

February 19, 2014

Today, FCC Chairman Tom Wheeler announced his plan to respond to last month's Court of Appeals decision affirming the FCC's authority to adopt rules to promote broadband deployment but overturning most of the rules the FCC actually adopted. As expected, Chairman Wheeler is steering a middle course that essentially would replace the old rules without asserting new authority over Internet service providers.

Overview

Today's announcement was not a surprise; indeed, Chairman Wheeler had been promising a response to the court decision for several weeks. The content of the announcement also was consistent with expectations – the FCC will open a new proceeding to attempt to reinstate the rules that were overturned, but will not take the more significant step of attempting to reclassify Internet access service as a common carrier service, which would subject Internet access to the same regulation as telephone services.

The FCC's course of action could lead to new rules being adopted as soon as the end of 2014, but considerable uncertainty will remain. It is very likely that the new rules will be appealed, and the statement also suggests that the FCC could adopt a case-by-case enforcement process, which will make it more difficult to know which practices are permissible and which practices are not. This uncertainty could affect both Internet service providers and edge providers that depend on Internet service providers to get access to their customers.

The Court Decision

On January 14, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision on the FCC's original network neutrality order. That decision held that the FCC has authority under Section 706 of the Telecommunications Act of 1996 to adopt regulations to promote deployment of broadband and other advanced services, but that the FCC's power did not extend to imposing traditional common carrier obligations on Internet service providers. As a result, the court overturned rules prohibiting unreasonable discrimination and blocking access to services and content, but upheld the rule requiring Internet service providers to disclose significant information about their services, including speed data and information on what kinds of content they block or limit. The court also suggested that rules similar to the anti-discrimination and no-blocking rules could be affirmed if the FCC followed a different approach in adopting them.

Today's Actions

Today, Chairman Wheeler took the court's invitation to revisit the rules that were overturned and announced how the FCC will proceed. These are the steps announced today:

- The FCC will not appeal the Court of Appeals decision to the Supreme Court.
- The FCC will open a proceeding to adopt new rules, with a focus on three areas:
 - Reinstating the no-blocking rule using a rationale that the court would find acceptable.
 - Adopting a new rule that addresses the same issues as the non-discrimination rule, without subjecting Internet service providers to common carrier treatment, and likely deciding discrimination issues on a case-by-case basis.
 - Enhancing the disclosures required under the "transparency" rule to ensure that sufficient information is available not just to consumers, but to edge providers.
- The FCC will open a new docket for public comment on network neutrality issues.
- The FCC will look for additional opportunities to enhance competition in Internet services, including considering whether it should take steps to eliminate legal restrictions that prevent cities and towns from offering Internet service to their residents.

In addition, Chairman Wheeler announced that the FCC's proceeding on the question of whether Internet access should be classified as a common carrier service, which has been dormant since the network neutrality order was adopted, will remain open and that the FCC will hold major Internet service providers to their stated

commitments to abide by the original rules.

Chairman Wheeler's announcement also included a fact sheet on investment in the Internet. This fact sheet was intended to demonstrate that the network neutrality rules did not stifle investment and innovation.

In response to the Chairman's announcement, both of the Republican commissioners issued statements opposing further action. Commissioner Pai said that the announcement "reminds me of the movie Groundhog Day" and that he was "skeptical that this effort will end any differently from the last." Similarly, Commissioner O'Rielly said that he was "deeply concerned by the announcement that the FCC will begin considering new ways to regulate the Internet" and that it "appears that the FCC is tilting at windmills here." Although neither of the other Democratic commissioners has responded, yesterday the White House issued a statement saying that "it strongly supports the FCC and Chairman Wheeler" in the effort "to use the authority granted by Congress to maintain a free and open Internet."

Next Steps

Today's announcement does not actually begin any proceeding, but does provide a roadmap for what will happen next. The first formal step will be for the FCC to adopt a notice of proposed rulemaking, which will describe how the FCC will revise the rules that were overturned or, in the case of the no-blocking rule, may simply describe the new legal justification the FCC intends to use to support the rule. This likely will not occur until sometime in the spring, possibly in April.

Following the release of the notice, the FCC will receive and review comments. The comment period is likely to extend to 60 to 90 days. The FCC will issue a new decision only after the comments are received and reviewed, which likely will take several months. As a consequence, it is unlikely that the FCC will issue a new order before the end of the year. While the Republicans on the FCC will oppose a new order, the Democrats have a 3-2 majority, and so it is unlikely that new rules could be blocked.

While the rulemaking is pending, the FCC likely also will be analyzing whether it can or should seek to adopt rules that give municipalities more freedom to construct and operate broadband networks. (It also is possible that this issue will be incorporated into the network neutrality rulemaking, but it appears more likely it will be addressed separately.) In addition, there is a good chance the FCC will focus greater scrutiny on current activities of Internet service providers, particularly their compliance with the current disclosure rules and, in the case of Comcast, its compliance with the network neutrality conditions agreed to in the NBCU transaction. This likely will be an issue in the Comcast-Time Warner merger proceeding at the FCC.

Implications

One important element of today's announcement is the specific statement that the FCC intends to "[h]old Internet Service Providers to their commitment" to maintain compliance with the previous network neutrality rules. This statement is intended as a warning, even though the FCC does not now have the authority to enforce those rules. In practice, the warning may not be necessary, because the initiation of the new rulemaking creates uncertainty that will make it difficult for Internet service providers to change their current practices. Thus, it is likely that the status quo will continue until the FCC issues a new order.

Similarly, the decision not to close the proceeding on reclassification also is intended to ensure that the large Internet service providers will cooperate with the FCC. The FCC's authority to regulate Internet access would be much broader if it reclassified the service as common carriage, and thus this potentially is a significant threat to Internet service providers. That threat helped bring many of the parties to the table in 2010; it is not clear whether it is as potent today.

The decision to open a new proceeding also creates a significant level of uncertainty as to what the regulatory regime will be in the long run. Assuming the FCC acts by the end of 2014, it is unlikely that any court appeal of the new rules will be resolved until late 2015 or early 2016. As a result, it could be two years or more before the final status of the rules is settled. While this likely will constrain Internet service providers from taking any steps that would violate the network neutrality rules, it also makes it more difficult for edge providers to plan for the future. In addition, the proposal to consider potential violations of a new anti-discrimination rule on a case-by-case basis means that there could be uncertainty about what types of activities are permissible and

impermissible under that rule.

Finally, the Chairman's statement does not address a host of potential issues that could be part of the new proceeding, notably including the permissibility of services like the AT&T Wireless sponsored data service or recent disputes about the carriage of Netflix traffic by large Internet service providers. While these issues could be included in the proceeding, recent statements from Chairman Wheeler, particularly concerning sponsored data, have suggested that he does not consider these concerns to fall within the scope of network neutrality. Nevertheless, there is a good chance that at least some parties will raise them in their comments, and the FCC may be forced to address those comments in its decision.

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Key Contacts

J.G. Harrington Washington, DC	jgharrington@cooley.com +1 202 776 2818
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