

# DAY ONE PROJECT

## Restoring the Federal Communications Commission's Legal Authority to Oversee the Broadband Market

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## Summary

The next leadership team of the Federal Communications Commission (FCC) must prioritize restoring the agency's authority to protect consumers and competition in the broadband market. Under the next administration, FCC leadership should quickly commence a proceeding proposing to reclassify broadband as a "telecommunications service" under Title II of the Communications Act of 1934. This reclassification will put the FCC on the firmest legal ground to

- (1) Restore or strengthen the 2015 network neutrality rules that prohibit providers of broadband Internet access from blocking, throttling, or otherwise discriminating against certain Internet traffic.
- (2) Fund broadband through the FCC's four universal service programs.
- (3) Protect consumers from fraud and privacy violations.
- (4) Promote broadband competition.
- (5) Protect public safety.

FCC leadership should simultaneously work with Congress to develop legislation to codify this authority as law, thereby protecting against potential future reversals.

## Challenge and Opportunity

Upon assuming office, the FCC leadership team appointed by President Trump moved almost immediately to repeal the Obama FCC's strong 2015 network neutrality rules and reclassify broadband as an unregulated "information service" under Title I of the Communications Act. The Trump FCC also determined, contrary to federal court precedent,<sup>1</sup> that a second section of the Communications Act (Section 706 of the Telecommunications Act of 1996) did not give the FCC authority to oversee the broadband market. These actions together left the FCC—for the first time since the birth of broadband—with no legal power to protect consumers and promote competition in the broadband market.

The FCC's decision to abdicate its legal authority over broadband has resulted in demonstrable harm. For example, in the summer of 2018, California firefighters had no recourse when Verizon throttled their broadband during the Mendocino complex fire. As a result, the firefighters struggled to organize the public safety response and communicate with the public during the fire. After months of negotiations, the firefighters ended up paying Verizon more than double of what they had previously.

Similarly, the FCC did nothing when three of the four national providers of mobile wireless broadband sold customers' personal information to data brokers, who then sold that information to bounty hunters who used it to locate people who did not want to be found. During the COVID-

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<sup>1</sup>Verizon v. FCC, 740 F.3d 674 (DC Cir. 2014).



19 pandemic, Americans have had to rely on the goodwill of broadband providers to not cut off non-paying customers or charge late fees because the FCC lacks the authority to make these accommodations mandatory.

Restoring the FCC's authority to oversee the broadband market will allow the FCC to protect first responders, ensure consumer privacy and welfare, and promote market competition. Restoring this authority will firmly cement the FCC's power to use its universal service funds to support broadband subsidies for the poor, for rural areas, for rural healthcare providers, and for schools and libraries.

At the same time, the next administration must work with Congress on a legislative solution to end the 18-year-long "ping-pong" game over the FCC's broadband authority: that is, over whether broadband is considered a "telecommunications service" under Title II of the Communications Act or an "information service" under Title I. Leaving this determination up to the whims of each new Administration creates market uncertainty and leaves consumers vulnerable. These problems can only be addressed by formally codifying the FCC's authority to oversee the broadband market.

## Plan of Action

The next FCC leadership team may have two options for restoring FCC authority over the broadband market. As a result of a remand from the DC Circuit Court in *Mozilla Corp. v. FCC*,<sup>2</sup> the current FCC is conducting an open proceeding considering how the FCC's reclassification of broadband as an information service has impacted public safety, the law that governs telephone pole attachments, and the Lifeline universal service program.<sup>3</sup> If the current FCC does not complete this proceeding (or fails to complete it to the satisfaction of the court), the next FCC leadership team could simply reverse the reclassification.<sup>4</sup>

Should the current FCC successfully complete the proceeding, the next FCC leadership team could start a new public-notice and comment proceeding proposing to reclassify broadband as a telecommunications service under Title II of the Communications Act. This new proceeding could either stand alone (resulting in a declaratory ruling that broadband is a telecommunications service) or be conducted as part of a larger rulemaking process to restore (or strengthen) the 2015 network neutrality rules.

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<sup>2</sup> 940 F.3d 1 (D.C. Cir. 2019)

<sup>3</sup> The FCC is expected to vote on October 27, 2020 on an order that attempts to address the DC Circuit's concerns and which upholds its decision to reclassify broadband as a Title I service. The order is subject to petitions for reconsideration, which are due 30 days after the order is published in the Federal Register. It is also subject to challenge in the court, where petitions for review would be due 10 days after publication in the Federal Register.

<sup>4</sup> Such a reversal would be justified based on the DC Circuit Court's decision and the record before the FCC in the remand proceeding.

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Separately and simultaneously, the next FCC leadership team should work with Congress to develop legislation that would permanently codify the FCC's authority to oversee the broadband market. This authority should be broad, giving the FCC powers that include adopting broadband privacy rules, protecting consumers from fraud and other anti-consumer actions, promoting competition in the broadband market, protecting public safety, and using universal service funds to support broadband access.

As with the 2015 net neutrality rules, stakeholder support will be instrumental in helping the next FCC achieve the goals stated above. Stakeholder support will be especially valuable in advancing legislation to permanently codify the FCC's authority over the broadband market. Key external stakeholders include nongovernmental organizations (including those focused on consumer privacy, racial equity, and other intersecting areas in addition to those focused directly on communications policy), as well as companies concerned about the gatekeeper power of major broadband providers. The latter includes smaller and non-incumbent broadband companies, security and alarm companies, retailers, and online companies of all sizes. Governmental stakeholders include the National Telecommunications and Information Administration (housed in the Commerce Department), the Federal Trade Commission, and other agencies with broadband-related work (e.g., the Department of Housing and Urban Development, the Department of Education, and the Department of State).

