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FCC Reverses 2015 Open Internet Order

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On December 14, 2017, the FCC adopted a decision reversing nearly all of the significant elements of its 2015 Open Internet Order and the "network neutrality" rules from that order, retaining only the requirement that internet service providers provide information concerning their services. The decision was adopted by a 3-2, party line vote. These are the key elements of the decision:

- It reverses the 2015 determination that broadband internet access is a common carrier service and therefore subject to the Title II regulation that applies to telephone companies. Instead, the FCC decided that broadband internet is an information service, subject to much lighter regulation. This decision reverts jurisdiction to the FTC for most ISP activity.
- The FCC also reversed a 2010 decision that Section 706 of the Telecommunications Act of 1996 gives it authority to take action to promote the development of advanced services, including broadband internet access. It concluded that it must rely on specific provisions of the Communications Act to support any regulation.
- In light of the reclassification of broadband internet access as an information service, the FCC repealed its rules against blocking, throttling, discrimination and paid prioritization, as well as the general conduct rule that prohibited unreasonable actions by broadband ISPs and its requirement that broadband ISPs interconnect with other companies on reasonable terms and conditions.
- The FCC retained the transparency rule, which requires ISPs to disclose information about their services, but in a modified form. ISPs may make disclosures through easily discoverable pages on their websites or by providing the required information to the FCC.
- The new transparency rule requires ISPs to disclose performance data, the terms and conditions of service and network management practices. The network management disclosures must cover (a) congestion management; (b) application-specific behavior; (c) device attachment rules; (d) security practices; (e) blocking of access to content, application and service providers; (f) throttling; (g) prioritization of affiliated content; and (h) paid prioritization. The first four items have been required since the FCC's 2010 decision, while the last four items were added by this decision. The decision also eliminates disclosures relating to the technical performance of ISP networks.
- The decision preempts states from adopting ISP-specific laws or regulations that are more stringent than the rules adopted in the order, but does not preempt states from adopting generally applicable laws that cover ISPs. It is not clear how this preemption would apply to many state laws, and particularly to state privacy and data breach laws, although Commissioner O'Rielly said during the December 14 meeting that state ISP privacy laws would be preempted and that the state role would be "extremely limited."
- The order says that customers, companies that connect to users or customers via ISPs and others will be able to address any unfair or anticompetitive practices through the FTC and antitrust law.

The FCC and FTC have entered into an agreement to share information concerning ISP activity, and the FTC will be responsible for policing the accuracy of disclosures made under the new transparency rule. The FCC, however, will enforce the requirement that ISPs make the disclosures.

The order is expected to be appealed by many parties that supported Title II classification of broadband internet access, as well as by states that oppose the preemption of some of their authority. The order also could be appealed by parties that oppose the transparency rule. The order is subject to review by the federal Office of Management and Budget before it goes into effect, and that review typically takes several months.

The order probably will not have an immediate significant effect on either ISPs or companies that use the internet to provide content, applications or services. Over time, it is likely that ISPs and those companies will enter into agreements to address traffic management issues, as they have in the past. It is unclear what other actions ISPs will take in light of the changes in the rules. Their actions will continue to be subject to the FTC Act, the Sherman Act and the Clayton Act, which are intended to guard against anticompetitive behavior.

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