The FCC's Net Neutrality Order Protects Internet Freedom by Restoring the Law

By S. Derek Turner and Matt Wood

"So, are there any surprises?"

That's the No. 1 question we've been asked since the FCC released the text of its order reclassifying broadband access as a common-carrier service under Title II of the Communications Act — the step needed to provide real Net Neutrality protections for Internet users.

And after a close read, the answer is no.

Below we cover the highlights of the few pages of new rules the FCC issued, as well as the order text supporting those rules. That text — the legal analysis, the history of the issue, the chronology of the decision-making process, and the procedures the agency followed along the way — comprises the vast majority of the 400-page order.

The rules themselves are a little less than eight pages long.

There are no "surprises" in these rules or in the order because the FCC did what it said it would do, both in the Feb. 4 fact sheet it released leading up to the Feb. 26 vote, and then in the detailed answers and explanations Chairman Wheeler and FCC staff offered at the open meeting on the 26th.

And the most important thing the FCC did is the easiest to explain.

Above all else, the FCC restored the rule of law. It returned to the will of Congress as written into the Act, and as updated on an overwhelmingly bipartisan basis in 1996. To keep access networks open, the FCC began treating broadband as an essential communications service again. But it did that without bringing Internet content under the agency's jurisdiction.

The order shows that the FCC listened to the millions of Americans who called for these rules. Washington worked the right way, for a change.

And the rules are good because they're grounded in good law.

Restoring People's Communications Rights Under the Law

The FCC replaced its prior unenforceable interpretation of its legal authority, which was struck down twice in court. It went back to the text of the current law in Title II, now rightly reapplied to broadband providers. The heart of Title II, in Sections 201 and 202 of the Act, make it clear that:

- these carriers need to provide broadband "communication service upon reasonable request" to customers in the areas where they have deployed and currently offer such service;

- their “charges, practices [and] classifications” for that service must “be just and reasonable”; and

- it’s unlawful for them to have “any unjust or unreasonable discrimination in charges, practices [and] classifications” for that service, including any “undue or unreasonable preference or advantage” or any “undue or unreasonable prejudice or disadvantage” applied to any particular user or class of users.

It’s hard to object to any of that, right? It’s also hard to read that and understand why it incites petulant tantrums from discrimination proponents like FCC Commissioner Ajit Pai. There’s no substance at all in the scorched-earth anti-Net Neutrality campaign Pai is leading on behalf of ISPs, including his former employer, Verizon.

In fact, there’s nothing in the FCC’s actions or the order itself that supports any of the crazy things some people are saying. There’s nothing untoward in this order or in these rules, and nothing unexpected once we understood that the FCC was returning to the sound footing of Title II.

Saving the Internet in Three Parts

Much has been made about the length of the FCC’s order, but complaining about page counts is silly. FCC decisions are like court opinions: They have a short ordering clause, and then a much longer explanation and narrative. The item has three parts:

Declaratory Ruling: This is where the FCC finds that what it calls “mass market broadband Internet access services” are “telecommunications services,” according to the legal definitions in the Communications Act. Broadband access is a service marketed to the public that enables users to send and receive the information of their choosing between points of their choosing, without change in the content of that information.

In this section, the FCC explains why this is precisely the right legal definition for broadband Internet access, and why it’s reversing the agency’s prior findings that these were “information services” (i.e., in the same category as websites). This classification once again makes broadband access providers “telecommunications carriers” under Title II of the Act, and it means that these carriers have certain duties, obligations and benefits that come with that designation.

Order: Having found that broadband access service is a common-carrier telecom service, the Commission uses its authority (under Section 10 of the Act) to forbear from applying most of Title II’s provisions to broadband carriers. That means it’s not applying laws that might otherwise regulate rates for broadband Internet access, require broadband providers to file tariffs, or require them to get permission before discontinuing Internet access service in a particular area. The FCC is also forbearing from unbundling and wholesale requirements that might otherwise require certain dominant broadband providers to open up their networks for use by competing ISPs.

