



Morgan Lewis

UNDERSTANDING THE FCC'S
SEMINAL NETWORK NEUTRALITY
DECISION:
PRACTICAL LESSONS FOR
TELECOM AND TECH COMPANIES

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Overview

- History of Network Neutrality
- Competition in the Broadband ISP Market
- FCC's 2015 Open Internet Order

History of the Network Neutrality Debate

- Roots of Net Neutrality Can be Traced Back to Basic Principles of FCC Common Carrier Regulation:
 - Section 201 - requires carriers to provide service upon reasonable request on rates, terms and conditions that are just and reasonable.
 - Section 202 - prohibits unreasonable discrimination -
 - Definition of common carrier – “one who holds its service out indifferently to all customers or classes of customers.”

Use of the Carrier's Network

- FCC Carterfone decision –principle that users can attach any device that doesn't harm network

History of the Network Neutrality Debate (cont'd)

FCC Computer Inquiry Proceedings

- FCC recognized growing interdependence between telephone and computer networks;
- In order to protect emerging computing market, FCC did not impose common carrier regulation on computer services but required Bell System to provide computer services through separate affiliate
- **Computer II** – established dichotomy between basic and enhanced services
 - Basic Services -- common carrier offering of transparent transmission capacity for the movement of information. Subject to common carrier regulation
 - Enhanced Services are offered over common carrier transmission facilities and use computer processing to act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide additional, different or restructured information; or involve subscriber interaction with stored information.

History of the Network Neutrality Debate (cont'd)

Telecommunications Act of 1996

- Adopted Basic/Enhanced framework
 - Telecommunications Service = Basic Service
 - Information service = Enhanced Service
 - FCC classifies “Internet access” as information service in 1998 Report to Congress, with a telecommunications transmission component
 - Explains that information services and telecommunications services are mutually exclusive
 - FCC Advanced Services Order classified RBOC broadband DSL services as a “telecommunications service (e.g. the xDSL-enabled transmission path) together with an information service... the...Internet access.”
- Section 706 – speed deployment of “advanced telecommunications” (i.e. broadband)
- Section 10 Forbearance
- Allows FCC to forbear from applying any provision of Act where it finds lack of regulation will not harm consumers and deprive them of access to services on just and reasonable rates terms and conditions.

History of the Network Neutrality Debate (cont'd)

- **Open Access Movement**
 - Large dial up ISPs sought access to cable broadband service under *Computer II*.
 - Portland Case – 9th Circuit found that cable broadband was two services
 - an information service comprising the Internet access, content, email, etc.
 - integrated with a stand alone offer of telecommunications service
 - Court observed that because cable broadband service offered users the ability to access the entire internet that this was pure transmission consistent with the Act's telecommunications service definition.
- **FCC 2002 Cable Modem Order** -- FCC, classifies cable modem Internet access as a single information service

History of the Network Neutrality Debate (cont'd)

Brand X

- Supreme Court upholds FCC Cable Modem Order
- “conclu[ded] that the term “telecommunications service” is ambiguous.”
- deferred to FCC
- Breyer concurrence suggested that FCC classification of Internet access without a separate telecommunications service was “barely” within FCC’s discretion.
- Scalia dissent (Ginsburg joined as well)

History of the Network Neutrality Debate (cont'd)

- **Chairman Powell's Four Freedoms (Feb 2004)**
 - Access the lawful Internet content of their choice
 - Run applications and use services of their choice, subject to the needs of law enforcement
 - Connect their choice of legal devices that do not harm the network
 - Competition among network providers, application and service providers, and content providers.
- **Madison River (March 2005)**
- **FCC Adopted Cable Modem Classification for other broadband – including wireline and wireless**
- **Network Neutrality "Policy Statement"**

History of the Network Neutrality Debate (cont'd)

- Comcast/Bit Torrent
 - FCC Sanctions Comcast for interfering with subscribers use of bit torrent app (Aug. 2008)
- Comcast v. FCC – Court finds FCC did not justify its attempt to regulate cable broadband ISPs
- Net Neutrality NPRM
 - Six proposed principles:
 - Access to Content
 - Access to Applications/Services
 - Connect Devices to the Network
 - Access to Competition
 - Nondiscrimination
 - Transparency
 - Subject to “Reasonable Network Management”

History of the Network Neutrality Debate (cont'd)

2010 Open Internet Order (Dec. 2010)

- Despite *Comcast* decision, FCC elected not to reclassify, relying on section 706 to take steps to promote deployment of broadband
- Requires wireline broadband service providers to:
 - Forego blocking of lawful content and applications
 - Treat lawful content in a “nondiscriminatory” manner (in effect banning paid prioritization)
 - Disclose network management, performance characteristics, and commercial terms of their offerings
- Rules subject to “reasonable network management,”
- Wireless broadband services subject to more limited obligations
- Specialized/managed services exempt.

