The Federal Communications Commission (“FCC”) published the text of the order it adopted on February 26, 2015 to implement rules to protect the Open Internet. The 384-page declaratory ruling and order (“Open Internet Order”) results in a major shift in the U.S. regulatory landscape.

The Open Internet Order changes the regulatory classification of “broadband Internet access service” from an “information service” not subject to common carrier regulation under the Communications Act to a “telecommunications service” subject to common carrier regulation under Title II of the Communications Act. The change in classification applies to mobile and fixed broadband Internet access services, regardless of whether they are delivered over cable, telephone, cellular or satellite facilities.

The Open Internet Order establishes rules that prohibit broadband Internet access service providers from blocking or throttling (slowing down) consumers’ access to lawful Internet content and services, and also from offering “paid prioritization” to Internet content providers seeking to reach consumers. In addition, the Open Internet Order gives the FCC the authority to oversee interconnection arrangements between broadband Internet access service providers and “edge providers” that offer content and services to consumers.

As a result of the decision, broadband Internet access service providers will now have access to utility poles, ducts and conduits under section 224 of the Communications Act. While most existing broadband Internet access service providers already had such access because they are also a cable operator or a telecommunications carrier offering voice or data services, the decision will result in new entities offering just broadband Internet access service (e.g., Google Fiber) being able to now use section 224.

Unfortunately for consumers and competitors, the FCC also decided in the Open Internet Order to forbear from applying almost all of the provisions Congress adopted in the Telecommunications Act of 1996 to promote competition and provide consumer choice. As adopted by the FCC, the Open Internet Order will not result in consumers having a greater choice of broadband Internet access providers. However, the FCC did rule that any reseller of broadband Internet access service is a telecommunications carrier subject to the order.

The declaratory ruling to reclassify broadband Internet access service will most certainly be challenged in court. However, this part of the FCC’s decision is the most careful, so it may more likely be upheld.

Two other portions of the Open Internet Order may also be appealed. The first is the FCC assertion that it possesses independent authority to impose its “Open Internet” rules under
section 706 of the Telecommunications Act. As interpreted by the FCC, its section 706 authority is almost unlimited, and could be used to regulate backbone networks and Internet content and services. The second is the FCC’s decision to forbear from applying provisions of Title II that Congress expressly adopted to promote competition in the provision of local services. These portions of the Open Internet Order are not as careful, and may more likely be challenged successfully by interested parties.

The full text of the order can be found here. If you are interested in more information on the Open Internet Order, or are interested in challenging the forbearance or other provisions, please contact Earl Comstock (202.659.6627) or Jim Falvey (202.659.6655). If you are interested in the impact of the pole attachment provisions of the Open Internet Order, please contact Charlie Zdebski (202.659.6605) or Brett Freedson (202.659.6669).

This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice.

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