

LNGS Client Advisory

Will the FCC Expand Open Internet Requirements Applicable to Mobile Broadband Providers, and Reclassify Broadband as a Title II Service?

In the next several months, the FCC could take significant action in its Open Internet proceeding—action that may have a substantial impact on mobile broadband providers.

The FCC's Open Internet rules originally treated fixed and mobile broadband differently, imposing less stringent requirements on mobile broadband providers. After these rules were vacated by a federal court of appeals in January, the FCC adopted a Notice of Proposed Rulemaking in May, tentatively concluding that it will keep the same approach for mobile broadband going forward. As you may have heard, over 3 million comments have been filed, fueled by the public interest groups focused mostly on "network neutrality" and some viral videos, most prominently one by HBO's John Oliver.

At the CTIA trade show last month, FCC Chairman Tom Wheeler hinted that he may not support any different, less stringent treatment for mobile broadband in the new Open Internet rules. He indicated that a basic issue is whether the assumptions behind the FCC's vacated rules, which were adopted in 2010, "match new realities" driven by significant changes in the mobile broadband marketplace. In addition, major players such as Google and Microsoft have argued that mobile wireless broadband providers should be subject to the same Open Internet rules as wireline providers.

No-Blocking Rule

A key issue involves the FCC's no-blocking rule, which barred fixed broadband providers from blocking lawful content, applications, services, and "non-harmful" devices, subject to reasonable network management practices.

Under the old rules, the FCC decided to impose only “basic” no-blocking requirements that prevented mobile broadband providers from blocking lawful web content **as well as applications that compete with the mobile broadband providers’ own voice or video telephony services**, subject to reasonable network management.

In the May NPRM, the FCC sought comment on whether to prohibit mobile providers from blocking access to **all** applications that compete with a mobile broadband provider’s other services, not just those that compete with voice or video telephony services. This is a significant shift.

Even though the FCC has found that mobile broadband providers have legitimate technical reasons to restrict certain devices and applications to guard the safety and integrity of their networks, there is cause for concern that an expanded no-blocking rule could overtax mobile broadband networks.

For example, expanded no-blocking requirements could open the door for the use of apps requiring significant network resources. Commenters responding to the NPRM explain that these apps could overwhelm signaling networks used by mobile broadband carriers to support data traffic. In addition, mobile broadband providers would face the burden of determining whether a particular app is actually competing with any of its services.

The Possibility of Reclassifying Broadband To Be a Title II Service

The NPRM also sought comment on whether the FCC should regulate broadband carriers under the common carrier requirements of Title II of the Communications Act of 1934. Such a step will have significant implications for mobile broadband carriers, potentially subjecting them to a host of common carriage regulations. When it previously considered this matter in 2010, the FCC’s general counsel advised that as few as six provisions in Title II (out of 48) could be used to regulate broadband, with the other 42 provisions left aside.

When the appeals court invalidated the prior rules, the FCC set about trying to regulate broadband without reclassifying it as a Title II service. We’ve looked at this pretty closely and believe the FCC’s authority to do that is quite limited. The more aggressive they get, the harder their court challenge will be, and the more likely it is to wind up in the Supreme Court. That is an unfavorable forum and to even get there will take nearly three years.

Although CTIA has pointed out that reclassification to Title II could mean rate regulation, tariffing obligations, depreciation rules, entry and exit regulation, resale and interconnection requirements, and numerous reporting burdens for mobile broadband, we think it is unlikely the FCC would want to convert mobile wireless into a wireline regulatory model.

The biggest benefit that the FCC may see in reclassification is the ability to fix the longstanding mess that is the contribution factor, currently hovering near 17% of interstate telecommunications revenue (which today is less than a quarter of most consumers' bills). If all mobile broadband were considered telecommunications, the contribution factor could be applied to 100% of the bill, reducing the factor down to 5% or perhaps less, spreading the cost of universal service more evenly across users, and providing the FCC with increased flexibility to fund E-Rate.

This month, in response to a question at a town hall meeting in Los Angeles, President Obama reaffirmed his support for net neutrality. Last week, Chairman Wheeler said he is on the same page with the President. This week, Senator Patrick Leahy sent a letter to Comcast, seeking a pledge that it would never create Internet fast lanes (paid prioritization).

Traditionally, a two-term president has less power with the Congress during the last two years in office, but has an opportunity to accomplish more because there is no possibility of re-election. If, as we all expect, the gridlock in Congress continues, we expect the Executive Branch to move as aggressively as 2016 electoral politics will permit.

Reclassifying the Internet under Title II is something that the FCC is undoubtedly empowered to do under the Telecom Act, although it will also undoubtedly go to court. It is an action that basically dares the Congress to do its job and rewrite the Telecom Act if it wishes to go in another direction. It is a peripheral but legitimate issue for the next election—a tax on the Internet vs. protecting the Internet. And in the short run, it potentially frees the FCC to lower the contribution factor while simultaneously raising more money for pet projects like E-Rate, which can be a deliverable for rural citizens in the 2016 election.

Accordingly, all else being equal, our sense is that the likelihood of reclassifying broadband as a telecommunications service has increased significantly as this

has played out. As we've discussed, such a reclassification could have important implications for mobile broadband providers. Once it is done, it will be very difficult for a future FCC, beginning in mid-2017, to reverse course yet again unless Congress legislates.

We also note that the FCC's Comcast/Time Warner merger proceeding bears watching. That merger has been delayed twice now, and we don't think either the Department of Justice or the FCC will act on it in 2014. However, if the FCC acts in the merger proceeding first, its decision may tip its hand regarding its industrywide net neutrality policies. Thus, if the FCC conditions merger approval on a commitment barring paid prioritization, this could signal the FCC's intent to reclassify broadband as a Title II service and prohibit paid prioritization practices.

Finally, we note that the record remains open for *ex parte* submissions in the Open Internet proceeding, as the FCC works toward prescribing new network neutrality rules.

Please let us know if you have any questions or would like to discuss further the FCC's Open Internet rulemaking and its potential impact on mobile broadband providers.

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