History of the Network Neutrality Debate (cont'd)

*Verizon v. FCC*¹

- Court struck down 2010 Open Internet anti-blocking and anti-discrimination rules.
- Held that FCC has authority under Section 706 to adopt substantive regulations.
 - Court sustained FCC analysis that broadband ISPs had incentive to interfere with edge providers' delivery of content to ISP's end users and that such interference if allowed would reduce investment in broadband.
 - But the FCC's rules unlawful because the Act prohibits the FCC from treating non-common carriers as common carriers.

FCC Proceedings

2014 NPRM

- Initial proposal suggested some forms of paid prioritization may be allowed.
- Public Debate
 - FCC pilloried for its NPRM which public perceived as allowing fast lanes; FCC received millions of comments shutting down the FCC's electronic filing system
- President Obama's Public Statement
 - November 2014 - President publicly declared favoring strong as possible rules to protect Open Internet – calling for rules that banned blocking, throttling and paid prioritization as well as calling for FCC to use Title II authority

Competition in the Broadband ISP Market

- FCC 2015 Broadband Progress Report – released February 4, 2015
 - changed definition of broadband from 4/1 Mbps to 25/3 Mbps
 - Chairman Wheeler suggested 25 Mbps as “sweet spot” for online video
 - FCC data: 12% of households have 3 or more options at 25 Mbps/3; 27% have 2 options; 45 % have only one and 16% have zero

FCC Open Internet Order on Remand

- Order adopted on 3-2 vote along party lines on Feb, 26, 2015, released March 12, published in Federal Register on April 13.
- FCC rules scheduled to go into effect on June 12.
- Key Aspects of Order
 - re-adopts FCC's 2010 Open Internet rules with some modifications
 - bars paid prioritization of Internet traffic
 - re-classifies broadband as telecommunications service subject to Title II; with broad forbearance of traditional telephone company requirements
 - re-classifies mobile broadband as commercial mobile service subject to common carrier regulation
 - applies same rules to fixed and mobile broadband
 - asserts jurisdiction over interconnection disputes but does not adopt bright line rule

Scope of the Order

- **Broadband Internet Access Service Definition**

- “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.”
- applies whether Internet service provider (ISP) leases or owns facilities (i.e., resellers are subject to the open Internet rules).
- Mass market includes services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.
- Excludes virtual private networks, content delivery networks, hosting or data storage, or Internet backbone services and premises operators (e.g., coffee shops, bookstores, airlines, private end-user networks).

Scope (cont'd)

- **Interconnection/Internet Traffic Exchange**

- Broadband definition includes exchange of Internet traffic by an edge provider or intermediary with the broadband provider's network.
- Provision of a broadband service implicitly includes a representation that the provider will make reasonable efforts to transmit and deliver its customers' traffic to and from "all or substantially all Internet endpoints" under sections 201 and 202 of the Communications Act of 1934, as amended.
- FCC found that broadband providers have the ability to use terms of interconnection to disadvantage edge providers and that consumers' ability to respond to unjust and unreasonable broadband provider practices are limited by switching costs.
- FCC will hear disputes regarding exchange of traffic raised under section 201 and 202 on a case-by-case basis. But the FCC excludes interconnection with a broadband Internet access service provider's network (including interconnection with CDNs) from application of the open Internet rules (blocking, throttling, paid priority, etc).

Non-Broadband Internet Access Services

- **Referred to as “specialized services” in FCC’s 2010 Open Internet Order**
- **2015 Open Internet Order Definition:**
 - services offered by broadband providers that share capacity with broadband Internet access service over providers’ last-mile facilities but do not provide access to all Internet endpoints; for example, facilities-based VoIP and IP-video offerings, connectivity bundled with e-readers, heart monitors, or energy consumption sensors, and automobile telematics.
- **Characteristics of Non-Broadband Internet Access Services**
 - not used to reach all parts of the Internet;
 - specific “application level” service
 - use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services
- FCC will monitor to make sure that such services are not undermining investment, innovation, competition, and end-user benefits or being used to evade open Internet rules.
- FCC especially 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

