section 222 (Privacy)
    - - How comply with Statute but not FCC CPNI Regs?)
    - - And what about Federal Trade Commission (FTC) ?
  - Section 255 (Disability Access)
    - Comply with ADA – but not with "hearing impaired" TRS
      - Again, how?
  - And Broadband Providers include "resellers"

Implications for Enterprises, Cloud and Mobility (Why do We Care?)

- For “Edge” Providers
  - “Any individual or entity that provides … [or provides a device used for accessing] .. content, application, or service over the Internet”
  - Include Enterprises and Internet Content Providers
  - Not Subject to Open Internet Rules or Title II
- Edge Connections Not Subject to USF
  - Some say Enterprises “dodged a bullet”
    - Maybe For Now
    - But USF to be addressed in separate proceeding
- But Edge Connection / Peering Contracts
  - Are subject to Sections 201 – 202 (Reasonableness) and Sections 206-209 (Complaint/ Remedies)

Implications for Enterprises, Cloud and Mobility (Why do We Care?)

- For Others:
  - Following are NOT subject to Open Internet Rules
    - Cloud Providers and Data Centers
    - "Add On" Services:
      - Email, Cloud Storage
      - Security Functions (SPAM protection)
      - Are all "information services"
    - "Specialized" (Non-BIAS) Services
      - VOIP, Heart-monitoring; Energy consumption
      - But FCC will watch for "abuse"

Final Thoughts

All of this is very complicated …

BUT… DO REMEMBER:
WHEN IN DOUBT – ASK YOUR LAWYER!

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8. The FCC's Open Internet Dismantling Order - (Death of Net Neutrality – Maybe?) (2017)

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REGULATORY ALERT

VIA ELECTRONIC MAIL

TO: Clients and Friends

FROM: Sapronov & Associates, P.C.

DATE: December 14, 2017

RE: The Federal Communications Commission's ("Commission" or "FCC") Draft Order Dismantling the Title II "Net Neutrality Rules"

I. EXECUTIVE SUMMARY

On November 22, 2017, the FCC circulated its draft Order[1] dismantling much of the 2015 "Net Neutrality" Rules which, among other things, reclassified broadband Internet access service ("BIAS") as a telecommunications service, subject to a myriad of regulations under Title II[2] of the Communications Act of 1934 (as amended).[3] The Commission adopted the *Order* at its December 14, 2017 meeting with a 3-2 vote along party lines.

The *Order* undoes much of the prior FCC's handiwork under former Chairman Wheeler and returns to a "light-touch" regulatory framework. The *Order* (i) restores the classification of BIAS as an "information service;" (ii) reinstates the classification of mobile broadband Internet access service as a private mobile service (the prior FCC said it was a "commercial mobile service" subject to Title II); (iii) returns authority to protect consumers online from unfair, deceptive and anticompetitive practices to the Federal Trade Commission ("FTC"); (iv) eliminates the vague Internet Conduct Standard implemented under the *Title II Order*; and (v)

[1] *In re: Restoring Internet Freedom*, Declaratory Ruling, Report and Order and Order, WC Docket 17-108 (*"Order").*

[2] "Title II" refers to Title II of the Communications Act, 47 U.S.C. Sections 201 *et. seq*., the provisions applicable to interstate common carriers, and is often used as a synonym for utility regulation.

[3] *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Title II Order"*).

adopts transparency requirements that Internet Service Providers ("ISPs") disclose information regarding their practices to consumers, entrepreneurs and the Commission. The *Order* also clarifies the effects of the return to an information service classification on other regulatory frameworks (*i.e.*, Privacy, USF Support, Disability Access).

II. ENDING TITLE II REGULATION OF THE INTERNET

A. Reinstating Information Service Classification of Broadband Internet Access

The *Order* reinstates the information service classification of broadband Internet access, reflecting this Commission's statutory interpretations, historical precedent and public policy.

1. Definition and What is Included

"Broadband Internet access service" is defined as a mass-market[4] retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.

It does *not*, however, include services offering connectivity to one (or a small number of) Internet endpoints for a specific device, such as an e-reader or heart monitors. Nor does it include virtual private networks (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services, as these services do not provide the capability to transmit/receive data from all or substantially all Internet endpoints.

Additionally, when premise operators – *i.e.*, coffee shops, bookstores, airlines, private end-user networks (schools/libraries/universities/businesses) - obtain broadband Internet access service to enable patrons to access the Internet from their establishments, said service is *not* considered BIAS, as long as it is not offered as a mass market service (defined above).

The *Order* also clarifies that this classification applies to *all* providers of broadband Internet access service, regardless of whether they lease or own the facilities used to provide the service.

2. Statutory Interpretation

This FCC finds that returning the classification of BIAS to that of an information service best comports with the text and structure of the Act, which defines an "information service" as

[4] Mass market means services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. "Mass market" also includes broadband Internet access service purchased with the support of the E-rate and Rural Healthcare programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund (CAF), but does not include enterprise service offerings or special access services, which are typically offered to larger organizations through customized or individually negotiated arrangements.

"the offering of a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[5] The *Order* extensively explores the meaning of "capability" as used in the definition of "information service" and finds that broadband Internet access is an offering to end users of precisely such a "capability" to perform all functions listed in this definition. The Commission also claims that by the plain meaning of the Act's definitions, Internet access service should be classified as an information service, as the statute expressly states that "Internet access service" "does not include telecommunications services," but rather is a service "…that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[6]

Arguments asserting that ISPs offer both information services and telecommunications services because BIAS includes a transmission component (and should therefore be subject to Title II) are rejected, stating that, in providing broadband Internet access service, an ISP *makes use* of telecommunications (it provides information-processing capabilities "via telecommunications") but does not separately *offer* telecommunications on a stand-alone basis to the public

3. Commission Precedent

The FCC notes that for almost twenty years broadband Internet access service had been classified as an information service, subject to the FCC's "ancillary jurisdiction" under "Title I" of the Act.[7] The Commission has consistently held that categories of telecommunications service and information service are mutually exclusive and, because it is an information service, Internet access cannot be a telecommunications service. This classification has been supported by six separate, prior FCC decisions.[8] Further, in its attempt to "make it fit," the *Title II Order* had to forbear, either in whole or in part, thirty separate sections of Title II, along with other provisions of the Act and Commission rules.[9] This Commission views the significant forbearance as obvious evidence that Title II is not a suitable classification for broadband Internet access service.

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[5] 47 U.S.C. § 153(24) (emphasis supplied).

[6] 47 U.S.C. § 231(e)(4).

[7] 47 U.S.Cs § 152(a). See, *e.g.*, *United States v. Southwestern Cable Co.* 392 U.S. 157(1968). *See generally*, Christopher J. Wright, *"The Scope of the FCC's Ancillary Jurisdiction after the D.C. Circuit's Net Neutrality Decisions"*, 20 Federal Communications Law Journal, Vol. 67 No. 20 (2014) http://www.fclj.org/wp-content/uploads/2015/04/67.1.2-Wright.pdf.

[8] *See: Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (Rel. April 27, 2017) at para. 38: Chairman Kennard first led the FCC in determining that Internet access service is an information service in the *Stevens Report*. Chairman Powell led the Commission to classify broadband Internet access service over cable systems as an information service in the *Cable Modem Order*. Chairman Martin led the Commission to classify several broadband Internet access services as information services in the *Wireline Broadband Classification Order*, the *BPL-Enabled Broadband Order*, and the *Wireless Broadband Internet Access Order*.101 Finally, Chairman Genachowski declined to reclassify broadband Internet access services in the *Open Internet Order*. (citations omitted).

[9] *See Open Internet Order*, 30 FCC Rcd at *e.g.*, 5834 (other citations omitted).

4. Public Policy

The *Order* finds that public policy supports the classification of BIAS as an information service, stating such classification is more likely to encourage investment and innovation, as well as further the goal of ensuring broadband is available to everyone.

Increased broadband deployment and subscribership require investment, and history has shown the regulatory climate affects investment. Regulated entities are restricted in what they can do and the products they may offer. The Commission points to the most regulated sectors, basic telephone service, as an example area that has experienced the least amount of innovation while the less regulated sectors, such as Internet service, has greatly evolved.

