



Insight

Five Questions To Ask About The Network Neutrality Rule Change

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Today, the Federal Communications Commission (FCC) voted to roll back the “Net Neutrality” rules passed in 2015. In place of these Obama-era rules, the FCC has returned power to regulate Internet providers to the Federal Trade Commission (FTC).

The network neutrality debate incorporates two separate yet related sets of questions. The first broad set of questions relates to principles of broadband network design: *What kinds of differentiation are best to manage traffic?* The second set relates to the limits of government power: *What kinds of laws should and can agencies put into place to guide those network decisions?*

This decision has attracted a lot of hyperbole and misinformation about what it actually means. Fundamentally, the net neutrality order overturned today was a haphazard approach to a real problem, and Congress needs to act to resolve this debate.

Here are five things you should know about the recent change.

What is network neutrality?

Network neutrality is the belief that Internet service providers (ISPs), such as Comcast and Verizon, should not speed up, slow down or block any content, applications, or websites that users would like to access.

In practice, networks regularly speed up and slow down content. Differentiation was built into the core of the Internet in the early 1980s by engineers who understood that networks would [need to make tradeoffs](#) between different kinds of service. Today, operators routinely use a variety of techniques to differentiate content, allowing them to ensure an efficient use of overall bandwidth. A well-known technique is called traffic shaping, which delays the flow of certain bits of information over a network so that preferred streams of traffic are prioritized. It effectively violates the spirit of network neutrality, yet it is among the most powerful tools a network engineer has. Thus, every FCC action includes the caveat that the rules are “subject to reasonable network management” so network operations can develop.

Indeed, in [the very first paper](#) proposing net neutrality, law professor Tim Wu readily admitted “network design is an exercise in tradeoffs.” He understood that his proposal would set the terms of reasonable network management, yet argued that the constraints created by net neutrality on network management “may be a necessary sacrifice” to ensure application innovation. The underlying question for policymakers, then, is the same as it has been for some time: Who determines what kinds of network management are in the consumer’s best interest?

Why were critics worried about rules based in Title II?

As AAF has explained, there are [countless options](#) to ensure the Internet is kept open and free. In 2015 the FCC embraced a strategy of categorizing the Internet as a public utility, thereby allowing the FCC to regulate it under Title II of the 1934 Communications Act. Yet this Title II reclassification scheme, which was just repealed, was simply one method among many.

Nevertheless, advocates for Title II reclassification sold their plan as the only path for network neutrality, defining this legal path as “real network neutrality” since only it can stop the creation of [fast lanes and slow lanes](#). Yet, even Wu [has acknowledged](#), “The fast lane is not a literal truth.”

Title II gave the FCC much more than just rules to apply to ISPs. For one, the agency was given the power to come back in the future to regulate the prices of broadband. Title II reclassification also gave the agency the ability to regulate privacy and cybersecurity, trampling on the FTC’s authority in these areas while also surpassing the guidelines Congress had laid out for the FCC. Indeed, in the latter days of the Democratic-led FCC, Title II provided the basis for [a proposal](#) that would have required agency approval of the privacy practices of every single device that the FCC authorized. As one judge [quipped](#) recently, the new rules would “virtually free the Commission from its congressional tether.”

The 2015 rules ironically also left some huge gaps in consumer protection. As the judge’s [recent court order](#) explains,

As the panel decision held and the agency has confirmed, the net neutrality rule applies only to “those broadband providers that hold themselves out as neutral, indiscriminate conduits” to any internet content of a subscriber’s own choosing.

In other words, as soon as ISPs decide not to be a neutral conduit, then they aren’t classified under Title II and aren’t under net neutrality rules. That’s a big gap waiting for exploitation.

What is the current law regarding network neutrality?

While many characterize FCC’s recent actions as a “repeal of network neutrality rules,” the reality is much murkier. In passing the Restoring Internet Freedom Order, the FCC chose to take a path that comports to longstanding principles of Internet regulation and plugs some of the original order’s holes.

The new regulatory regime doesn’t have the rigid rules of the 2015 net neutrality order, but that isn’t to say that consumers aren’t protected from bad behavior coming from ISPs. Instead, the FCC [is working with the](#) FTC, which has broad authority to investigate and bring action against companies that act against the interest of consumers.

This move has been proposed before. Former FCC Commissioner Rob McDowell [suggested this path](#) in 2010. Former FTC Commissioner Joshua Wright also put his support behind it, as did [Jonathan Nuechterlein](#), a former general counsel of the FTC in the Obama Administration. Moreover, in 2007, the Department of Justice [filed an opinion with the FCC](#), saying “The FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws.”

Hasn’t network neutrality always been about FCC power?

The idea of network neutrality has been likened to the civil rights battle, a fight for Internet freedom, a Bill of

Rights for the Internet, and [even a pizza](#). Unlike lower taxes or budgetary spending caps, network neutrality isn't a fixed policy, a fact that invites mischief at the agency level. As the FCC's use of Title II has shown, agencies with broad power and limited checks face a great temptation to push their power as far as it will go.

Even one of the most ardent supporters of Title II reclassification [warned](#) years ago that the effort was sure to embolden the FCC:

But Congress has never given the FCC any authority to regulate the Internet for the purpose of ensuring net neutrality. In place of explicit congressional authority, we expect the FCC will rely on its "ancillary jurisdiction," a position that amounts to "we can regulate the Internet however we like without waiting for Congress to act." (See, e.g., the FCC's brief to a court earlier this year). That's a power grab that would leave the Internet subject to the regulatory whims of the FCC long after Chairman Genachowski leaves his post.

What can settle this debate?

The fear expressed in the quote above is simply a fact of executive regulation—what one administration enacts, the next administration can undo. When the White House changes guard again, a new FCC Chair can come in and reinstate the 2015 Order. The resulting regulatory instability is good for no one.

What FCC Chairman Pai has set into motion is only a temporary fix. The only long-term solution is for Congress to take action.