BY-LINED ARTICLE

Net Neutrality Is Dead; Long Live Net Neutrality

By William K. Keane and Glenn B. Manishin
April 19, 2010
Duane Morris LLP

In a decision that has already generated a huge volume of commentary and predictions,[1] on April 6, 2010, the U.S. Court of Appeals for the District of Columbia Circuit reversed a contentious ruling by the Federal Communications Commission (FCC) from 2008 that penalized Comcast Corp. for violating the Commission's "network neutrality" Internet principles.[2] Those principles include a content-access requirement that the FCC said precluded broadband operators and other Internet Service Providers (ISPs) from using network management practices to block or "throttle" specific Internet Protocol (IP) based services, such as the peer-to-peer, or P2P, filing-sharing communications offered by BitTorrent.

The court's opinion represents a devastating blow to the FCC's assertion of ancillary jurisdiction authority over the Internet, ISPs and IP-based services. It calls into question how, if at all, the agency can implement many of the proposals put forward in its recent National Broadband Plan (NBP) and the "open Internet" proceeding launched last fall to codify those 2005 net neutrality principles (plus two additional rules proposed by new FCC Chairman Julius Genachowski). And the D.C. Circuit decision calls out for resolution by Congress of the jurisdictional void created-a call some legislators have already heeded.[3]

Yet much of this crisis mentality appears unwarranted. There are accepted legal bases the FCC could employ to achieve a substantial part of its objectives related to consumer protection on the Internet. Where the FCC may not by statute operate, the Federal Trade Commission (FTC)—which for several years has been biting at the bit to oversee broadband competition and consumer protection—can. That is because the *Comcast* decision compels the conclusion, at the very least, that broadband is not a "common carrier" service over which the FCC enjoys exclusive federal jurisdiction. The FCC's proposal in its recent broadband plan that the agency apply universal service funds to subsidize broadband deployment in rural areas is likely not threatened materially by the *Comcast* decision. The larger public-policy fight over so-called "reclassification" of broadband as a Title II service presupposes, incorrectly, that Title II treatment means subjecting IP-based services to the same, traditional public utility model of regulation as monopoly telephone providers. In short, the agency and Congress face a dizzying array of alternatives and options.

This article has two parts:

- First, we review the proceedings leading up to and the substance of Circuit Judge David S. Tatel's opinion for a unanimous three-judge panel of the court of appeals.

- Second, we put the decision into context and explore ways in which the FCC could react, including the legal rationale(s) the agency would need to develop on remand.

Both portions of the article are of necessity general overviews. A complete examination of this rather wonkish area of communications jurisprudence requires a longer treatise than warranted for such a time-sensitive article. Readers are encouraged to address these issues in greater detail with their legal counsel.

1. The Comcast Decision

The FCC had classified cable modem service as an information service under the bifurcated regulatory approach of *Computer II* and the 1996 Telecommunications Act, a ruling affirmed by the Supreme Court in *NCTA v. Brand X*, 545 U.S. 967 (2005). Nonetheless, the Commission later developed a set of four network neutrality principles adopted in a 2005 "policy statement."[4] These were intended to protect what the agency perceived as a threat to the open character of the Internet if vertically integrated content providers blocked or discriminated against other websites and content in order to favor their own IP-based services.[5]

1. To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
2. To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
3. To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
4. To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

Much like the assumptions underlying the NBP, the net neutrality principles aspired to an Internet free of any provider's control, giving every end user access—with little or no permissible differentiation among services or even packets—to all content available anywhere, anytime. (They also harkened to a similar failed effort by public-interest advocates, in the late 1990s, for what was then termed "cable open access.")

Whether regulatory intervention is *needed* to ensure this result was not at issue in the *Comcast* appeal, but it was central to the FCC's enforcement action that triggered the case. Faced with the reality that file-sharing end users were consuming huge amounts of bandwidth, Comcast deliberately limited their ability to use P2P client-side applications by first outright blocking, and later imposing network management controls on, BitTorrent IP traffic, so that the latency-sensitive applications of the majority of its Internet customers would be delivered uninterrupted. Some consumer advocates alleged that the cable giant did so in order to protect its own on-demand video-programming services from potential competition. Comcast stopped the practice after the story was published, but was later discovered to have misled the Commission with its initial responses—and the company never revealed to customers that some IP traffic was not being routed with the same throughput as other services. The FCC subsequently imposed reporting and disclosure requirements on Comcast's traffic-management practices, based on the 2005 policy statement, which the agency had not promulgated as actual rules or regulations.

Comcast appealed that decision. The FCC defended its actions on the ground that, even though Internet broadband is not a telecommunications service subject to Title II of the Act, the agency has ancillary jurisdiction to regulate. That ancillary jurisdiction doctrine, sometimes confusingly referred to as "Title I jurisdiction," is based on a 1960s-era decision by the Supreme Court in which the FCC had restricted cable television by regulation in order to protect traditional TV broadcasters, over which the agency enjoyed express statutory authority. In *Comcast*, the D.C. Circuit concluded that under that approach, *ancillary regulations must be ancillary to something explicit in the Act*—in other words, the Commission must show that its traffic management directive was "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities." Concluding that the FCC had not done so, the court reversed.

