TELECOMMUNICATIONS
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Net Neutrality Magic

Seemingly with a broad stroke of a magic wand after previously exempting certain broadband providers from regulation as information service providers, last week the FCC voted 3-2 to classify broadband Internet access as a telecommunications service under Title II of the Communications Act. But the FCC will be "foregoing utility-style, burdensome regulation that would harm investment" according to FCC Chairman Tom Wheeler's remarks at the FCC's February 26th meeting.

Did the Internet fundamentally change within the last few months? If so, how? If not, what was the justification for this fundamental classification change? And can and should the FCC have it both ways, by classifying broadband Internet access as a telecommunications service, but not regulate it as such? How long will such "utility-style" regulatory forbearance last, and what are the objective factors and criteria that will trigger it? These are just some of the questions that will likely be reviewed by the courts after broadband service providers "lawyer up" to challenge the new rules. Critics of the new rules, which aren't yet available to the public, argue that they are unnecessary, arbitrary and capricious and that they will stifle competition and investment.

As a practical matter, the change is a response to the decision of U.S. Court of Appeals for the D.C. Circuit in *Verizon v. Federal Communications Commission, et. al*., No. 11-1355 (D.C. Cir. Jan. 14, 2014). In that case, the Court vacated the FCC's anti-discrimination and the anti-blocking provisions of the FCC's net neutrality rules, finding that the FCC did not have authority to enact such regulations. The Court held that Section 706 of the Communications Act of 1996 vests the FCC with authority to "enact measures encouraging the deployment of broadband infrastructure" and that the FCC interpreted this statute "to promulgate rules governing broadband providers' treatment of Internet traffic." But the Court found that the Communications Act prohibits the FCC from regulating broadband providers as common carriers having "classified them as in a manner that exempts them from treatment as common carriers." That is, having previously exempted certain broadband providers as information service providers that are exempt from Title II common carrier obligations, the Court ruled that the FCC cannot now regulate them by imposing anti-discrimination and anti-blocking obligations on them.

But was and is there adequate factual justification for the FCC to now regulate broadband providers by classifying broadband Internet service as a Title II service? FCC Chairman Wheeler said at the FCC's February 26th meeting that "[w]e know from the history of previous networks that both human nature and economic opportunism act to encourage network owners to become gatekeepers that prioritize their interests above the interests of their users" and that ". . . broadband providers have both the economic incentive and the technological capability to abuse their gatekeeper position." If/when the new rules are challenged, courts will be testing these and other claims to assess whether the new rules are justified and enacted with adequate authority, or whether they are arbitrary, capricious and, as FCC Commissioner Michael O'Reilly noted in his dissent, if they "protect against hypothetical harms . . . without a shred of evidence" that they are necessary.

We welcome your thoughts. If you have questions, please contact us.