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FCC Releases Order Subjecting Broadband Internet Access Services to Greater FCC Oversight

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As was widely anticipated, in a party-line, 3-2 vote last month, the Federal Communications Commission ("FCC") sought to impose network neutrality rules on mobile and wireline broadband Internet access service providers. To give it a stronger statutory hook for the current iteration of its open Internet regulations, the FCC also took the unprecedented step of reclassifying broadband Internet access service as a "telecommunications service" subject to regulation under Title II of the Communications Act of 1934 (the "Communications Act"). Ending much industry anticipation and speculation, last week the FCC released the complete text of its Report and Order on Remand, Declaratory Ruling and Order (the "Open Internet Order"), which ultimately hews closely to the Fact Sheet that FCC Chairman Wheeler's office released several weeks prior to the Commission's February 26 vote.[1] Weighing in at 313 pages (before the dissenting statements of Commissioners Pai and O'Rielly), the Open Internet Order is rich with detail and complexity, giving industry participants and their advocates much to ponder as they assess the item's full impact on current operations and strategic plans.

Overview of the Open Internet Order

Report and Order on Remand: Establishing Open Internet Rules

In what may portend imminent legal challenges, the FCC begins the Open Internet Order by responding directly to the D.C. Circuit's rejection last year of the Commission's prior attempt to implement open Internet rules. Subsequently, after invoking its reclassification of broadband Internet access service, the FCC re-implements its prior open Internet rules, expands its existing transparency rules (which survived the D.C. Circuit's decision), and takes several actions to enhance its enforcement authority over broadband Internet access service providers, as further discussed below.

Three Bright-Line Rules

As expected, the Open Internet Order establishes three bright-line rules that will apply to providers of broadband Internet access service:

- **No Blocking** of access to legal content, applications, services, or non-harmful devices;
- **No Throttling** of lawful traffic on the basis of content, applications, services, or non-harmful devices; and

- **No Paid Prioritization** that would create "fast lanes" by favoring traffic from some sources (including content and services of affiliates of broadband Internet access service providers).

In addition, as in the FCC's prior iterations of open Internet regulations, the Report and Order on Remand includes a mechanism to permit broadband Internet access service providers to engage in "reasonable network management." The item looks to account for differences in broadband technologies but emphasizes that network management practices must be tailored to technical requirements and not commercial purposes.[2] Further, the FCC has supplemented these three bright-line rules with a rule establishing a "no-unreasonable interference/disadvantage standard," permitting the agency, on a case by case basis, to prohibit practices that unreasonably interfere with, or disadvantage, customers' ability to access content on the Internet.[3]

Expanded Transparency Rules

In a departure from the Fact Sheet released by FCC Chairman Wheeler's office in early February, the Open Internet Order includes a revision of the FCC's rules regarding disclosures that broadband Internet access service providers must make to consumers. Specifically, the FCC has expanded the scope of its transparency rules to require providers of broadband Internet access service to disclose promotional rates, fees and surcharges, data caps, packet loss rates, and, importantly, privacy policies.[4] Note, however, that fixed and mobile providers of broadband Internet access service with 100,000 or fewer subscribers are temporarily exempted from these disclosure rules.[5]

Enhanced Enforcement Authority Over Broadband Internet Access Service Providers

The Open Internet Order also broadens the FCC's authority to conduct enforcement proceedings on a number of related issues. In addition to affirming the applicability of the enforcement mechanisms left untouched by the D.C. Circuit's decision last year, the Commission has created the position of "Open Internet Ombudsperson" to provide parties with assistance in the context of open Internet complaints filed against broadband Internet access service providers.[6] The FCC has also established a process by which broadband Internet access service providers may seek advisory opinions from the FCC on proposed network management procedures.[7]

Declaratory Ruling and Order: A "Light Touch" Reclassification of Broadband Internet Access Service

In the Declaratory Ruling portion of the Open Internet Order, the FCC broadly reclassified broadband Internet access service—whether delivered by wire or wirelessly—as a "telecommunications service."[8] This approach was necessary because of the D.C. Circuit's decision last year overturning the FCC's earlier open Internet rules that were implemented pursuant to Section 706 of the Telecommunications Act of 1996.[9] By reclassifying broadband Internet access services as "telecommunications services," however, the FCC was able to invoke its broad—and relatively undisputed—regulatory powers under Title II of the Communications Act of 1934.[10] As a result, once the reclassification goes into effect, providers of broadband Internet access service will be subject to a wide range of statutory obligations.

