Overview of the Restoring Internet Freedom Order

CONTINUING LEGAL EDUCATION
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THE DEATH OF NET NEUTRALITY (MAYBE?)

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THE DEATH OF NET NEUTRALITY (MAYBE?)

1. The FCC's Order
2. Ending "Title II" Regulation of the Internet
3. Returning to a "Light Touch" Regulatory Framework
4. Dismantling the 2015 Open Internet Rules
5. "Light Touch" Enforcement
6. Effects on Other FCC Policies
7. Conclusion (For now)

THE FCC'S ORDER

- November 22, 2017 – FCC circulates draft Order dismantling much of the 2015 "Net Neutrality" rules (*"Title II Order"*)
  - Adopted along party lines at December 14, 2017 Open Meeting
- Will become effective 60 days after publication in Federal Register

SUMMARY OF THE FCC'S ORDER

- Order undoes most of former FCC Chairman Wheeler's Open Internet policy
  - Reverses Title II utility-style regulation of broadband Internet access service ("BIAS")
  - Returns classification of BIAS to that of an information service
  - Reinstates mobile BIAS classification to private mobile service (rather than CMRS under *"Title II Order"*)
  - Returns enforcement authority to Federal Trade Commission ("FTC")
  - Eliminates Internet Conduct Standard

ENDING "TITLE II" REGULATION OF THE INTERNET

- Reinstating Information Service Classification of BIAS
  - Information (a/k/a "enhanced") service
    - Unregulated
      - Distinguished from "Telecommunications" ("Basic) service
    - Regulated under 47 U.S.C. §201 et. seq. ("Title II")
      - Sometimes referred to as "utility" style regulation
  - BIAS:
    - Defined as mass-market retail service providing the *capability* to transmit to and receive data from all/substantially all Internet endpoints
    - Includes services over any technology platform – satellite, wired, fixed & mobile wireless (regardless of licensed/unlicensed spectrum)

ENDING "TITLE II" REGULATION OF THE INTERNET

- Reinstating Information Service Classification of BIAS
  - Does NOT include
    - Services with one or a few endpoints, *i.e.*, eReaders, heart monitors
    - Virtual Private Networks (VPNs)
    - Content Delivery Networks (CDNs)
    - Hosting or Data Storage Services
    - Internet backbone services
    - Any other services that do not provide capability to transmit/receive data from all/substantially all Internet end points

ENDING "TITLE II" REGULATION OF THE INTERNET

- Reinstating Information Service Classification of BIAS
  - Premise Operators – coffee shops, book stores, airlines, schools, libraries, universities NOT considered BIAS providers
    - As long as not offered as mass market service
- Reclassification applies to ALL BIAS providers, regardless if they lease or own facilities

ENDING "TITLE II" REGULATION OF THE INTERNET

- FCC Arguments for Dismantling *Title II Order*
  - Statutory Interpretation
  - Prior FCC Decision Precedent
  - Public Policy
  - Economics / Investor Incentive

RETURNING TO A LIGHT-TOUCH REGULATORY FRAMEWORK

- FCC Arguments for return to "light touch"
  - Internet developed & flourished for two decades under light-touch
  - Internet will be kept open through:
    - Competition
    - Existing consumer & antitrust laws
    - New Transparency Rule

RETURNING TO A LIGHT-TOUCH REGULATORY FRAMEWORK

- The FTC, Consumer Protection & Antitrust Laws
  - FTC has authority under Section 5 of the FTC Act
    - Better suited for "whole of the Internet" – including edge providers
    - Creates even playing field
- Antitrust Laws
    - Sherman Act – Sections 1& 2
    - Anticompetitive arrangements illegal
      - Arrangements to block, throttle or discriminate illegal
    - Exclusionary conduct illegal
      - Cannot favor own content/services over non-affiliate
      - No refusal to deal/exclusive dealings

