

February 26, 2015

As expected, today the FCC adopted new network neutrality rules, in a 3-2 party line vote, over bitter dissents from the Republican commissioners. The FCC's press release is available [here](#), Chairman Wheeler's statement is available [here](#), Commissioner Clyburn's statement is available [here](#), Commissioner Rosenworcel's statement is available [here](#), Commissioner Pai's statement is available [here](#), and Commissioner O'Rielly's statement is available [here](#).

In broad terms, the FCC brought back the rules that the U.S. Court of Appeals overturned in early 2014, and justified its legal authority to do so by reclassifying broadband Internet access as a common carrier service subject to the FCC's general authority under Title II of the Communications Act. The FCC also extended the rule that requires broadband providers to disclose information about their services and terms and conditions; specifically banned paid prioritization (or "fast lanes") for particular content; applied some standard common carrier consumer protection rules, including customer privacy requirements, to broadband; and adopted general requirements for connection between broadband providers and content and application providers. The order was not released today, and so many of the details of the decision are not yet available.

Key elements of the decision:

- Broadband Internet access has been reclassified as a common carrier service, subject to regulation under Title II of the federal Communications Act. The FCC also relies on authority under two other provisions of law – Section 706 of the Telecommunications Act of 1996 (which gives it the power to take action to promote advanced services in certain cases) and Title III of the Communications Act, which governs all spectrum-based services, including wireless services. The FCC concludes that mobile broadband is a "commercial mobile service" under Section 332 of the Communications Act.
- Blocking access to legal content, applications, and services, or to devices that do not harm the network, will be prohibited.
- Impairing or degrading lawful Internet traffic (content, applications, and services), which is often referred to as throttling, will be prohibited.
- Paid prioritization or "fast lanes" for content or applications that pay extra for the privilege will be prohibited.
- The existing transparency rule has been modified to require providers to disclose more information to consumers and edge providers. There is a temporary exemption for providers with up to 100,000 subscribers, which may be extended by the FCC's Consumer and Governmental Affairs Bureau. The new disclosure requirements include promotional rates, modem rental fees, early termination fees, surcharges, data caps, and packet loss. There will be a safe harbor format for disclosures that providers can use.
- Broadband providers will be subject to a "general conduct rule." Under that rule, they will not be allowed to "unreasonably interfere with or unreasonably disadvantage" the ability of edge providers and consumers to reach each other. These issues will be addressed on a case-by-case basis, based on effects on competition, innovation and consumer protection, and other factors. During the press conference after the meeting, Chairman Wheeler indicated that the FCC would consider whether an activity harmed consumers or competition in evaluating whether conduct is unreasonable. While Commissioner Pai suggested that usage-based pricing and "zero rating" plans, such as mobile plans that permit unlimited music streaming, would be prohibited by the rules, Chairman Wheeler indicated that no decision has been made on those services.
- Broadband providers are allowed to engage in reasonable network management (other than paid prioritization). Practices can be justified only based on achieving goals related to network management, not goals related to commercial interests. The FCC will consider the technical attributes of the provider's network (*e.g.*, wireless v. wireline) in evaluating what is reasonable.
- As was the case for the original rules, the new rules will not apply to specialized services (such as voice over IP services) offered over broadband facilities, but the FCC will monitor these services to make sure they are not becoming substitutes for broadband access.
- Interconnection with edge providers and other network providers is considered part of the common carrier service offered by broadband providers. The FCC will consider complaints about interconnection between broadband Internet networks and other networks and services. During the meeting, the requirement was described as "the duty to make the necessary traffic arrangements to allow consumers to use the Internet as they wish." The FCC will evaluate complaints on a case-by-case basis, following a general "just and reasonable" standard. During the press conference, Chairman Wheeler stated that the

FCC intentionally chose not to adopt specific standards. Advance approval of interconnection arrangements will not be required.

- Providers will be able to ask the FCC for advisory opinions on whether particular actions are permitted, and the responses generally will be public.
- The following elements of the rules that generally apply to common carriers will be applied to broadband services:
 - Limitations on unjust and unreasonable practices and on discrimination.
 - Provisions allowing the FCC to investigate and act on consumer complaints.
 - Customer privacy requirements under Section 222 of the Communications Act.
 - Access to utility poles and conduits used to deploy broadband networks. During the post-meeting press conference, FCC staff said that the order would not permit utilities to use the order "as an excuse" to raise rates to existing users of utility poles.
 - Protections for people with disabilities (many of which apply already).
 - Access to federal universal service funding, notably for the FCC's Lifeline program that supports service to low-income households.
- The order will forbear from applying 27 requirements applied to common carriers under the Communications Act and more than 700 common carrier regulations. The requirements that will not be applied to broadband providers include the following:
 - Regulation of retail rates.
 - Tariffs.
 - Unbundling.
 - Contributions to the federal universal service fund, including preemption of state universal service fund contribution requirements. The FCC is, however, considering the broader question of whether contributions will be required in a different proceeding.
 - Accounting standards.
 - Entry and exit regulation.
 - Reporting requirements (although it was not clear whether this applies to all or only some reports).
- The FCC order does not propose, support, or authorize imposition of any taxes or fees on broadband services. Commissioner Pai argued that taxes would be applied by states and local authorities, but Chairman Wheeler disagreed.
- Unlike the earlier rules, there will be no distinction between requirements for landline broadband service and wireless broadband service. The FCC did not indicate whether the definition of broadband would be the same for landline and wireless services.
- Like the original rules, the new rules will not apply to broadband service sold to enterprise customers, like large businesses or colleges and universities.

These rules do not go into effect immediately. The FCC must release the order and publish the rules in the *Federal Register*, and it will not be effective until 60 days after publication. In addition, the changes in the transparency rules will be reviewed by the federal Office of Management and Budget before they can go into effect, which will delay the effectiveness of the changes.

It also is almost certain that the decision will be appealed. Appeals cannot be filed until after the order appears in the *Federal Register*, but likely will be filed immediately after that because the parties that file early may have an opportunity to influence which court will hear the appeal. If the court that hears the appeal grants a stay, the rules will not go into effect unless the FCC is successful in defending its order.

The information provided by the FCC today does not answer all of the questions about this order. For instance, the information provided at the meeting and in the materials released by the FCC does not include a list of all of the common carrier requirements that will be applied—or not applied—to broadband. As noted above, the FCC also did not indicate how broadband would be defined for purposes of these rules, although it is likely that the definition will be intended to cover nearly all providers. Many of these questions likely will be answered in the order once it is released, but some will be left to future FCC proceedings and decisions on complaints under the new rules.

Cooley attorneys are actively involved in advising clients on the FCC rules applicable to the broadband, wireless, and wireline industries. Should you have any question on the FCC's new network neutrality rules, please contact one of the attorneys listed here.

This content is provided for general informational purposes only, and your access or use of the content does not

create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

J.G. Harrington Washington, DC	jgharrington@cooley.com +1 202 776 2818
Christy Burrow Washington, DC	cburrow@cooley.com +1 202 776 2687

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.