The uncertainty under *Title II* of what is and is not allowed - and having to "ask permission" before offering a new product wastes time and resources, especially those of small and rural providers. Numerous commenters stated that, rather then face potential substantial fines, they shelved projects and have delayed rolling out new features and services. As one commenter put it, "any rational ISP will think twice before investing in innovative business plans that might someday be found to violate the Commission's undisclosed policy preferences and thus give rise to a cease-and-desist order and perhaps massive forfeiture penalties."[10]

Economic studies conducted concluded investment in broadband by major ISPs fell approximately 5.6% from 2014-2016.[11] Additionally, the Commission states that simple comparisons of investment before and after the *Title II Order* show that reclassification of BIAS has discouraged investment proving, in their view, that such classification has no discernable benefit over the original Title I classification (as an information service). It finds Title II classification of BIAS to be contrary to the public interest.

B. Reinstating the Private Mobile Service Classification of Mobile Broadband Internet Access Service; Other Definitions

The *Order* restores the prior definitions and interpretations of Section 332 of the Act regarding mobile broadband Internet access service and returns its classification to an information service, not commercial mobile service (or its functional equivalent).

The Commission previously codified the definition of "commercial mobile service" under the term "commercial mobile radio service" (CMRS)[12] – this service is treated as common carriage, subject to Title II. It also defined "public switched network" as "[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan in connection with the provision of switched services."[13] "Interconnected service" was defined as "a service that gives subscribers the capability to communicate . . . [with] *all* other users on the

[10] *Order* at 102.
[11] *See* Hal J. Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2017), https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/.
[12] 47 U.S.C. § 332(d)(1).
[13] 47 CFR § 20.3 (2014).

public switched network."[14] "Private mobile service," is defined as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[15] If a service does not meet the definition of CMRS, it is a private mobile radio service.[16] The Act prohibits the Commission from treating providers of private mobile service as common carriers.[17]

In the past, the Commission found that wireless broadband Internet access service was not a commercial mobile service because it did not meet the definition of an "interconnected service" under the Act and the Commission's rules. It found that wireless broadband Internet access was not "interconnected" with the "public switched network" because it did not use the North American Numbering Plan. The *Title II Order* changed the definitions of "public switched network" and "interconnected service" in order to fit mobile broadband Internet access into the interconnected service category.

The *Order* restores the prior definitions of "public switched network" and "interconnected service," and determines that mobile broadband Internet access not a commercial mobile service, but rather a private mobile service.

III. RETURNING TO A LIGHT-TOUCH REGULATORY FRAMEWORK

The Commission points out that, for almost twenty years, the Internet developed and flourished under light-touch regulation. Further, edge providers (Amazon, Facebook, Google) have exploded throughout a variety of markets (finance, education, music and video distribution, social media, etc.) without the networks that carried them being subject to Title II regulations.

The Commission believes that a return to a light-touch regulatory framework best suites the needs of BIAS, and believes the Internet's openness will be preserves through competition, existing consumer protection and antitrust laws, and the transparency rule it adopts with the *Order*.

A. Competition

The Commission believes that competition is one of the best incentives ISPs have to preserve Internet openness, and finds that the competition that currently exists in the broadband market (coupled with existing laws) are enough to keep ISPs honest.

For example, the content and applications produced by edge providers are one of the top consumer demands when they access the Internet. It therefore would not make good business sense for an ISP to block this content, essentially cutting out exactly what consumers are looking for - especially considering that edge providers subscribe to all platforms, and no one ISP has a monopoly over them. Additionally, the market power held by Amazon, Facebook and Google far outweigh the market power of even the largest ISP. This puts pressure on ISPs, as they

[14] 47 CFR § 20.3 (2014).
[15] 47 U.S.C. § 332(d)(3).
[16] *Second CMRS Report and Order*, 9 FCC Rcd at 1447, para. 79.
[17] 47 U.S.C. § 332(c)(2).

understand that they depend on edge providers and have therefore committed to refrain from blocking or throttling lawful content, even without Title II regulation.

Mobile wireless ISPs also face fierce competition in most markets, with constant "head-to-head" competition between the four major carriers. And with 5G technology just around the corner promising to sharply increase mobile data speeds, the pressure of mobile ISPs to remain open and competitive is significant.

B. Existing Consumer Protection and Antitrust Laws – Returning Authority to the Federal Trade Commission

1. Consumer Protection

The FCC finds that, in addition to competition, existing antitrust laws and the Federal Trade Commission's ("FTC") authority under Section 5 of the FTC Act[18] provides protection for consumers in what it views as the unlikely event an ISP engages in behavior that is harmful to the open Internet. The Commission states that these laws are better suited to address such concerns as they apply to the whole of the Internet, including edge providers, allowing for an even playing field.

The FTC has broad authority to protect consumers from "unfair or deceptive acts or practices"[19] and has exercised this authority to protect consumers in all sectors of the economy, including against some of the practices at issue in here, such as throttling. However, the *Title II Order* stripped the FTC of its authority over BIAS, as the agency is strictly forbidden from regulating common carriers.[20] Reinstating the information service classification of BIAS returns jurisdiction to the FTC, the agency, according the FCC, with the most experience in dealing with consumer issues.

The FTC's rules against unfair and deceptive practices prohibit companies from selling consumers one product or service, but providing them with something else, which makes any voluntary commitments from the ISPs regarding their network management practices enforceable. The FTC also requires the "disclos[ur]e [of] material information if not disclosing it would mislead the consumer," so if an ISP "failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC's deception authority would apply."

Throughout this proceeding, many of the largest ISPs have committed to no blocking or throttling – a 2007 FTC Report on Broadband Industry Practices suggests that an ISP that starts treating traffic from different edge providers differently without notifying consumers and obtaining their consent may be engaging in a practice that would be considered unfair under the FTC Act.[21] These commitments can be enforced by the FTC under Section 5.

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[18] 15 U.S.C. §§ 41-58, as amended.
[19] 15 U.S.C. § 45(a)(1).
[20] *See* 15 U.S.C. § 45(a)(2) (exempting from Section 5 "common carriers subject to the Acts to regulate commerce").
[21] *See* https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

2. Antitrust

Existing antitrust laws, specifically Sections 1 and 2 of the Sherman Act[22] (as well as Section 5 of the FTC Act) protect competition in all sectors of the economy where the antitrust agencies have jurisdiction. The Communications Act includes an antitrust savings clause, so the antitrust laws apply with equally to entities regulated by the Commission.

Section 1 of the Sherman Act makes anticompetitive arrangement illegal by barring contracts in restraint of trade. If ISPs negotiate agreements to block, throttle or discriminate against conduct or applications, they would be deemed illegal. Section 2 makes it illegal for an ISP to favor its own content or services over an unaffiliated providers' content or services by prohibiting exclusionary conduct (including refusal to deal/exclusive dealing). Treble damages are available under both sections.

The conduct covered by Section 2 of the Sherman Act would be evaluated under "the rule of reason," an inquiry that pays close attention to the consumer benefit v. consumer harms. Complaints will be reviewed on a case-by-case, content-specific basis, and consumer-harmful arrangements will be deemed illegal and treble damages will be assessed. Additionally, the FTC and Department of Justice can bring enforcement actions in situations where private plaintiffs are unable or unwilling to do so.

The Commission finds this case-by-case approach to be more cost effective overall, as opposed to the current bright-line and Internet Conduct rules, which they claim are "more likely to inhibit innovation before it occurs, whereas antitrust enforcement can adequately remedy harms *should* they occur."

C. Transparency

Transparency disclosures are essential in providing the Commission with the necessary information it needs in order to monitor the marketplace for the introduction of new services and technologies and to identify and eliminate potential barriers. Disclosures provide valuable information to other industry participants, reduces the possibility that ISPs will engage in harmful practices, assist consumers in making informed choices regarding their purchase and use of BIAS, boost consumer confidence, and provide entrepreneurs and small businesses the information they need to create, improve and market their products.

