

Legal Sidebar

Net Neutrality: Can the FCC Reclassify Broadband Internet Access Services?

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On November 10, 2014, President Obama [released a statement](#) urging the Federal Communications Commission (FCC) to adopt rules governing the provision of broadband Internet access services, commonly called “net neutrality” rules. In the statement, the President recommended that the FCC reclassify the statutory definition of broadband Internet access services from information services to telecommunications services. Such reclassification would grant the FCC more clear authority to impose the rules that the President has recommended. Title II of the Communications Act permits the FCC to regulate the rates of services classified as telecommunications services and to prohibit unreasonable discrimination in the provision of those services, among other things. In other words, telecommunications services may be regulated as “common carriers,” and if broadband Internet service providers were reclassified as telecommunications services, they may be regulated as common carriers as well. However, [many that recommend](#) that the FCC reclassify broadband Internet access services, including President Obama, recommend that the FCC forbear from applying many of the provisions of Title II to broadband Internet access services, including the provision authorizing rate regulation. Instead, many reclassification advocates argue that only network neutrality rules, [which would require disclosure, would prohibit blocking or throttling of legal content, and would prohibit certain kinds of content discrimination on the part of service providers](#), should be implemented following reclassification.

On the other hand, some Members of the House and Senate [have sent a letter](#) to the FCC arguing that the FCC should not reclassify these services and that the agency may encounter legal difficulties if it chose to do so. This leads to the question: Does the FCC have the authority to reclassify the provision of broadband Internet access services? The short answer is yes. However, the Members of Congress rightly point out in their letter that reclassification may not be particularly easy.

In order to understand how the FCC might legally be able to reclassify broadband Internet access services, [it is helpful to understand how it came to classify these services as information services in the first place](#). Prior to the Telecommunications Act of 1996, the FCC had faced the question of whether and how to regulate providers of Internet services. Initially, the agency chose to distinguish between what it termed “basic services” and “enhanced services.” Basic services were “pure communications” services. That is to say that they were “virtually transparent in terms of [their] interaction with customer supplied information.” The most common example of a basic service would be a telephone call. Enhanced services, on the other hand, involved “computer processing applications . . . used to act on the content, code, protocol, and other aspects of the subscriber’s information.” This definition encompassed services that provided end users with a connection to the Internet. It may be worthwhile to point out that, at the time these definitions were promulgated, most connections to the Internet were accomplished via a dial-up connection. Therefore, the transmission component of a connection to the Internet was treated as distinct from the service providing the actual Internet connection. Basic services, the transmission component, were subject to common carrier requirements. Enhanced services, the connection component, were not.

This regulatory regime was in place when Congress enacted the Telecommunications Act of 1996 and, in the Act, Congress preserved a similar distinction. Under the Telecommunications Act, telecommunications carriers, not unlike basic service providers, are subject to common carrier regulation, but only to the extent that they are providing telecommunications services. Information services providers, not unlike enhanced service providers, are not subject to common carrier regulation. Tracking its previous regulatory distinctions and the definitions in the Telecommunications Act, the FCC generally treated the provision of “pure transmission” services as telecommunications services, but treated the provision of “Internet access

services” as information services.

The Commission apparently changed course in 2002, when deciding how to treat the provision of broadband Internet access by cable providers. Rather than treating the access service portion of cable broadband service as an information service and the transmission service as a telecommunications service, the Commission determined that cable companies were providing an integrated information service when they provided cable broadband Internet service. As a result of this interpretation, cable broadband service providers were exempt from Title II common carrier regulations.

The [Supreme Court upheld the FCC’s decision](#) to classify cable broadband service as an information service. The Court found that the definitions of telecommunications service and information service in the Communications Act were ambiguous, and that the FCC had reasonably interpreted these ambiguous provisions. As a result, it was within the FCC’s discretion to determine whether Internet access services should be regulated under Title II as telecommunications services, subject to common carrier regulation described above, or, less onerously, under Title I as information services.

When statutory definitions are ambiguous and agencies have discretion to interpret their meaning during initial implementation, the [Supreme Court has held](#) that an agency may revisit its previous decisions regarding its interpretation of an ambiguous statute and may reinterpret a statute in light of changing circumstances. In doing so, an agency need not justify its reinterpretation in light of its previous interpretation. In other words, an agency need not explain why its new interpretation is better or more reasonable than its old interpretation. It need only justify its new interpretation as being reasonable in light of the text of the statute. Consequently, if the FCC chooses to attempt to reclassify broadband internet access services as telecommunications services, the agency will only need to show that its new interpretation of these services is a reasonable reading of the statute. Considering the fact that these services seem to have once, at least in part, been classified as telecommunications services, the FCC may be able to sufficiently justify reclassification to a reviewing court. However, as the Members of Congress write in their letter, such reclassification would essentially reverse 20 years of regulatory precedent and an interpretation of the classification of these services that was upheld by the Supreme Court. A reviewing court may be reluctant to uphold a reinterpretation of the statutory definitions if the FCC fails to sufficiently justify its action. Consequently, a decision to reclassify may turn out to be quite time consuming for an agency that has spent a great deal of time attempting to impose network neutrality regulations to almost no avail. It remains unclear whether the FCC will be willing to engage in such regulatory heavy lifting, or will instead attempt to use its existing authority to impose a more flexible version of the rules President Obama has proposed.

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