RETURNING TO A LIGHT-TOUCH REGULATORY FRAMEWORK

- Consumer Protection - FTC Enforcement
  - FTC has broad authority to protect consumers from “unfair or deceptive acts or practices
  - Rule prohibit marketing/selling one thing, but providing something else
    - Voluntary commitments from ISPs enforceable
  - Requires disclosing material information if not disclosing would mislead consumers
    - Failure to disclose blocking, throttling, etc. enforceable under deception rules

DISMANTLING THE 2015 OPEN INTERNET RULES

- 2015 Open Internet Rules codified at Part 8 of Code of Federal Regulations (47 C.F.R. Part 8)
  - *Title II Order* had adopted "Bright Line" rules
    - No Blocking
    - No Throttling
    - No Paid Prioritization whatsoever (other 2 had exceptions)
    - Transparency Rule – "enhanced" the 2010 Rule
  - Plus General Conduct Standard
    - No discrimination

DISMANTLING THE 2015 OPEN INTERNET RULES

- Bright-Line & General Conduct Rules Eliminated
  - Created by *Title II Order*
  - "Catch-all" standard to prevent "harms"
  - Gave FCC broad discretion to prohibit any practices it deemed "unreasonable interference" with consumers' ability to reach Internet content, services or applications

“LIGHT TOUCH” ENFORCEMENT

- Transparency
  - Essential for FCC to monitor marketplace
  - Provides valuable information to industry participants
  - Assists consumers / businesses in making informed choices
  - Boosts consumer confidence
  - Reduces likelihood of ISPs will engage in harmful practices

"LIGHT TOUCH" ENFORCEMENT

- New Transparency Rule
  - Applies to ALL BIAS providers (fixed, mobile, small business providers)
  - Publically disclose accurate information regarding:
    - Network Management Practices
      - Including any blocking, throttling or paid prioritization
    - Performance
    - Commercial Terms

“LIGHT TOUCH” ENFORCEMENT

- New Transparency Rule
  - Network Management Practices – must disclose
    - Congestion management practices
    - Application-specific behavior
    - Device attachment rules
    - Security practices
    - Any blocking, throttling, affiliate prioritization or paid prioritization

“LIGHT TOUCH” ENFORCEMENT

- New Transparency Rule
  - Performance Characteristics – must disclose:
    - Accurate service description
    - Impact of specialized services on performance
  - Commercial Terms – must disclose:
    - Commercial terms of service
      - Price, privacy/other policies, redress options

"LIGHT TOUCH" ENFORCEMENT

- New Transparency Rule
  - Means & Format of Disclosure
  - Two Options:
    - Prominently Display on easily assessable, publically available website (that is also assessable to people with disabilities)
      - Hard copy distribution not necessary
      - No need to file with Commission
    - Transmit disclosures to FCC and it will publish on easily assessable, publically available website
  - No particular format required

EFFECTS ON OTHER FCC POLICIES

- Effects of the Order on Other FCC Policies
  - Wireline Infrastructure
    - Effects of reclassification of BIAS as information service will be addressed in separate proceedings
      - (*e.g.*, Pole Attachment Proceeding)
  - Wireless Infrastructure
    - Covered by some of the same statutory provisions as wireline as they use the same infrastructure
      - Section 224 (pole attachments)
      - Section 332(c)(7) (local authority over zoning)
      - Reaffirmed in *Dismantling Order*

EFFECT ON OTHER FCC POLICIES

- Effects on Other Regulations
  - Internet Traffic Exchange
    - Traffic exchange between ISPs and Edge Providers no longer subject to Title II
  - Forbearance
    - Forbearance granted under *Title II Order* moot
  - Disability Rules
    - No changes – all services must be accessible to persons with disabilities

EFFECTS ON OTHER FCC POLICIES

- Universal Service
  - Reclassification does not affect/alter existing programs (*i.e.* Connect America Fund)
  - Provider eligibility to receive funding does not change
- Preemption of State/Local Laws
  - FCC finds that regulation of BIAS should be governed by universal set of federal laws
  - Precludes state/local governments from implementing inconsistent rules

