



Wow!

“No fast lanes” on the U.S. Internet

March 2015

Speed read

The US Telco regulator, the Federal Communications Commission (FCC), came out strongly for net neutrality on 27 February. Here we summarise some of the key points of a decision that applies to both mobile and fixed, and strongly entrenches the idea that there won't be differentiated quality of service offered by an ISP for different types of “*legal content, applications, services, or non-harmful devices*”.



No fast lanes. Gone is the idea that consumers can have that fast lane choice by paying more or less for the service they choose. That standard benefit for consumers of differentiation (like an airline choice between business class and economy) is sacrificed to the competing objective of equal treatment and avoiding problems with, for example, charging certain content providers more to carry their traffic, thereby creating distortions, etc.

This is one policy approach, as adopted by the three majority Democrat Commissioners: the Republican dissenting Commissioners don't agree with that policy approach.

There is also concern expressed by both net neutrality supporters (most notably the Electronic Frontier Foundation (EFF)) and opposers (such as the Republican Commissioners) that a broadly based rule around internet conduct will enable the FCC to dictate the way in which ISPs offer their services to consumers, even if there are no fast lanes. Examples include regulatory action deciding the extent to which an ISP can offer differentiated (and constrained) service options, such as whether they can be differentiated by speed and data caps, etc.

As between ISPs there can still be service quality and price differences, of course: for example, mobile, fibre and DSL providers will each offer different service qualities and pricing.

The new rules go wide: for example, there's an internet interconnection regime as well.

But there are three important caveats to the above:

- The FCC hasn't released the 332 pages of new rules yet, and the devil will likely be in the detail as it usually is with telco regulation. There will be tension and gaming points such as around distinguishing network-required traffic management from “commercial” traffic management. The fact that there's 332 pages of detail implies that this is way more complicated than what has been released so far. See, for example, the internet conduct rule noted above.
- With a 3-2 split between Democrat and Republican Commissioners, and a changing political environment in the States, will this stick?
- While it seems the FCC has tried to belt and brace its decision legally, this looks like it may be heading to litigation.

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For other countries such as NZ, this will help inform the debate, and the 332 pages of detail may end up being a valuable resource. So will the differing views held by the various Commissioners, each based on differing policy and political perspectives.

We’ve recently written about a [new Canadian net neutrality decision](#), and, in NZ, the regulator already may be able to take some steps under the Telco Act and/or Part 4 of the Commerce Act, if the need arises (this may be an issue anyway for the Telco Act review). It is surprising that some don’t see this as an issue on the horizon, or even immediately. The issues underpinning net neutrality are more likely here.

The Detail

Here’s what the FCC says at a high level (as above, there’s 332 pages of important detail behind this, not yet released).

Three so-called “Bright line rules”

If 332 pages are needed, there’s a reasonable suspicion that the 3 keynote rules, applying to fixed and mobile, won’t be quite so bright-lined. Here they are in the FCC’s words, reflecting a strong net neutrality stance:

Bright Line Rules

The first three rules ban practices that are known to harm the Open Internet:

- **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 bright-line rules against blocking and throttling will prohibit harmful practices that target specific applications or classes of applications. And the ban on paid prioritization ensures that there will be no fast lanes.

One of the Republican Commissioners neatly summarised how he sees this playing out (and this does reflect our experience elsewhere):

“The FCC “fact” sheet promised bright line rules, but the reality is that the bulk of this rulemaking will be conducted through case-by-case adjudication, mostly at the Bureau level and in the courts. To be sure, there are three bright line rules: no blocking, no throttling, and no paid prioritization. But those are mere needles in a Title II haystack.”

Although much will depend on the detail of the 332 pages of rules, it appears that the consumer loses the choice to elect to have fast lanes. Based on what the Republican Commissioners have to say, that is the effect.

Provider standards for internet conduct

Backing this up are standards, which the FCC can enforce, by which ISPs cannot “unreasonably interfere with or unreasonably disadvantage” the ability of consumers to select, access, and use the lawful content, applications, services, or devices of their choosing; or of edge providers to make lawful content, applications, services, or devices available to consumers.

We can only speculate what these rules involve, as little detail is provided. See, for example, the speculation in [Reuters](#),¹ and in an [EFF commentary](#).²



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Here's what one of the Republican Commissioners has to say about this:

"... pernicious is the FCC's new "Internet conduct" standard, a standard that gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers. Usage-based pricing plans and sponsored data plans are the current targets. So if a company doesn't want to offer an expensive, unlimited data plan, it could find itself in the FCC's cross hairs.

Our standard should be simple: If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn't take it away from you. Banning diverse service plans would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans."

Transparency

Consistent with what is happening in other countries, broadband providers must disclose, in a consistent format: promotional rates, fees and surcharges, data caps, packet loss as a measure of network performance, and details of network management practices that can affect service.

This is the sort of tool that may emerge strongly internationally, as it helps consumers compare quality of service between providers on an apples and apples basis.

The FCC is adopting the approach of having a "safe harbour" way of reporting that information.

Reasonable network management

ISPs can manage the technical and engineering aspects of their networks, based on differing attributes (e.g. management of

congestion over mobile differs from DSL, which differs from fibre). The ISP can do that, so long as that is the real purpose.

Avoiding workarounds

The new law will cover relevant traffic other than over the public internet, to stop workarounds avoiding the open internet rules.

Broadband interconnection regulation

This is potentially big and may be picked up by other jurisdictions.

For the first time, the FCC can address issues that may arise in the exchange of traffic between mass-market broadband providers and other networks and services. The Commission can hear complaints and take appropriate enforcement action if it determines that the interconnection activities of ISPs are not just and reasonable.

Price controls?

The majority say there are none. The minority say that in reality there are, ultimately, price controls, with one Republican Commissioner even describing the FCC's approach as price regulation fauxbearance instead of forbearance.

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1. A. Selyukh "On U.S. net neutrality rules, 11th-hour push against vague rule" (20 Feb 2015) Reuters.
 2. C. McSherry "Dear FCC: Rethink The Vague "General Conduct" Rule" (24 Feb 2015) Electronic Frontier Foundation.

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