## Going Further

The three years during which the 2015 network neutrality rules were in effect and the FCC retained Title II authority over broadband demonstrated that strong rules and broad federal authority are necessary to protect consumers and ensure market competition. The sections below describe steps that the next administration could take to further improve equity, competition and consumer protection in the U.S. broadband sector.

## Strengthen the FCC's Title II Authority Over Broadband

When the Obama FCC reclassified broadband as a telecommunications service in 2015, it chose to "forbear," or not apply, the vast majority of Title II to broadband. Under Section 10 of the Telecommunications Act of 1996, the FCC has the power to forbear from applying any particular provision of Title II to telecommunications services if it finds that doing so would be in the public interest. Simply bringing broadband under Title II authority was considered a bold and controversial policy decision, so leadership at the time chose not to apply other controversial—albeit pro-competitive and pro-consumer—Title II provisions to broadband as well. Chief among these were Section 251(c)(3), which requires dominant telecommunications services to open their networks to competitors, and Section 254, which requires telecommunications services to pay fees that fund the FCC's four universal-service programs (Lifeline, the Rural Digital Opportunities Fund, the Rural Health Care Program, and E-Rate).

In its proceeding to reclassify broadband as a telecommunications service, the next FCC leadership team should forbear from all of the same provisions as did the Obama FCC, with the exception of Sections 251(c)(3) and 254. The state of broadband competition in 2015 was poor enough to warrant application of Section 251(c)(3), and it is even more necessary today. A recent study by the Institute for Local Self-Reliance (ILSR)<sup>5</sup> shows that nearly 50 million Americans have a choice of only one broadband provider. Even this large number is likely an underestimate: the ILSR's study was based on data from the FCC, which grossly overstates the number of people who can access broadband.<sup>6</sup> The study also found that the nation's two largest cable providers have a monopoly over 47 million Americans. Another 33 million Americans have only DSL as their "competitive" choice. The market for mobile wireless broadband has similarly shrunk, with three national providers and only a handful of regional providers remaining.

The Obama FCC also chose not to apply Section 254 to broadband. It instead left a body called the Federal-State Joint Board on Universal Service to decide whether to apply universal-service fees to broadband. The Joint Board—an entity comprised of state utilities officials, FCC Commissioners, and a single consumer advocate—took no action pursuant to the FCC's request. Without broadband providers, the number of entities contributing to universal-service programs has shrunk, as more and more companies move away from what are currently considered telecommunications services (*i.e.*, wired telephone service, mobile telephone service, and voice-over IP services). Applying Section 254 to broadband would ensure that the responsibility to support universal-service funds is shared fairly among all telecommunications companies and would ensure that the FCC's universal-service programs remain robust and viable for many years to come.

### Strengthen and Improve the Net Neutrality Rules

The 2015 net neutrality rules were headlined by three "bright line" rules banning blocking, throttling, and paid prioritization by broadband providers. The 2015 rules also included a "general conduct" provision intended to capture discriminatory conduct not expressly covered by the bright line prohibitions. The general conduct provision stated that a provider of broadband Internet access could not "unreasonably interfere with or unreasonably disadvantage" (1) consumer access to lawful content, applications, and services, or (2) content providers' ability to distribute lawful content, applications, or services. The rule was criticized both by industry and public-interest advocates as too

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<sup>5</sup> Mitchell & Kienbaum (2020). Most Americans Have No Real Choice in Internet Providers. <https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers/>.

<sup>6</sup> *Id.* Under FCC rules, if a broadband provider could (not if they do) provide service to just one customer in a census block, then the entire census block is considered served.

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vague and complicated.<sup>7</sup> The next FCC leadership team should replace this rule with a straightforward prohibition against “unreasonable discrimination” in the transmission of network traffic. This standard mirrors Section 201 of the Communications Act and was part of the net neutrality rules adopted by the Obama administration’s first FCC Chair in 2011 and overturned by the DC Circuit in 2014.<sup>8</sup>

The next FCC leadership team should also either ban or adopt a presumption against the use of “zero rating,” which is the practice of not subjecting certain content, applications, and services to data caps. The Obama FCC refused to ban zero rating, instead subjecting that practice to the general conduct rule. As a result, mobile broadband companies frequently used (and still use) zero rating as a way to avoid prohibitions against paid prioritization and favor certain content, applications, and services: in particular, those that they own.<sup>9</sup> At a minimum, the FCC should institute a rebuttable presumption against this practice. Another option, which California included in its 2018 net neutrality law, is to ban zero rating unless an entire category of applications is zero rated (e.g., all video-streaming applications).

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<sup>7</sup> The general conduct rule was written to withstand a court determination that the FCC’s reclassification was unlawful, but that it had authority to regulate broadband providers under Section 706.

<sup>8</sup> The DC Circuit overturned the 2011 rules because it found that they treated broadband providers like common carriers, which is not permitted under the authority the FCC relied upon - Title I of the Communications Act. *Verizon v. FCC*, supra.

<sup>9</sup> For example, AT&T “zero rates” both its owned and operated DIRECTV streaming service and its HBO Max service.



## About the Author

Gigi Sohn is one of the nation's leading public advocates for open, affordable, and democratic communications networks. She is a Distinguished Fellow at the Georgetown Law Institute for Technology, Law & Policy and a Benton Senior Fellow & Public Advocate. She is the host of the "Tech on the Rocks" podcast. She served as Counselor to former FCC Chairman Tom Wheeler from 2013–2016, and as Co-Founder, President, and CEO of Public Knowledge, a public interest organization that promotes freedom of expression, an open internet and access to affordable communications networks from 2001-2013.



## About the Day One Project

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