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**November 24, 2014**

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: *Framework for Broadband Internet Service, GN Docket No. 10-127; Open Internet Rulemaking, GN Docket No. 14-28***

Dear Ms. Dortch:

On Friday, November 21, Verizon General Counsel and Executive Vice President Randal S. Milch sent the attached email to Commission Chairman Tom Wheeler in response to the Chairman's public comments that same day that any new open Internet rules are certain to be appealed by broadband Internet access service providers. Mr. Milch referred the Chairman to Mr. Milch's November 4, 2014 blog posting, also attached, which notes that if "new rules are based on Section 706 of the Communications Act, then the possibility that a rule prohibiting paid prioritization will be overturned is essentially eliminated, and the chances that there will even be appeals of the rules are reduced considerably."

Please contact me if you any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "William H. Johnson".

William H. Johnson

Attachments

cc: Jonathan Sallet

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**From:** Milch, Randal S  
**Sent:** Friday, November 21, 2014 5:44 PM  
**To:** 'tom.wheeler'  
**Subject:** Open Internet

Dear Chairman Wheeler

I saw reports of your comments today, and in particular your view of the inevitability of litigation challenging the Commission's eventual Open Internet rules.

I hope you might be interested in a short analysis I wrote on that very subject -- <http://publicpolicy.verizon.com/blog/entry/diminishing-the-prospects-of-further-net-neutrality-litigation> -- where I describe why Open Internet rules based on Section 706 and which prohibit harmful "paid prioritization" will not be the object of a successful court challenge -- by Verizon or anyone else.

Respectfully,

Randy Milch



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# Verizon Policy Blog

## Diminishing the Prospects of Further Net Neutrality Litigation

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Nov 4 | [Randal Milch](#)

There has been a lot of speculation lately that, whatever the FCC decides about new Net Neutrality rules, the whole thing is headed for another round in court. That doesn't have to be the case. The FCC has the opportunity to create Net Neutrality rules that prevent any harmful "paid prioritization" practices that some fear, and to do so in a way that both ensures the rules are not overturned and makes further litigation a diminishing prospect.

The key to whether there is further litigation is the statutory basis the FCC chooses as the foundation for its new rules. If, as the FCC proposed back in May and as the D.C. Circuit suggested in its decision nearly a year ago, the new rules are based on Section 706 of the Communications Act, then the possibility that a rule prohibiting paid prioritization will be overturned is essentially eliminated, and the chances that there will even be appeals of the rules are reduced considerably. Here's why.

Based on the public record and news reports, there are three active camps in the current debate: the utility regulation proponents, championed by Free Press, Public Knowledge and a few of the Silicon Valley companies pushing hard for a re-classification of Internet access as a "Title II" telecommunications service; the Internet service providers and others, such as organized labor and a number of civil rights groups, which argue strenuously that reclassification will endanger further investment in America's superior networks, and that Section 706 provides a sufficient basis for rules; and the majority of the tech industry, quietly pushing a Section 706 solution.

There are also two basic views of how the new rules could turn out: either they “over-regulate” the space by extending FCC authority beyond its statutory limits, or by creating regulations that have no basis in the record, thereby changing the way the Internet has operated for the past two decades; or they could impose less regulation than the Title II advocates would like. The truth is that a lawsuit by the “Internet is a utility” crowd claiming that the FCC imposed less regulation than they wanted has a very low chance of success. And this is true here in particular. The courts have clearly identified a lawful statutory basis for action, and the FCC has the ability to closely match its rules to the record it produces.

Now in broad strokes let’s compare these two views with what the FCC might do. If the FCC reclassifies Internet access as a Title II service, the hyper-regulatory group will be happy, but may sue anyway if the FCC forbears from too many arcane common carrier rules for their taste (and to keep their fund raising pipeline flowing). As well, the ISPs, and perhaps some in the tech industry, will have no choice but to fight the sudden reversal of two decades of settled law. By departing from the judicially sanctioned Section 706 approach, the FCC will have increased both the likelihood – and the likelihood of success – of any legal challenge.

Recently we’ve heard press reports that the [FCC might embrace a “hybrid” model](#) – one that splits Internet access apart (at least in metaphysical terms), and reclassifies the content-provider portion as a Title II service, but bases customer-facing rules on section 706. Both the utility regulation crowd and the ISPs have pushed back hard on this approach. Here the FCC has opened itself to credible challenges by all parties. Again, by departing from the safe harbor of Section 706, the FCC will face strong challenges on the partial move to Title II from those investing in networks. And because the FCC will have to describe why the partial move was necessary, it will open itself to challenge by the utility regulation camp about why a wholesale move to Title II wasn’t equally necessary. Like a full move to Title II, the hybrid approach also fairly guarantees litigation.

Finally, there is the original section 706-based proposal. In this instance all of the major ISPs and their trade associations have conceded that the FCC can lawfully prohibit harmful paid prioritization on this basis – effectively waiving their ability to challenge the FCC’s authority to do so and taking them out of the litigation path. For their part, the utility regulation camp cannot appeal an FCC decision to rely on 706 as a basis for prohibiting paid prioritization without arguing that those rules are invalid, which they would be loath to do. Their only possible appeal is to argue that the FCC should have regulated even more heavily, and reclassified under Title II to impose legacy common carrier regulations. The Title II advocates will have a very hard time finding a solid basis on which to challenge what they believe is the “under regulation” of this route: the statutory basis is already blessed, and the record will likely support the regulations proposed.

So don’t believe those who say that further litigation is inevitable. The bottom line is that *effective* Net Neutrality rules – without further judicial intervention – are within reach, if the FCC takes the Section 706 route it originally proposed.



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