The *Order* returns (with minor adjustments) to the transparency rule adopted in the 2010 Open Internet Order,[23] which is sufficient in providing the Commission and consumers with the information they need while minimizing the burdens to ISPs. Specifically, the following rule is adopted:

> *Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to*

[22] Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7.
[23] *Open Internet Order*, 25 FCC Rcd at 17936-41, 17959, paras. 53-61, 98.

enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

The transparency rule applies to fixed and mobile BIAS (and any functional equivalents), as well as small business providers.

1. Content of Required Disclosures

With this *Order*, the FCC requires ISPs to prominently disclose net network management practices, performance, and commercial terms of their broadband Internet access service. While the Commission agrees there should be enough flexibility in the rule to allow providers to adjust to their specific needs, it does describe specific requirements to guide ISPs.[24]

a. Network Management Practices

ISPs must disclose their congestion management, application-specific behavior, device attachment rules, and security practices. Additionally, disclosure of any blocking, throttling, prioritization of affiliate content and paid prioritization is required.

b. Performance Characteristics

ISPs must disclose a service description, as well as the impact of specialized services (non-broadband Internet access service data services), on performance.

c. Commercial Terms

ISPs are required to disclose commercial terms of service, including price, privacy, policies, and redress options.

The additional reporting obligations added to the transparency rule under the *Title II Order*, along with any related Guidance, are eliminated, as there is no evidence the obligations benefit consumers, entrepreneurs or the Commission in a manner that justifies the burdens imposed. This includes the performance metric, which required the disclosure of packet loss, geographically-specific disclosures, and disclosure of performance at peak usage times, among other things.

2. Means and Format of Disclosure

ISPs have two options for disclosure

- They may prominently display the disclosures on an easily accessible, publically available website, in a manner that is also accessible to people with disabilities.

[24] See Exhibit "A" for verbatim details regarding required disclosures.

Distribution of hard copy versions is not necessary, and there is no need to file anything with the Commission; or

- They may transmit their disclosures to the Commission, which will make them available on a publically available, easily accessible website.

The direct notification requirement prescribed by the *Title II Order*, which required ISPs to directly notify an end user if "their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, like is likely to have a significant impact on the end user's use of the service," is eliminated.

No particular format is required, and any such mandates from the *Title II Order* are eliminated.

Importantly, as many of the previous, additional transparency disclosure requirements have been eliminated and the task will now be much less burdensome, the small business provider exemption is not longer in effect.

D. Bright-Line and General Conduct Rules Eliminated

The *Title II Order* created a "catch-all" standard intended to prohibit "harms" its rules were meant to address. This standard gave the Commission broad discretion and enabled it to prohibit any practices it deemed to be unreasonable interference with a consumer's ability to reach Internet content, services and applications of their choice. The standard was been enforced on a case-by-case basis using a non-exhaustive list of factors, leaving Internet service providers to guess what they are and are not allowed to do. This rule is now eliminated.

The *Title II Order* also created "bright line" rules banning blocking, throttling, and paid prioritization (by "enhancing" its transparency rule, discussed above and now eliminated).

The agency finds that the new transparency rule adopted in the *Order*, combined with the antitrust and consumer protections laws, as well as industry competition is enough to achieve the same benefits at a lower cost. It finds no need for specific "conduct rules. Additionally, the Commission finds it does not have legal authority to adopt conduct rules for all ISPs, and declines to create a "patchwork" of rules.

E. ENFORCEMENT

Due to the modifications in its regulations, the FCC finds it necessary to also modify its enforcement practices.

The *Title II Order* created a formal complaint rules, advisory opinions and the position of an *Open Internet Ombudsperson*, someone individuals and organizations could contact with question or complaints regarding the open Internet, who would ensure they reached the appropriate bureau and/or office. While the Commission agrees that there should be staff tasks with these responsibilities, it believes a separate Ombudsperson is unnecessary. Instead, it finds

the existing informal consumer complaint process administered by the Consumer and Governmental Affairs Bureau ("CGAB") is best suited to address these issues. In fact, during the ten months of the Ombudsperson's existence, only 38 emails and 10 phone calls related to the open Internet were received. By comparison the CGAB received approximately 7,700 complaints relating to the open Internet. The Commission views this as evidence that consumers are accustomed to and comfortable with dealing with the CGAB and its informal complaint process.

For the above reasons, the Commission eliminates the Ombudsperson, the formal complaint process and advisory opinions created by the *Title II Order*.

IV. EFFECTS ON REGULATORY STRUCTURE CREATED BY THE *TITLE II ORDER*

The Commission clarifies the regulatory effects of the *Order's* reclassification of BIAS as an information service on other regulatory areas affected by the *Title II Order*. This includes the effects on: 1) Internet traffic exchange arrangements; 2) the *Title II Order*'s forbearance framework; 3) privacy; 4) wireline broadband infrastructure; 5) wireless broadband infrastructure; 6) universal service; 7) jurisdiction and preemption; and 8) disability access.

A. Ending Title II Regulation of Internet Traffic Exchange

Historically, Internet traffic exchange between ISPs and edge providers functioned and flourished with little Commission oversight. The *Title II Order* subjected these agreements to eight different sections of Title II. The Commission finds this unnecessary, as these entities are sophisticated, well-capitalized businesses capable of negotiating agreements. Therefore, Internet exchange arrangements are no longer subject to Title II or its regulations.

B. Forbearance

As the information service classification of BIAS has been reinstated, any forbearance granted under the *Title II* Order is now moot. The *Order* returns the option of those seeking to voluntarily elect to offer broadband transmission on a common carrier basis to do so under the frameworks established in the *Wireline Broadband Classification Order* and the *Wireless Broadband Internet Access Order*.[25]

Under this order, BIAS was ruled to be an information service. However, facilities-based wireline carriers could voluntarily elect to offer the BIAS transmission component (typically DSL) on a common carrier basis. They could do so under tariff or non-tariff arrangements. These options were offered in order to maximize broadband deployment in a manner that best suited the provider's business operations. This proved especially helpful to small carriers

[25] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al*., CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Classification Order*), *aff'd Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *see also Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5913-14, 32-34.

servicing rural areas who could take advantage of common carrier benefits such as high-cost universal service support.

Carriers are again afforded this choice.

C. Returning Broadband Privacy to the FTC

Reinstating the information service classification of BIAS returns jurisdiction over broadband privacy and data security to the FTC. Under the *Title II Order*, the Commission attempted to implement new privacy rules, including those of BIAS.[26] However, these rules were struck down by Congress under the Congressional Review Act,[27] which prohibits the Commission from implementing substantially similar rules. This, coupled with the FTC's extensive experience and expertise in this area, heavily weighs in favor of returning jurisdiction to the FTC.

D. Wireline Infrastructure

To the extent the reclassification of BIAS as an information service impacts the deployment of wireline infrastructure, the Commission will address that topic in detail in proceedings specific to those issues.[28] It cautions, however, that this decision is not an excuse to create barriers to infrastructure investment, specifically calling out pole owners and warning them not to use this as a pretext to increase pole attachment rates or inhibit broadband providers from attaching equipment. The Commission warns it will not hesitate to take action against barriers to broadband infrastructure.

E. Wireless Infrastructure

Previously, the Commission determined that wireless BIAS is afforded come of the same statutory provisions as a covered service using the same infrastructure – specifically, Section 244, which gives providers the right to attach to utility poles at regulated rates, and Section 332(c)(7), which preserves state and local authority over personal wireless service facilities (subject to certain limitations).[29] It reiterates these findings here and clarifies the following:

- Cell towers and other forms of network equipment can be used "for the provision" of both personal wireless services and wireless broadband Internet access on a commingled basis; and

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[26] *2016 Privacy Order*, 31 FCC Rcd at 14051.

[27] *See* Pub. L. No. 115-22 (Apr. 3, 2017); *see also* 5 U.S.C. § 801(b)(2)).

[28] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017); *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, FCC 17-78 at 9, para. 21. (June 23, 2017).

