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Life in the Slow Lane?

What the Net Neutrality Repeal May Mean for Telehealth Services

Written by Kristi Kung on January 25, 2018

Will the repeal of the net neutrality rules negatively impact the provision of TELEHEALTH SERVICES, which require robust and reliable internet connectivity?

Net neutrality is the principle that Internet Service Providers (ISPs) must treat all internet data equally and not discriminate or charge differently based on content, user, website, platform, application, or method of communication. Following this principle, the Obama-era Federal Communications Commission (FCC) adopted net neutrality rules in 2015, classifying high-speed broadband service as a public utility under Title II of the Telecommunications Act and prohibiting ISPs from intentionally speeding up, slowing down, or blocking any content, applications, or websites.^[1] On December 14, 2017, however, the FCC voted 3-2 to repeal the net neutrality rules, creating considerable uncertainty about how this policy change will affect the healthcare industry, particularly with respect to telemedicine.^[2]

FCC Chairman Ajit Pai has argued that the government's light touch approach to high-speed internet will be a net benefit for

telemedicine. Pai stated at the Project Goal's Conference on Aging and Technology on November 30, 2017,

[O]ne aspect of this proposal I think is worth highlighting here is the flexibility it would give for prioritizing services that could make meaningful differences in the delivery of healthcare. By ending the outright ban on paid prioritization, we hope to make it easier for consumers to benefit from services that need prioritization—such as latency-sensitive telemedicine. Now, we can't predict exactly which innovations entrepreneurs will come up with. But by replacing an outright ban with a robust transparency requirement and FTC-led consumer protection, we will enable these services to come into being and help seniors.[3]

However, the 2015 rules already prioritized critical healthcare services. The net neutrality rules distinguished between Broadband Internet Access Services (BIAS, or general internet traffic) and Non-BIAS data services, which are exempt from the rules and receive prioritized broadband capacity to ensure faster speeds and greater reliability. The 2015 rules included references to comments made by telehealth advocates that paid prioritization arrangements could improve the provision of telemedicine services.[4] In response, Order 15-24 provided "[W]e note that telemedicine services might alternatively be structured as "non-BIAS data services," which are beyond the reach of the open Internet rules." [5] Therefore, **telehealth services could have secured an exemption under the old rules without implementing paid prioritization across the market.**

Healthcare industry experts now worry that the FCC's repeal of the net neutrality rules will negatively impact the provision of telehealth services, which require robust and reliable internet connectivity. If the internet is divided into free slow lanes and pay-for-access fast lanes, many experts worry that rural providers and small practices may struggle to afford high-quality telehealth services. This may cause smaller providers, such as primary care clinics, to opt out of developing and offering telehealth services. This is particularly concerning in rural communities which tend to rely more heavily on critical telehealth services, such as telestroke programs.^[6] The American Medical Informatics Association (AMIA), in a letter to the FCC, stated that "AMIA believes that access to broadband is, or soon will become, a social determinant of health."^[7] Potential expansion of health disparities as a result of the net neutrality repeal is a significant concern; leading advocates to call on the FCC to create an exemption for healthcare providers and vendors. Notably, however, such exemptions likely would not address the issue of consumer affordability, potentially with substantial impact to remote monitoring services. Net neutrality advocates have posed the question "what happens to telehealth if Netflix streaming services is given preference over critical medical applications?"

Internet Service Providers (ISPs), not surprisingly, have applauded the repeal, asserting that lack of competition in the marketplace may be hindering innovative telehealth delivery models. Ending net neutrality may address under-connected rural areas and stimulate new telecommunications

infrastructure; however, competition among ISPs will be necessary to ensure that costs are kept in check. In areas with low to no competition in ISPs, typical in rural areas, providers and patients alike could be priced out of the connectivity required to support telehealth. An oversight and enforcement mechanism will be needed to ensure that connectivity for telehealth remains viable and affordable.

The new rules will not take effect until approved by the OMB and published in the Federal Register. In anticipation of the proposed regulations and in response to the FCC Order, many state attorneys general and other trade groups have already filed legal challenges to the FCC's Order.^[8] Senate Democrats have also announced that they are one vote shy of 51 majority vote for repeal of the new FCC Order.^[9] However, legislative action is unlikely since a Democratic win in the Senate would also require winning a vote in the House, where Republicans hold a greater majority. Further, any legislation would be subject to a veto by President Trump, who has publicly endorsed the FCC's net neutrality repeal. We will be playing close attention to developments in this arena as the net neutrality repeal takes effect and legal action plays out.

[1] See, FCC Order 15-24, *available here*: https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

[2] See, FCC Restoring Internet Freedom Order, *available here*: <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order> (the new order reclassifies broadband

Internet access service as an “information service” under Title I of the Communications Act.)

[3] Remarks of FCC Chairman Ajit Pai, Project Goal’s Conference on “Aging and Technology: Creating Opportunities to Age Well with Innovation” (Nov. 30, 2017), *transcript available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1130/DOC-348017A1.pdf.

[4] See, FCC Order 15-24, at pg. 58; *e.g.*, California Telehealth Network (CTN) Reply at 7, 9 (explaining that as full motion synchronous video conferencing becomes more necessary for digital diagnosis and treatment, as required by many telehealth services, the total bandwidth consumption in the Internet ecosystem for telehealth will grow, encouraging investment and deployment); AALL Comments at 2 (“Health sciences libraries also provide Internet access to images that support telemedicine, particularly in remote areas where Internet service can be disproportional or uneven and to reach the underserved.”); MMTC Comments at 11 (arguing that the Commission should employ a “rebuttable presumption against paid prioritization . . . while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare,” such as telemedicine applications).

[5] See *id.*

[6] The FCC has, however, proposed to increase the \$400 million annual cap on the Rural Health Care Program (RHCP), designed

to subsidize the difference in rates between rural and urban areas for telecommunication services.

[7] See, AMIA's Letter to the FCC Chairman, "Re: Request for Comment – Actions to Accelerate Adoption and Accessibility of Broadband-Enabled Health Care Solutions and Advanced Technologies (GN Docket No. 16-46, FCC 17-46)", dated May 24, 2017, available here: <https://www.amia.org/sites/default/files/AMIA-Response-to-FCC-Notice-on-Accelerating-Broadband-Health-Tech-Availability.pdf>; see also, Evan Sweeney's article "FCC Votes to Repeal Net Neutrality, Raising Implications for Telehealth and Remote Monitoring", *FierceHealthcare* (Dec. 15, 2017), available here: <https://www.fiercehealthcare.com/regulatory/fcc-net-neutrality-repeal-telehealth-remote-monitoring-rural-health-care-program>.

[8] See, Kang, Cecilia, "Flurry of Lawsuits Filed to Fight Repeal of Net Neutrality", *New York Times*, available at: <https://mobile.nytimes.com/2018/01/16/technology/net-neutrality-lawsuit-attorneys-general.html?referer=https://www.google.com/> (Jan. 16, 2018).

[9] See, "21 States Are Suing the FCC to Restore Net Neutrality Rules," *Fortune*, available at: <http://fortune.com/2018/01/16/net-neutrality-fcc-states-lawsuit/> (Jan. 17, 2018).

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