

March 12, 2015

Today, the FCC released its 400-page [report](#) (including 80 pages of dissents from the two Republican commissioners) in the network neutrality proceeding. Despite speculation that some of the rules might not have been revealed in the FCC's previous public statements, the order contains few surprises.

Highlights of the Order

- **Scope of the rules:** The rules apply to "broadband Internet access service," defined as any service, wired or wireless, that provides access to substantially all Internet end points, except for dial-up services. The rules apply to both licensed and unlicensed wireless services. The rules do not cover (a) "specialized services" that use Internet Protocol but do not provide access to the entire Internet, such as voice over IP service offered over cable facilities or medical monitoring devices; (b) enterprise, virtual private network, hosting, data storage, and Internet backbone services; or (c) "premises operators," such as coffee shops, bookstores and colleges and universities that provide access to the Internet.
- **Blocking:** The rules prohibit blocking access to lawful content, applications, and services, or blocking use of devices that are not harmful to the network.
- **Throttling:** The rules prohibit impairing or degrading Internet traffic based on content, applications, or services, or an end user's installation of a device that does not harm the network.
- **Paid prioritization:** The rules prohibit paid prioritization, which is defined as using any technique to give some traffic an advantage over other traffic in return for any kind of payment or on behalf of an affiliated entity.
- **Transparency:** The FCC retained the existing rule requiring ISPs to disclose the terms and conditions under which they provide service, including prices and speeds. The new rules also require ISPs to disclose promotional rates, all data caps and allowances, and packet loss, as well as to provide specific notification of network practices that are likely to significantly affect consumers' use of the service. The additional requirements will not be applied to ISPs with 100,000 or fewer subscribers, at least initially.
- **General conduct rule:** Broadband Internet access providers cannot "unreasonably interfere with or unreasonably disadvantage" either end users or edge providers in the use of Internet service. This rule is in addition to the specific network neutrality requirements, and questions under the rule will be addressed on a case-by-case basis.
- **Interconnection:** The FCC concluded that what it calls "commercial arrangements for the exchange of traffic with a broadband Internet access provider" are within the scope of the common carrier provisions of the Communications Act, and therefore subject to complaints that practices are unjust or unreasonable. It did not adopt any specific rules, but instead decided to "watch, learn, and act as required" in response to complaints.
- **Reasonable network management:** Most of the FCC's substantive requirements—but not the paid prioritization rule—will be subject to an exception for reasonable network management. Network management is reasonable only if it is "primarily used for and tailored to achieving a legitimate network management purpose." The FCC will consider technical characteristics of the provider's network in determining what is reasonable, but did not provide any guidance on how acceptable practices might differ between wired and wireless services. (This has suggested some concerns about how wireless providers might differentiate services as they move to 5G.)
- **Reclassification of broadband services:** The FCC determined that broadband Internet access should be treated as a telecommunications service subject to the common carrier requirements of the Communications Act. As described below, the order forbears from applying some of those requirements to broadband services.
- **Taxes and fees:** The FCC will not require broadband Internet access providers to contribute to the federal universal service

fund today, but is considering whether to change the contribution rules in another proceeding, and could require contributions later. The FCC took similar action as to contributions to the fund that supports Telecommunications Relay Service. The FCC also concluded that the reclassification of broadband Internet access as a common carrier service would not affect the existing exemption from state and local taxes under the Internet Tax Freedom Act.

- **State regulation:** In addition to classifying broadband Internet access as a common carrier service, the FCC also reaffirmed that it is a jurisdictionally interstate service. Based on that determination, the FCC concluded that the service is not subject to state regulation. It also determined that its decision to forbear from certain types of regulation also precludes states from applying the same types of regulation.
- **Enforcement and interpretation:** The order creates new procedures for complaints about potential violations of the rules and for issuing advisory opinions on the permissibility of particular actions that ISPs might take. The rules permit formal and informal complaints to the FCC, and the FCC can take action to address specific complaints or take broader enforcement action to impose forfeitures or other remedies available to it under the Communications Act. While advisory opinions will not bind the FCC, they will immunize a party that receives one against enforcement actions unless the FCC specifically advises the party that the advisory opinion has been withdrawn.

Common carrier regulation

The reclassification of broadband Internet access as a common carrier service subjects that service to a much different regulatory regime than the one that applied to it as an information service. The order used the FCC's authority to forbear from applying certain regulations to craft a specific set of requirements for broadband Internet access that are related to, but distinct from the rules that apply to telephone service.