[29] Among other limitations, it provides that state or local government regulation (1) "shall not unreasonably discriminate among providers of functionally equivalent services," (2) "shall not prohibit or have the effect of prohibiting the provision of personal wireless services" and (3) may not regulate the siting of personal wireless service facilities "on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

- Section 332(c)(7) applies to facilities, including DAS or small cells, deployed and offered by third-parties for the purpose of provisioning communications services that include personal wireless services

The Commission considers infrastructure that will be deployed for the provision of personal wireless services, including third-party facilities such as neutral-host deployments, to be "facilities for the provision of personal wireless services" and therefore subject to section 332(c)(7) as "personal wireless service facilities" even where such facilities also may be used for broadband Internet access services.

F. Universal Service

The reclassification of BIAS as an information service does not affect or alter existing programs (*i.e.* Connect America Fund) that support the deployment and maintenance of broadband-capable networks. Therefore, provider eligibility to receive support does not change.

G. Preemption of Inconsistent State and Local Laws

The Commission finds that the regulation of BIAS should be governed by a uniform set of federal regulations, and therefore precludes states or local governments from imposing regulations of BIAS that are inconsistent with the rules already in place and adopted in the *Order*. Any inconsistent rules, or any rules attempting to impose those repealed by the *Order* (*i.e. Title II Order* regulations) will be preempted.

H. Disability Access Provision

Persons with disabilities have the right to access BIAS regardless of its classification. Nothing in the *Title II Order* changes the disability access rules; likewise, existing rules are not changed with this *Order*.

V. CONCLUSION

The *Order* was voted on at the FCC's December 14, 2017 Open Meeting and was adopted along party lines. It will become effective sixty (60) days after publication in the Federal Register. A Law Seminars International (LSI) Telebriefing discussing the FCC's vote, the reaction - presumably sound and fury on the Left, Schadenfreude on the Right – and the views from Wall Street and other sources will follow shortly thereafter. For more information, please visit www.lawseminars.com or contact us at info@wstelecomlaw.com.

As always, should you have any questions or comments, or wish a more detailed analysis on the implications to your company, please do not hesitate to contact us.

EXHIBIT "A"

REQUIRED CONTENT OF TRANSPARENCY DISCLOSURES

Network Management Practices

Blocking. Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.

Throttling. Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.

Affiliated Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.

Paid Prioritization. Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.

Congestion Management. Descriptions of congestion management practices, if any. These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.

Application-Specific Behavior. Whether and why the ISP blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.

Device Attachment Rules. Any restrictions on the types of devices and any approval procedures for devices to connect to the network.

Security. Any practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics

Service Description. A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.

Impact of Non-Broadband Internet Access Service Data Services. If applicable, what non-broadband Internet access service data services, if any, are offered to end users, and whether and how any non-

broadband Internet access service data services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms

Price. For example, monthly prices, usage-based fees, and fees for early termination or additional network services.

Privacy Policies. A complete and accurate disclosure about the ISP's privacy practices, if any. For example, whether any network management practices entail inspection of network traffic, and whether traffic is stored, provided to third parties, or used by the ISP for non-network management purposes.

Redress Options. Practices for resolving complaints and questions from consumers, entrepreneurs, and other small businesses.

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 CFR Parts 1, 8, and 20 as follows:

PART 1 – PRACTICE AND PROCEDURE

1. Amend section 1.49 by revising paragraph (f)(1)(i) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * * * *
(f) * * *

(1) * * *

(i) Formal complaint proceedings under Section 208 of the Act and rules in §§1.720 through 1.736, and pole attachment complaint proceedings under Section 224 of the Act and rules in §§1.1401 through 1.1424;

* * * * *

2. Amend the heading of part 8 to read as follows:

PART 8: INTERNET FREEDOM

3. Amend the authority citation for part 8 to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 201(b), 218, 257, and 303.

4. Amend section 8.1 to read as follows:

§8.1 Transparency.

(a) Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

(b) Broadband Internet access service is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

(c) A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

5. Remove and delete in their entirety sections 8.2, 8.3, 8.5, 8.7, 8.9, 8.11, 8.12, 8.13, 8.14, 8.15, 8.16, 8.17, 8.18, and 8.19.

PART 20: COMMERCIAL MOBILE SERVICES

6. Amend Section 20.3 as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. * * *

* * * * *

(b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

* * * * *

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) * * *

* * * * *

Public Switched Network. The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan in connection with the provision of switched services.

9. Net Neutrality: The Partisan Battle Over Internet Control (2017)

Net Neutrality:
The Partisan Battle over Internet Control

Presentation for

LAW SEMINARS INTERNATIONAL

26th Annual Conference on Cutting Edge Issues In Technology Law

November 30 - December 1, 2017

Seattle, Washington

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Net Neutrality as a *Nom De Guerre*: The Partisan Battle over Internet Control

- Prelude to the Net Neutrality War
  - We have been here before
    - Age old dichotomy in U.S. telecom policies:
      - Encourage computer and information technology (CIT) advancements by dominant carriers while preventing anti-competitive behavior
        - Played out in Congress, the FCC, the Courts, state regulators and, the Federal Trade Commission (FTC)
        - Anticompetitive practices (discrimination, cross-subsidy)
        - "Bottleneck" control of essential (e.g., access) facilities

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- Prelude to the Net Neutrality War *(Cont.)*
  - Pendulum has shifted from one administration to the other
  - At times, policy makers favor technology advancement; at other times, enforce anticompetitive practices
    - each at the expense of the other

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- Prelude to the Net Neutrality War *(Cont.)*
  - A brief history of Net Neutrality's ancestry
    - Kingsbury Commitment
    - 1956 Consent Decree
      - AT&T prohibited from entering computer markets

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- A brief history of Net Neutrality's ancestry *(Cont.)*
  - AT&T Consent Decree
    - Modification of 1956 Consent Decree (hence the term "MFJ")
    - AT&T prohibited from
      - Manufacturing
      - Long Distance
      - Information services

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- A brief history of Net Neutrality's Ancestry *(Cont.)*
  - Computer Trilogy
    - Computer Inquiries I, II, & III
    - Separates regulated from unregulated services
    - Basic v. Enhanced (Telecom v. Information Services)
    - Structural Separations v. Vertical Integration (with safeguards)
    - Introduces "Open Network Architecture" concept
      - Requires non-discriminatory network access, technical disclosure (transparency), and unbundling of "pipes" and content

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- A brief history of Net Neutrality's Ancestry *(Cont.)*
  - 1996 Telecom Act
    - MFJ restrictions vacated
    - Replaced with managed competition
    - Carrier networks "unbundled"
    - Mandatory interconnection and access rights
    - Vertical Integration permitted with safeguards
    - Codifies privacy protection as "CPNI" (47 U.S.C. §222)

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- A brief history of Net Neutrality's Ancestry *(Cont.)*
  - Post '96 Act Developments
    - FCC IP NPRM (still pending) – VoIP status is muddled
      - Politically impossible to legislate
      - FCC attempts workaround (Vonage decision)
        - Ad hoc enforcement
      - Shifts from economic (entry, rate) regulation to "social regulation"
        - USF, disability access, E911

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- Post '96 Act Developments *(Cont.)*
  - But "IP enabled service" remain neither telecom nor information services
  - And mobile broadband Internet access is not commercial mobile radio service (CMRS)
    - and thus not subject to "Title II" of Communications Act

Net Neutrality as *Nom De Guerre*: The Partisan Battle over Internet Control

- Net Neutrality's tortured history commences
  - Begins (ironically) as an FCC "policy" enforcement under Republican Chairman (Kevin Martin)
  - Leads to multi-year litigation with Comcast
  - FCC makes multiple, Sisyphean attempts to enforce Net Neutrality policies, each failing for lack of jurisdiction
  - Net Neutrality becomes politicized during Obama (for) / McCain (against) election campaign

The Pendulum Swings: the Obama Years

- Anticompetitive practices come under scrutiny
  - Strict and aggressive Enforcement Bureau policies
    - Large forfeitures; liability admission as condition for settlements
    - Multi-jurisdictional privacy enforcement (FTC, FCC, States)
    - Data privacy and cybersecurity breaches are targeted
      - AT&T $100M settlement for misleading "unlimited data" plans
      - Verizon "super-cookie" CPNI settlement
      - Cox cybersecurity settlement (Cable Act violation)
      - Wi-Fi hotspot blocking (M.C. Dean)

