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Newsbrief

What's New at Terreni Law Firm, LLC

Spring has finally sprung! Here's the latest in utility law news.

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Firm Updates

Look for an exciting announcement about a new initiative to help South Carolina's senior citizens later this month from Lt. Governor Henry McMaster, Sustaining our Seniors, Duke Energy Carolinas, and the Office of Regulatory Staff!

FCC's Net Neutrality Order Sparks Fierce Debate

On February 26, 2015, the Federal Communication Commission voted to promulgate new regulations for broadband Internet service in a 3-2 vote split along party lines, with Democrats holding the majority vote. The majority stated that consumer protection was required because, as "gatekeepers" of the Internet, "broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like." The new rules support the concept of "Net neutrality," and are intended to prevent providers from blocking content, throttling traffic, and creating "fast lanes," or a tiered internet service, which would allow higher speeds and larger volumes of traffic for websites willing to pay more to their ISP. Providers will also be required to disclose details of their network management practices.

The FCC reclassified fixed and mobile broadband providers as "public utilities" and ISPs as "common carriers" under Title II of the 1934 Communications Act. This reclassification serves as a means of enforcing the Net neutrality rules and will allow the FCC to regulate broadband services in the same way it does the country's traditional telephone network. However, opting for "light touch" regulation, the FCC also chose to forebear most of the regulatory provisions in Title II. Nevertheless, the reclassification of broadband providers and ISPs as public utilities and common carriers does open the door for future regulation. Just because the FCC has chosen not to exercise the full extent of its authority with the proposed regulations, does not mean that it could not do so in the future. For consumers, though, nothing about their broadband service—from the speed to the monthly bill—will be directly affected by the decision in the immediate future, as the new rules neither regulate rates, nor impose new taxes or fees, nor will they "require broadband providers to increase network speeds."

The new rules will not go into effect immediately: before the rules can be published in the Federal Register, they must undergo a review period under the Office of Information and Regulatory Affairs, which lasts for 60 days. Following that, they will be subject to Congressional review for an additional 60 days. It is at that point that the rules are expected to be challenged in court by major companies such as Verizon, AT&T, and Comcast, all of which have already stated that they will sue. As of March 26, two companies, United States Telecom Association and Alamo Broadband, had already filed petitions against the new rules. In its filing, United States Telecom Association cites violations of the United States Constitution and federal law: "US Telecom seeks review of the Order on the grounds that it is arbitrary, capricious, and an abuse of discretion ...violates federal law, including, but not limited to, the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; conflicts with the notice-and-comment rulemaking requirements...and is otherwise contrary to law." The FCC contends that the lawsuits are "premature and subject to dismissal."

However, dissenting FCC Commissioner Ajit Pai, wrote that the FCC's order "has glaring legal flaws," arguing among other things that the proposed regulations were improperly noticed, that broadband service is an "information service" exempt from regulation under the Telecommunications Act of 1996, and that mobile broadband providers are not "commercial mobile service" providers subject to regulation under the Act. Pai also questioned the policy rationale for the new regulations: "if this Order manages to survive judicial review, these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers. To paraphrase Ronald Reagan, President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem." Commissioner Michael O'Rielly dissented on similar grounds.

A plethora of heavyweight internet companies, such as Google, Netflix, Twitter, and Etsy, support the new rules. However, several major tech companies, including Intel, oppose the new rules, arguing that they will stifle the possibility of new investments in their products, which will in turn further discourage competition in the broadband service market. They are also concerned that, sooner or later, Internet service will be heavily regulated and subject to fees that the companies will have to pass on to customers in order to absorb. Other opponents include members of the House Communications and Technology Subcommittee, the chairman of which denounced the new rules, calling them "ill-advised, illogical, and illegal," and stating that the FCC's actions have overstepped its authority.

The debate over the net neutrality promises to be contentious. FCC Chairman Tom Wheeler is currently in the middle of several rounds of hearings before congressional committees regarding the justification for the new rules. Wheeler has previously stated that "This is no more a plan to regular the Internet than the First Amendment is a plan to regulate free speech." President Obama has made no secret of his support for Net neutrality, stating "I am unequivocally committed to net neutrality," at an event in October 2014. In Congress, the debate seems to be taking place along partisan lines. Rep. Edward Markey, a Massachusetts Democrat, declared the day of the FCC's vote "Internet Innovation Freedom Day," while Rep. Louie Gohmert (Texas) became furious during one hearing session and shouted at Wheeler, "You're playing God with the Internet...That's not your job. Congress wasn't asking you to take over the Internet."

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