Without detailing each of the statutory hooks advanced by the Commission, it suffices to say that the agency did not seriously urge the court of appeals to sustain ancillary Internet regulation in order to protect its Title II, III (broadcasting) or VI (cable) jurisdiction over legacy services for which the Communications Act grants explicit regulatory authority. Instead, the FCC urged that various general statements of public policy appearing in the 1996 Act amendments provided the necessary linkage. The D.C. Circuit rejected that contention, concluding that policy does not suffice under the ancillary jurisdiction doctrine as a statutorily mandated responsibility. The FCC also cited section 706 of the 1996 Act, which directs it to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The court likewise rejected that linkage because the Commission itself had long ago ruled that section 706 does not constitute "an independent grant of authority" to the agency.

These holdings, foreshadowed earlier by oral argument,[6] are relatively unsurprising. What is somewhat unusual is that, in its appellate positions, the FCC suggested additional grounds for an ancillary jurisdiction theory that had not been relied on in its 2008 order. The most cogent of these added rationales was that Internet openness and nondiscrimination is ancillary to the "just and reasonable practices" mandate of sections 201(b) and 202(a), applicable to telecommunications carriers. Judge Tatel's opinion dismissed these *post-hoc* justifications not on the substance, but rather because Administrative Procedure Act precedent requires a reviewing federal court to sustain or reverse a regulatory order on the same grounds offered by the agency in its underlying decision.

Comcast's challenge of the 2008 order had offered the Court the opportunity to overturn it on the narrower ground that principles, unlike rules, are not enforceable in company-specific adjudications. But the D.C. Circuit did not reach that question. Its analysis essentially concurred with dissenting Commissioner Robert McDowell's criticism that "[u]nder the analysis set forth in the order, the commission apparently can do anything so long as it frames its actions in terms of promoting the Internet or broadband deployment."[7]

The end result is that the FCC's network neutrality principles are effectively dead, for now at least. The agency has various options available, but unless and until it develops either an alternative rationale under its existing statutory framework or procures a new legislative grant of authority from Congress, it cannot police the practices of ISPs and broadband providers. It is to these alternatives and their viability that we now turn.

2. The Post-Comcast Regulatory and Legislative Environment

In the wake of the D.C. Circuit's decision, network neutrality advocates urged the FCC to ensure Internet openness by "reclassifying" broadband as Title II telecom service. Gloating opponents opined that the FCC was properly chastised and should rein in its efforts to regulate what they view as an increasingly competitive market, in which most major ISPs have

long ago pledged to respect net openness as a business matter. Meanwhile, web-based grassroots campaigns, with typical rhetorical excesses, sprang up overnight to "save Internet freedom."

The reality is somewhere in between. Had the FCC desired, it could have-and still might-justify its ancillary jurisdiction by articulating a relationship between broadband Internet access and traditional, regulated communications services. By declining to review the Obama Commission's arguments based on the mandatory obligations of reasonable rates and practices under Title II, the court of appeals has all but begged the FCC to do so on remand. The problem with this approach, especially given the history of the ancillary jurisdiction doctrine, is that it reflects a paternalistic, corporate welfare model of economic regulation, which is out of favor as a policy matter with politicians, regardless of their party affiliation or ideology.

It would not, however, require much in the way of legislation to give the FCC explicit authority to adopt and impose network neutrality nondiscrimination rules. In its 2009 stimulus legislation, Congress allocated $7.2 billion for distribution by executive branch agencies in the form of grants to spur broadband deployment. A portion of those funds was expressly conditioned on grantees' agreement in advance to comply with the Commission's 2005 network neutrality principles. Unlike broader calls to completely rewrite the Communications Act in light of convergence, a legislative "fix" specific to net neutrality would not be unusually difficult. Whether there exists the political will and votes to do so, especially in the aftermath of the divisive healthcare reform debate, is unclear.

Nor does the *Comcast* decision by the D.C. Circuit necessarily spell the death knell for the Commission's National Broadband Plan. Some of its proposals, such as privacy protections for broadband end users and truth-in-billing disclosure requirements for ISPs, would surely require new legislative authority. Yet the basic objectives of the plan, including its proposal to allocate an additional $16 billion in universal service funds to subsidize broadband services, are not necessarily invalid after *Comcast*. That is because section 254 of the Act likely allows the FCC to both collect USF contributions from and-as reflected in the E-rate program-use them for "advanced services" like Internet access.

The final FCC option is to reconsider its earlier rulings that Internet access services (at least when integrated with IP transport) are "information services" for purposes of the 1996 Act's classifications. Some analytical maneuvering would obviously be required to achieve that result, since the agency needs to develop and articulate changed circumstances that rationally justify a reversal of its prior ruling. But since the Supreme Court has recently emphasized that the APA does not impose on administrative agencies any higher burden of justification to repeal or revise its rules and policies than to adopt them in the first place, the FCC conceivably might be able to satisfy that standard.