The Pendulum Swings: the Obama Years

- Net neutrality becomes poster child for Democratic agenda
  - Obama Broadband stimulus package requires Net Neutrality as condition for funding
  - Democrat controlled FCC adopts "Open Internet" rules
    - Transparency, no throttling, no paid prioritization whatsoever (first 2 rules have exceptions)
    - Plus "general conduct standard" proscribing discrimination

The Pendulum Swings: the Obama Years

- Democrat controlled FCC adopts "Open Internet" rules *(Cont.)*
  - FCC rules upheld by D.C. Circuit Court – USTA v. FCC (2016)
    - FCC followed D.C. Circuit Court "roadmap" in prior Verizon v. FCC (2014) decision
    - FCC found unexpected authority under Section 706
    - Broadband Internet Access Service (BIAS) becomes regulated as common carriage under Title II
      - Including the private (or so we thought) mobile broadband variety
      - But "edge providers" (Google, Amazon) get a pass

The Pendulum Swings Back: The 2016 Republican Sweep

- New Republican Controlled FCC
  - Congress resurrects the Congressional Review Act (CRA)
  - But partisan divide wider than ever
  - Legislation increasingly unlikely
  - President Trump opposes Net Neutrality – but other policies unclear
  - And privacy enforcement takes still another turn

The Pendulum Swings Back: The 2016 Republican Sweep

- Privacy under Net Neutrality Principles
  - FCC 2016 Open Internet Privacy Rules
    - Following 2016 Presidential election, FCC Chairman Wheeler, as a swan song, adopts Open Internet "Privacy" rules
      - Sweeping expansion of "CPNI," adding "PII" and attaching to (newly reclassified) BIAS providers
      - Swiftly reversed under Republican sponsored CRA

The Pendulum Swings Back: The 2016 Republican Sweep

- FCC 2016 Open Internet Privacy Rules *(Cont.)*
  - FTC exercises concurrent privacy jurisdiction under FTC Act over "unfair" privacy practices
    - As do most states
    - But FTC enforcement hobbled by "common carrier" exception under FTC Act
      - Regulatory "blind spot"
      - Currently under en banc review in 9th Circuit
        - But all this will change with the FCC's new Net Neutrality Order (see below)

The Pendulum Swings Back: The 2016 Republican Sweep

- Other Privacy Rules ("Do Not Contact")
  - Multi-jurisdictional enforcement:
    - FCC, FTC, and states also concurrently enforce Telephone Consumer Protection Act (TCPA) and other "do not contact" laws
    - Just ask Dish Networks
    - But FCC's TCPA policies under appeal in 2nd Circuit

Net Neutrality Today: a *Nom De Guerre* for both the Left and the Right

- Partisan battle lines are drawn
  - Congressional Democrats vow to fight Open Internet privacy repeal
  - FCC Republican Chairman Pai issues new Open Internet Notice (NPRM)
    - Net Neutrality proponents generate flood of comments
    - Thus seeking to deny FCC the required "record" supporting Open Internet rules' reversal

Net Neutrality Today: a *Nom De Guerre* for both the Left and the Right

- Partisan battle lines are drawn *(Cont.)*
  - Edge providers encourage "popular" resistance (*e.g.*, protests) to Republican agenda
    - A type of "crowd regulation"
    - But even Congress has noticed that only the "gatekeepers" (*e.g.*, AT&T, Comcast) are regulated – not the content providers (Google, et. al.)
    - Politically untenable

Net Neutrality Today: a *Nom De Guerre* for both the Left and the Right

- Partisan battle lines are drawn *(Cont.)*
  - FCC decision expected in mid December, 2017 – and with it (depending on your point of view):
    - The demise of Net Neutrality or a return to the "light touch" regulation
      - (*i.e.* to the original Net Neutrality "principles" of Bush-era Republican Commissioners Martin and Powell)
  - Here is a very brief sketch of what to expect

Dismantling of the Title II Order

- May 23, 2017 FCC releases Notice of Proposed Rulemaking proposing to reverse majority of Net Neutrality Rules
- November 22, 2017 FCC releases draft Net Neutrality Order, which includes
  - Reclassification of Broadband Internet access as Common Carrier
    - Reinstate as "information service"
  - Reinstate the private mobile service classification of mobile broadband Internet access service (and thus not subject to Title II)

Dismantling of the Title II Order

- Returning to a "Light Touch" Regulatory Framework
  - Eliminate Internet Conduct Standard
    - Gave FCC broad discretion to prohibit any behavior it deems harmful to consumers
    - Enforced on case-by-case basis
    - Vague – non-exhaustive list of factors – too much guesswork for providers
    - No evidence policy has provided any consumer benefit
    - Providers hesitant to offer new services for fear of a violation
  - Return Jurisdiction over broadband Internet access service to FTC

Dismantling of the Title II Order

- Returning to a "Light Touch" Regulatory Framework *(Cont.)*
  - Current Open Internet (Title II) Rules Reversed
    - 47 C.F.R., Part 8
    - Return to Transparency Rule adopted in 2010 Open Internet Order, with modifications
      - Publically disclose accurate information (via easily accessible website or by transmitting to Commission, who will publish) re:
        - Network management practices
        - Performance
        - Commercial terms

Dismantling of the Open Internet Order

- Order will be voted on at December 14, 2017 FCC Open Meeting
- Expected to be adopted on party lines

Final Thoughts

All of this is very complicated …

BUT… DO REMEMBER:
WHEN IN DOUBT – ASK YOUR LAWYER!

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10. Death of Net Neutrality (Maybe?) (2017)

DEATH OF NET NEUTRALITY (MAYBE ?)

Presentation for

LAW SEMINARS INTERNATIONAL

December 20, 2017 Telebriefing

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The Death of Net Neutrality
(Maybe?)

1. The FCC's *Dismantling Order*
2. Ending "Title II" Regulation of the Internet
3. Returning to a "Light Touch" Regulatory Framework
4. Dismantling the 2015 Open Internet Rules
5. "Light Touch" Enforcement
6. Effects on Other FCC Policies
7. Conclusion (For now)

The FCC's *Dismantling Order*

Summary of FCC 2017 Net Neutrality Decision

- Described as "Restoring Internet Freedom"
- Declaratory Ruling, Report and Order, and Order
- WC Docket No. 17-108

I. Declaratory Ruling - Reclassifications

A. Return Information Service Classification of Broadband Internet Access

B. Reinstates Mobile Broadband Classification as Private Mobile Service

C. Clarify Effects of Reclassification on Other FCC Regulations

II. Report and Order

A. Adopts Transparency Rule

B. Restores FTC Enforcement Authority over Broadband

C. Undoes Inadvertent cut-off under "Common Carrier exemption"

III. Order

A. Denies expansion of record to include informal consumer complaints and other materials

B. Finds record sufficient to support decision

The FCC's *Dismantling Order*

- FCC Title II *"Dismantling Order"*
  - November 22, 2017 – FCC circulates draft Order dismantling much of the 2015 "Net Neutrality" rules (*"Title II Order"*)
    - Adopted along party lines at December 14, 2017 Open Meeting
  - Will become effective 60 days after publication in Federal Register

The FCC's *Dismantling Order*

- Order undoes most of former FCC Chairman Wheeler's Open Internet policy
  - Reverses Title II utility-style regulation of broadband Internet access service ("BIAS")
  - Returns classification of BIAS to that of an information service
  - Reinstates mobile BIAS classification to private mobile service (rather than CMRS under *"Title II Order"*)
  - Returns enforcement authority to Federal Trade Commission ("FTC")
  - Eliminates Internet Conduct Standard

Ending "Title II" Regulation of the Internet

Reinstating Information Service Classification of BIAS

- Information (a/k/a "enhanced") service
  - Unregulated
    - Distinguished from "Telecommunications" ("Basic) service
  - Regulated under 47 U.S.C. §201 et. seq. ("Title II")
    - Sometimes referred to as "utility" style regulation
- BIAS:
  - Defined as mass-market retail service providing the *capability* to transmit to and receive data from all/substantially all Internet endpoints
  - Includes services over any technology platform – satellite, wired, fixed & mobile wireless (regardless of licensed/unlicensed spectrum)

