

Last week, the FCC ignited a firestorm of Net Neutrality activity with the approval of a [Declaratory Ruling, Report and Order, and Order](#) to repeal Net Neutrality at the FCC December Open Meeting. Leading up to the vote, activists, industry representatives, tech giants, trade organizations, legislators, and citizens voiced their support or disapproval toward one of the most polarizing telecommunications topics in memory. This brief will offer an updated summary of the FCC's newly adopted Order; review legislative, legal, and state reactions; and discuss what is ahead for the battle to preserve a free and open internet.

### What Does the Order Do?

First, some history – As outlined in a [previous Connected Nation Policy Brief](#), Obama-era Net Neutrality rules went into effect on June 12, 2015, and aimed to ensure consumers and businesses would have access to a fast, fair, and open internet. The two main components of the rules were:

1. ISPs would fall under the category of telecommunications services (as opposed to information services), so they would be bound by the regulations of Title II of the Telecommunications Act of 1934, which provides the FCC the authority to regulate them as a public utility.<sup>1</sup>
2. The inclusion of the “Bright Line Rules” which state:
  - **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.

The newly adopted FCC Order, as of last week, eliminates the 2015 rules, which Chairman Pai and other Republican Commissioners have referred to as “heavy-handed utility-style regulation of broadband internet access service, which imposed substantial costs on the entire internet ecosystem.”<sup>2</sup>

<sup>1</sup> <https://www.forbes.com/sites/nelsongranados/2015/06/11/net-neutrality-goes-into-effect-what-consumers-should-expect/#571f7d696c38>

<sup>2</sup> [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db1214/DOC-348261A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348261A1.pdf)

Specifically, the newly adopted Declaratory Ruling, Report and Order, and Order:

- Restores the classification of broadband internet access service as an “information service” under Title I of the Communications Act;
- Reinstates the classification of mobile broadband internet access service as a private mobile service;
- Asserts that the 2015 regulations reduced internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers;
- Finds that public policy, in addition to legal analysis, supports the information service classification, because it is more likely to encourage broadband investment and innovation;
- Renews the Federal Trade Commission’s (FTC) role as the lead agency to protect consumers, enabling it to apply its extensive expertise to provide uniform online protections against unfair, deceptive, and anticompetitive practices;
- Requires that ISPs disclose information about their practices to consumers, entrepreneurs, and the commission, including any blocking, throttling, paid prioritization, or affiliated prioritization. These practices, however, are not prohibited by the FCC;
- Finds that transparency, combined with market forces as well as antitrust and consumer protection laws, achieves benefits comparable to those of the 2015 “bright line” rules at lower cost;
- Eliminates the “vague and expansive” Internet Conduct Standard, under which the FCC could micromanage innovative business models; and
- Finds that the public interest is not served by adding to the already-voluminous record in this proceeding, additional materials, including confidential materials, submitted in other proceedings.<sup>3</sup>

Furthermore, on the day before the FCC’s December meeting, the FCC and the FTC issued a memorandum of understanding (MOU)<sup>4</sup> to go into effect upon the repeal of Net Neutrality rules. The MOU outlines each agency’s role in patrolling internet service providers moving forward. The MOU states that the FCC will monitor the broadband market, identify market entry barriers, and take enforcement actions as necessary against ISPs that do not notify the FCC of or post on an easily accessible website any blocking, throttling, or paid prioritization activity. The FTC will investigate and take enforcement action as appropriate against ISPs that are engaged in unfair, deceptive, or unlawful acts or practices. The MOU also calls for pooling resources together to share legal and technical expertise when needed.

As [Connected Nation has stated](#), the FCC’s recent actions have been praised by those who have long argued that the 2015 rules were a policy solution in search of a problem, and condemned as a threat to democracy by those who wish to leave the rules in place. Net neutrality proponents promise a legal challenge to any step the FCC takes to repeal the rules. This would mark at least the third substantive round of litigation in the federal court system over Net Neutrality.

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<sup>3</sup> [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db1122/DOC-347927A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1122/DOC-347927A1.pdf)

<sup>4</sup> [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/ftc\\_fcc\\_mou-internet\\_freedom\\_order\\_draft.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/ftc_fcc_mou-internet_freedom_order_draft.pdf)

## **Legislative Reactions**

Congressional reaction to last week's development has been mixed. In the days preceding the FCC's vote, various Democratic lawmakers, including Sen. Richard Blumenthal (D-CT) called for a delay on the vote.<sup>5</sup> They were followed, on the morning of the FCC Meeting, by Republican Senator Susan Collins (R-ME) and Independent Senator Sen. Angus King (I-ME) who also sent a letter calling for a delay.<sup>6</sup> Various letters<sup>7,8</sup> from legislators urging the FCC not to repeal the 2015 Net Neutrality rules were countered by letters from lawmakers praising the FCC's action. On December 14, approximately 100 Republican House members voiced their support of the FCC's recent Order in a letter led by House Energy and Commerce Committee Chairman Greg Walden (R-OR) and Communications and Technology Subcommittee Chairman Marsha Blackburn (R-TN).<sup>9</sup>

