# Net Neutrality Rollback Raises Significant Questions

By now, almost all Americans are aware that, as expected, the Federal Communications Commission (FCC) rolled back the net neutrality rules put in place in 2015. On Thursday, after almost a year of debate that escalated into heated exchanges, protests and the alleged hacking and manipulation of the public comment process, the FCC adopted a declaratory ruling, report and order in the proceeding Restoring Internet Freedom, WC Docket No. 17-108, FCC-CIR1712-04 (Dec. 14, 2017) ("Internet Freedom order"). The Internet Freedom order repeals key regulations governing providers offering broadband internet access services and has frequently been referred to as the "death" of net neutrality. This issue has infiltrated every news and social media outlet for the last few weeks, including a controversial YouTube parody video of FCC Chairman Ajit Pai dancing in a Santa Claus hat wielding a lightsaber. However, now that the Internet Freedom Order has been issued, there are considerable legal questions to be addressed. None of these questions is more important than who is going to protect businesses and consumers under this new regulatory framework.

The net neutrality laws in place for the last two years classified internet providers as Title II carriers, placing broadband under the auspices of the FCC. Those measures provided the FCC with the legal teeth to protect consumers from discrimination by their internet service providers ("ISPs"). The Internet Freedom order reclassifies ISPs as information providers under Title I, divesting the FCC of primary jurisdiction over broadband internet access service. This leaves the FCC with little power to regulate ISPs and protect consumers and small businesses going forward.

The Internet Freedom order also eliminates the three so-called "bright line" rules (no blocking, no throttling, no paid prioritization), issues that have been the focus of much public attention. The FCC also erased the "catch-all" general conduct standard as only a modified version of the transparency rule adopted by the commission in 2010 remains. Without these "bright line" rules and other provisions, there is concern that companies may arbitrarily block websites, reduce service speed or charge more for access to internet "fast lanes."

So what is left and who is in charge? The Internet Freedom order focuses on the disclosure of certain practices rather than prohibiting them. Under the "recalibrated" transparency rule, ISPs are now required to "publicly disclose accurate information regarding their network management practices and the performance and commercial terms of their services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings."[1] These disclosures need to be made via a publicly available, easily accessible website or through transmittal to the FCC (who would then make them available to the public).[2] The Internet Freedom order also contains a list of the eight specific network management practices that must be disclosed (not prohibited), including blocking, throttling, paid/affiliated prioritization and security practices.[3] ISPs must also disclose two performance characteristics and three commercial terms: price, privacy policy and redress options.[4]

What happens when these disclosures are not made? Or, when the inevitable happens and the ISPs do not play nice, even though they promised to with a cherry on top? We already know that Comcast seemingly dropped the promise of "no paid prioritization" when it knew the tides were changing under Chairman Pai. Well, now the FCC says it is the Federal Trade Commission's (FTC) problem.

Under the Internet Freedom order, in the "unlikely event that ISPs engage in conduct that harms Internet openness," the FCC gives consumer protection authority to the FTC. Specifically, the Internet Freedom order declares that antitrust law and the FTC's authority under Section 5 of the FTC Act[5] to prohibit unfair and deceptive practices will provide enough protection for consumers.[6] The FCC believes that antitrust and consumer protection laws are well suited to address any openness concerns because they apply to the entire internet ecosystem, including edge providers. In theory, Chairman Pai and his compatriots believe this avoids tilting the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the internet. However, there are only a handful of paragraphs in the entire 200-page order that

address this issue.

Lucky for us though, the FCC and FTC issued a joint Memorandum of Understanding (MOU) to further muddy the waters on this issue.[7] The MOU, also issued last Thursday, finalized, in vague terms, the allocation of oversight and enforcement authority related to broadband internet access service. A draft of the MOU was first announced three days before the FCC's vote to roll back the net neutrality rules. It appeared to be a response to the public outcry against the looming reversal of the net neutrality rules and issued to provide some public guidance on which agency will be taking the lead on oversight and enforcement going forward. The MOU, which is also short on specifics, divvies up a few general categories of responsibilities. The FCC is now tasked with simply monitoring the broadband market and identifying market entry barriers, by among other activities, reviewing information complaints filed by consumers. The FCC may also take enforcement actions against ISPs that fail to comply with the new transparency rule's posting requirements. Notably, however, the FCC will not address the adequacy of the disclosure. Instead, the MOU tasks the FTC with the authority to investigate and take enforcement action against ISPs for unfair, deceptive or otherwise unlawful acts or practices, including but not limited to, actions pertaining to the accuracy of the disclosures required under the transparency rule, as well as their marketing, advertising and promotional activities.

