

## **Net Neutrality: The Changing Landscape**

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### **Abstract**

On December 14, 2017 the FCC voted to repeal the net neutrality rules adopted by the FCC on February 26, 2015. The repeal goes into effect 60 days after it is published in the Federal Register. When the 539 page repeal order was released on January 4, 2018 it was not known when it would be published in the Federal Register. The repeal is being challenged on many fronts. Thirty US Senators are backing a plan to block the repeal through congressional action. A coalition of 22 state attorneys general filed a lawsuit to block the repeal in the US Court of Appeals for the District of Columbia. Legislators in many states have introduced bills that would either create state net neutrality laws or use other approaches to preserve the spirit of the 2015 requirements. Gov. Andrew Cuomo issued an executive order in January that preserves open internet protections for New Yorkers. However, the new FCC ruling prohibits state and local government from adopting their own rules. Even Burger King has entered the fray with a pseudo-educational prank advertisement. This paper will attempt to make sense of a very changing landscape.

### **Introduction**

How should broadband Internet service be classified? Is it a public utility or an information service? That question is at the heart of the recent Federal Communications Commission's recent decisions.

On February 26, 2015 the FCC, in a vote of 3-2, classified it as a public utility. The order issued that day banned blocking, throttling (impairing or degrading traffic on the basis of content or service), and paid prioritization. The transparency rule from a 2010 order remained in place. That rule requires fixed and mobile broadband providers to disclose their network management practices and performance characteristics. The FCC at the time claimed that this order was grounded in the Telecommunications Act and Title II of the Communications Act. The 2015 order was challenged in court. In June, 2016 the US Court of Appeals for the District of Columbia Circuit upheld the order and its declaration of broadband as a utility.

It is naïve to think that politics do not play at least a partial role in the net neutrality debates. Hence it should be noted that in 2015 there were 3 Democrats and 2 Republicans serving on the FCC, with Tom Wheeler, a Democrat, as chairman. After the new administration took office in 2017, the FCC had 3 Republicans and 2 Democrats with Ajit Pai, a Republican, as chairman.

On May 18, 2017 the FCC's Republicans voted to propose a new review of the rules, a review which would include a cost-benefit analysis. Chairman Pai argued that the 2015 rules slowed the telecom industry's investment in building out broadband access and introducing innovative new products. [1] This opened a 90 day period during which comments from stakeholders and the general public were

gathered. Approximately 23 million comments were submitted. However, groups on both sides of the issue began to notice that many of the comments were fake. As many as 8 million of the comments may have been fake, and another million came from real people whose identities were stolen. Nearly a half-million were filed from Russian email addresses, according to one of the Democratic commissioners. [2] New York State Attorney General Eric Schneiderman and 28 U.S. Senators sought to get the FCC to delay making its decision, but the FCC stuck to the original December 14 date for its decision. A group of ten Congressional Democrats asked the U.S. Government Accountability Office (GAO) to investigate the pervasiveness of fraudulent comments. The GAO accepted the request, considering that the work was within the scope of its authority. The estimate was that it would take about 5 months for the investigation to begin.

The crucial vote took place on December 14, 2017, and “Restoring Internet Freedom” was passed by a vote of 3-2. The text was released on January 4, 2018 and published in the Federal Register on February 22, 2018. Restoring Internet Freedom was to go into effect 60 days after being published in the Federal Register, i.e. on April 23, 2018 (except for some amendatory instructions). However, since the transparency rules were being changed somewhat, the changes are contingent on the US Office of Management and Budget’s approval of the modified collection requirement. As of April 26 the approval had not yet been given and hence the 2015 rules were still in effect. The new order restores classification of broadband internet access service as an information service and reinstates the private mobile service classification of mobile broadband internet access service. ISPs must disclose information about their network management practices and performance characteristics (maintaining the standing transparency rule which has been in effect since 2010). Other conduct rules imposed by the 2015 order (blocking, throttling, paid prioritization) were eliminated, claiming that those rules have greater costs than benefits. However, ISPs must disclose any blocking, throttling or paid prioritization. The order preempts any state or local measures that would effectively impose rules or requirements that the FCC repealed in this order or declined to impose. [3]

Not surprisingly, strong reactions followed almost immediately. First, consider possible congressional action. The ultimate solution may require congressional action, but it is not likely that this will happen soon. All members of the Democratic Senate caucus and one Republican support a procedural effort (made possible by the Congressional Review Act) to block the December 14 decision. The OneMoreVote action day on February 27 was designed to help get the one more vote needed in the Senate, but this would still have to pass the House and be signed by the President. Rep. Marsha Blackburn (R-Tennessee) introduced a bill (Open Internet Preservation Act) to ban blocking and throttling but not paid prioritization. The Internet Association, a political lobbying group which represents Google’s parent, Facebook, Amazon, Microsoft, and Netflix among others, wrote a strong letter to Senators McConnell and Schumer saying that it backed Senate efforts to reverse the December 14 vote. The letter also recognized the need for a bipartisan effort to establish permanent net neutrality rules, rules which restore the protections of the 2015 Order.

