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# FCC Firms Up Legal Grounds for Net Neutrality

FCC Chairman Tom Wheeler has said he won't impose some of the measure's more restrictive provisions.
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By JACOB GERSHMAN
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Federal Communications Commission Chairman Tom Wheeler 's embrace of sweeping new Internet regulations drew cheers from net-neutrality supporters, but the battle for control of the Internet's future is just getting started.

Cable and phone companies opposed to the plan are steeling themselves for a long legal slog that is likely to stretch well beyond the end of President Barack Obama 's term and whose outcome is uncertain.

"A barrage of litigationwhich could well wind up in the Supreme Courtis sure to follow," said Peter Karanjia, a communications lawyer at Davis Wright Tremaine LLP in Washington and a former deputy general counsel at the FCC.

Under Mr. Wheeler's proposal, broadband Internet service would be governed by the same Title II regulations used to regulate the phone system. Providers wouldn't be allowed to selectively slow traffic from websites such as Google Inc. 's YouTube video unit and streaming-video service Netflix Inc. or offer them fast lanes at a higher price. The rules also would give the FCC oversight of deals cut by telecom and cable companies with Internet carriers at the edges of their networks.

It isn't the first time that the FCC has pursued rules based on net neutrality—the idea that all Internet traffic should be treated equally.



But legal experts say the FCC is on firmer legal ground than before.

Since Congress has never specifically taken a position on net neutrality, the biggest hurdle for the FCC has been explaining to a court where it gets the authority to impose it. That was the issue that doomed the agency's "open Internet" rules, a similar package of regulations adopted in 2010.

In defending those rules, the FCC relied on a minor provision of Congress's 1996 overhaul of the Communications Act of 1934 that instructed the FCC to encourage investment and competition in the advanced telecommunications market.

That was a thin reed in the eyes of the U.S. Court of Appeals for the District of Columbia Circuit, which struck down the rules last year.

But the court also suggested the FCC could find better legal footing for such rules through the agency's Title II authority.

Net-neutrality advocates say Mr. Wheeler's plan, if adopted by the FCC, has a greater shot at surviving a court review.

"Every time they've tried before, [the FCC] relied on a random scrap of authority," said Columbia University law professor Tim Wu, a champion of net neutrality. "This time they relied on the main gun of the agency."

Title II of the 1934 law treated the phone system as a common carrier, subjecting it to the same kind of public-protection rules that govern railroads or pipelines.

Telecom services have to serve the public indiscriminately, and their prices and practices have to be "just and reasonable." It is up to the FCC to define exactly what that means.

The FCC had decided years ago not to use Title II to regulate Internet lines, and now is reversing course. Mr. Wheeler has said he won't impose some of the measure's more restrictive provisions, such as price controls. Nevertheless, telecom and cable companies fear giving the commission that authority, and say they feel no less confident of their legal position this time around.

"The radical course of 'reclassification' will lead to endless rounds of litigation and will likely be reversed on appeal," wrote Kathleen Grillo, Verizon Communications Inc.'s senior vice president for federal regulatory and legal affairs, in a comment submitted to the FCC last month.

Legal observers say the FCC could still be vulnerable to a court challenge.

Northwestern University law professor James B. Speta, who focuses on telecommunications and Internet policy, said that if the rules are finalized, broadband companies could object to being labeled a telecom service.

It is a technical argument that rests on the idea that what they offer is more complex than a "dumb pipe" connection between two users. They also process and store data and offer security screening, spam protection, email and other services to their Internet customers.

Mr. Speta said broadband carriers also could try to make the case that the net-neutrality regulations have no justifiable basis. A court could overturn the rule if it determines the agency's action was arbitrary or capricious.

"Reclassification would be contrary to the public interest by preventing investment, stifling innovation and increasing compliance costs for small businesses," wrote lawyers for the Wireless Internet Service Providers Association in a comment submitted last year.

The group also questioned whether Title II classification necessarily forbids the creation of Internet "fast lanes."

There is also a potential constitutional argument, Mr. Speta said. Broadband carriers could claim that they have a First Amendment right to decide what's carried on their networks.

"I feel good about the legal authority that we've chosen," Gigi Sohn, a special counsel to the FCC chairman, told C-Span on Friday.

—Gautham Nagesh contributed to this article.

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