The Internet Freedom order and the MOU have been widely criticized by many Democrats and public interest groups and as they are not without substantial problems. In a dissenting statement, Commissioner Mignon Clyburn called the Free Internet order an "ironic comfort" to consumers.[8] Commissioner Clyburn also called the MOU "a confusing, lackluster, reactionary afterthought: an attempt to paper over weaknesses in the Chairman's draft proposal repealing the FCC's 2015 net neutrality rules."[9] Commissioner Jessica Rosenworcel, the other dissenting Democrat on the FCC, correctly noted that the FTC is not the expert agency for communications. Moreover, her dissenting comments pointed out that ISPs can easily evade FTC scrutiny by adding its new transparency provisions to the fine print in its terms of service.[10]

Commissioner Rosenworcel also emphasized the fact that "it is both costly and impractical to report difficulties to FTC."[11] By the time the FTC gets around to addressing discriminatory treatment in court proceedings or enforcement actions, it is fair to assume that the startups and small entities harmed by such practices could be long gone. This also hurts consumers without the resources to pursue such claims. Although this problem persisted at the FCC, by erasing the rules prohibiting such conduct, the stakes are much higher.

The extent to which the MOU and the FCC's new empowerment of the FTC takes effect will depend upon, among other things, the pending case interpreting Section 5 of the FTC Act that is before the Ninth Circuit Court of Appeals, Fed. Trade Comm'n v. AT&T Mobility LLC, 864 F.3d 995 (9th Cir. 2017).

On Aug. 26, 2016, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit dismissed an FTC case against AT&T Mobility over allegedly "unfair and deceptive" throttling practices in connection with wireless data services provided to AT&T Mobility's customers with unlimited data plans.[12] The Ninth Circuit ruled that the regulatory exemption that prevents the FTC from regulating common carriers is not confined to common carrier "activity" by an entity that has the status of a common carrier, but rather to any activity of that common carrier, including noncarrier activities, such as providing broadband internet service. In other words, the Ninth Circuit ruled that AT&T Mobility's conduct in providing broadband internet access services was exempt from FTC's oversight pursuant to Section 5. The court's ruling was based on the fact that AT&T Mobility is a common carrier, even though at the time the suit was brought (pre-net neutrality rules), broadband internet access service was a Title I service and not a common carrier service or activity. Effectively, the Ninth Circuit's ruling meant that, if a common carrier bought Yahoo or Google, who are both edge providers, the FTC could not enforce their privacy policies, and neither could the FCC because it does not regulate edge providers. Thus, the decision left a huge gap in oversight of these providers — any common carrier providing broadband internet service escaped FCC and FTC oversight.

Now that broadband internet access services have been relegated back to a Title I service, this gap persists. The FCC says the FTC is in charge, but the AT&T Mobility case disagrees. Some clarity could be given by the Ninth Circuit in the near future, as on May 9, 2017, the U.S. Court of Appeals for the Ninth Circuit issued an order granting the FTC's request for rehearing en banc of the court's earlier decision.[13] In a brief order, Chief Judge Sydney Thomas noted that "[t]he three-judge panel disposition in this case shall not be cited as

precedent."[14] However, unless and until the Ninth Circuit decides to set aside its decision, the standard articulated in the AT&T Mobility case is squarely against the spirit of the MOU, leaving it as nothing more than aspirational.

Besides the substantial jurisdictional question left open by the MOU and the FCC's new grant of responsibility on the FTC, there are practical problems. Congress formed the FCC to regulate communications networks, whereas the FTC has authority over unfair methods of competition and deceptive trade practices. The FTC's regulatory and enforcement capabilities do not translate to managing complex network traffic, like the internet. Also, the FTC's expertise is focused on the punishment after the harm occurs. Accordingly, the FTC hammer is no substitute for the FCC's rules when it comes to preventing blocking, throttling and discrimination online before they harm innovative startups and internet users. Rules that just last year were upheld by the United States Court of Appeals for the D.C. Circuit, when it affirmed the FCC's authority to promulgate net neutrality rules with respect to broadband internet.[15]

As FTC Commissioner Terrell McSweeney stated before the Judiciary Committee on this same issue when the net neutrality rules were being discussed in 2015, trying to enforce discrimination against internet traffic using antitrust rules after the problem has already occurred requires multiple steps and a longer time table.[16] This is especially problematic for investors, small businesses, start-ups and the general public.

Questions will continue to remain unanswered as there is also other congressional and judicial action on the horizon. Last Friday, New York Senator Charles Schumer said he would force a vote on the FCC action under the Congressional Review Act (CRA). Massachusetts Senator Ed Markey and Pennsylvania Congressman Mike Doyle, both Democrats, have also said they plan to bring a CRA petition to challenging the FCC's ruling. If such a petition passed and received President Donald Trump's signature, the FCC's ruling would be reversed. In addition, shortly after the FCC's vote last week, New York Attorney General Eric Schneiderman announced that he would bring suit to stop the Internet Freedom order based, in part, on the controversy concerning over two million alleged fake public comments that may have corrupted the FCC's proceedings.

It is clear that Internet Freedom order and the MOU leave much to be desired in terms of clarity, particularly in presenting sound legal principles that govern claims against ISPs. As such, net neutrality will remain a hot news topic and the subject of an ongoing dialogue in 2018.

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