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FCC Chairman Tom Wheeler has released his proposal for the network neutrality order the FCC is expected to adopt at its open meeting on February 26. In general, the proposal follows the outline that most observers have been expecting since the president announced his support for a "Title II" approach in November, but some parts of the proposal go further than might have been anticipated. While this technically is just a proposal, it likely reflects what the order will say, and there is not much likelihood that there will be significant changes between now and the final decision.

These are the highlights of the proposal:

- Broadband Internet access would be reclassified as a common carrier service, subject to regulation under Title II of the federal Communications Act. The FCC also would rely on its authority under 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 wireless services.
- The network neutrality rules would prohibit:
    - Blocking access to legal content, applications or services or to devices that do not harm the network.
    - Throttling, defined as impairing or degrading lawful Internet content.
    - Paid prioritization or "fast lanes" for content or applications that pay extra for the privilege.
- To address future changes to how broadband providers operate, the FCC would adopt a general rule that would prohibit providers from harming consumers or edge providers.
- The FCC would modify the existing transparency rule to require providers to disclose more information to consumers and edge providers. While the proposal is not specific, it is likely that the new transparency rules will be similar to the rules proposed in the original notice of proposed rulemaking in May.
- Broadband providers will be allowed to engage in reasonable network management (other than paid prioritization), but only if the purpose of their actions is really related to managing the network, and not 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.
- Specialized services (such as voice over IP services) offered over broadband facilities would not be subject to the network neutrality rules, but there could be more scrutiny of these services to make sure they are not substituting for broadband access. They also would be subject to the transparency rule.
- The FCC would consider complaints about interconnection between broadband Internet networks and with edge providers, and determine whether the broadband providers are acting in a just and reasonable fashion.
- Reclassification generally would subject broadband Internet providers to the requirements of Title II, but the FCC also would forbear from applying many of those requirements. The major Title II provisions that would apply include:
    - Limitations on unjust and unreasonable practices.
    - Provisions allowing the FCC to investigate and act on consumer complaints.
    - Customer privacy requirements.
    - Access to utility poles and conduits used to deploy broadband networks.
    - Protections for people with disabilities (many of which apply already).
    - Access to federal universal service funding (although this likely will not change current funding obligations).
- The major provisions of Title II that would not be applied include the following:
    - Rate regulation.
    - Contributions to the federal universal service fund.
    - No accounting requirements.
- The FCC order also would not be intended to affect the existing exemption from taxation under the federal Internet Tax Freedom Act.

Much of what is in the proposal is consistent with recent expectations about how the FCC would act. However, the proposal goes beyond those expectations in some areas. Most notably, the general "no harm" standard for evaluating new broadband practices was not in the FCC's original proposal and will create the opportunity for the FCC to effectively adopt new rules through complaints and other avenues as time goes on, without a formal

rulemaking. The complaint process for interconnection also was not in the original rulemaking, although there has been some discussion of it in recent weeks. It also is notable that the FCC intends to apply new customer privacy requirements to broadband service, as there are no FCC privacy rules for that service today.

The proposal also leaves many open questions. These questions include whether there are additional common carrier requirements that will not be applied to broadband service; whether the FCC's full telephone privacy rules will be applied to broadband; how the interconnection complaint process will work and what entities it covers; the extent to which the FCC will scrutinize specialized services offered over broadband facilities, which generally were not monitored at all under the earlier rules; and whether complaints can be filed both at the FCC and in federal court. Most important, the proposal does not address the question of whether the definition of "broadband" adopted just last week by the FCC in its 2015 Broadband Progress Report will be used to determine what services are subject to these rules, or if some other definition will be adopted. Some of these issues may have been addressed already but were left out of the summary released today; others may be subject to negotiation within the FCC over the next three weeks or may not be addressed at all.

While it is likely that the Republican commissioners will argue that the FCC should wait to see if Congress acts on network neutrality legislation, there is no reason to believe that action on this proposal will be delayed past the scheduled February 26 vote. Moreover, there are significant differences between this proposal and the pending legislation. Given the president's position on network neutrality, there is not much chance of successful legislation unless Congress moves considerably closer to the position adopted by Chairman Wheeler.

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