- As with 2010 rules, 2015 Open Internet rules are subject to reasonable network management
 - Case-by-case review of practices that (1) ensure network security and integrity, (2) address unwanted traffic, and (3) alleviate congestion.
- recognition that mobile broadband may apply network management differently than wired networks.
- Applies to:
 - no-blocking rule,
 - the no-throttling rule
 - the no-unreasonable interference/disadvantage standard
- Does Not Apply to Paid Prioritization

No Blocking/No Throttling

- Adopts same no blocking rule from 2010 Order
 - Broadband providers “shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”
 - bars broadband ISPs from charging a fee to edge providers in order to avoid having edge providers’ content, service or application blocked.
- No Throttling
 - Broadband providers “shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”
 - bars broadband ISPs from charging a fee to edge providers in order to avoid having edge providers content, service or application degraded/throttled.
 - Throttling ban does not include slowing down end user broadband connection based on a choice made by the user, such as purchasing a service plan with tiers of data thresholds and after crossing the threshold the user is dropped to a lower tier of service

No Paid Prioritization

- Defined as “management of a broadband providers’ network to directly or indirectly favor some traffic over other traffic... either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliate[]
 - FCC found that allowing priority arrangements could lead to degraded performance for services/applications/devices that did not have priority
 - Prioritization of traffic not in exchange for consideration (and not benefiting an affiliate) may be allowed as part of reasonable network management
- Waiver Process: FCC allows providers to seek waivers to engage in paid prioritization under extremely limited circumstances
 - 1) public interest benefit such as enhancing competition, innovation, consumer demand or investment and
 - 2) must not harm the open Internet (does not degrade Internet access, hinder consumer choice; impair competition, innovation, or investment; or free expression).

No Unreasonable Interference or Disadvantage Standard of Conduct

- Rather than re-adopt the 2010 “no discrimination” rule that was vacated by the DC Circuit, the FCC adopted a general standard by which it would evaluate broadband ISP behavior that cause similar harms but do not fall neatly within the bright line 2015 Open Internet rules.
- Such conduct will be evaluated on a case-by-case basis under the following standard:
 - Providers may not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.
 - Subject to reasonable network management

No Unreasonable Interference or Disadvantage Standard of Conduct (cont'd)

- Factors FCC will consider:
 - Does the practice allow end user control?
 - Does practice have anti-competitive effects?
 - Consumer protection (deceptive/unfair practices)
 - Effect on innovation
 - Effect on free speech
 - Is the practice “application agnostic” (does not interfere with consumer choices about which content, applications, services or devices to use)?
 - Is the practice consistent with industry best practices and technical standards?

Sponsored Data/Usage Caps

- FCC discussed and established no bright line rule
- Not expressly prohibited
- Will evaluate complaints (if any) on case by case basis

Enhanced Transparency Rule

- DC Circuit decision did not disturb FCC's 2010 transparency rule.
 - required broadband ISPs (both fixed and mobile) to “publicly disclose accurate information regarding the network management practices, performance and commercial terms” of service.
 - FCC issued advisories in 2011 and 2014 regarding transparency requirements
- FCC adopted enhanced transparency requirement in 2015 decision
 - specificity regarding pricing terms including the full monthly charge; all additional one time and/or recurring fees; data caps or allowances including cost of exceeding caps
 - detailed performance info: packet loss (speed/latency already covered); geographically specific/distinguish between peak/off-peak; mobile – distinguish 3G/4G performance
 - include details of practices unique to particular classes of users (service tiers; data usage/location)
 - Form of Disclosure - direct notice required if user behavior will trigger network practice (e.g. reduced speeds after cross usage threshold)

Enhanced Transparency Exemption

- Small providers are temporarily exempt from the new requirements (small provider defined as having less than 100,000 broadband lines on last form 477); FCC Consumer & Gov't Affairs Bureau will assess whether a permanent exemption is warranted, and if so the appropriate thresholds
- Small providers remain subject to the basic transparency rule adopted in 2010

Enforcement

- **Case-by-Case Enforcement Process.**
- **Complaints.** Parties may file informal and formal complaints against violations of the open Internet rules under the same procedures adopted in the 2010 Open Internet Order
- **Advisory opinions.** The FCC will use advisory opinions issued by the Enforcement Bureau; similar to those issued by the Department of Justice Antitrust Division to help provide legal certainty. May be of limited value given conditional nature of opinion.
- **Enforcement advisories.** Consistent with the FCC's practice in other contexts, it will issue periodic enforcement advisories regarding the open Internet rules.
- **Dispute resolution.**
 - Ombudsperson/Voluntary Alternative Dispute Resolution/multi-stakeholder processes and technical advisory groups.