Scope of Reclassification

Importantly, the scope of the FCC's reclassification hinges on the meaning of the term "broadband Internet access service." The FCC defines a broadband Internet access service expansively as a "mass market retail service . . . that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints."[11] Despite its breadth, however, the definition specifically excludes dial-up services, and, in other parts of the Open Internet Order, the FCC clarifies that the term does

not encompass enterprise services, virtual private network services, hosting or data storage services, and facilities-based VoIP services.[12]

Application of Certain Title II Obligations to Broadband Internet Access Services

Given the magnitude of the obligations imposed on telecommunications services under Title II of the Communications Act, the FCC took pains to emphasize that it was approaching reclassification of broadband Internet access services with a "light touch" from the outset. The Communications Act provides the FCC with authority to forbear from enforcing portions of Title II against telecommunications service providers.[13] Typically, it is the telecommunications providers that affirmatively seek forbearance by the FCC on discrete issues. But in this case, in keeping with its intent to adopt a light touch, the FCC proactively exercised its authority to forbear from enforcing numerous portions of Title II and certain implementing regulations.

Nevertheless, much ink will be spilled debating whether the FCC's touch was sufficiently light, as the Commission determined that it **will** apply the following Title II provisions to broadband Internet access service providers:

- Certain "core" statutory provisions prohibiting "unjust and unreasonable practices",
- Provisions granting the FCC authority to hear consumer complaints,
- Protections for consumer privacy,
- Provisions relating to pole attachments,
- Protections for individuals with disabilities, and
- Provisions that will allow universal service fund support to be used for future deployment of broadband networks.

The Open Internet Order does **not** impose the following:

- Any form of rate regulation (including tariffs, rate approval, or unbundling of services),
- Any requirement that providers of broadband Internet access service contribute to the universal service fund, or
- Any other form of FCC-imposed tax or fees.

Key Takeaways

While the intricacies of the regulations—and the merits of the FCC's approach—will continue to be debated by policymakers and advocates over the coming months, we highlight below several significant implications of the Open Internet Order of particular relevance for telecommunications providers, content companies, wireless carriers, and other industry participants.

Internet Fast Lanes to End Users Will be Prohibited

In a clear victory for edge service providers, the FCC has implemented a rule that specifically prohibits paid prioritization agreements—also known as "fast lanes"—between edge providers and broadband Internet access service providers.[14] Once it goes into effect, this ban could effectively moot certain

peering arrangements that broadband Internet access service providers and edge providers have negotiated over the past year, and parties to such arrangements should carefully review the Open Internet Order to determine whether their arrangements may be affected.[15]

Note, however, that the FCC's ban on paid prioritization is not an outright ban on Internet traffic exchange agreements. In the Open Internet Order, the FCC expressly stated that it does not have sufficient background to adopt a bright-line rule regarding Internet exchange agreements. Instead, the agency will regulate Internet traffic exchange agreements on a case-by-case basis using its general Title II authority to prohibit unjust and unreasonable practices.[16]

Broadband Internet Access Service Provider Conduct Will Be Regulated by Bright-Line Rules and a Reasonableness Standard

In the Open Internet Order, the FCC repeatedly touts the clarity associated with the bright-line open Internet rules. The three bright-line rules—no blocking, no throttling, and no paid prioritization—are aimed at addressing the FCC's current concerns about the openness of the Internet, but the FCC also recognized that technology and markets often evolve faster than codified rules. Accordingly, the FCC included a "no-unreasonable interference/disadvantage" rule that provides it with flexibility to address market and technological developments that might not be captured by its bright-line rules. While much attention has been focused on the bright-line rules, broadband Internet access service providers and content providers should remain mindful that the FCC will retain significant regulatory flexibility to enforce its no-unreasonable interference/disadvantage standard.

