

Communications and Information Technology Alert

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FCC Releases Open Internet Order

On March 12, 2015, the Federal Communications Commission (FCC or “Commission”) released the full text of its Open Internet Order (“Order”). The rules adopted in the Order will become effective 60 days after publication in the Federal Register and apply equally to mobile and fixed broadband Internet access services. Click [here](#) to download the Order.

The Rules

The Order adopts rules that prohibit three specific practices: blocking, throttling and paid prioritization. Specifically, the rules state:

- **No Blocking:** A person engaged in the provision of broadband Internet access service shall not block lawful content, applications or services, or use of a non-harmful device, subject to reasonable network management.
- **No Throttling:** A person engaged in the provision of broadband Internet access service shall not impair or degrade lawful Internet traffic on the basis of Internet content, applications or services, or use of a non-harmful device, subject to reasonable network management.
- **No Paid Prioritization:** A person engaged in the provision of broadband Internet access service shall not engage in paid prioritization.
 - Paid prioritization is defined as the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation or other forms of preferential traffic management, either (i) in exchange for consideration (monetary or otherwise) from a third party or (ii) to benefit an affiliated entity.

In addition, the Commission adopted a revised transparency rule that requires greater disclosure than was previously required.

- **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.

Legal Authority

The Order reclassifies broadband Internet access service as a Title II telecommunications service and holds that the FCC has authority to adopt the open Internet rules under both Title II and section 706 of the Communications Act. Noting “changed factual circumstances” regarding the nature of broadband Internet access service since it last examined the issue in 2010, the Commission, using its discretion to interpret ambiguous provisions of the Communications Act, concluded that reclassification of broadband Internet access service as a Title II telecommunications service is necessary to “permit the implementation of sound policy consistent with our statutory objectives.”

In addition to reclassifying broadband Internet access service as a Title II telecommunications service, the Order also asserts authority to adopt the open Internet rules under section 706 of the Communications Act.

Forbearance

The FCC held that a number of key provisions of Title II should apply to fixed and mobile broadband Internet access services, including those covering service and charges, discrimination and preferences, complaints to the Commission, consumer privacy, pole attachments, universal service and access by persons with disabilities. However, it also granted forbearance of 27 other Title II provisions, including sections related to tariffing and the Commission’s authority to prescribe rates. In addition, the FCC declined to apply the open Internet rules to interconnection but, for the first time, it made clear that the Commission has authority to consider claims regarding interconnection disputes.

Broadband Internet Access Service Defined

As the Order makes clear, the rules apply only to certain forms of broadband Internet access service, which the Commission defines as 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.” The definition also includes any service the Commission deems a “functional equivalent” of broadband Internet access service.

Mass-market broadband is defined as a retail service offered on standardized terms to residential and small business consumers and is distinct from enterprise services offered to larger organizations on customized terms. It also is distinct from services that “do not provide the capability to receive data from all or substantially all Internet endpoints,” virtual private networks and content delivery networks. Additionally, the definition does not cover personal Wi-Fi hotspots or broadband access services offered by premises operators, such as coffee shops, airlines and others who typically are end users of broadband Internet access service entitled to protection for the service they obtain, but offer service to their patrons as an “ancillary benefit.”

Interconnection and Peering Arrangements

In addition to the above exclusions, the FCC declined to subject Internet traffic exchange to the rules. Instead, the FCC will intervene where disputes between last-mile broadband Internet access providers and connecting network providers arise and will resolve such matters on a case-by-case basis under its Title II and section 706 authority. The FCC explained that the offering of broadband Internet access service “includes the promise to make the interconnection arrangements necessary to allow access” to all or substantially all Internet endpoints. The Commission further argued that as a telecommunications service, the provision of broadband Internet access “implicitly includes” the representation that the broadband provider will make “just and reasonable efforts to transmit and deliver its customers traffic to and from ‘all or substantially all of the Internet endpoints’” under certain provisions of Title II.

Non-Broadband Internet Access Data Services (Specialized Services)

The FCC chose not to subject non-broadband Internet access data services to the new rules because such services do not reach large parts of the Internet, are specific “application level” services, and use some form of network management to isolate the capacity used by such services from that used by broadband Internet access services. Excluded services include, but are not limited to, facilities-based Voice over Internet Protocol (VoIP), Internet Protocol video offerings and services bundled with telematics, heart monitors and e-readers. While the FCC concluded that such services were not subject to its rules, it made clear that it has authority under Title II to revisit that decision if it determines that a particular service is providing a functional equivalent of broadband Internet access service or is being used to evade the protections set forth in its rules. The Commission noted that it is particularly concerned “that over-the-top services offered over the Internet are not impeded in their ability to compete with other data services.”

Reasonable Network Management

The Commission retained an exception to its rules for “reasonable network management.” The exception is defined as “a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for, and tailored to, achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.” Importantly, the Commission reaffirmed that it will take into consideration the type of network (cable, DSL, fiber or mobile) in evaluating whether and how a practice should be reviewed under this exception.

Enforcement

In addition to certain enhancements to its informal and formal complaint process, the FCC determined that advisory opinions could be a useful tool that would enable companies to seek prospective guidance on the propriety of certain Internet access practices, and they would allow the Commission to explain how it would evaluate certain types of behavior and the factors it will consider in determining whether a violation has occurred.

In addition to advisory opinions, the FCC reaffirmed that it will continue to issue enforcement advisories as another tool to promote understanding of what is required under the rules and what the consequences are for failing to comply.

Conclusion

The Commission's decision to reclassify broadband Internet access service as a telecommunications service and to use its Title II authority to adopt conduct-based rules will certainly be challenged in the courts. It may be years before there is certainty with respect to the regulatory classification of, and rules governing, broadband Internet access service. In addition, the Republican leadership in both the House and Senate have expressed interest in pursuing legislation that would codify certain conduct-based rules but that also would limit the FCC's role in deciding the scope and interpretation of such rules. In the coming weeks, FCC Chairman Wheeler will testify in a series of hearings concerning the Order. Additionally, we expect that ongoing clarifications related to the Order will be needed from the FCC, which has indicated that issues like privacy will require its further consideration.

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