Reclassification of Broadband Under Title II

- Order relies upon multiple complimentary sources of authority:
 - Section 706 - designed to protect virtuous cycle of innovation and investment; clear legal authority from 2014 DC Circuit opinion.
 - Title II - reclassification of broadband provides authority and allows FCC to clear the hurdle the DC Circuit erected when struck down blocking and discrimination rules as *per se* common carriage
 - Section 201(b) allows FCC to prohibit practices that are unjust and unreasonable; ban on paid prioritization flows from 201(b), not discrimination prohibition under 202(a)
 - General conduct standard does not require anyone to offer broadband nor does it preclude individualized negotiations provided such negotiations do not unreasonably interfere with ability of users and edge providers to reach each other over the Internet using broadband service.
 - Title III (mobile) – FCC revises definition of Public Switched Network to include networks using IP addresses and finds mobile broadband the functional equivalent of CMRS

Justifying Reclassification Under Title II

- FCC determined key terms in Communications Act are ambiguous; FCC receives substantial deference when interpreting ambiguous terms of Act
- FCC 2002 Cable Modem Order and Supreme Court in Brand X both recognized that the statute was ambiguous on classification of broadband
- FCC found core use of broadband is transmission
 - “merely transferring a packet to its intended recipient does not by itself involve generating, acquiring, transforming, processing, retrieving, utilizing or making available information”
 - DNS and caching are adjunct services that are covered by the telecommunications systems management exception to the statutory definition of Information Service

Changes in Market Since 2002

- **FCC's rationale for reclassification:** The FCC identifies changed factual circumstances since the 2002 Cable Modem order that justify reclassification
 - Consumers rely heavily on 3d party applications rather than those provided by ISP
 - Broadband providers marketing and pricing focus on speed and reliability, not apps like email or chat
 - Technical characteristics of broadband
- **FCC rejects claims that reclassification will harm investment --** citing markets regulated under Title II that attract significant investment, including wireless, enterprise broadband, and wireline broadband of RLECs opting to provide wireline broadband under Title II since 2005

Classification of Mobile Broadband

- Is not a private mobile service but is either a commercial mobile radio service (“CMRS”) or its functional equivalent
- CMRS definition in the Act requires service to use the “Public Switched Network” as defined by the FCC; because the FCC’s rule defining the terms Public Switched Network is limited to the use of telephone numbers, the order amends the definition of public switched network in its rules to include the use of “public IP addresses” as an alternative to use of telephone numbers
- If broadband is not CMRS, the order concludes it is the functional equivalent of CMRS and amends its rules (section 47 C.F.R. 20.3) accordingly

Forbearance Under Title II

- **No Forbearance from Core Customer Safeguards**

- The FCC will not forbear from sections 201 and 202, which 1) prohibit unjust and unreasonable charges, practices, classifications and regulations, and 2) prohibit unjust and unreasonable discrimination with regards to the same.
 - ❖ But FCC forbears from applying 201/202 in a manner that would enable adoption of prescriptive rate regulation of broadband Internet access in the future and from other interconnection requirements in the Act.
- For broadband provider interconnection/traffic exchange practices, the FCC will rely on the “backstop” of sections 201 and 202 for case-by-case review.
- No forbearance from sections 206, 207, 208, and 209 which allow filing of complaints (including for damages) for violations of the Act

Other Provisions the Apply to Broadband

- Section 222 (Protecting Customer Privacy): applies, but Order finds FCC's current rules not needed.
- Section 255 (Disability Access): but Order forbears from imposing Telecommunications Relay Service ("TRS") contribution obligations.
- Section 224 (access to poles, conduits and right-of-way): FCC cautioned pole owners against making claims that Order allows utilities to raise rates on cable broadband providers.
- Section 254 (Universal Service Fund) FCC forbears from applying section 254(d), (g), and (k) but will apply the remainder of section 254, section 214(e) and its implementing rules.
 - Forbearance under subsection (d) is limited to forbearing from any immediate USF contribution obligation with FCC continuing to evaluate comprehensive reform of USF contributions

Broad Forbearance from 27 Remaining Title II Provisions

- **Sections 203-205:** (tariffing and ex ante review of rates).
- **Section 212:** Monitoring of interlocking directorates.
- **Sections 211, 213, 215, and 218-220:** Information and collection and re-reporting provisions consistent with forbearance of tariffing requirements or ex ante rate regulation
- **Section 214:** entry/exit/transfer of control
- **Sections 251/252, and 256:** (Interconnection/Unbundling/market-opening provisions)
- **Section 258:** prohibition on unauthorized carrier changes (“Slamming”).
- **Sections 271-276:** Bell Company unbundling and network access requirements.
- **Section 226:** (Telephone Operator Services); **Section 227(c)(3)** (notification under Telephone Consumer Protection Act); **Section 228** (pay-per-call services); **Section 260** (telemessaging)
- **Truth-in-billing rules**

