

THE NEW ERA OF EXECUTIVE ACTION

# PROMOTING NET NEUTRALITY

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## Background

From the start, Internet service providers (ISPs) have typically treated bits of information traveling on their networks equally. That is, they haven't privileged any one website, online service, or piece of content over another—even if the owner of that site, service, or content were willing to pay enormous amounts of money to make its material easier to access. This principle—known as “network neutrality”—is why your personal blog takes no longer to load than the New York Times. It is also why companies that started in dorm rooms (like Facebook) have been able to compete with—and sometimes topple—established empires. In short, net neutrality has allowed the Internet to become the innovative, experimental, and open space we cherish today.

Though usually abided by in practice, the government's authority to enforce net neutrality through regulation has long been disputed. In 2008, the Federal Communications Commission (FCC) sanctioned Comcast for “throttling”—that is, slowing down—users' access to a file-sharing service called BitTorrent. Comcast appealed the FCC's order, and in 2010, a federal appeals court ruled that the FCC lacked the authority to prevent Comcast from slowing down BitTorrent traffic. In response, the FCC announced new Open Internet Rules in December 2010, which prohibited “blocking” or “unreasonable discrimination” by broadband providers.

But, in January 2014, the courts again sided with an ISP—this time, Verizon—repudiating the FCC's rules against network discrimination. Because the FCC had previously classified broadband providers such as Verizon and Comcast as “information services” and not as “telecommunications services,” the court ruled that the FCC lacked the authority to enforce net neutrality on cable networks. Telecommunications services (such as telephone lines) are subject to much greater regulation, because they are considered “common carriers” under the Communications Act of 1934.

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To the chagrin of consumer advocacy groups and many tech companies, the FCC proposed rules in April 2014 that would have allowed broadband providers to charge companies a premium for preferential treatment—precisely the scenario net neutrality is meant to prevent. In response, consumer groups and millions of individuals submitted requests and comments to the FCC in support of net neutrality.

## Action

On November 10, 2014, President Barack Obama publicly asked the FCC to reclassify consumer broadband services under Title II of the Communications Act, allowing the agency to regulate broadband as a common carrier.

Following the president's lead, the FCC voted on February 26, 2015, to reclassify broadband under Title II and enforce strict net neutrality laws. Unlike the 2010 rules, the new regulations would extend to mobile broadband service.

The 3-2 vote was split along party lines, with Chairman Tom Wheeler and the two other Democratic commissioners in favor, and two Republican commissioners against.

## What It Does

The new regulations have several key provisions that were sought by net neutrality advocates. Specifically, the rules state the following:

- No blocking: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- No throttling: broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- No paid prioritization: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no “fast lanes.” This rule also bans ISPs from prioritizing the content and services of their affiliates.

The order also declares that the FCC shall refrain (forbear) from enforcing some twenty-seven provisions of Title II—and 700 associated regulations—that are not necessary for ensuring net neutrality. For example, broadband providers will not be subject to utility-style rate regulation.

## Status

The new rules were released in full on March 12, 2015. The rules will take effect sixty days after they appear in the *Federal Register*.

## Impact

While the full effect of the rules will not be known for some time, it is interesting to note that Internet service providers—who opposed the new rules—in fact saw their share prices surge when the rules were announced.

## Response

Two lawsuits against the FCC order have already emerged in what is expected to be a drawn-out legal battle.

- On March 23, 2015, Texas-based broadband provider Alamo Broadband filed suit against the FCC in the Fifth Circuit Court of Appeals in New Orleans.
- USTelecom—an industry group representing AT&T, Verizon, and others—filed another in the D.C. Circuit Court of Appeals.

Both request that the court “hold unlawful, vacate, enjoin and set aside” the net neutrality order. One of the dissenting Republican FCC commissioners, Ajit Pai, has also asked the House of Representatives to strip funding from the FCC budget that would be used to implement the order. A number of companies, industry groups, and members of Congress have leveled criticism of the new rules:

- Verizon said the FCC’s decision would “encumber broadband Internet services with badly antiquated regulations,” calling it “a radical step that presages a time of uncertainty for consumers, innovators and investors.” The company issued the release in a typewriter font—and later, in Morse code—to bring attention to what they view as the antiquated model of regulation employed by the order.
- National Cable and Telecommunications Association (NCTA) president and CEO Michael Powell said the FCC order would usher in “a backward-looking regulatory regime that is unsuited to the dynamic and innovative Internet”—well beyond what is necessary to achieve net neutrality, which the NCTA nominally supports. Powell warned that future FCC commissioners would abuse the broad regulatory powers granted under Title II.
- Comcast said it “fully embraced” the spirit of the rules, but objected to Title II reclassification, which “is certain to lead to years of litigation and regulatory uncertainty and may greatly harm investment and innovation.”
- CTIA, an industry group of wireless providers, called the order “disappointing and unnecessary,” suggesting that “Title II puts at risk our nation’s 5G future and the promise of a more connected life.”

- House Speaker John Boehner said, “Overzealous government bureaucrats should keep their hands off the Internet.” And twenty-one other Republican lawmakers moved to nullify the FCC order through a “Congressional Review Act” resolution.

Meanwhile, consumer and advocacy groups, content providers, and members of Congress have spoken in support of the new regulations.

- Consumer groups and net freedom advocacy groups—Consumer Federation of America (CFA), Consumers Union, American Civil Liberties Union (ACLU), Center for Democracy and Technology (CDT), Demand Progress, Electronic Frontier Foundation (EFF), Fight for the Future (FFTF), Free Press, and others—hailed the decision.
- Netflix called the decision a “win for consumers” that will help ensure “ISPs cannot shift bad conduct upstream to where they interconnect with content providers like Netflix.”
- Senator Al Franken called the order “an enormous victory . . . the culmination of years of hard work by countless Americans who believe—just as I do—that the Internet should remain the free and open platform that it’s always been.”