Alerts and Updates

FCC'S "NET NEUTRALITY" LOOKING TO REGULATE THE INTERNET?

November 9, 2009

On October 22, 2009, the Federal Communications Commission (FCC) launched a potentially controversial proceeding that looks toward regulation of the Internet. The FCC has proposed to formally codify certain Internet-openness policies that it has followed for the past several years, while adding two more policies.

The four existing policies state that consumers are entitled to run the lawful applications of their choice, to connect legal devices of their choice, to access the lawful Internet content of their choice and to have competition between and among Internet access providers.

The fifth principle would ban discrimination by Internet access providers between and among lawful content, applications and services.

The sixth principle would require providers to disclose their network management practices. All six principles would be subject to an exception for "reasonable network management" by the provider, as well as to the needs of law enforcement and public safety.

The principles would be applied to all broadband providers—wireline and wireless. However, the FCC suggests that *how* the policies would be applied might vary from one technology platform to another, and has asked for public comment.

The Commission voted unanimously to initiate the proceeding. However, the two Republican Commissioners only concurred with the agency's decision to open the process, and dissented to the notion that there are problems with the Internet market that the FCC can and should address.

The FCC's Notice of Proposed Rulemaking poses a multitude of questions, including an appropriate definition of reasonable network management; whether net neutrality principles, if adopted, would infringe First Amendment rights of providers and, if so, whether those rights are outweighed by the rights of others; whether there should be an exception for managed or specialized services, such as those provided to large business users; and many other issues.

The definition of reasonable network management is vital. A small fraction of Internet users consume most of the available bandwidth, primarily via file-sharing and Internet downloads, often to the detriment of the majority of users.

The central issue in the proceeding seems straightforward: Is the Internet broken, and if so, is the federal government the entity to fix it? However, upon closer examination of the issues, the complexity of the undertaking becomes apparent.

A notable example is that the network increasingly exhibits at its core the kind of intelligence that one finds at the edges with Yahoo, Google, Facebook and eBay. A potential risk with the type of policies supported by net neutrality advocates is that those policies may relegate providers of the underlying facilities that make the Internet possible—*e.g.*, AT&T, Comcast and Verizon—to little more than providers of transport facilities.

Of the six principles, the one garnering the most attention is the fifth, the non-discrimination provision. Non-discrimination in telecommunications is a common carrier concept. Section 202(a) of the Communications Act bans "unjust or unreasonable discrimination" by common carriers.

Inclusion of the concept, even without the "unjust or unreasonable" qualifier, may invite the kind of litigation that characterizes common-carrier regulation. The FCC's Notice stressed that the agency intends to fill out the contours of its policy via case-by-case adjudication.

The FCC's proceeding is likely to be significant, given the agency's repeated decisions holding that wireline and wireless broadband providers are information services, not to be regulated as common carriers—and therefore not subject to the non-discrimination provisions of Title II of the Communications Act. Cable modem service, for example, was held to be an information service in 2002, a distinction that was upheld by the U.S. Supreme Court in the *Brand X* case.[1]

Legal consistency aside, a chief policy issue is whether adoption of a non-discrimination provision would deter investment in broadband facilities. Even the prospect of Internet regulation has raised concern that the Obama administration's chief domestic communications goal—the spread of broadband facilities—may be undermined by the pursuit of one of its other objectives: Net neutrality.

At a minimum, the FCC needs to address whether there is a market failure. However, no evidence of a pattern of problems exists to date. To the contrary, only a handful of cases involving alleged discriminatory conduct by an Internet service provider have been presented, and the Commission has dealt with these matters.

In the words of Commissioner Robert M. McDowell, the FCC conducted a two-year-long inquiry in a search for broadband market failure, and "we came up empty."[2]

Rather, most of the impetus for regulation has stemmed thus far from concern over what *might* happen, given the possible means and motives of broadband providers to favor their own services and applications.

The FCC has established a lengthy comment period: Until January 14, 2010, for opening comments; and until March 5, 2010, for reply comments.

For Further Information

If you would like more details regarding the proceeding, please contact William K. Keane or Glenn B. Manishin in our Washington, D.C. office, any of the attorneys in the Information Technologies and Telecom Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *NCTA v. Brand X*, 545 U.S. 967 (2005).
2. Statement of Commissioner Robert M. McDowell, Concurring in Part, Dissenting in Part.