

FCC Adopts New Net Neutrality Rules and Imposes Title II Regulation on Broadband Services

February 26, 2015

Today, the Federal Communications Commission (FCC) voted 3-2 to adopt new net neutrality rules applicable to providers of broadband Internet access service. These rules, which will apply equally to both mobile and fixed broadband providers, will prohibit blocking, throttling, and paid prioritization and will govern future conduct by broadband providers. The rules rely, in part, upon Title II of the Communications Act, and broadband Internet access service will be subject to various Title II requirements once the FCC's order takes effect.

Chairman Wheeler voted for the Order, while Commissioners Clyburn and Rosenworcel concurred. Commissioners Pai and O'Rielly dissented. Although the text of the order has not yet been released, a summary of the order based on currently available information is available below.

Bright Line Net Neutrality Rules. The FCC order will adopt the following net neutrality rules that will apply to providers of fixed and mobile broadband Internet access service:

1. **No Blocking:** broadband providers may not block access to legal content, applications, services, or non-harmful devices.
2. **No Throttling:** broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
3. **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

Authors

Bennett L. Ross
Partner
202.719.7524
bross@wiley.law

Practice Areas

Telecom, Media & Technology

"fast lanes." This rule also bans broadband providers from prioritizing content and services of their affiliates.

Standard for Future Conduct. Broadband providers 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 apparently intends to review usage-based and sponsored data arrangements on a case-by-case basis under this rule.

Greater Transparency. The FCC order will adopt enhanced transparency rules. In particular, the FCC order will require 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. The FCC will adopt a temporary exemption from the transparency enhancements for fixed and mobile providers with 100,000 or fewer subscribers. The Consumer and Governmental Affairs Bureau will determine whether to retain the exception and, if so, at what level. The FCC order also creates for all providers a "safe harbor" process for the format and nature of the required disclosure to consumers, which the FCC 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, a broadband provider may engage in reasonable network management. In assessing reasonable network management, the Commission's standard would take account of the particular engineering attributes of the technology involved-whether fiber, DSL, cable, unlicensed wireless, 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 cannot cite reasonable network management to justify renegeing on its promise to supply a customer with "unlimited" data.

Specialized Services. The FCC's net neutrality rules will not apply to data services that do not go over the public Internet and thus are not broadband Internet access services. However, the FCC order will ensure these services do not undermine the effectiveness of the net neutrality rules and will subject these services to transparency requirements.

Interconnection. The FCC order will give the FCC the authority to hear and resolve complaints on a case-by-case basis regarding disputes that may arise in the exchange of traffic between mass-market broadband providers and edge providers.

Legal Authority. The FCC order relies upon Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996. The mobile broadband rules also rest on Title III of the Communications Act.

Reclassifying Broadband Internet Access under Title II. The FCC will reclassify "broadband Internet access service" as a telecommunications service under Title II. The FCC order will find 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. The FCC order will conclude that a

broadband provider's "offer" of Internet access service includes the capability for an end user to reach all lawful content on the Internet. According to the FCC, this offering also encompasses the duty to make traffic arrangements and allow consumers to use the Internet as they wish. This rationale applies equally to fixed and mobile broadband (which the FCC will find is a commercial mobile radio service subject to Title II).

Forbearance. The FCC order will purport to forbear from 27 provisions of Title II and over 700 FCC regulations adopted pursuant to Title II.

Major provisions of Title II that will apply to broadband Internet access services:

- Sections 201 and 202, which prohibit "unjust or unreasonable" charges, practices, and classifications, and which prohibit "unjust or unreasonable discrimination."
- Section 208 and related enforcement provisions, specifically sections 206, 207, 209, 216 and 217.
- Section 222, which protects the privacy of customer information.
- Section 224, which ensures fair access to poles and conduits and regulates pole attachment rates.
- Sections 225 and 255, which protect people with disabilities.
- Section 254, which provides universal service.

Major provisions of Title II that will be subject to forbearance:

- The FCC order will forbear from the tariffing requirements of section 203, the authority to prescribe just and reasonable rates under section 205, and unbundling requirements under section 251.
- The FCC order will not require broadband providers to contribute to the Universal Service Fund based on their broadband revenues, although it reserves the possibility that such contributions may be required in the future.