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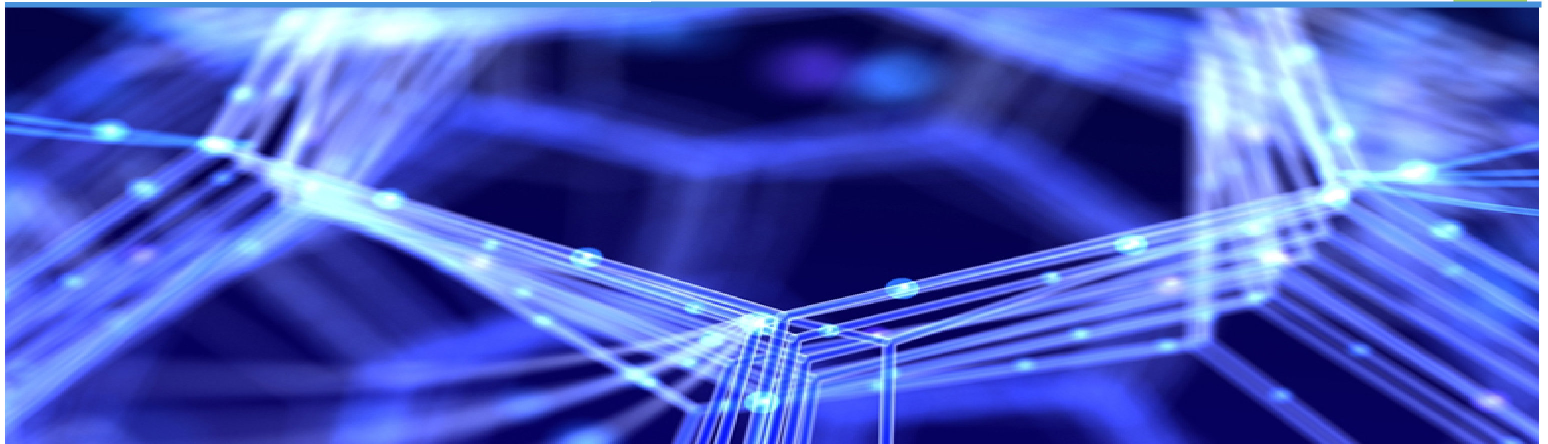

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FCC to Revisit Whether and How to Regulate Internet Access

On May 18, the Federal Communications Commission (FCC) voted to open a new proceeding to revisit an important legal and public policy question which has been addressed on several prior occasions: whether and how to regulate access to the internet. The debate over what some call “net neutrality” and what others call “internet freedom” begins with a threshold legal question: how to classify broadband internet access service under the Communications Act of 1934, as amended by the Telecommunications Act of 1996. If broadband internet access is classified as an information service, it would be subject only to light touch regulation under Title I of the Communications Act. If, on the other hand, broadband internet access service remains classified as a telecommunications service, it would remain subject to Title II of the Communications Act – which contains the statutory requirements for telecommunications common carriers. Those requirements are based upon traditional principles of public utility regulation, including just and reasonable rates, nondiscrimination, and duty to serve.

In a series of FCC decisions involving cable modem service (2002), wireless internet access service (2007), and telephone company digital subscriber line service (2005) (all of which are forms of broadband internet access service), the FCC consistently concluded that such services were information services because they contained both transmission (access to internet websites, etc.) and content. As such, those services were subject to light-touch regulation with minimal legal requirements. That approach was affirmed by the United States Supreme Court in 2005. In 2010, the FCC adopted a series of rules to govern internet access, but did so without reclassifying the service. Those rules which prohibited discriminatory treatment as well as blocking internet content were challenged. In 2014, a federal appeals court overturned the FCC rules on the premise that those rules subjected internet service providers (ISPs) to common carrier regulation despite the fact that those companies were not common carriers.

In 2015, the FCC, with a Democratic majority, and led by then-Chairman Tom Wheeler, did a profound “about-face,” and concluded that broadband internet access service was a telecommunications service subject to Title II. Based upon that reclassification, the FCC established a series of rules governing broadband internet access. Those rules are specifically applicable to ISPs (companies which provide consumers with access to the internet). ISPs include wireline and wireless telecom and companies generally thought of as cable companies.

The rules adopted by the FCC prohibited ISPs from: i) blocking access to internet content; ii) throttling (slowing down the speed of access to certain internet content); and iii) paid prioritization (charging providers of internet content money for having their content delivered to consumers at greater speed, thereby creating so-called internet “fast lanes”). The FCC also established a general conduct rule which empowered it to take action against ISPs on a case-by-case basis for action which the FCC believes might interfere with access to the internet. That 2015 FCC order reclassifying broadband internet access service as a Title II service was affirmed by the court of appeals in June 2016.

