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March 16, 2015

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**Much You**  
**Pay for**  
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**New FCC net**  
**neutrality**  
**standard**  
**leaves ISPs**  
**guessing**

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**regulations**  
**mean new**  
**taxes and**  
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**critics say**

**Politico**  
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**Comcast**  
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**Little support**  
**in D.C. for**

The Federal Communications Commission delivered a thrilling victory to Internet activists last week by approving sweeping net neutrality regulations, but critics already are plotting how to kill the rules in court. Comcast has warned that "we all face inevitable litigation and years of regulatory uncertainty." AT&T has pointed to "the uncertainty of litigation, and the very real potential of having to start over—again—in the future." Industry lobbying associations like CTIA-the Wireless Association, the National Cable and

Telecommunications Association, and the American Cable Association also have made it clear that they are considering lawsuits.

The FCC's rules bar Internet providers from blocking any online content, selectively slowing down traffic, or offering "fast lanes" for sites that pay more. Supporters of the regulations argue that they are critical for preventing Internet providers from acting as "gatekeepers" and restricting what people can access online. The opponents consider the rules an illegal power grab that will burden companies, ultimately making Internet service slower and more expensive for everyone.

The specific legal arguments will largely depend on the language of the new rules, which the FCC still has not publicly released (although it has outlined the most important elements). Once the actual text is available, teams of highly paid lawyers for the cable and telecom companies are sure

to examine every word of the 317 pages, searching for any weaknesses.

In such a complex and massive set of regulations, there are sure to be dozens of legal lines of attack. Here are three:

THE INTERNET ISN'T A 'TELECOMMUNICATIONS SERVICE' A key part of the net



**Comcast-  
Time Warner  
deal**

**Cincinnati  
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**Cincinnati  
Bell bets big  
on fiber optic  
network**

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considers  
changes to  
landmark  
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neutrality debate has been about the legal authority that the FCC uses to justify its regulations. The FCC's new rules declare broadband Internet a "telecommunications service" under Title II of the Communications Act—a provision that the agency has used for decades to regulate landline phone companies. The provision grants the FCC expansive powers over a company's practices.

Net neutrality advocates argue that invoking Title II is the only way the FCC can enact rules that can stand up in court. The FCC first enacted net neutrality rules in 2010, but a federal court struck them down in early 2014. The D.C. Circuit Court of Appeals ruled that the FCC was inappropriately treating Internet providers like "common carriers" (essentially public utilities)—something the FCC could only do under Title II. So for net neutrality advocates, the fix was simple: just classify Internet providers under Title II and enact new rules. But the critics say it isn't so easy.

The Supreme Court in 2005 gave its stamp of approval to the FCC's decision to treat broadband as an "information service" (a much weaker classification) instead of a "telecommunications service." The FCC will have to convince the courts to let it change its mind. "What's changed now so that the services can be viewed differently?" asked Randolph May, the president of the Free State Foundation, which is opposed to the rules. "That's going to be a challenge for the commission to sustain its position."

But net neutrality supporters argue that the Supreme Court was only deferring to the FCC's expert opinion at the time and say the courts are likely to defer again to the agency. Additionally, the market has changed dramatically over the past 10 years. Back then, more people relied on their Internet provider for e-mail and other Web services, so it made more sense to consider the providers as offering more than just telecommunications.

The FCC's case for Title II reclassification is a "legal slam dunk" according to Barbara van Schewick, a Stanford University law professor and net neutrality advocate. FCC Chairman Tom Wheeler also believes that, based on last year's court decision, he'll have a strong position against the Internet providers.

"The D.C. Circuit sent the previous Open Internet Order back to us and basically said, 'Hey, you're trying to impose common carrier-like regulation without stepping up and saying that these are common carriers,'" Wheeler explained during a press conference following last week's net neutrality vote. "We have addressed that issue. That is the underlying issue. That is the *sine qua non* of all the debates that have happened thus far. So that gives me great confidence going forward."

THERE WASN'T ENOUGH EVIDENCE Virtually any time groups challenge an FCC decision, they argue that it was "arbitrary and capricious"—a legal standard that can invalidate regulations. This time will likely be no different, with net neutrality opponents expected to claim that FCC didn't have enough evidence of any real problem that would justify the new regulations. "The problem is the disconnect between the evidence that they claim to support their actions and the actual evidence on the record," said Geoffrey Manne, the executive director of the International Center for Law and Economics and a critic of the FCC's decision.

Invoking the broad Title II powers wasn't justified, Manne said, and neither was the FCC's decision to ban Internet providers from offering "fast lanes" for sites that pay more. "All of the economic literature makes very clear that paid prioritization can be beneficial to consumers," he said. The Free State Foundation's May argued that President Obama's call for the FCC to invoke Title II could be especially problematic. The courts are more likely to view the rules as a political calculation than the careful decision of an expert agency, he argued. "I wouldn't suggest [that Obama's intervention] was in of itself unlawful," May explained. "But it may mean that a court would be more likely to scrutinize the FCC's decision and give it less deference."

Net neutrality advocates argue that the FCC relied on extensive economic analysis in shaping its 2010 rules and considered even more data for the new regulations. Industry

groups, economists, and experts on all sides of the issues weighed in, helping the FCC craft its decision for how best to protect an open Internet. The agency relied on a lot more than just Obama's statement. "I thought we had a really good record in 2010, and the record now is even stronger," van Schewick said.