The FCC's Net Neutrality Repeal: Problems with the Order, and Congressional and State action

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Overview

- Issues in the Commission's 2017 Order to repeal Net Neutrality
- Congressional Action
- State Action

Broadband Internet Access Service is Not a Title I Information Service

- The Commission provided an untenable interpretation of "Information Service"
- The Commission misinterprets Sections 230 and 231
- Add-on Applications bundled with broadband service do not transform it into an information service
- Other incidental provider activities fall within the telecommunications management exception and do not transform it into an information service

The Commission Distorts and Misinterprets its Past Precedent on Protecting an Open Internet

- The Commission abandoned its longstanding commitment to protecting internet openness
- The Commission abandoned its fundamental consumer protection and other policy goals for broadband networks
- The Commission misrepresented the regulatory history of internet access service

The Commission Did Not Consider the Consequences of Title I Classification to Consumer Protection, Universal Service, and Competition

- The Commission did not adequately address how consumer privacy on broadband networks will be protected
- The Commission did not address how broadband-only providers can receive universal service lifeline support without Title II
- The Commission did not consider the effect of competition in the broadband market place without Title II

Congressional Review Act (CRA) Repeal of Net Neutrality Order

- Congressional Review Act empowers Congress to overturn a federal regulation, prohibiting the agency from enacting a substantially similar rule in the future
- Congress has 60 legislative days to pass a joint resolution to overturn the FCC's net neutrality Order
- The 60-day clock begins to run once the Order is published in the federal register and the FCC submits its report to Congress

CRA Process in the Senate

- Member of Senate drafts a joint resolution
- Resolution gets assigned to a committee of jurisdiction
- Senate Committee has 20 calendar days to report on the jurisdiction
- After 20 days and with support from 30 senators, the Resolution can be fast-tracked to the Senate floor for a vote
- Requires simple majority vote to pass in the Senate

CRA Process in the House

- Just like in the Senate, a joint resolution is assigned to the committee of jurisdiction
- However, the House Committee must report the resolution, there is no fast-track option to put the resolution on the House floor
- Requires a simple majority vote to pass in the House

Recent CRA Action on Net Neutrality

- Senator Ed Markey announced his plans to introduce a CRA to repeal the FCC's Order. 49 senators have come out in support of his plan including Senate Minority Leader Chuck Schumer
- In the House, Congressman Mike Doyle announced plans to introduce a CRA. So far, 80 Representatives have come out in support
- Both chambers must wait for the Order to get published in the federal register and the FCC to submit its

Recent State Action on Net Neutrality

- Eight states have introduced net neutrality legislation so far (California, Montana, Nebraska, New York, Rhode Island, Washington)
- Montana Executive Order No. 3-2018: prohibits internet service providers from receiving state contracts if they won't agree to net neutrality rules
- Attorneys general for 21 states have filed a legal challenge to block the FCC's order

The FCC's *Preserving Internet Freedom Order*: Preemption of State Laws and Regulations

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Overview

- FCC's preemption power
- FCC preemption of state network neutrality laws and regulations
- Legal assessment
- State responses

FCC's Preemption Power

- The Communications Act of 1934 created a "dual regulatory system"
  - -- The FCC has exclusive jurisdiction to regulate inter-state and international communications
  - -- Regulation of intra-state communications is reserved to the states (Communication Act § 2(b), 47 U.S.C. § 152(b))
- The Supreme Court has recognized an exception to Section 2(b); the FCC may preempt state regulation of intrastate communications where:
  - -- it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation"; and
  - -- application of "inconsistent state regulation . . . would negate" a federal requirement. *Louisiana PSC v. FCC,* 476 U.S. 355, 375 n.4 (1986).