Legal challenges started quickly. An initial petition was filed by a coalition of 22 states and the District of Columbia. Now that Restoring Internet Freedom has been published in the Federal Register the coalition has re-filed the petition to formally commence the lawsuit against the FCC’s repeal of the 2015 order. The coalition is led by New York State Attorney General Eric Schneiderman. The petition has been filed in the U.S. Court of Appeals for the D.C. Circuit, the same court which heard the lawsuit after the 2015 order. [4] The Benton Foundation filed suit against the December 14 decision. The suit

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was filed on February 27, the OneMoreVote action day. The goal of the Benton Foundation is to bring open, affordable, high-capacity broadband to all in the United States. [5] Six companies, part of the Coalition for Internet Openness, filed a petition in the U.S. Court of Appeals for the D.C. District on March 5, 2018. Suits have also been filed by Free Press and Public Knowledge, two public interest groups.

Despite the provision disallowing state or local measures which would impose rules or requirements repealed in Restoring Internet Freedom, states have been active in various ways. On January 22, 2018 Montana Gov. Steve Bullock issued an executive order which forbids any ISP with state government contracts from blocking or charging more for faster web deliveries. The order applies to new and renewed contracts signed after July 1, 2018. AT&T and Verizon, among others, hold government contracts in the state. On January 24, 2018 Gov. Andrew Cuomo of New York issued an executive order that prohibits ISPs from entering into contract with the state government unless they agree to policies that mirror the FCC's former net neutrality rules. Other executive orders have been issued by the governors of New Jersey, Hawaii, and Vermont. The executive order issued by Gov. Phil Scott of Vermont states that state agencies may only use service providers that do not throttle, block, or prioritize network content.

Washington State became the first state to pass rules that ban network discrimination. Washington House Bill 2282, signed into law by Gov. Jay Inslee on March 5, 2018 bars ISPs in the state from blocking content, applications, or services or slowing down traffic on the basis of content or whether paid to favor certain content. The law goes into effect on June 6, 2018. Oregon's legislature passed a bill (by strong bipartisan margins) that bars state agencies from doing business with broadband providers that do not abide by the principles of net neutrality. Gov. Kate Brown signed the bill on April 9, 2018. It goes into effect on January 1, 2019. The law was written more narrowly than the Washington State law in an attempt to survive lawsuits from ISPs. The California State Senate passed bill 460 which upholds net neutrality. The bill now goes to the State Assembly.

Legislators in many other states are considering similar action. However, no such bill will come from the state of Connecticut. A similar bill was proposed and came before the state's Energy and Technology Committee. The committee has 2 senators from each party; when House members are included the Democrats have a majority. Sen. Paul Formica used a seldom used procedure to require that the four Senators vote first on the bill before it could be considered by the representatives in the House. The vote by the four senators was a tie, which, according to the rules, killed the bill. Sen. Formica feels that this is a federal issue and that they are saving the state from the hassle of fighting an inevitable lawsuit. [6] Colorado is also not likely to have such a bill. On April 23, a Republican-led State Senate panel rejected a proposed bill.

Even Burger King jumped in to the debate. On January 24, 2018 Burger King published a new commercial on YouTube (shared across Burger King's Facebook, Twitter, and Instagram pages) which was a fictional spoof of the December 14 decision. Customers were being charged for Whoppers in accordance with how fast they wanted them to be prepared. Slow MBPS (i.e. making burgers per second!) cost \$4.99, but hyper-fast MBPS cost \$25.99. The commercial showed customers becoming very upset, wondering why someone got the Whopper faster! The Burger King brand was trying to make a point that the Internet should be the same for everyone.

It should be recognized that the net neutrality debate involves some big players: service providers such as Comcast, Verizon, and AT&T, and content providers such as Google and Amazon. AT&T, which had supported the December 14 decision, took out a full page ad in the New York Times and the Washington Post on January 24. The ad called for a net neutrality law that would govern ISPs and web companies such as Facebook and Twitter. AT&T CEO Randall Stephenson called for Congress to pass an “Internet Bill of Rights”, including provisions that would require ISPs to not discriminate in the way they treat online traffic.

On March 8, 2018 the U.S. Judicial Panel on Multidistrict litigation randomly selected San Francisco’s 9<sup>th</sup> Circuit Court to hear the consolidated challenges to the FCC’s December ruling. [7] Note that this is not the same court that heard the case in 2016.

Many questions remain as states continue to act and the lawsuits pile up. Will ISPs choose not to engage in blocking, throttling, and paid prioritization (as some claim) even though they could? Has anyone calculated how the December 14 order might change who benefits from the advertising dollars? There are more questions than answers, and the landscape changes weekly.

## References

- [1] <https://www.npr.org/section/thetwo-way/2017/05/18/528941897/fcc-votes-to-begin-rollback-of-net-neutrality-regulations>
  - [2] Baig, Edward C. “FCC rebuffs calls to delay vote on Net neutrality” USA Today: December 5, 2017, page 5B.
  - [3] <https://www.federalregister.gov/documents/2018/02/22/2018-03464/restoring-internet-freedom>
  - [4] Quinn, Melissa. [www.washingtonexaminer.com/six-companies-sue-fcc-over-net-neutrality-repeal/article/2650719](http://www.washingtonexaminer.com/six-companies-sue-fcc-over-net-neutrality-repeal/article/2650719)
  - [5] <https://www.benton.org/about-benton>
  - [6] <https://m.ctpost.com/local/article/Republicans-block-state-net-neutrality-bill-12791381.php>
  - [7] <https://www.reuters.com/article/us-usa-internet/u-s-appeals-court-to-san-francisco-will-hear-net-neutrality-appeal-idUSKCN1GK380>
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