**THE RULES VIOLATE FREE SPEECH** The most controversial argument that Internet providers are likely to make is that the regulations violate their First Amendment right to free speech. Just like newspapers have the right to edit the content that appears on their pages, Internet providers should be able to control the traffic that flows over their networks, they argue. That constitutional argument has the potential to overturn not only the net neutrality rules, but a whole range of communications regulations. Advocates fear that the attack could virtually cripple the FCC.

In its lawsuit over the 2010 regulations, Verizon made the First Amendment argument, but the court never actually addressed the issue. Net neutrality advocates argue that the rules protect speech rather than restrict it. The Internet providers aren't actually speaking, but are instead transmitting the speech of others, the advocates say. The claim that Internet providers have free speech rights "clearly just doesn't match with how users view the Internet," van Schewick said.

Manne argued that the regulations "pose a very serious risk" to free speech, but that the First Amendment isn't likely to be the main argument for the opponents. "It's the last line of defense," he explained. "I'm so confident these other issues are going to be problematic, we're very unlikely to see any of the reviewing courts make a final determination on the First Amendment issues." – **National Journal**

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The Federal Communications Commission is putting its review of Comcast Corp.'s deal for Time Warner Cable and AT&T Inc.'s planned acquisition of DirecTV on hold, pending a court decision related to the disclosure of video-programming contracts. The commission said it had stopped the clocks on its 180-day review of those deals which were set to expire by the end of March. It said it can restart the clock as it sees necessary. The court case is over an FCC decision to give third parties commenting on the mergers limited access to video-programming contracts between the merging companies and TV-channel owners like CBS Corp., Walt Disney Co. and Viacom Inc.

The TV-channel owners are fighting the disclosure of that information, which may include pricing and strategy insights. The FCC has argued that the information will allow for input into the deal review and agency has placed protections to prevent the details from leaking. In late February, the federal court heard arguments in the case, but hasn't yet issued a decision. People close to the deals have warned that the lawsuit could trip up the timeline for the completion of the combinations, which have been closely watched in telecom and media circles.

Comcast has been saying that it expects its deal to close early this year. A Comcast spokeswoman on Friday called the case a "procedural matter" and said a decision from the court is expected soon. A Time Warner Cable spokeswoman said the company is "pleased" with the progress on the review so far. – **Wall Street Journal**

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Even before the Federal Communications Commission adopted strong net neutrality rules last month, some Republican lawmakers were saying that what the country really needed was an update to the nation's main communications law. It is old, they argued, and does not address the ways in which people use the Internet today. Congress should certainly review the law, but it should be careful not to undermine a statute that has contributed to the success of the Internet and wireless telecommunications.

It is no secret that Republicans, like Representative Fred Upton of Michigan and Senator John Thune of South Dakota, hate the F.C.C.'s new net neutrality rules, released last week, which will prevent cable and phone companies from creating fast lanes and slow

lanes on the Internet. That is why consumers and Democratic lawmakers should be wary of any effort by those critics of the commission to amend the Communications Act of 1934, which Congress revised significantly in 1996.

The United States has been at the forefront of Internet-based technology in part because the communications law and F.C.C. regulations made it possible for Americans to use telephone lines to get online in the heyday of AOL. Congress and the F.C.C. also used the law to make wireless frequencies available to phone companies that used them to build national cellphone networks.

Republicans may be able to get legislation passed, but President Obama would be unlikely to sign any bill expected to weaken the F.C.C. and fatten the profits of the dominant cable and phone companies at the expense of their customers. The Communications Act could be improved, however, by finding ways to make the telecom industry more competitive so it could better serve the needs of consumers and the economy.

Residential high-speed Internet service still has far too little competition. Most Americans have only one or two choices for that service — from cable companies like Comcast and phone companies like AT&T. In the cable TV market, consumers have to buy expensive bundles with dozens of channels they do not watch in order to have access to the few they want. And the wireless industry is dominated by two large companies, Verizon and AT&T.

To encourage broadband competition, Congress could make it easier for private companies and utilities owned by local governments to provide Internet service in more parts of the country. In the pay TV business, it could unify the different rules that govern cable, satellite and Internet-based TV systems so they all have the same access to TV programming, which would give consumers more choices. Lawmakers could also require those businesses to let consumers buy just the channels they want, rather than being forced to pay for bundles. Congress could make more wireless frequencies available and reserve some of them for small or new companies. Unless lawmakers are willing to make changes that give consumers more and better choices, there is no reason for Congress to rewrite the Communications Act. — *New York Times*

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TiVo Inc., the San Jose-based maker of digital video recorder devices, said Friday it would acquire certain assets from the bankrupt online streaming service Aereo Inc. The acquisition of Aereo's assets was approved by a U.S. Bankruptcy Court judge, TiVo said Friday. Terms were not disclosed. "This strategic acquisition of Aereo's trademarks and customer lists will enhance our ability to serve the growing segment of consumers who want access to both broadcast television and over the top content," TiVo Chief Executive Tom Rogers said in a statement.

Aereo filed for bankruptcy protection in November, five months after the Supreme Court ruled that its service, which allowed people to watch, pause and record live TV on their computers, violated copyright law. The justices said Aereo functioned similarly to a cable company, but didn't pay to transmit copyrighted content. The ruling effectively shut down the company. — *Bloomberg*



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