Ending "Title II" Regulation of the Internet

Reinstating Information Service Classification of BIAS

- Does NOT include
  - Services with one or a few endpoints, *i.e.*, eReaders, heart monitors
  - Virtual Private Networks (VPNs)
  - Content Delivery Networks (CDNs)
  - Hosting or Data Storage Services
  - Internet backbone services
  - Any other services that do not provide capability to transmit/receive data from all/substantially all Internet end points

Ending "Title II" Regulation of the Internet

Reinstating Information Service Classification of BIAS

- Premise Operators – coffee shops, book stores, airlines, schools, libraries, universities NOT considered BIAS providers
  - As long as not offered as mass market service

- Reclassification applies to ALL BIAS providers, regardless if they lease or own facilities

Ending "Title II" Regulation of the Internet

- FCC Arguments for Dismantling *Title II Order*
  - Statutory Interpretation
  - Prior FCC Decision Precedent
  - Public Policy
  - Economics / Investor Incentive

Ending "Title II" Regulation of the Internet

- Statutory Interpretation
  - Plain meaning of Act's definitions support information service classification of BIAS

47 U.S.C. § 231(e)(4) – "Internet access service…**does not include telecommunications services**" but is a service "that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information and other services as part of a package of services offered to customers"

Ending "Title II" Regulation of the Internet

- Statutory Interpretation: Mobile Broadband
  - 2015 *Title II Order*:
    - Had classified Mobile BIAS as CMRS
    - Thus made Mobile BIAS subject to Title II
      - Changed definitions of "public switched network" and "interconnected service" to make fit
      - Even though prior FCC had found CMRS did not meet definition of "interconnected service"
      - Because not "interconnected" with "public switched network" – does not use North American Numbering Plan
      - But *Title II Order* changed definition of PSTN to included IP addressing

Ending "Title II" Regulation of the Internet

- Statutory Interpretation
  - FCC *Dismantling Order* changes Mobile BIAS back to Private Mobile Service
  - And therefore reclassified as Information Service
    - *Dismantling Order* restores prior definitions of "pubic switched network" and "interconnected service"
    - And thus restores mobile broadband classification as private mobile service (information service)

Ending "Title II" Regulation of the Internet

- Prior FCC Precedent
  - Internet classified as information service for almost two decades
  - Telecommunications service and information service are mutually exclusive
  - Supported by six separate, prior FCC decisions
  - *Title II Order* had to forebear 30 provisions of Title II from broadband access to "make it fit"

Ending "Title II" Regulation of the Internet

- Public Policy
  - FCC Majority believes it likely will encourage innovation and investment
  - Title II classification caused uncertainty
    - Allegedly caused many providers to halt new projects
    - Hesitant to invest in infrastructure
      - Investment fell 5.6% from 2014-2016
    - Investors unsure what is and is not allowed

Returning to a Light-Touch Regulatory Framework

- FCC Arguments for return to "light touch"
  - Internet developed & flourished for two decades under light-touch
  - Internet will be kept open through:
    - Competition
    - Existing consumer & antitrust laws
    - New Transparency Rule

Returning to a Light-Touch Regulatory Framework

- Competition
  - "Best Incentive" for ISPs to behave
  - Consumers demand edge content – blocking would only hurt ISP
    - Market power of Amazon, Google & Facebook far outweigh even largest ISP
    - As edge providers, not subject to BIAS regulation
      - Competition puts pressure on ISPs to remain honest

Returning to a Light-Touch Regulatory Framework

- Competition *(cont'd)*
  - Mobile Wireless ISP markets fiercely competitive
  - "Big Four" often head-to-head
  - 5G Just around the corner
    - Sharply increase mobile data speeds
    - Pressure to remain open/competitive significant

Returning to a Light-Touch Regulatory Framework

- The FTC, Consumer Protection & Antitrust Laws
  - FTC has authority under Section 5 of the FTC Act
    - Better suited for "whole of the Internet" – including edge providers
    - Creates even playing field
- Antitrust Laws
  - Sherman Act – Sections 1& 2
  - Anticompetitive arrangements illegal
    - Arrangements to block, throttle or discriminate illegal
  - Exclusionary conduct illegal
    - Cannot favor own content/services over non-affiliate
    - No refusal to deal/exclusive dealings

Returning to a Light-Touch Regulatory Framework

- Consumer Protection - FTC Enforcement
  - FTC has broad authority to protect consumers from "unfair or deceptive acts or practices
  - Rule prohibit marketing/selling one thing, but providing something else
    - Voluntary commitments from ISPs enforceable
  - Requires disclosing material information if not disclosing would mislead consumers
    - Failure to disclose blocking, throttling, etc. enforceable under deception rules

Returning to a Light-Touch Regulatory Framework

- Consumer Protection & Antitrust Laws
  - Alleged violations evaluated on case-by-case, content specific basis
  - "Rule of Reason" – consumer benefit v. consumer harm
  - Treble damages assessed when violations found

Dismantling the 2015 Open Internet Rules

- 2015 Open Internet Rules codified at Part 8 of Code of Federal Regulations (47 C.F.R. Part 8)
  - *Title II Order* had adopted "Bright Line" rules
    - No Blocking
    - No Throttling
    - No Paid Prioritization whatsoever (other 2 had exceptions)
    - Transparency Rule – "enhanced" the 2010 Rule
  - Plus General Conduct Standard
    - No discrimination

Dismantling the 2015 Open Internet Rules

- Bright-Line & General Conduct Rules Eliminated
  - Created by *Title II Order*
  - "Catch-all" standard to prevent "harms"
  - Gave FCC broad discretion to prohibit any practices it deemed "unreasonable interference" with consumers' ability to reach Internet content, services or applications

Dismantling the 2015 Open Internet Rules

- FCC Arguments for Eliminating Bright-Line & General Conduct Rules
  - Rules has non-exhaustive list of "factors"
  - Created confusion & uncertainty re: what is and is not allowed
  - FCC Majority believes they stifled innovation/creation of new services

Dismantling the 2015 Open Internet Rules

- Bright-Line & General Conduct Rules Eliminated
  - Bright-line rules expanded transparency rule to include no blocking, throttling or paid prioritization

- ALL NOW ELIMINATED

Dismantling the 2015 Open Internet Rules

- *Title II Order* Enforcement
  - *Title II Order* created formal complaint procedures, advisory opinions and position of Ombudsperson
  - ALL NOW ELIMINATED
  - Informal complaint procedure reinstated
    - Handled by Consumer & Governmental Affairs Bureau

"Light Touch" Enforcement

- Transparency
  - Essential for Commission to monitor marketplace
  - Provides valuable information to industry participants
  - Assists consumers / businesses in making informed choices
  - Boosts consumer confidence
  - Reduces likelihood of ISPs will engage in harmful practices

"Light Touch" Enforcement

- New Transparency Rule
  - Applies to ALL BIAS providers (fixed, mobile, small business providers)
  - Publically disclose accurate information regarding:
    - Network Management Practices
      - Including any blocking, throttling or paid prioritization
    - Performance
    - Commercial Terms

"Light Touch" Enforcement

- New Transparency Rule
  - Network Management Practices – must disclose
    - Congestion management practices
    - Application-specific behavior
    - Device attachment rules
    - Security practices
    - Any blocking, throttling, affiliate prioritization or paid prioritization

"Light Touch" Enforcement

- New Transparency Rule
  - Performance Characteristics – must disclose:
    - Accurate service description
    - Impact of specialized services on performance
  - Commercial Terms – must disclose:
    - Commercial terms of service
      - Price, privacy/other policies, redress options

"Light Touch" Enforcement

- New Transparency Rule
  - Means & Format of Disclosure
  - Two Options:
    - Prominently Display on easily assessable, publically available website (that is also assessable to people with disabilities)
      - Hard copy distribution not necessary
      - No need to file with Commission
    - Transmit disclosures to FCC and it will publish on easily assessable, publically available website
  - No particular format required