The FCC didn't forbear from some key laws. It kept the nondiscrimination authority for Net Neutrality in place (in Sections 201 and 202 of the Act). It also kept provisions protecting consumer privacy (Section 222) and universal service (Section 254) in place, but it left decisions about how to implement those laws to other proceedings because they aren't directly related to the Open Internet rules.

Report and Order: This is the part of the item where the FCC responds to the D.C. Circuit Court of Appeals' remand of the agency's 2010 Open Internet rules and adopts new rules based firmly in Title II authority. These rules apply equally to mobile and fixed broadband services. That's a big change and a huge improvement over the 2010 Open Internet rules, which contained little to no protections against blocking and discrimination by wireless broadband providers.

Together these three parts form a solid shield to protect Internet users.

First and foremost, the restoration of Title II is critical. That's because it also restores Internet users' legal rights to (1) access broadband services and (2) use those broadband services to communicate with the world, free from undue ISP interference.

No matter how the rules based on this law might have been structured, it's the law in Title II that makes it illegal for ISPs to unreasonably discriminate against their users, and it's this law — specifically, provisions like Section 208 of the statute — that gives people due process to address any violations of this ISP duty. The specific rules matter, but the foundation on which they're based is even more important.

Turning to the specific rules, the FCC wisely prohibited several inherently harmful practices. Because any such ISP conduct threatens the open Internet, the Commission declared blocking, throttling and paid prioritization to be unlawful. As the order explains, "The record in this proceeding reveals that [these] three practices in particular demonstrably harm the open Internet … [and] we find each of these practices is inherently unjust and unreasonable, in violation of section 201(b) of the Act." And contrary to what Commissioner Pai seems to think, this part of Title II clearly gives the FCC the authority to ban these practices upon finding them *per se* unreasonable.

It's crucial that we now have protections back in place, and back on solid legal authority, to keep ISPs from shutting down content, charging extra tolls to access certain kinds of websites or apps, and creating slow lanes for those who cannot pay those tolls.

Many ISPs claim to have had a change of heart and say they now actually support rules that would bar these practices. However, as the FCC notes, "While we appreciate that several broadband providers have claimed that they do not engage in paid prioritization or that they have no plans to do so, such statements do not have the force of a legal rule that prevents them from doing so in the future. The future openness of the Internet should not turn on the decision of a particular company. We are concerned that if paid prioritization practices were to become widespread, the damage to Internet openness could be difficult to reverse."

Flexibility to Adapt Open Internet Protections Going Forward

Title II itself protects Internet users from other harmful practices outside of these bright-line ban categories. So the FCC chose to embody the prohibition against other unreasonably discriminatory practices with a "general conduct" rule that says:

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

We recognize that some open Internet proponents like the Electronic Frontier Foundation, which fully supports returning to Title II, have voiced concerns about the general conduct standard. But by not attempting to define each and every unjust ISP practice now, the FCC leaves the fight against any new forms of unreasonable discrimination to future proceedings and complaint processes guided by the sound and bounded law of Title II.

It's important to note that we were always going to need continued vigilance from open Internet supporters, advocates, and users — regardless of how the FCC had decided to write its rules. The regulatory process is not a "set it and forget it" exercise; no legal process is.

Even if an ISP does something to violate one of the three bright-line rules against blocking, throttling or prioritizing, someone is still going to have to file a complaint against that practice, and the FCC is going to give the ISP a chance to argue that its practice is not actually a violation of the rules. If a carrier does something unreasonably discriminatory that no one has yet contemplated, the process for getting the FCC to stop that behavior is identical to the process for getting the FCC to enforce a bright-line rule.

The vital consideration here is that broadband carriers are now legally prohibited from imposing unjust or unreasonable practices on their users, or from acting in an unjust or unreasonably discriminatory manner. And the general conduct rule applies only to broadband Internet access service providers — the carriers that provide your broadband connection — not to other "future conduct" on the Internet by users, edge providers, or anyone in between.

The FCC has identified three types of *per se* violations of Section 201(b)'s prohibition on unreasonable practices by such carriers, and it has the full ability to declare that other such practices are *per se* unlawful in the future — after an evidentiary hearing and due process. This is how the law works, and this is how it *should* work.

