

## 5 Telecom Issues To Watch Amid FCC Broadband Proposal

By **Matthew DelNero** (October 31, 2023, 5:11 PM EDT)

On Oct. 19, the Federal Communications Commission voted to begin the process of restoring net neutrality rules and reasserting the agency's regulatory authority over broadband providers.[1]

The three Democrats on the commission approved the resulting notice of proposed rulemaking, while the FCC's two Republicans voted against it.[2] This move was widely expected following the confirmation of experienced telecom lawyer Anna Gomez as the third Democrat to the FCC — breaking a 2-2 tie that had persisted since the start of the Biden administration.[3]



Matthew DelNero

The approval of the notice represents the latest phase in a long-standing public policy and legal debate over the respective rights and responsibilities of companies that provide mobile and fixed or residential broadband to the public.

### **Proposal to Restore 2015 Net Neutrality Rules and Basis of Authority**

The notice proposes a path that would largely return broadband regulation in the U.S. to the framework that was adopted in 2015 during the Obama administration — an action that itself was reversed by the Republican-led FCC during the Trump administration.

First, and of greatest significance, the FCC is proposing to classify broadband internet access service as a regulated telecommunications service under Title II of the Communications Act.

As in 2015, the FCC would use its unique statutory forbearance authority so that only some, but not all, of the rules and requirements that governed the telephone network would apply to broadband.

For example, the FCC has stated that it would not regulate the price of broadband subscriptions or impose unbundling rules under which broadband providers would have to open their networks to competitors.

On the other hand, the FCC's general authority to prohibit "unjust or unreasonable practices" or "unreasonable discrimination," along with other statutory provisions concerning privacy, disability access and certain other areas, would apply to broadband.

In a change from 2015, the FCC also proposes to bring broadband providers under a statutory provision

giving the FCC a role in overseeing market entry and exit.

Second, the FCC proposes to readopt the specific net neutrality rules adopted in 2015, including those that ban certain practices, such as blocking or throttling lawful content, or charging online services for prioritization on the network, known as paid prioritization.

It also would resurrect the general conduct rule, under which other potentially anti-competitive or otherwise harmful practices could be evaluated on a case-by-case basis.

And the notice of proposed rulemaking asks whether the FCC should make any changes or additions to the transparency rule under which broadband providers have been required to disclose information about their terms and practices, including via the recently adopted broadband label rule.[4]

Unlike other net neutrality rules, the transparency rule has remained in place in one form or another through both Democratic and Republican administrations.

### **Same Legal Classification For a Broader Policy Agenda**

Although the above summary might suggest the FCC simply plans to readopt its 2015 decision, a closer look reveals a shift in emphasis.

In the past, policymakers embracing a Title II classification for broadband often did so on the theory that this statutory underpinning was necessary to support a set of robust net neutrality rules.

Now, however, FCC Chairwoman Jessica Rosenworcel and her fellow Democrats on the commission expressly support a Title II classification for multiple public policy goals in addition to net neutrality — with the commission majority citing hot topics such as national security, cybersecurity, privacy, unlawful robotexts and broadband network resiliency and outages, as well as net neutrality.

The notice's discussion around national security and public safety underscore this broader policy agenda. The notice repeatedly suggests that classifying broadband as a Title II telecommunications service would improve the FCC's ability to "protect the nation's communications networks" and thereby promote both national security and public safety.

A related fact sheet issued by FCC leadership cited possible actions such as denying companies controlled by hostile foreign governments the ability to access U.S. broadband networks, requiring broadband providers to fix and report on internet outages, and ensuring that public safety officials have access to the broadband services they need in performance of their duties.[5]

A discussion in the notice of proposed rulemaking on use of Title II to combat robocalls and robotexts similarly breaks new ground.

For example, the notice observes that robotext scams often include links to spoofed websites, and asks whether reclassification would allow the agency to "require that ISPs block traffic to IP addresses associated with those websites."

The FCC has taken this mandatory blocking approach in its ongoing and expanding efforts to combat unlawful robocalls on the telephone network. It has not, however, previously sought to mandate that providers block certain internet traffic deemed to be potentially harmful.

## **Next Steps and Issues to Watch**

The FCC has already announced that formal comments on the notice will be due on Dec. 14, with replies to those comments due Jan. 17. Parties may also make ex parte filings both before and after those dates.

In addition to express comments in which members of the public weigh in with their views — not necessarily on the formal comment dates — trade associations, public interest organizations, broadband providers, tech companies and other organizations will likely file detailed comments addressing the many legal and policy issues raised in the notice.

This article has mostly focused on the commission majority's rationale and justification for the proposed path forward.