On December 16, Sen. Ed Markey (D-MA) released the text of a resolution<sup>10</sup> that would use the Congressional Review Act (CRA) to reverse the FCC's repeal vote. As of the writing of this brief, the resolution has 16 Democratic co-sponsors, and Rep. Mike Doyle (D-PA) has said he intends to introduce a House counterpart. Further legislation is likely to emerge as Congress jumps to take up the issue. On the day of the FCC's action, House Communications and Technology Subcommittee Chairman Blackburn (R-TN) said in a video to expect legislation where Congress "will codify the need for no blocking, no throttling, and making certain that we preserve that free and open internet."<sup>11</sup> On the Senate Republican side, Sen. John Thune (R-SD) has indicated that he is working to bring Democrats to the table as well to codify some open internet principles. Earlier indications are that at least some Democratic lawmakers, in the wake of the FCC's new order, appear more willing to consider a permanent, legislative alternative than they were while the 2015 Order was in place. Large ISPs including AT&T, Charter, and Comcast have all advocated for legislation.

## **Net Neutrality in the States and in the Courts**

Legislation is not the only tool Net Neutrality proponents have in their belt. Legal challenges to the repeal order are guaranteed, led by telecommunications policy groups such as Free Press, Public Knowledge, and the Computer and Communications Industry Association.

In a joint letter, the Attorneys General of Oregon, California, Delaware, Hawaii, Iowa, Illinois, Kentucky, Massachusetts, Maryland, Maine, Mississippi, North Carolina, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, and the District of Columbia wrote to the FCC Commissioners promising a legal challenge to the repeal. The Attorney General of New York has promised a legal challenge centered on questions regarding the validity of some of the comments filed at the FCC in

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<sup>5</sup> [https://www.blumenthal.senate.gov/imo/media/doc/12.08.2017\\_Net\\_Neutrality\\_Letter.pdf](https://www.blumenthal.senate.gov/imo/media/doc/12.08.2017_Net_Neutrality_Letter.pdf)

<sup>6</sup> <https://twitter.com/SenAngusKing/status/941323962684006400>

<sup>7</sup> <https://www.tomudall.senate.gov/news/press-releases/udall-heinrich-call-on-fcc-chairman-pai-to-abandon-reckless-plan-to-end-net-neutrality>

<sup>8</sup> <https://doyle.house.gov/sites/doyle.house.gov/files/documents/20171213DoyleNDelayLtrAll.pdf>

<sup>9</sup> <https://energycommerce.house.gov/wp-content/uploads/2017/12/121317-FCC-Net-Neutrality.pdf>

<sup>10</sup> <https://www.markey.senate.gov/imo/media/doc/CRA%20Net%20Neutrality%20.pdf>

<sup>11</sup> <https://twitter.com/MarshaBlackburn/status/941335231449137152/video/1>

favor of repeal. During the December Open Meeting, Commissioner O’Rielly addressed these concerns and explained that the FCC does not tally comments in favor or against any measure in order to determine a policy direction, which in his opinion makes the quantity of comments a moot point.

Additionally, some states are looking at how they can act on the subject of Net Neutrality, despite clear language in the order that would inhibit state Net Neutrality rules. For example, Washington’s Gov. Jay Inslee joined state Attorney General Bob Ferguson and others last week to announce state plans to aim to preserve an open internet and to protect Washington consumers. The proposal would stop the state from doing business with carriers that do not honor Net Neutrality, provide a speed test for Washington residents, work with legislators to strengthen state consumer protection laws to include Net Neutrality, and encourage new entrants in to the ISP market such as authorizing public utility districts and rural and urban port districts to provide retail ISP and telecommunications services.<sup>12</sup> This sort of state-based policy is exactly the sort of “Balkanization” that markets seek to avoid because of the difficulty posed by different regulatory standards from jurisdiction to jurisdiction.

### **What Does the Future Hold for Net Neutrality?**

With the December 14 FCC vote in the past, multiple legislative and legal battles loom as activists and legislators from all sides of the policy spectrum aim to protect what they feel is best for the future of the internet. With everyone touting the importance of a free and open internet, the tactics for achieving that goal could not be more polarizing.

As stated above, the FCC’s Order will be challenged in court, while Congress, with the support of broadband providers, will push legislation that will aim to secure the fate of Net Neutrality. Given the uncertain nature of the judicial system, it’s conceivable that a consensus, bipartisan legislative solution is possible that gives clear statutory direction to the FCC. With these actions and others certainly appearing in the coming days and weeks, the future of Net Neutrality is far from solidified as America moves onto Round 3 (or perhaps Round 4 or 5), of the debate around a free and open internet.

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<sup>12</sup> <https://medium.com/wagovernor/state-leaders-announce-steps-to-protect-net-neutrality-dff666151d0e>