"Light-Touch" Enforcement

- Reinstates Jurisdiction of FTC
  - Over BIAS privacy and data security
  - FTC Act prohibits from regulating common carriers
    - *Title II Order* had removed FTC jurisdiction over BIAS by classifying as common carrier
    - Issues pending before 9th Circuit

"Light-Touch" Enforcement

- Privacy
  - Previous attempt at privacy rules by FCC struck down by Congressional Review Act
  - FCC prohibited from implementing substantially similar rules
  - Return to statutory CPNI restrictions under 47 U.S.C. § 222

Effects on Other FCC Policies

- Effects of the *Dismantling Order* on Other FCC Policies
  - Wireline Infrastructure
    - Any effects of reclassification of BIAS as information service will be addressed in separate proceedings (*i.e.* Pole Attachment Proceeding)
  - Wireless Infrastructure
    - When originally classified as information service, FCC determined wireless BIAS covered by some of the same statutory provisions as a "covered service" as they use the same infrastructure
      - Section 224 (pole attachments)
      - Section 332(c)(7) (local authority over zoning)
      - Reaffirmed in *Dismantling Order*

Effect on Other FCC Regulations

- Effects on Other Regulations
  - Internet Traffic Exchange
    - Traffic exchange between ISPs and Edge Providers no longer subject to Title II
  - Forbearance
    - Forbearance granted under *Title II Order* moot
  - Disability Rules
    - No changes – all services must be accessible to persons with disabilities

Effects on Other FCC Policies

- Universal Service
  - Reclassification does not affect/alter existing programs (*i.e.* Connect America Fund)
  - Provider eligibility to receive funding does not change

- Preemption of State/Local Laws
  - FCC finds that regulation of BIAS should be governed by universal set of federal laws
  - Precludes state/local governments from implementing inconsistent rules

Conclusion (for now)

- *Dismantling Order* approved by 3-2 vote
  - Vehemently Opposed by Democratic Minority
- Some edge providers encourage popular opposition ("crowd regulation")
- Others may migrate to net neutrality friendly EU
- If Democrats win mid-term elections, Congress will likely seek to reverse the *Dismantling Order*
- Further judicial appeals all but certain

Conclusion (For Now)

- So Net Neutrality's tortured history will likely continue
  - But for now:
    - Sound and fury on the Left
    - *Schadenfreude* on the Right
    - Wall Street reaction ???
    - What will High Tech community do ?
  - And for our "Short History of Net Neutrality"
    - (Updated 2017 edition to include the *Dismantling Order*)
    - Call or visit us at info@wstelecomlaw.com

Final Thoughts

All of this is very complicated …

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11. Overview of the Restoring Internet Freedom Order (2018)

Overview of the Restoring Internet Freedom Order

CONTINUING LEGAL EDUCATION
THOMSON REUTERS

February 5, 2018

Moderated by
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THE DEATH OF NET NEUTRALITY (MAYBE?)

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THE DEATH OF NET NEUTRALITY (MAYBE?)

1. The FCC's Order
2. Ending "Title II" Regulation of the Internet
3. Returning to a "Light Touch" Regulatory Framework
4. Dismantling the 2015 Open Internet Rules
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- Order undoes most of former FCC Chairman Wheeler's Open Internet policy
  - Reverses Title II utility-style regulation of broadband Internet access service ("BIAS")
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- FCC Arguments for Dismantling *Title II Order*
  - Statutory Interpretation
  - Prior FCC Decision Precedent
  - Public Policy
  - Economics / Investor Incentive

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  - Internet developed & flourished for two decades under light-touch
  - Internet will be kept open through:
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    - New Transparency Rule

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EFFECTS ON OTHER FCC POLICIES

- Effects of the Order on Other FCC Policies
  - Wireline Infrastructure
    - Effects of reclassification of BIAS as information service will be addressed in separate proceedings
      - (*e.g.,* Pole Attachment Proceeding)
  - Wireless Infrastructure
    - Covered by some of the same statutory provisions as wireline as they use the same infrastructure
      - Section 224 (pole attachments)
      - Section 332(c)(7) (local authority over zoning)
      - Reaffirmed in *Dismantling Order*

EFFECT ON OTHER FCC POLICIES

- Effects on Other Regulations
  - Internet Traffic Exchange
    - Traffic exchange between ISPs and Edge Providers no longer subject to Title II
  - Forbearance
    - Forbearance granted under *Title II Order* moot
  - Disability Rules
    - No changes – all services must be accessible to persons with disabilities

EFFECTS ON OTHER FCC POLICIES

- Universal Service
  - Reclassification does not affect/alter existing programs (*i.e.* Connect America Fund)
  - Provider eligibility to receive funding does not change
- Preemption of State/Local Laws
  - FCC finds that regulation of BIAS should be governed by universal set of federal laws
  - Precludes state/local governments from implementing inconsistent rules

The FCC's Net Neutrality Repeal: Problems with the Order, and Congressional and State action

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Overview

- Issues in the Commission's 2017 Order to repeal Net Neutrality
- Congressional Action
- State Action

Broadband Internet Access Service is Not a Title I Information Service

- The Commission provided an untenable interpretation of "Information Service"
- The Commission misinterprets Sections 230 and 231
- Add-on Applications bundled with broadband service do not transform it into an information service
- Other incidental provider activities fall within the telecommunications management exception and do not transform it into an information service

The Commission Distorts and Misinterprets its Past Precedent on Protecting an Open Internet

- The Commission abandoned its longstanding commitment to protecting internet openness
- The Commission abandoned its fundamental consumer protection and other policy goals for broadband networks
- The Commission misrepresented the regulatory history of internet access service

The Commission Did Not Consider the Consequences of Title I Classification to Consumer Protection, Universal Service, and Competition

- The Commission did not adequately address how consumer privacy on broadband networks will be protected
- The Commission did not address how broadband-only providers can receive universal service lifeline support without Title II
- The Commission did not consider the effect of competition in the broadband market place without Title II

Congressional Review Act (CRA) Repeal of Net Neutrality Order

- Congressional Review Act empowers Congress to overturn a federal regulation, prohibiting the agency from enacting a substantially similar rule in the future
- Congress has 60 legislative days to pass a joint resolution to overturn the FCC's net neutrality Order
- The 60-day clock begins to run once the Order is published in the federal register and the FCC submits its report to Congress

CRA Process in the Senate

- Member of Senate drafts a joint resolution
- Resolution gets assigned to a committee of jurisdiction
- Senate Committee has 20 calendar days to report on the jurisdiction
- After 20 days and with support from 30 senators, the Resolution can be fast-tracked to the Senate floor for a vote
- Requires simple majority vote to pass in the Senate

CRA Process in the House

- Just like in the Senate, a joint resolution is assigned to the committee of jurisdiction
- However, the House Committee must report the resolution, there is no fast-track option to put the resolution on the House floor
- Requires a simple majority vote to pass in the House

Recent CRA Action on Net Neutrality

- Senator Ed Markey announced his plans to introduce a CRA to repeal the FCC's Order. 49 senators have come out in support of his plan including Senate Minority Leader Chuck Schumer
- In the House, Congressman Mike Doyle announced plans to introduce a CRA. So far, 80 Representatives have come out in support
- Both chambers must wait for the Order to get published in the federal register and the FCC to submit its

Recent State Action on Net Neutrality

- Eight states have introduced net neutrality legislation so far (California, Montana, Nebraska, New York, Rhode Island, Washington)
- Montana Executive Order No. 3-2018: prohibits internet service providers from receiving state contracts if they won't agree to net neutrality rules
- Attorneys general for 21 states have filed a legal challenge to block the FCC's order

The FCC's *Preserving Internet Freedom Order*: Preemption of State Laws and Regulations

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Overview

- FCC's preemption power
- FCC preemption of state network neutrality laws and regulations
- Legal assessment
- State responses

FCC's Preemption Power

- The Communications Act of 1934 created a "dual regulatory system"
  - -- The FCC has exclusive jurisdiction to regulate inter-state and international communications
  - -- Regulation of intra-state communications is reserved to the states (Communication Act § 2(b), 47 U.S.C. § 152(b))
- The Supreme Court has recognized an exception to Section 2(b); the FCC may preempt state regulation of intrastate communications where:
  - -- it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation"; and
  - -- application of "inconsistent state regulation . . . would negate" a federal requirement. *Louisiana PSC v. FCC,* 476 U.S. 355, 375 n.4 (1986).