Broadband providers and their representatives, however, already have signaled strong disagreement with the plan and will contest it vigorously, and they will have full support of Republican policymakers arguing that the policy proposals set forth in the NPRM are not only unnecessary, but also harmful and unlawful.

For example, Commissioner Brendan Carr, a Republican who has served on the commission since 2017, has opposed the notice in unequivocal terms, stating: "I oppose this unlawful plan. The American people want more freedom on the Internet — not greater government controls over their online lives."<sup>[6]</sup>

Among the issues likely to be debated in filings with the FCC are:

### ***1. FCC Section 214 Authority Over Entry and Exit from the Broadband Market***

In contrast to the 2015 order, the FCC has proposed to apply — i.e., not forbear from — Section 214 of the Communications Act to broadband. Doing so would give the FCC authority over who can provide broadband in the U.S. market, and the conditions under which a company can stop providing service.

The notice of proposed rulemaking suggests that application of Section 214 is necessary so that the FCC and the Team Telecom group of executive branch agencies can ensure foreign investment in U.S. broadband providers is consistent with national security and law enforcement objectives.<sup>[7]</sup>

The notice acknowledges that applying Section 214 authority to broadband raises practical challenges and seeks comment on how to address them.

Given that this would be the first time the FCC would possess this market entry and exit authority directly over broadband, it is likely to generate significant debate and discussion.

### ***2. Legal Authority***

The FCC's 2015 order survived legal challenges by broadband providers and their representatives, and the U.S. Supreme Court's 2005 *National Cable & Telecommunications Association v. Brand X Internet Services* decision held that the FCC had the authority to decide the ambiguous question of whether broadband is a telecommunications service under the Communications Act.

Both of those decisions, however, applied traditional deference from *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* to the agency and predated the current Supreme Court majority's embrace of the major questions doctrine in *West Virginia v. EPA* in 2022 and *Biden v. Nebraska* in 2023.

In a white paper commissioned by two major broadband trade associations, two former solicitors general who served during the Obama administration opined that classification of broadband as a Title II service would be a "wasted effort" because the Supreme Court would overturn it in light of the major questions doctrine.

The notice of proposed rulemaking asks about the import of the major questions doctrine, but implicitly pushes back on the industry's claims by pointing to evidence that arguably cuts against the notion that classification of broadband of a telecommunications service is a newfound power under the major questions doctrine.[8]

And in the wake of *West Virginia v. EPA*, over a year ago, longtime public interest lawyer Harold Feld wrote a detailed blog post describing theories under which the Supreme Court could find classification of broadband under Title II to be consistent with the major questions doctrine.[9]

Given the stakes and the ongoing evolution of the Supreme Court's thinking on deference to agency interpretations, this issue is sure to be debated at length in comments and other filings responding to the notice.

### ***3. Relationship of Regulation to Investment***

Broadband providers and their representatives likely will argue, as they have in the past, that increased regulation of the sector will depress investment.

Indeed, NCTA - The Internet & Television Association, which represents many cable broadband companies, reacted to the announcement of the notice of proposed rulemaking by asserting that new rules would "complicate, if not deeply upset, our collective efforts to bring internet to rural and unserved communities." [10]

Republican Commissioner Nathan Simington made similar arguments and asserted that "5G will be crippled" if the FCC moves forward as proposed. [11]

Others in favor of the FCC's plan can be expected to push back and argue that regulation and investment are not mutually exclusive.

### ***4. Broadband Privacy Rules***

In October 2016, the FCC adopted privacy regulations on broadband providers pursuant to Section 222 of the Communications Act. Those regulations, however, never went into effect, as the Republican-led Congress promptly invalidated them under the Congressional Review Act after the January 2017 change in administration.

Under the CRA, an invalidated rule "may not be reissued in substantially the same form, and a new rule that is substantially the same ... may not be issued." [12]

In the notice of proposed rulemaking, the FCC proposes to again apply Section 222 to broadband, but it

does not speak to what would happen after that.

Among the FCC's options could be to simply apply the statutory privacy protections on a case-by-case basis, without specific rules, adopt new rules or policies in a way that attempts to navigate the requirements of the CRA, or apply the preexisting rules that were issued principally with telephone service in mind.

While the FCC need not resolve this question at the same time it decides upon the notice's proposals, stakeholders can be expected to lay down a marker on how they would like to see the FCC proceed in this area were it to classify broadband as a Title II telecommunications service.

## **5. USF Contributions**

The FCC's Universal Service Fund distributes nearly \$9 billion in funding each year to support deployment and affordability of broadband and other communications services in rural and other high-cost areas, to schools, libraries and rural health care institutions, and to low-income households.