Appeals

- Initial “protective” Appeals
 - USTA (trade association for large incumbent phone companies) and Alamo Broadband – a wireless ISP, filed the day after FCC released the Order in DC and 5th Circuit respectively, protective measure due to procedural issue; likely to be dismissed
 - Cases consolidated in DC Circuit under rules for appeals of agency orders in multiple courts
- Primary appeals filed after Federal Register Publication on April 13
 - DC Circuit – USTA, AT&T, CenturyLink, CTIA the Wireless Association, National Cable & Telecom Association, American Cable Association, Wireless ISP Association
 - Fifth Circuit – Alamo Broadband
 - Third Circuit – Full Service Network, TruConnect Mobile, Sage Telecommunications, and Telescape

Appeals (cont'd)

- Currently all cases but Third Circuit cases have been consolidated in DC Circuit
- Speculation that second lottery could occur if USTA/Alamo BB March appeals are dismissed
 - Judicial Panel on multidistrict litigation rules do not specify when agency must request lottery
 - lottery would be between DC, 3d, 5th Circuits
 - even after lottery opponents of FCC order could seek transfer to DC Circuit
 - contrarian view that DC Circuit is better for FCC
 - court upheld FCC analysis of need for Open internet rules and findings regarding incentives of network operators to block degrade traffic
- Last day to appeal is July 12 (90 days from April 13 publication date)

Arguments on Appeal

- USTA filed preliminary (and non-binding) Issues List at DC Circuit
 - Order reclassifying broadband service as a telecommunications service violates the Communications Act, and First/Fifth Amendments to Constitution
 - Order classifying and asserting authority over Internet traffic exchange/interconnection violates the Communications Act, and First/Fifth Amendments to constitution
 - FCC's rules adopted exceed the FCC's authority and are arbitrary/capricious
 - Order violates the notice and comment procedures under the Administrative Procedure Act

Petition for Stay

- Voice Communication Exchange Committee (filed on April 27)
- Carriers -- AT&T, CenturyLink, CTIA, USTA (filed May 1, 2015)
- Cable Company Associations American Cable Association and National Cable & Telecom Assoc. (filed May 1, 2015)
- Arguments for staying reclassification
 - reclassification conflicts with text and structure of the Act and Brand X; section 230(b)
 - changes in market perceived by FCC (consumer use of 3d party email, DNS, web hosting etc.) all existed in 2002 when FCC adopted information service classification
 - mobile classification conflicts with Act and precedent
 - FCC's notice was inadequate – particularly on mobile and general conduct standard
- Irreparable harm
 - predictions of flurry of class action lawsuits on internet traffic exchange
 - costs of complying with CPNI statute without any rules from FCC

Legislative Activity

- Two front strategy by Republican-led Congress:
 - Republicans in the House and Senate are holding a series of hearings designed to paint the Obama administration as anxious to control, tax, and regulate the Internet, but also to make a case to Democrats that a law enshrining net neutrality would guarantee the principle far better than a rule, which is already being challenged in court and is subject to potential reversal by a future FCC.
 - ❑ effort to draft legislation that retains core Open Internet protections on blocking/degrading traffic but limits FCC authority under 706/Title II
 - ❑ Senate budget resolution in mid-March called on Congress to “preserve and protect the open Internet in a manner that provides clear and certain rules.” Supported by two Senate Democrats, including the Ranking Member of the Commerce Committee, Senator Bill Nelson (D-FL) and Senator Joe Manchin (D-WV). Seen as small step forward to begin building bipartisan consensus.

Legislative Activity (cont'd)

- Congress continues to voice objections to Order and Chairman Wheeler's tactics
 - Legislation now pending to reform FCC processes, including requiring release of text of proposed orders and requiring immediate publication of orders after approved
 - Republicans also plan to make an issue of the FCC's funding and perhaps to consider a resolution that would overturn the rules. But they'll have trouble getting either past Democrats in the Senate, much less a veto by President Obama.
 - Including use of Congressional Review Authority to override FCC Order. This bill is being led by Rep. Doug Collins (R-GA) in the House and (presidential candidate) Sen. Rand Paul (R-KY) in the Senate.

Questions?

Please submit questions for us using the Q&A tool, or do not hesitate to contact us

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