In the new rulemaking proceeding announced on May 18, the FCC first proposes to reclassify broadband internet access service back to being an information service. It also proposes to repeal the general conduct rule. While not directly proposing to eliminate the rules against blocking, throttling, and paid prioritization, the FCC asks questions about whether those rules remain necessary, and if they are to be retained, on what legal basis they could be retained.

Who is Affected by the FCC’s Proposals?

In general, three categories of entities are impacted by the FCC’s plans to reclassify and reduce the regulatory requirements for broadband internet access: 1) ISPs; 2) providers of internet content and applications (what the FCC calls “edge” providers); and 3) consumers. ISPs strongly oppose the classification of broadband internet access service as telecommunications service subject to Title II and can be expected to argue for reconsideration. Edge providers (entities who provide content and applications over the internet) generally favor net neutrality rules and the Title II classification since they are concerned that ISPs, absent such rules, could favor some content providers and disfavor others. Consumer groups generally favor rules governing internet access and support retention of the telecommunications service classification and Title II jurisdiction if that is necessary to justify rules against blocking, throttling, and paid prioritization. Those groups have encouraged consumers to make their views known to the FCC and already more than two million comments favoring retention of the rules and opposing reclassification have been received.

What Will the FCC Do?

The FCC’s 2015 order reclassifying broadband internet access as a telecommunications service was adopted by a 3-2 vote along party lines. The 3 Democratic commissioners voted in favor; the 2 Republican commissioners voted against and issued dissenting statements. With the change in administrations following the 2016 election of President Trump, there is now a 2-1 Republican majority at the FCC (there are 2 vacancies, only one of which may be filled by a Republican). The May 18 rulemaking notice was adopted by a 2-1 vote, again along party lines with the one Democratic commissioner dissenting. With a Republican majority at the FCC, it seems likely that the FCC will reclassify broadband internet access and that the general conduct rule will be repealed. Whether it will vote to retain some form of blocking, throttling, or paid prioritization rules is unknown, and, if it chooses to do so, how it will rationalize that decision in light of the 2012 appeals court decision mentioned above which overturned the FCC’s rules on the basis that they were common carrier rules.

Few, if any issues in recent years have generated as much debate as net neutrality and ISP reclassification. That debate will likely continue in the current proceeding. One of the more contentious points is whether imposing common carrier regulation on broadband internet access service has reduced investment in broadband network deployment. Proponents of undoing the 2015 reclassification and rules have claimed that the FCC action chilled broadband investment and reference various studies and data points to support that claim. Consumer groups and others who favor the 2015 approach point to conflicting data which suggest that there has been no reduction in investment resulting from that action. Another fundamental issue regarding the FCC’s internet rules is whether the rules are necessary. Those who favor Title II authority and strong anti-blocking, throttling, and paid prioritization rules claim that such rules are needed to prevent ISPs from favoring some internet content providers (and content itself) and disfavoring others. Opponents of such rules argue that those concerns are speculative, that there has been no history of such conduct, and, to the extent that ISP conduct antithetical to an open internet occurs, it can be addressed without such rules.

If the FCC elects to reclassify broadband internet access service and reduce or eliminate rules promulgated based on that reclassification, one concern for the FCC will be how to defend such a major change in interpretation only several years after its 2015 decision and slightly more than a year after the appeals court affirmed that decision. This 2015 decision was affirmed by the court based on a judicial doctrine of according broad deference to agencies to interpret the statutes under which they operate. Whether that deference is so broad as to allow an agency to reverse its interpretation twice within a period of several years is uncertain. It will be up to the court to make that determination and up to the FCC to persuade the court that it is entitled to such deference.

The FCC has invited comment on its proposed reclassification and rule changes. Comments are due **July 17, 2017**. It is anticipated that numerous comments will be filed – by ISPs, by edge providers, and by consumers. This is an opportunity for those who have views about net neutrality and internet access to express those views to the FCC. The current FCC chairman has indicated that this is a priority matter, and that action will be taken relatively soon.

This *GT Alert* was prepared by **Mitchell F. Brecher**. Questions about this information can be directed to:

- Mitchell F. Brecher | +1 202.331.3152 | brecherm@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+ 31 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Berlin¬
+49 (0) 30 700 171 100

Berlin-GT Restructuring¯
+49 (0) 30 700 171 100

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

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+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0)203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2.369.1000

Shanghai
+86 (0) 21.6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3.636.6000

Tokyo¤
+81 (0)3 4510 2200

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900

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