FCC's Preemption Power

- While this is sometimes referred to as the "Impossibility Exception," the FCC may preempt inconsistent state regulation where, "*due to practical and economic considerations,*" simultaneous compliance with both federal and state requirements is "*highly unlikely*." *People of the State of California v. FCC,* 39 F.3d 919, 933 (9th Cir. 1994) ("*California III*") (emphasis added)

- However, "the impossibility exception is narrow . . . [T]he FCC has the burden of showing that the state regulation would negate valid FCC regulatory goals." *California III,* 39 F.3d at 931. Indeed, the FCC's exercise of its preemption authority must be "narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id*. (emphasis added)

- Consistent with these standards, federal courts have repeatedly upheld the FCC's preemption of state information services regulation that would "negate" federal deregulatory policies. *See, e.g., CCIA v. FCC,* 693 F. 2d 198 (D.C. Cir. 1982)

FCC Preemption of State Network Neutrality Laws and Regulations

- As discussed, the FCC's *Restoring Internet Freedom Order* eliminated all federal network neutrality rules (other than the transparency requirement)
- The *Order* seeks to broadly preempt states and localities from adopting their own network neutrality legislation. Specifically, the FCC preempted measures that would:
  - -- "effectively impose rules or requirements that we have repealed or decided to refrain from imposing"; or
  - -- "impose more stringent requirements for any aspect of broadband service" *Order* ¶ 195

FCC Preemption of State Network Neutrality Laws and Regulations

- The FCC highlighted two types of state laws that it intended to preempt:

  -- "'[E]conomic' or 'public utility-type' regulations, including common-carriage requirements akin to those found in Title II of the [Communications] Act or as well as other rules or requirements that we refrain from imposing" *Order* ¶ 195

  -- "[L]aws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the [new] transparency rule" *Id.* ¶ 195 n.729

FCC Preemption of State Network Neutrality Laws and Regulations

- At the same time, the FCC clarified that it did not intend to "disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings" – at least "so long as the administration of such general state laws does not interfere with federal regulatory objectives." *Order* ¶ 196. In particular, states may continue to:

  -- perform "any functions expressly reserved to them under the [Communications] Act," including "exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters." *Id.*

  -- encourage the deployment of broadband capability by "promoting access to rights-of-way under state law, encouraging broadband investment . . . through state tax policy, and administering other generally applicable state laws. *Id.* ¶ 195 n.731

FCC Preemption of State Network Neutrality Laws and Regulations

- The FCC stated that its preemption order met the "Impossibility Exception"
  - -- *Inseverability*: "Because both interstate and intrastate communications can travel over the same Internet connection. . . in response to a single query . . . it is impossible or impracticable for ISPs to . . . Comply with state or local rules for intrastate communications without applying the same rules to interstate communications." *Order* ¶ 200
  - -- *Negation*: "[S]tate and local regulation of the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today." *Id.* ¶ 201

Legal Assessment

- Twenty-two States already have filed petitions seeking judicial review of the FCC's *Order*

  -- While the states oppose the FCC's decision to eliminate the existing Open Internet rules, they are likely to focus on the FCC's preemption of state laws and regulations that differ from the new federal deregulatory regime

  -- Even if the reviewing court upholds the FCC's decision to eliminate the Open Internet rules, it might not uphold the FCC's decision to preempt all state measures that "interfere" with the FCC's new deregulatory policy

Legal Assessment

- As noted above, in order to preempt state law, the FCC must show that it is not possible to apply divergent federal and state law ("inseverability") and that it has limited its preemption to preclude only those state measures that would "negate" federal policy

  -- The FCC has made a convincing case for inseverability

    + During a single on-line session, a user may interact with data stored on computer servers located in the same state, a different state, or outside the country

    + The user and the ISP typically neither know nor care where the data is stored

    + Therefore, as a practical matter, it would not be possible to apply state network neutrality rules only to *intra*-state Internet serves while applying different federal rules to *inter*-state Internet services

Legal Assessment

-- However, the FCC has not limited its preemption to state laws or regulations that would "negate" the FCC's policy

+ The FCC did not show that it has "narrowly tailored" the preemption to preclude only those state measures that would "negate" the FCC's policies
+ Indeed, the FCC's *Order* never uses the term "negate"
+ Rather, the FCC purposed to preempt *all* State measures that "interfere" with the agency's new deregulatory policy

- A reviewing court could:

-- remand the Order and direct the FCC to justify or limit the extent to which it has sought to preclude State network neutrality measures

-- narrowly construe the scope of the preemption

State Responses

- States are considering a variety of ways to preserve an open Internet, including:

  -- adopting state network neutrality statutes;
  -- constructing or promoting publicly owned broadband networks;
  -- conducting monitoring or certification;
  -- leveraging state government's role as a major buyer of ISP services; and
  -- conditioning state benefits on network neutrality compliance

- If the reviewing court upholds the FCC's Order (including the preemption portion) some of these actions clearly would be impermissible, while others could be allowed

State Responses

- State network neutrality statutes
  - -- Some states are considering adopting laws that impose substantive network neutrality requirements
  - -- For example, in Washington State, House Bill 2282, would require ISPs providing service in the state to comply with the transparency, general conduct and the "bright line" rules contained in the FCC's 2015 *Open Internet Order*
  - -- Other states are considering classifying practices like paid prioritization as unlawful "unfair trade practices" under state law
  - -- Such laws are clearly subject to preemption because they "negate" federal policy by directly forbidding ISPs from taking actions that the FCC has expressly decided to allow

State Responses

- Publicly owned broadband networks
  - -- Thirty states allow municipalities to construct or operate municipal broadband networks
  - -- Some states, such as Hawaii, are considering adopting laws that require municipal networks to adhere to network neutrality principles
  - -- Congress did not give the FCC authority to preempt state laws governing the terms and conditions under which their own political sub-divisions participate in the Internet service market *Tennessee v. FCC, 15-3291* (6th Cir. 2016)
  - -- Therefore, the FCC could not preempt state laws requiring that municipal networks adhere to network neutrality principles

State Responses

- Leveraging state government's role as a major buyer of ISP services
  - -- States purchase large quantities of communications services from entities that provide Internet access services
  - -- Some states are considering using their buying power to "encourage" ISPs to comply with network neutrality principles
  - -- The lawfulness of such efforts must be assessed based on the specific facts
    - + State purchasing measures that consider network neutrality compliance as one of many factors are likely permissible
    - + However, measures that effectively require an ISP to comply with network neutrality or loose a significant amount of state business are likely preempted because they would "negate" FCC policy by forcing the ISP to comply

State Responses

- Monitoring or certification

  -- Some states are considering monitoring ISP operations to see whether a service provider is "throttling" traffic to particular users; other states are considering issuing certifications to ISPs that voluntarily comply with network neutrality provisions

  -- Such measures appear to be permissible
     + ISPs would remain free to decide whether to exercise their new federal rights
     + Indeed, such measures can be justified as "policing fraud," a state power the FCC expressly intended to preserve

  -- Because the FCC has preempted additional state transparency requirements, states would need to rely on information disclosed by ISP pursuant to the FCC rules or gathered by third parties

State Responses

- Conditioning state benefits on network neutrality compliance
  - -- Some states are considering preventing ISPs that do not comply with network neutrality principles from receiving state benefits, such as cable franchises or access to rights-of-way or pole attachments
  - -- The FCC stated that it did not intend to interfere with the States' exercise of these powers
  - -- However, such measures are likely preempted because they effectively require an ISP to comply with network neutrality principles in order to do business, thereby "negating" the FCC's deregulatory policy

Conclusion (For Now)

- The Net Neutrality saga continues
  - Judicial review
  - Legislation
  - Congressional Review Act
  - State Action / Federal Preemption

- Predictions?

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