Wireless Broadband Carriers Will See Additional Regulation

As previewed in the Fact Sheet, the Open Internet Order classifies mobile broadband Internet access services as a commercial mobile service that is subject to Title II regulation. This is a substantial change from the FCC's prior hands-off approach that limited the effect of open Internet rules on wireless carriers. The FCC based this decision on changes in the marketplace, including the facts that "mobile broadband networks are faster, more broadly deployed, more widely used, and more technologically advanced than they were in 2010" and that mobile broadband "is no longer in a nascent stage."[17] Again, this is a marked departure from prior FCC wireless policy, and wireless carriers will want to carefully scrutinize the potential impact of the Open Internet Order on their operations.

The FCC's Role as a Privacy Regulator Will Grow

The FCC's Fact Sheet noted, without much fanfare, that the consumer protection provisions of Title II would apply to broadband Internet access service. But, in contrast to this passing reference in the Fact Sheet, issues of consumer privacy permeate the Open Internet Order. For instance, the FCC expands providers' obligations to disclose certain privacy practices as part of the agency's transparency requirements. And, in discussing its decision not to forbear from enforcing Section 222 consumer privacy protections in this context, the FCC took the opportunity to underscore its recent efforts to expand its role as a national privacy regulator.[18] Indeed, the day after the Order's release, Travis LeBlanc, the chief of the FCC's Enforcement Bureau, spoke at the Berkeley Center for Law & Technology Privacy Law Forum and discussed how he expects to see privacy enforcement against broadband Internet access service providers as a growing trend. As such, broadband Internet access service providers—both wireline and wireless—will want to pay close attention to the FCC's emerging privacy rules and enforcement practices.[19]

The Road Ahead: The Dissenting Commissioners Flag Avenues for Appeal

The Open Internet item will not go into effect until 60 days following its publication in the *Federal Register*, which usually occurs several weeks after the FCC releases the text of an item. Publication in the *Federal Register* will also start the clock for parties to petition for FCC reconsideration or to seek appellate review of the FCC's decision. It is widely anticipated that the FCC's Open Internet item will be challenged in court. And, while the FCC has attempted to limit the Open Internet Order's vulnerability to an appellate challenge, in their dissenting statements, Commissioners Pai and O'Rielly have effectively seeded the record with possible grounds for appeal. For example, both dissenting statements suggest that the Commission's Open Internet Order is procedurally flawed because the underlying Notice of Proposed Rulemaking did not adequately signal that reclassification with forbearance was a possibility.

The fate of the FCC's open Internet rules—and, more fundamentally, its reclassification of broadband Internet access service—may ultimately be years away. More immediately, the most pressing question is whether parties seeking appellate review will request—and whether a court will grant—a stay of the new rules while the appellate process unfolds.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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1 *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

2 *Open Internet Order* ¶¶ 214-224.

3 *Id.*, ¶¶ 294-296.

4 *Id.*, ¶¶ 163-171.

5 *Id.*, ¶¶ 172-175.

6 *Id.*, ¶¶ 254-256.

7 *Id.*, ¶¶ 229-239.

8 *Id.*, ¶¶ 309, *et seq.*

9 Telecommunications Act of 1996, Pub. L. 104-104, § 706(a). In Section 706, Congress directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

10 Throughout the Declaratory Ruling section of the Open Internet Order, the FCC repeatedly pointed to the Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), for support that it could reconsider its earlier classification of Internet access as an "information service" in light of technological changes and marketplace developments.

11 47 C.F.R. § 8.11(a).

12 *Open Internet Order* ¶ 26.

13 47 U.S.C. § 160(a).

14 *Open Internet Order* ¶ 125.

[15] The FCC has also established a mechanism to permit petitions for waiver of the paid prioritization ban, though, importantly, the FCC anticipates granting waivers of the ban "only in exceptional cases." *Open Internet Order* ¶¶ 130-132.

[16] *Id.* ¶¶ 202-203.

[17] *Open Internet Order* ¶¶ 9, 398.

[18] *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability, 29 FCC Rcd 13325 (2014).

[19] The Commission did, however, recognize that its rules implementing Section 222 are ill-suited for protecting consumer privacy in the context of broadband Internet access services, and the agency decided to forbear from enforcing its privacy rules at this time. The FCC also signaled its intent to launch a formal rulemaking proceeding to develop new privacy rules for providers of broadband Internet access service.