

FCC Adopts Net Neutrality Rules, Establishes New Regulatory Framework for Broadband Services

A Connected Nation Policy Brief

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On February 26, 2015, in a 3-2 vote along party lines, the Federal Communications Commission (FCC) adopted a set of strong network neutrality rules and regulatory framework that will govern the manner in which broadband Internet Service Providers (ISPs) offer service to consumers and businesses. As expected, a key component of the FCC's action was to classify broadband Internet access services as "common carrier" services, which opens the door to regulate broadband ISPs as public utilities. This framework is likely the most significant regulatory development with regard to the Internet since its inception.

This FCC action is fully consistent with President Obama's public announcement made in November of 2014 calling for implementation of strong Open Internet rules and reform of the regulatory framework to apply to broadband services. Yesterday, the White House released a statement praising the FCC's decisions.

The FCC decision is a key milestone in what to date is a decade-long regulatory debate regarding appropriate rules to govern broadband service and relations between ISPs, content providers, edge providers, and the final consumer. This decision is the second attempt by the FCC to define such rules in a robust manner that will pass judicial review.

However, the FCC action is unlikely to be the last chapter of the Net Neutrality debate. It is expected that the decision will be challenged through courts and could take years of legal and regulatory uncertainty to resolve. In their dissenting statements, Republican Commissioners Ajit Pai and Michael O'Rielly provided a preliminary overview for these legal challenges. Statements from the consenting majority can be found here.

While establishing Net Neutrality rules is the core objective of the FCC's actions this week, perhaps its most meaningful component is the decision to reclassify broadband as a telecommunications service under Title II of the Communications Act of 1934, which will impose on broadband "common carrier" regulations historically applied to voice service. Importantly, the action also extends Net Neutrality regulation to wireless mobile broadband services, which were exempt from key aspects of earlier FCC Net Neutrality decisions.

Prior to this action, broadband was classified under Title I of the Communications Act as an "information service," and the terms and conditions of those offerings were largely deregulated as a result. Reclassifying Internet access as common carrier "telecommunications" does give the FCC the authority to ensure that Internet access offerings to consumers are "just and reasonable," but that classification also carries with it a myriad of legal and regulatory implications for broadband providers. Many of these are addressed below, and still more will be described in more detail when the final text of the FCC's decision is released.

The applicability of these regulations has elicited very strong reactions (both pro and con) from the telecommunications and technology sector as well as members of Congress.

FCC's New Open Internet Rules

The FCC News Release issued yesterday summarizing its decision as well as Commissioners' statements outlines many of the rules adopted. The centerpiece of the FCC's approach is the following three rules:

- **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.

These rules will prevent broadband ISPs from taking certain actions to target or favor certain Internet applications or services over one another. In addition, the ban on “paid prioritization” would prohibit a broadband ISP from charging Internet application or content firms (like Netflix) for superior service in providing content to end user consumers (e.g., “fast lanes” on the Internet). These rules are the core concerns of many consumers and businesses that lobbied for strong Net Neutrality regulation.

In addition, the FCC adopted a general rule under Title II that broadband 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. The FCC refers to this as a general “future conduct” rule that it believes will help “ensure” that the FCC has authority to address “questionable practices on a case-by-case basis” in the future.

The FCC's action yesterday also takes the following steps:

➤ **Rules apply equally to broadband services provided via fixed or mobile wireless platforms**

The FCC's original 2011 Net Neutrality rules did not fully apply to mobile wireless network services, but the rules adopted yesterday will apply equally to all broadband ISPs, regardless of technology used.

➤ **Additional service disclosure requirements**

FCC rules already require ISPs to make publicly available the terms and conditions of their service offerings. Yesterday the FCC adopted additional requirements, including a requirement that broadband ISPs disclose, in a consistent format, promotional rates, fees and surcharges, and data caps. These disclosures must also include packet loss as a measure of network performance and provide notice of network management practices that can affect service.

Smaller broadband ISPs with 100,000 or fewer subscribers will be given a temporary exemption from these new disclosure requirements. The FCC delegated the authority to maintain or revise that exemption to the FCC's Consumer and Governmental Affairs Bureau.