These are the most significant requirements that the FCC decided **to apply** to broadband Internet:

- **Limitations on unjust and unreasonable practices:** The FCC will apply the core elements of common carrier regulation, which prohibit carriers from engaging in unjust and unreasonable practices and from unreasonably discriminating among customers.
- **Enforcement:** The FCC will apply the provisions of the Communications Act that permit parties to file complaints with the FCC about violations of the statute or the rules. Parties also will be allowed to file complaints in federal court, but the FCC urged courts to send cases to the FCC.
- **Customer privacy:** The customer privacy obligations of Section 222 of the Communications Act, which include a requirement to obtain customer consent before using information related to the customer for marketing purposes, will be applied to broadband Internet service. The FCC is not, however, applying the rules that implement Section 222 at this time, which leaves some question as to how broadband Internet access providers will ensure that they comply with the statutory requirement.
- **Accessibility:** The requirements to provide accessible services for people with disabilities will apply to broadband Internet service. Many of these requirements already apply through other provisions of the Communications Act.

These are the most significant requirements that the FCC decided **not to apply** to broadband Internet:

- **Pricing regulation:** The FCC will not apply any of its specific pricing rules to retail broadband Internet and, specifically, will not require providers to file and receive approval of tariffs listing their prices and other terms and conditions. It may review the reasonableness of rates, particularly for interconnection, on a case-by-case basis.
- **Contribution requirements:** As noted above, broadband Internet access providers will not be required to contribute to the federal universal service fund or to the Telecommunications Relay Service fund, at least initially.
- **Entry and exit requirements:** Broadband Internet access providers will not be required to obtain FCC approval to begin providing service, to stop providing service or to be bought or sold.
- **Telephone-specific interconnection and unbundling:** The interconnection and unbundling rules adopted following the Telecommunications Act of 1996 will not be applied to broadband Internet access. This includes requirements to permit resale of retail or wholesale services.

- **Truth in billing and slamming:** The FCC concluded that there is no need to apply these rules to broadband Internet access, particularly in light of the transparency rule.

The classification of broadband service as a common carrier service also permits providers to take advantage of some benefits of being a common carrier under the Communications Act. Most notably, the FCC determined that broadband providers will be eligible to use utility poles and conduits in the same way as telephone companies and that broadband providers will be eligible for universal service funding, provided that they meet other requirements in the Communications Act.

What was not known before

The FCC's previous public statements about the order described most of the significant decisions it contains. There were, as a result, only a few elements of the order that could be thought of as surprises. They included the following:

- **The paid prioritization rule covers affiliated entities:** The focus in discussions of this rule had been on third parties paying for preferential access to end users, but the rule also prohibits preferential access—even if no money changes hands—for affiliates of an ISP. This is similar to the non-discrimination rule the FCC adopted in 2010.
- **Waivers of the paid priority rule:** The order creates a process for waivers of the paid priority rule if an ISP can demonstrate that a waiver is in the public interest. The standards for waivers are strict; in fact, the order notes that waivers for telemedicine likely would not be granted because it could be offered as a specialized service.
- **Ability to rely on advisory opinions:** Some of the discussion during the FCC's open meeting suggested that advisory opinions would be entirely non-binding. However, the actual rules give the party that requests the opinion protection against enforcement action unless the opinion is revoked and the FCC gives notice. This makes such opinions more useful, although still only in a limited way.
- **Customer notice of network practices that are likely to significantly affect consumers' use of the service:** This requirement was not mentioned at the open meeting, and depending on how it is applied, could require customer-specific notice in certain circumstances, or simply require notice that particular kinds of uses (*e.g.*, gaming) may be affected by specific network management techniques.

Next steps

As the FCC indicated at the open meeting, the order will not go into effect until 60 days after notice of the decision is published in the *Federal Register*. There is no specific time for *Federal Register* publication, but an order this long may take two weeks or more to appear. The changes in the transparency rule also must be reviewed by the federal Office of Management and Budget before they can go into effect, and that could take six months or more.

Appeals of the decision can be filed as soon as the order appears in the *Federal Register*, and likely will be filed immediately. Because the FCC is treating this decision as a response to the D.C. Circuit's decision on the 2010 rules, it is likely that the appeal will go to that court. Filing an appeal will not automatically stay the rules, so if the court does not grant a stay, the rules will be in effect while the appeal is being considered.

The rules also could be overridden if Congress passes and the President signs legislation creating a different network neutrality regime. Unless the legislation largely follows the framework of the FCC decision, it does not appear likely that the President would sign it. Congressional Republicans also could try to overturn the decision through a legislative veto or a rider on an appropriations bill, but those actions also would require Presidential approval.

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. 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.