Concerns about over- or under-reach will exist regardless of how rules and even statutes are written, as will the continued impacts of regulatory capture. But with Title II restored, the FCC has a law it must follow — not a legal foundation that it's inventing on the fly. And members of the public for the first time in a decade have a sustainable legal right to complain and have their grievances heard and judged based on that law's requirements. The law, combined with the

public's vigilance, will stop most harmful ISP practices before they start while enabling the public to make a case against questionable practices as they arise.

In sum, the general conduct standard is simply an embodiment of the law's ban on unreasonable carrier behavior, a ban that by design gives the FCC and the public a process for evolving this protection as markets and technologies evolve. *Nothing* in the general conduct standard blesses or approves any specific practice, which means the general conduct rule is by no means a limiting clause.

As the FCC explained: "While these three bright-line rules comprise a critical cornerstone in protecting and promoting the open Internet, we believe that there may exist other current or future practices that cause the type of harms our rules are intended to address. For that reason, we adopt a rule setting forth a no-unreasonable interference/disadvantage standard."

Applying the Rules in the Real World

There has been a lot of discussion not just about what these rules cover, but what they don't cover. The FCC touched on some of these topics in the text of the order — like so-called interconnection fees and zero-rating plans — without developing any bright-line bans on these practices. Is there reason to stop and think about these other practices? Of course there is, if and when broadband providers use them to disadvantage or unreasonably discriminate against their customers' online choices.

But even without rules banning such practices now, ISPs under Title II now have a legal duty not to engage in *any* unjust practices. That means Internet users have rights and real people have the upper hand, as they should, when it comes to stopping ISPs from behaving badly. Open Internet proponents could ask the FCC to act both before an ISP tries any harmful new scheme (via petitions for rulemaking or declaratory rulings filed at the FCC) or after an ISP unveils a harmful practice (via formal complaints to correct such behavior).

Consider "interconnection" with the broadband provider. As Free Press explained in our filings, if the broadband provider is just charging access fees for content that its users have requested — flowing over a connection and using data capacity they've already paid for — that's a problem, and an unjust abuse of the broadband provider's gatekeeper power.

It might have been cleaner if the FCC had gone ahead in this order and recognized as unjust what Comcast and other ISPs did when they failed to provide enough capacity to receive the Netflix video traffic their customers had requested. Yet the underlying issue is complex, and the FCC chose to proceed incrementally while recognizing that such exchange of traffic is a part of the service ISPs provide to their customers. Thankfully, the FCC didn't rely on the tenuous and unworkable "commercially reasonable" standards or "sender-side" hybrid proposals to do this; it decided to protect users' rights to the content and data they pay for, rather than fixating only on the competitive harms to online content providers.

In the end, this all means that ISPs can't simply shift their gatekeeper abuses to this traffic exchange point to avoid the FCC's rules and law. That's an important win.

Reflect, Regroup and Fight On

Internet users once again have the legal right to use data communications services to speak free from undue discrimination — and that is nothing short of amazing. The FCC's vote is monumental, and a major turnaround from last spring, given the political forces arrayed against Internet users. The fight this Internet community just went through at the FCC was a tough one, and it will continue in Congress and in court.

But if we weren't living in an era in which deep-pocketed companies shape policy more often than not, the FCC's actions wouldn't be viewed as so stunning. The agency merely acted to preserve the successful status quo by faithfully interpreting the law enacted by Congress. In so doing it protected the public interest.

The fight for Net Neutrality isn't a new fight. As Sen. Ed Markey has noted, there has always been a fight to preserve nondiscrimination principles — and it was waged long before Tim Wu published a paper coining the struggle in the Internet-access space as "Net Neutrality."

The FCC's order delves briefly into this long history, tying its actions now to those it took half a century ago to separate content from carriage and keep those carriage networks open to new uses. It also explains how Congress endorsed that FCC approach in 1996, the last time it engaged in a comprehensive update of the Communications Act.

