

Daily Journal

www.dailyjournal.com

THURSDAY, FEBRUARY 9, 2017

PERSPECTIVE

A new sheriff in FCC town

By Bennett L. Ross

In the movie “48 Hours,” Eddie Murphy’s character Reggie Hammond admonishes bar patrons that “there’s a new sheriff in town.” The same is true at the Federal Communications Commission, and his name is Ajit Pai. One opportunity for Chairman Pai to lay down the law concerns net neutrality. What started as a purported desire to preserve the openness of the internet morphed under the Obama administration into a regulatory scheme that treats 21st century internet broadband networks like 19th century railroads. Then-Commissioner Pai vigorously objected to this approach, and the FCC under his chairmanship could be poised to make significant changes to the current regime. But, after multiple judicial challenges to the FCC’s net neutrality orders and with the current rules still under judicial scrutiny, the path forward is not entirely clear.

The ultimate goal should be to provide consumers and the industry with regulatory certainty — a seemingly elusive goal as of late — that removes disincentives to infrastructure investment championed by both political parties. For nearly 15 years — under both Democrat and Republican chairmen — internet broadband was classified under the Communications Act as an unregulated information service by the FCC, during which time broadband deployment and adoption exploded. But that changed in 2015, when the FCC under then-Chairman Tom Wheeler reversed course, reclassifying internet broadband as if it were a monopoly-provided, rotary-dialed telephone. While the new FCC undoubtedly could restore the unregulated classification of internet broadband, a future Democrat-controlled FCC could change regulatory course yet again. It is hard to see who benefits from such a political seesaw. The possible exception being the “army of perfumed lawyers and

lobbyists,” who, in the words of Supreme Court nominee Neil Gorsuch, are inevitably involved whenever an administrative agency “reverse[s] its current view 180 degrees anytime based merely on the shift of political winds.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, Circuit Judge, concurring).

Legislation would solve this administrative conundrum. But no consensus yet exists on what net neutrality legislation should look like. Although Senate Commerce Committee Chairman John Thune, R-S.D., and Ranking Member Bill Nelson, D-Fla., have expressed a willingness to work together on a bill, some Senate Democrats have demanded that legislation enshrine the existing net neutrality regime — a nonstarter for Republicans. By contrast, Republicans who may be amenable to bright-line legislative rules — such as prohibitions against blocking and throttling — undoubtedly will insist that legislation cabins the FCC’s authority to regulate the internet, which would be a bitter pill for some Democrats to swallow. To complicate matters further, some members of Congress want to wait for the new FCC to act before moving forward with any legislation. Given other legislative priorities such as health care, a Supreme Court nominee as well as hundreds of other political appointees requiring Senate confirmation, on top of the general partisan rancor in Washington, the environment for legislative compromise is less than ideal.

What is a new FCC chairman to do? Without waiting for Congress or the courts, Chairman Pai has already begun resetting the net neutrality table. Within weeks after Chairman Pai took charge of the agency, the FCC set aside and rescinded a staff report raising questions on AT&T’s and Verizon’s sponsored data and zero rating practices (which involve not counting certain content against subscriber data limits) and closed related



New York Times News Service
Tom Wheeler, former chairman of the FCC, in New York, Oct. 19, 2016.

staff inquiries.

Chairman Pai could take a step further by declaring that the FCC will not enforce the current net neutrality rules and will not subject broadband to traditional telecommunications regulation pending final judicial review of the current rules. This approach would eliminate — at least temporarily — the specter of innovation only with permission and intrusive regulation of broadband, which has chilled broadband investment. It also would allow the U.S. Court of Appeals for the D.C. Circuit to resolve pending petitions for rehearing en banc and for the parties to seek Supreme Court review if those petitions are denied.

Assuming the case finds its way to the Supreme Court (which is not a given by any means), there are conceivable judicial outcomes that could prove useful to resolving the net neutrality issue once and for all. For example, the Supreme Court could find that Congress meant what it said when it directed that the internet remain “unfettered by Federal or State regulation,” 47 U.S.C. Section 230(b) (2). A judicial holding that the FCC lacks the legal authority to promulgate net neutrality rules would force Congress’s hand. But the wheels of justice grind slowly, and this approach is a long shot that would take time.

Another option for Chairman Pai would be for the FCC to change administratively the current net neu-

trality regime. This approach would require the FCC to initiate a rulemaking proceeding and would involve the agency reclassifying broadband as an unregulated information service and eliminating net neutrality rules entirely or adopting more circumscribed rules. If the FCC elects to adopt new, narrowly tailored rules, it would have to articulate a new theory of the agency’s legal authority for such rules, which may prove easier said than done. Chairman Pai forcefully took issue with the FCC’s legal justifications for the current rules, which would be a non-starter this time around.

Any changes the new FCC may make to the current net neutrality regime would undoubtedly be appealed, which would introduce yet another round of uncertainty. And, some members of Congress may want to let judicial review of any such changes run its course before tackling net neutrality legislation, which would delay further any eventual legislative fix.

In short, like most complicated, contentious issues in Washington, net neutrality does not lend itself to any quick fixes. But it is a problem that desperately needs solving, and Chairman Pai is certainly up to that task. While the final chapter of the net neutrality story has yet to be written, it remains to be seen whether happy endings are limited to the movies.

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