It is under strain, however, because funding for the USF comes solely from a percentage of revenues from shrinking spending on voice and other traditional telecommunications service.

In theory, the FCC could immediately subject broadband revenues to USF contributions by applying Section 254(g) of the Communications Act. As in 2015, however, the FCC has proposed to apply Section 254 to broadband but to forbear for the time being from the contributions obligations.

In addition to other factors, this forbearance would appear to reflect concern about both practical and political challenges of requiring contributions from broadband revenues all at once and under a short timetable.

Already, however, advocates for rural broadband providers — who support expansion of the contribution base to include broadband, in addition to other services — have signaled discomfort with this aspect of the notice of proposed rulemaking and have asked that, at a minimum, the FCC use the opportunity to develop a "meaningful and balanced record" on contributions reform.

## **Conclusion**

These are just a few of the topics likely to get significant attention in the record that will develop in response to the notice of proposed rulemaking.

With reply comments slated to be filed by January 2024, it is conceivable that the FCC could act to classify broadband as a Title II telecommunications service and adopt new neutrality rules as early as March or April 2024.

Given the importance of broadband in our society and economy, as well as strongly held, competing views over the pros and cons of regulation in this area, this topic is sure to be a major focus of the FCC and stakeholders in the coming weeks and months.

---

*Matthew DelNero is a partner and co-chair of the technology and communications regulation practice group at Covington & Burling LLP.*

***Disclosure: DelNero was a senior official with the FCC's Wireline Competition Bureau from 2014-2017, and he was part of the team that developed the FCC's 2015 net neutrality decision.***

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] FCC Votes to Start Proceeding on Reestablishing Open Internet Protections, News Release, FCC (Oct. 19, 2023), <https://docs.fcc.gov/public/attachments/DOC-397827A1.pdf>.

[2] Safeguarding and Securing the Open Internet, Notice of Proposed Rulemaking, WC Docket No, 23-320, Notice of Proposed Rulemaking, FCC 23-83 (rel. Oct. 20, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

[3] In another notable development for the trajectory of the rulemaking, on Sept. 30, 2023, the U.S. Senate confirmed Democratic Commissioner Geoffrey Starks to another term on the FCC, meaning that the agency will continue to have a Democratic majority in the year ahead. The Senate simultaneously confirmed Republican Commissioner Brendan Carr to another term.

[4] Consumer and Governmental Affairs Bureau Announces Compliance Dates of April 10, 2024 and October 10, 2024 for Broadband Label Rules, Public Notice, DA 23-943 (Oct. 10, 2023), <https://docs.fcc.gov/public/attachments/DA-23-943A1.pdf>.

[5] Fact Sheet: National Security and Public Safety Impacts of Restoring Broadband Oversight, FCC Office of the Chairwoman (Oct. 5, 2023), <https://docs.fcc.gov/public/attachments/DOC-397494A1.pdf>.

[6] Carr Opposes Plan for Government Control of the Internet, Office of Commissioner Brendan Carr (Sept. 27, 2023), <https://docs.fcc.gov/public/attachments/DOC-397264A1.pdf>.

[7] The formal name of this interagency committee is The Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector. The Department of Justice chairs the Committee, and the Department of Homeland Security and Department of Defense also serve as members. See The Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, Frequently Asked Questions (Dec. 7, 2021), <https://www.justice.gov/nsd/committee-assessment-foreign-participation-united-states-telecommunications-services-sector>.

[8] Donald B. Verrilli, Jr. and Ian Heath Gershengorn, Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine (Sept. 20, 2023), [https://www.ncta.com/sites/default/files/2023-09/MajorQuestionsPaper\\_September2023.pdf](https://www.ncta.com/sites/default/files/2023-09/MajorQuestionsPaper_September2023.pdf).

[9] Harold Feld, Does SCOTUS EPA Case Impact Net Neutrality? Here's Why I Say No, Wetmachine: Tales of the Sausage Factory Blog (July 1, 2022), <https://wetmachine.com/tales-of-the-sausage-factory/does-scotus-epa-case-impact-net-neutrality-heres-why-i-say-no/>.

[10] Statement of Michael Powell, President & CEO, NCTA-The Internet & Television Association, The FCC's Plan Is a Blow to Delivering Internet for All, NCTA-The Internet & Television Association (Sept. 26, 2023), <https://www.ncta.com/media/media-room/statement-of-michael-powell-president-ceo-ncta->

the-internet-television-association-the-fccs-plan-is-a-blow-delivering-internet-for-all.

[11] Dissenting Statement of Commissioner Nathan  
Simington, <https://docs.fcc.gov/public/attachments/FCC-23-83A5.pdf>.

[12] 5 U.S.C. § 801.