FCC's Preemption Power

- While this is sometimes referred to as the "Impossibility Exception," the FCC may preempt inconsistent state regulation where, "*due to practical and economic considerations*," simultaneous compliance with both federal and state requirements is "*highly unlikely*." *People of the State of California v. FCC,* 39 F.3d 919, 933 (9th Cir. 1994) ("*California III*") (emphasis added)

- However, "the impossibility exception is narrow . . . [T]he FCC has the burden of showing that the state regulation would negate valid FCC regulatory goals." *California III,* 39 F.3d at 931. Indeed, the FCC's exercise of its preemption authority must be "narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* (emphasis added)

- Consistent with these standards, federal courts have repeatedly upheld the FCC's preemption of state information services regulation that would "negate" federal deregulatory policies. *See, e.g., CCIA v. FCC,* 693 F. 2d 198 (D.C. Cir. 1982)

FCC Preemption of State Network Neutrality Laws and Regulations

- As discussed, the FCC's *Restoring Internet Freedom Order* eliminated all federal network neutrality rules (other than the transparency requirement)

- The *Order* seeks to broadly preempt states and localities from adopting their own network neutrality legislation. Specifically, the FCC preempted measures that would:

  -- "effectively impose rules or requirements that we have repealed or decided to refrain from imposing"; or

  -- "impose more stringent requirements for any aspect of broadband service" *Order* ¶ 195

FCC Preemption of State Network Neutrality Laws and Regulations

- The FCC highlighted two types of state laws that it intended to preempt:

  -- "'[E]conomic' or 'public utility-type' regulations, including common-carriage requirements akin to those found in Title II of the [Communications] Act or as well as other rules or requirements that we refrain from imposing" *Order* ¶ 195

  -- "[L]aws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the [new] transparency rule" *Id.* ¶ 195 n.729

FCC Preemption of State Network Neutrality Laws and Regulations

- At the same time, the FCC clarified that it did not intend to "disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings" – at least "so long as the administration of such general state laws does not interfere with federal regulatory objectives." *Order* ¶ 196. In particular, states may continue to:

  -- perform "any functions expressly reserved to them under the [Communications] Act," including "exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters." *Id.*

  -- encourage the deployment of broadband capability by "promoting access to rights-of-way under state law, encouraging broadband investment . . . through state tax policy, and administering other generally applicable state laws. *Id.* ¶ 195 n.731

FCC Preemption of State Network Neutrality Laws and Regulations

- The FCC stated that its preemption order met the "Impossibility Exception"

  -- *Inseverability*: "Because both interstate and intrastate communications can travel over the same Internet connection. . . in response to a single query . . . it is impossible or impracticable for ISPs to . . . Comply with state or local rules for intrastate communications without applying the same rules to interstate communications." *Order* ¶ 200

  -- *Negation*: "[S]tate and local regulation of the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today." *Id.* ¶ 201

Legal Assessment

- Twenty-two States already have filed petitions seeking judicial review of the FCC's *Order*

-- While the states oppose the FCC's decision to eliminate the existing Open Internet rules, they are likely to focus on the FCC's preemption of state laws and regulations that differ from the new federal deregulatory regime

-- Even if the reviewing court upholds the FCC's decision to eliminate the Open Internet rules, it might not uphold the FCC's decision to preempt all state measures that "interfere" with the FCC's new deregulatory policy

Legal Assessment

- As noted above, in order to preempt state law, the FCC must show that it is not possible to apply divergent federal and state law ("inseverability") and that it has limited its preemption to preclude only those state measures that would "negate" federal policy

  -- The FCC has made a convincing case for inseverability

    + During a single on-line session, a user may interact with data stored on computer servers located in the same state, a different state, or outside the country

    + The user and the ISP typically neither know nor care where the data is stored

    + Therefore, as a practical matter, it would not be possible to apply state network neutrality rules only to *intra*-state Internet serves while applying different federal rules to *inter*-state Internet services