Much of the opposition to this sort of "reclassification" stems from the fear that characterizing Internet access as a telecommunications service would carry with it the full panoply of legacy Title II dominant carrier regulation, such as rate-of-return pricing, entry and exit licensing and the like. The two, however, are not coextensive. It has been the law for several decades, codified by Congress in 1996, that the FCC enjoys the ability to refrain or "forbear" from regulation. Reclassifying broadband as a Title II telecom service could, at least hypothetically, be coupled with a simultaneous decision forbearing from application of most substantive regulations to ISPs.[8] Yet, at least to policy interest advocates, that would be viewed as a loss; in their regulatory paradigm, broadband represents the new common carriage and should be offered on a quasi-utility basis. That perception would have to be changed if proponents of reclassification are to stand a realistic chance of persuading the agency and, more importantly, successfully withstanding judicial review.

Finally, under both the Bush and Obama administrations, the FTC has expressed a clear desire to exercise its own statutory jurisdiction over broadband services. Historically, the FTC is precluded from applying the Federal Trade Commission Act and its unfair competition and consumer protection standards to common carriers. But absent reclassification, broadband is plainly not a common-carrier service under either the Communications Act or the FTC Act. As a result, although FTC Chairman Jon Liebowitz has not made a public statement to-date in the wake of *Comcast*, most observers anticipate that agency to move relatively rapidly into broadband for purposes of filling the void left in the wake of the court of appeals' decision.

Conclusion

Network neutrality is a complex, contentious and confusing issue. While the D.C. Circuit's opinion is abundantly clear, it is not apparent how the FCC or Congress will respond and whether the agency will seek Supreme Court certiorari review to test the basis and scope of its ancillary jurisdiction. Having persisted formally since 2005, and as a matter of policy debate for more than a decade, network neutrality is not necessarily dead—it is just entering a new phase of consciousness. That it looks comatose is perhaps a mirage that will be evaporated in time.

William K. Keane practices in the area of telecommunications law and policy. His practice focuses on the representation of clients in radio spectrum policy and transactional matters. Mr. Keane counsels broadcast and industrial clients on FCC compliance issues; prepares license applications and other filings for submission to the Commission; represents clients in FCC enforcement proceedings; and provides advice and counsel in connection with communications asset transactions.

Glenn B. Manishin concentrates his complex litigation practice principally in the areas of antitrust, telecommunicationstelecommunications and technology policy]. Mr. Manishin has more than two decades of significant experience in high-tech litigation, with an emphasis on the impact of convergence and legal uncertainty between legacy industries and the new economy.

Disclaimer: This article is prepared and published for informational purposes only and should not be construed as legal advice. The views expressed in this article are those of the authors and do not necessarily reflect the views of the authors' law firm or its individual partners.

Notes

1. *See, e.g.*, "Court Limits FCC Power over Internet," *Boston Globe*, April 7, 2010, available at http://www.boston.com/business/technology/articles/2010/04/07/federal_court_reverses_comcast_internet_ruling/; Editorial, "FCC Must Quickly Reclaim Authority over Broadband," *San Jose Mercury News*, April 7, 2010, available at http://www.mercurynews.com/opinion/ci_14839845; "FCC to Start Writing Internet Rules After U.S. Court Setback," *Business Week*, April 8, 2010, available at http://www.businessweek.com/news/2010-04-08/fcc-to-start-writing-internet-rules-after-u-s-court-setback.html.
2. *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. April 6, 2010), available at http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf.
3. Rep. Henry Waxman (D-Calif.), chair of the House Committee on Energy & Commerce, announced almost immediately that he is "working with the Commission, industry, and public interest groups to ensure that the Commission has appropriate legal authority to protect consumers." Waxman Statement, April 6, 2010, available at http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1945:chairman-waxmans-

statement-on-net-neutrality-ruling&catid=155:statements&Itemid=55. Earlier, in July 2009, Reps. Edward Markey (D-Mass.) and Anna Eshoo (D-Calif.) introduced H.R. 3458, the Internet Freedom Preservation Act of 2009, to enshrine what the legislation terms "Internet freedom" into law. However, In 2006 Congress failed to pass five bills, backed by groups including Google, Amazon.com, Free Press and Public Knowledge, that would have handed the FCC the power to oversee network neutrality compliance.

4. *Policy Statement*, CC Docket No. 02-33, released Sept. 23, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.
5. *Id.* at 3 ¶ 4.
6. *See, e.g.*, "Appeals Court Unfriendly to FCC's Internet Slap at Comcast," *Dow Jones Newswire*, Jan. 8, 2010, available at http://topics.npr.org/article/03vr4it8Qm7AF.
7. "Does the FCC Have the Authority?" *PC News*, Aug. 1, 2008, available at http://www.pcmag.com/article2/0,2817,2326981,00.asp. *See also* R. McDowell, "Hands Off the Internet," *Washington Post*, April 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040803375.html.
8. In response to concerns voiced regarding reclassification, Rep. Markey said that even under Title II, the FCC could forbear if it wanted to" and that in the past it had "availed itself" of that power. "We shouldn't pretend that going back to Title II would mean that the earth would stop spinning on its axis and it would be the end of times," he added. *See* "Concerns About Title II Reclassification Aired at House Hearing on Broadband Plan," *T.R. Daily*, April 8, 2010.