



Written by [C. Mitchell Shaw](#) on November 18, 2015

Net Neutrality Faces New Challenges

With a 3-2 vote on February 26, 2015, the Federal Communications Commission (FCC) reclassified the Internet as a public utility under Title II of the Communications Act. Now, almost nine months later, the overreaching regulatory agency is still having to defend its action against one of its own. Commissioner Ajit Pai — who voted against the rules — has been unrelenting in his criticism and has the benefit of having the facts on his side. The FCC is also being forced to defend so-called “Net Neutrality” in a federal court.



Pai’s most recent comments about FCC Chairman Wheeler’s scheme to regulate the Internet are as scathing as anything he had to say right after the rules were approved in a period of secrecy and double-talk by those in favor of Net Neutrality. [Inside Sources](#) reported on Pai’s continued efforts to undermine the rules:

Despite the fervor the FCC’s order has raised since its passage in February, Pai doesn’t believe it’ll withstand future regulatory, legislative or judicial scrutiny (the rules have already been challenged in the D.C. Court of Appeals, where the broadband industry and FCC will face off over the legality of the regulations next month).

In what is perhaps the most blistering (and factual) statement ever issued about Net Neutrality, Inside Sources quoted Pai as saying:

The commission ominously warned that “[t]hreats to Internet openness remain today,” that broadband providers “hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don’t like,” and that the FCC continues to hear concerns about other broadband provider practices involving blocking or degrading third-party applications, FCC Commissioner Ajit Pai told the Bill of Rights Institute’s Kansas Public Lecture late Thursday. “The only problem with all of this: none of it is true.”

The New American has reported extensively on Net Neutrality. In an article originally published in our print magazine and later [on our website](#), this writer covered the details of the rules and how Net Neutrality “transforms the FCC into what many are now calling the ‘Federal Department of the Internet.’” While the rules against blocking, throttling, and paid prioritization are bad enough, we pointed out that the greatest danger of Wheeler’s scheme is the “no-unreasonable interference/disadvantage standard,” which Wheeler himself called a “catch-all standard.” In defense of his “catch-all standard” Wheeler stated:

The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, “A little neglect may breed great mischief.”



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That “no-unreasonable interference/disadvantage standard” (also known as the “general conduct rule”) which we described as “so vague and general that there is no part of the Internet that it would not allow the FCC to regulate,” says:

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

We warned that this rule would necessarily be abused at Wheeler’s whim. Then, [in June](#), the FCC “announced that it was not only fining AT&T \$100 million for violating its so-called ‘transparency rule’ but also was going to mandate that the company install numerous ‘requirements to bring AT&T into compliance’ with that rule.” The purpose of the fine: AT&T had slowed data speeds to users after they reached certain limits. Never mind that this is a common practice in the mobile industry. Never mind that AT&T spelled this out clearly in its terms of use to which users agreed. Never mind that AT&T had then gone to extremes to make sure users understood those agreements and the data-speed limits associated with them. Wheeler was itching to flex his Net Neutrality muscles.

As we reported then:

At issue was AT&T’s repeatedly stated policy that at certain times and under certain specifically stated circumstances, subscribers to its “unlimited” data services would experience a slowdown (called either “congestion” by its supporters or “throttling” by its enemies such as Consumers Union) in connectivity. AT&T bent over backwards to make sure that every one of its customers was aware of the possibility, including

- Issuing a press release in 2011 to more than 2,000 news outlets;

- Including an insert in its bills explaining its policy;

- Posting an informational page on its website about it, with a link to its AT&T Wireless website for more information;

- Announcing the modification of its service contract in August 2012 to cover its response to potential congestion;

- Sending text messages to its “unlimited data” users months before it began to slow data transmission, warning of possible slowdowns;

- Sending text messages after it began slowing data transmission explaining when that slowing would begin and offering suggestions on how to switch to a different plan to avoid possible congestion in the future.

While the “transparency rule” the FCC accused AT&T of violating is an older rule and predates this newest attempt at Net Neutrality, it was the new rules that gave Wheeler the “teeth” to go after AT&T. AT&T is fighting the FCC’s ruling on the \$100-million fine and that will just be added to the mountain of litigation aimed at sorting through all of this mess.

The most sizable obstacle for Net Neutrality to overcome is the federal lawsuit filed by members of the broadband industry. The case will begin in December and will be heard by a three-judge panel. One of



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those judges, Circuit Judge David Tatel, has heard these arguments twice before. As *The New American* reported:

This is not the first time the FCC has attempted to enforce Net Neutrality. Two previous attempts were fairly short-lived, with the courts deciding that the FCC lacked the authority to enforce Net Neutrality. So, FCC Chairman Tom Wheeler began seeking a legal tool to make the third time a charm. When President Obama called on the FCC to reclassify the Internet as a public utility, Wheeler (who had originally opposed the idea) reversed his previous position and began pushing reclassification as the legal tool Net Neutrality advocates had been seeking. Having been denied the ability to regulate the Internet in the past because of a lack of legal authority, the FCC simply reclassified it as a Title II public utility, and — voilà! — the authority to regulate it suddenly exists.

In both of those instances, Circuit Judge David Tatel has struck Net Neutrality down. Inside Sources quotes Pai as saying, “Given that Judge Tatel was on the previous two panels that struck down the decisions, he obviously has some expertise in this area.” As to the other judges and how they may view this issue, Pai said, “As for where the other two judges might come down, it’s a complete crapshoot.”

Considering Pai’s outspoken comments and the fact that before the FCC gerrymandered its jurisdiction to include the Internet, it has twice been ruled to lack the authority to enforce Net Neutrality, there is hope that the court will again strike it down. Getting the FCC’s hands off the Internet would be great start at keeping it open and free.



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