Legal Assessment

-- However, the FCC has not limited its preemption to state laws or regulations that would "negate" the FCC's policy

+ The FCC did not show that it has "narrowly tailored" the preemption to preclude only those state measures that would "negate" the FCC's policies
+ Indeed, the FCC's *Order* never uses the term "negate"
+ Rather, the FCC purposed to preempt *all* State measures that "interfere" with the agency's new deregulatory policy

- A reviewing court could:

-- remand the Order and direct the FCC to justify or limit the extent to which it has sought to preclude State network neutrality measures

-- narrowly construe the scope of the preemption

State Responses

- States are considering a variety of ways to preserve an open Internet, including:

  -- adopting state network neutrality statutes;
  -- constructing or promoting publicly owned broadband networks;
  -- conducting monitoring or certification;
  -- leveraging state government's role as a major buyer of ISP services; and
  -- conditioning state benefits on network neutrality compliance

- If the reviewing court upholds the FCC's Order (including the preemption portion) some of these actions clearly would be impermissible, while others could be allowed

State Responses

- State network neutrality statutes

-- Some states are considering adopting laws that impose substantive network neutrality requirements

-- For example, in Washington State, House Bill 2282, would require ISPs providing service in the state to comply with the transparency, general conduct and the "bright line" rules contained in the FCC's 2015 *Open Internet Order*

-- Other states are considering classifying practices like paid prioritization as unlawful "unfair trade practices" under state law

-- Such laws are clearly subject to preemption because they "negate" federal policy by directly forbidding ISPs from taking actions that the FCC has expressly decided to allow

State Responses

- Publicly owned broadband networks

  -- Thirty states allow municipalities to construct or operate municipal broadband networks

  -- Some states, such as Hawaii, are considering adopting laws that require municipal networks to adhere to network neutrality principles

  -- Congress did not give the FCC authority to preempt state laws governing the terms and conditions under which their own political sub-divisions participate in the Internet service market *Tennessee v. FCC, 15-3291* (6th Cir. 2016)

  -- Therefore, the FCC could not preempt state laws requiring that municipal networks adhere to network neutrality principles

State Responses

- Leveraging state government's role as a major buyer of ISP services

  -- States purchase large quantities of communications services from entities that provide Internet access services

  -- Some states are considering using their buying power to "encourage" ISPs to comply with network neutrality principles

  -- The lawfulness of such efforts must be assessed based on the specific facts

    + State purchasing measures that consider network neutrality compliance as one of many factors are likely permissible

    + However, measures that effectively require an ISP to comply with network neutrality or loose a significant amount of state business are likely preempted because they would "negate" FCC policy by forcing the ISP to comply

State Responses

- Monitoring or certification

    -- Some states are considering monitoring ISP operations to see whether a service provider is "throttling" traffic to particular users; other states are considering issuing certifications to ISPs that voluntarily comply with network neutrality provisions

    -- Such measures appear to be permissible

    - + ISPs would remain free to decide whether to exercise their new federal rights
    - + Indeed, such measures can be justified as "policing fraud," a state power the FCC expressly intended to preserve

    -- Because the FCC has preempted additional state transparency requirements, states would need to rely on information disclosed by ISP pursuant to the FCC rules or gathered by third parties

State Responses

- Conditioning state benefits on network neutrality compliance

  -- Some states are considering preventing ISPs that do not comply with network neutrality principles from receiving state benefits, such as cable franchises or access to rights-of-way or pole attachments

  -- The FCC stated that it did not intend to interfere with the States' exercise of these powers

  -- However, such measures are likely preempted because they effectively require an ISP to comply with network neutrality principles in order to do business, thereby "negating" the FCC's deregulatory policy

Conclusion (For Now)

- The Net Neutrality saga continues
  - Judicial review
  - Legislation
  - Congressional Review Act
  - State Action / Federal Preemption
- Predictions?

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