The current form of this longstanding struggle against gatekeeper power arose as it became clear that the phone and cable companies were eager to discriminate — and as they figured out a way to get out from under the law's basic prohibitions against this behavior. These broadband providers and their lobbyists got previous Commissions to improperly remove broadband from the "telecommunications service" category in a series of decisions made during the last presidential administration.

The phone and cable companies didn't like the law's basic requirements for nondiscriminatory common carriage, so they got the FCC to ignore and supplant the rule of law. This created many years of broadband providers telling their users to trust them, because they would never do anything to violate the spirit of the law that they worked so hard to dismantle.

For more than a decade, the FCC operated unmoored from the rule of law. In the regulatory context, this was not just a recipe for agency capture, but for how the revolving door became an industry in and of itself.

Having set aside its own authority, the FCC pretended it could step in if needed — though in the absence of the substance and the enforcement processes established in Title II this meant the public had no real recourse to complain or force the FCC to do its job. And in the absence of the solid legal authority it had cast aside, the FCC's sound principles and Open Internet rules were struck down twice in court — due entirely to this compromised legal framework.

Preserving the Status Quo and Putting Users' Rights Back on Solid Ground

The ISP industry is a highly concentrated market with insurmountable entry barriers and no effective competition. In this environment, the lack of legal obligations and rules leads to abuse no matter how often or how loudly these company's lobbyists say otherwise. Rules shape behavior. With the rules the FCC just adopted back in place, buttressed by the force of good law for the first time in a decade, ISPs will not be able to engage or even contemplate engaging in some of the discriminatory tactics that they would have rolled out absent these rules.

Today, just as it was the day before the FCC voted, the *status quo* is an open Internet operated on a common-carrier basis. It works that way because today's Internet access services are an outgrowth of the 50-plus years of telecommunications common-carriage law that separated content from conduit, ensuring that the transmission-network owner had the right incentives and obligations to carry content without undue interference. The ISPs are the ones that want to change that *status quo*. Verizon claimed in its court challenge that it had a right to edit the Internet content it carried for its customers. The FCC order makes clear that its rules "do not curtail broadband providers' free speech rights" when it comes to their own speech — but these carriers aren't "speakers" when they're carrying the speech of others.

This policy approach, as the FCC order details, created a clear telecommunications services market for data. That's what enabled end-users to connect computers to form the Internet in the first place, and later offer commercial and noncommercial services that rode across those access networks. This *status quo*, along with FCC policies to maintain it against the constant assault from the phone and then the cable companies, fostered the rapid adoption of home Internet access services in the 1990s, and the rapid deployment of broadband services as computing and networking technologies continued to evolve. Indeed, as the FCC recounts in the order (with a story told in greater detail in the comments Free Press filed), the broadband era had its greatest period of growth and investment before a previous FCC tossed aside the common-carriage framework.

The FCC's decision in 2002 finding that cable-modem service wasn't a common-carrier telecom service threatened to destroy this *status quo*. That disaster was averted over the following years when people demanded restoration of nondiscrimination protections in Net Neutrality principles and rules. The FCC did that starting around 2005 with a patchwork approach, cobbling together merger conditions, policy statements, individual enforcements, and rules based on that cable-modem decision and the decisions that followed.

The FCC finally returned to the law and got the foundation right in the current order. But make no mistake: This fight has always been about preserving and protecting the Internet's existing openness; it has always been a fight to preserve the *status quo*. Returning to Title II means simply restoring the rule of law — a law that was in place from the beginning of the computing era all the way through to the era a decade ago when a majority of Americans had adopted broadband.

That's why the FCC's order is an easy rebuttal to all the hysteria spouted by the powerful ISPs and their mouthpieces. Those who oppose legal protections for the open pathway to get online, and who favor discriminatory market-power abuses, want to ignore the history and the law.

They'll try to dismiss the FCC's actions with a flurry of fibs, and wage a petty political war designed to make open Internet protections look partisan.

While the order's release should ground this discussion in the facts and the law, the ISPs have created an industry of outrage built on a bed of lies, and that's not something that's easily undone.