

PUBLIC UTILITY LAW SECTION



of the State Bar of Texas

The FCC's Open Internet Order
is lawful; it appears the FCC
will change course

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The FCC's Open Internet Order

- The Open Internet Order is commonly known as the net neutrality rule
 - The Order classified broadband Internet access service (BIAS) as a “telecommunications service” and imposed several “open Internet” and traditional common-carrier regulations on BIAS.
 - Based on the principle that principle broadband providers must treat all internet traffic the same regardless of source.
 - Although broadband providers were spared from Title II common carrier obligations, the FCC made clear it would seek to preserve principles of internet openness.

Three bright line rules

- Three bright line rules prohibit practices that target specific applications or classes of applications and ensure there will be no fast lanes
 - **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 content and services of their affiliates.

DC Court of Appeals - 2016

- June 14, 2016 – DC Court of Appeals upheld the FCC’s Open Internet Order
 - The decision upheld the FCC on the declaration of broadband as a utility, which was the most significant aspect of the rules.
- July 29, 2016 - CTIA, US Telecom, NCTA, and the American Cable Association asked for an *en banc* hearing.

DC Court of Appeals - 2017

- May 1, 2017 – The DC Court of Appeals declined to hear the case *en banc*.
 - Two fundamental principles in court’s review
 - Role in reviewing agency regulations is a limited one
 - Ensure agency acted within delegation of authority and
 - Did not act arbitrarily or capriciously
 - Courts do not inquire as to whether the agency’s decision is wise as a policy matter
 - Forbidden from substituting the court’s judgment for the agency’s.
 - Survived procedural challenges
 - Federal APA NPRM notice
 - Provision of a meaningful opportunity to comment

DC Court of Appeals - 2017

- May 1, 2017 – The DC Court of Appeals declined to hear the case *en banc*.
 - Survived substantive challenges to reclassification
 - The FCC has authority to reclassify broadband as a telecommunications service
 - Chevron two-step analysis 1) Whether Congress has spoken; 2) if silent or ambiguous, is the agency’s answer based on a permissible construction of the statute?
 - Congress has not spoken unambiguously, forbearance in the FCC Order is not unreasonable
 - FCC adequately explained why it reclassified broadband
 - No reason to second guess factual determinations, the court defers to the agency’s expertise in evaluating complex market conditions.
 - FCC could implement common carrier regulation of ISPs
 - No statutory test requiring application of the *NARUC* test for common carriage.
 - Citing *Brand X*, the court said the FCC could institute common carrier regulation of ISPs

It appears the FCC will change course

- Now-Chairman Pai was a critic of the Open Internet Order
- May 18, 2017, the FCC voted to begin return to light-touch regulatory framework
 - Reinstatement of the "information service" classification of broadband Internet access service.
 - Restore the determination that mobile broadband is not a "commercial mobile service" subject to "heavy-handed" regulation.
 - Restore the authority of the nation's most experienced cop on the privacy beat – the Federal Trade Commission – to police the privacy practices of ISPs.
- July 18, the White House supported the "FCC chair's efforts to review and consider rolling back these rules"

What is next?

- How does the FCC propose to proceed?
 - Examine the utility-style Title II rules to determine whether regulatory intervention in the market is necessary.
 - Asked for comment on whether to keep, modify, or eliminate the "bright-line rules" adopted in 2015.
 - Proposed to eliminate the "general Internet conduct standard," which gives the FCC far-reaching discretion to prohibit any ISP practice that it believes runs afoul of a long and incomplete list of factors.
 - FCC also proposed to conduct a cost-benefit analysis as a part of its analysis.
- Comments were due August 16th, extended to August 30th
 - Already close to 20 million comments, the most in FCC history
 - The proposal to create the net neutrality rules and enact Title II regulation had 3.7 million
- Conflict will be establishing any rules without Title II classification.