➤ **Allowances for reasonable network management**

Recognizing the need of broadband providers to manage the technical and engineering aspects of their networks, the FCC's new rules will allow ISPs to engage in "reasonable network management" practices. This decision, which is in line with earlier FCC Net Neutrality decisions, adds a level of uncertainty to the regulatory implications of this new ruling. At issue will be what in fact constitutes "reasonable" network management practices and what does not and will therefore be prohibited under the new rules.

Existing FCC statements on this matter shed little light into the principles that will drive such assessment. Further details are expected once the FCC Order is released. The ultimate final implications of this exemption will likely be unknown until a body of regulatory review is established over the coming years to settle the matter. The current regulatory uncertainty of this important rule generates inherent new regulatory risks for broadband providers.

➤ **Interconnection Rules**

The FCC also adopted rules that would govern the relationship between broadband ISPs and Internet backbone and transit providers. These rules were the subject of intense, last-minute negotiation among the FCC offices, and an assessment of the full extent of their reach must await publication of the final FCC Order. However, generally speaking, the FCC rules will allow the FCC to police and resolve disputes involving the exchange of traffic between mass-market broadband providers and other networks and services, such as peering relationships. 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.

Reclassifying Broadband Internet Access under Title II

As noted above, perhaps the most impacting aspect of the FCC's decision is the reclassification of broadband Internet access services as telecommunications service under Title II of the Communications Act of 1934, while forbearing from certain provisions of the Communications Act that are not in the public interest. Full details of this decision will be available once the FCC Order is released. The implications of this reclassification can be substantial and can relate to a host of other state and federal regulatory policies, including state and local taxation of telecommunications services, the authority and ability to regulate rates, and the need for broadband ISPs to comply with telephone consumer privacy and disabled access rules.

Given current available information, it appears the FCC's rules will apply the following provisions of Title II to broadband ISPs:

- Prohibition on "unjust and unreasonable practices" in Sections 201 and 202;
- Investigation of consumer complaints and enforcement;
- Consumer privacy protections in Section 222;
- Access to poles, ducts and conduits in Section 224; and
- Disabled access requirements in Sections 225 and 255.

Based on the FCC News Release, the following provisions of Title II will not apply to broadband ISPs:

- Ex ante review of broadband access rates through tariff filings;
- Requirements to contribute to universal service fund;
- Network cost and accounting filing requirements; and
- Last-mile interconnection or unbundling.

Next Steps in the Net Neutrality Debate

First and foremost, the FCC will release the over 300-page Order that will reveal the details of this decision. This could take days or even weeks to complete. Once the Order is released and published in the Federal Registry, it is widely expected that it will be challenged in the courts by multiple affected broadband stakeholders. Those providers might ask the federal appeals court to issue a stay of the FCC rules.

Ultimately, federal courts will decide whether the FCC's attempt to find sound statutory authority to write Open Internet rules will stick. This process could take years to unfold and regulatory uncertainty will remain throughout the process.

One possible outcome of this process is an acceleration of legislative action to re-write the Telecommunications Act of 1996. Over the past years, increasing voices are recognizing the need for Congress to act and re-established a legal framework for the sector that will be better equipped to address the complexities of the communications industry of the 21st century. Legislative initiatives to this end underway could be revamped over the coming years.

In short, this FCC decision, while important, is unlikely to be the end of the Net Neutrality debate or, more importantly, the debate regarding what legal framework should apply to the broadband industry, and the content and edge providers that rely on broadband networks to reach their customers.

For more information about broadband policy developments please contact Connected Nation at policy@connectednation.org.

Previous Connected Nation Policy Briefs on Net Neutrality:

February 6, 2015: [FCC Chairman Releases Details of Net Neutrality Regulation](#)

January 26, 2015: [Net Neutrality: An Update](#)

November 10, 2014: [President Obama Outlines Net Neutrality Proposal](#)

May 15, 2014: [FCC Proposes New Net Neutrality Rulemaking Process](#)

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