

Daily Journal

www.dailyjournal.com

THURSDAY, DECEMBER 19, 2017

PERSPECTIVE

Return of the light-touch ISP Regulation

By Bennett L. Ross

The Preserving Internet Freedom Order adopted last week by the Federal Communications Commission represents the latest installment in an ongoing saga, not unlike the newest “Star Wars” movie. However, this saga involves so-called net neutrality rather than a battle for the galaxy. Nevertheless, some net neutrality enthusiasts believe that the FCC’s decision is the regulatory equivalent of the Death Star that will destroy the internet as we know it. But reality is very different from science fiction.

As background, the internet largely existed free from government regulation from the dawn of the commercial internet in the late 1980s. For more than 20 years, the FCC — under both Democrat and Republican chairmen — applied a “light” regulatory touch to internet service providers. In 2010, while adopting rules prohibiting ISPs from blocking and engaging in unreasonable discrimination (rules that the U.S. Court of Appeals for the D.C. Circuit subsequently vacated), the FCC rejected regulating ISPs under the same scheme that governed railroads in the 19th century, known as Title II.

However, in 2015, at the urging of President Barack Obama, the FCC changed course, subjecting ISPs to Title II regulation and adopting no-blocking, no-throttling, and no-paid-prioritization rules, as well as a general Internet conduct rule to which ISPs were required to adhere. A divided panel of the D.C. Circuit upheld the FCC, deferring to the agency’s interpretation of federal law — a decision the Supreme Court is considering whether to review.

The order essentially does three things. First, it restores light-touch regulation of ISPs. While ending Title II regulation of the internet, ISPs remain subject to the antitrust laws and the jurisdiction of the Fed-

eral Trade Commission. Second, the order rescinds the rules adopted in 2015. ISPs remain subject to transparency requirements and must prominently disclose network management practices, performance, and commercial terms of their broadband internet access service. According to the FCC, the required disclosures increase the likelihood that ISPs will abide by open internet principles and that any harmful practices that do occur will be quickly remedied. Third, the order preempts inconsistent rules or requirements imposed on ISPs by state or local governments.

The claim that the order puts the internet “in peril” or that ISPs will now decide “which websites, content, and applications succeed” is nonsensical. The commercial internet developed and thrived under the very same light-touch regulatory regime that the order restores. Furthermore, opponents of the order cannot point to a single website or application that has shuttered due to blocking by an ISP. Indeed, examples of ISP blocking are few and far between.

Equally nonsensical is the claim that the order will relegate consumers to “slow lanes” for internet access unless websites and applications agree to pay ISPs for priority access (so-called “fast lanes”). According to the FCC’s most current data, the maximum advertised download speeds among the most popular fixed broadband service tiers offered by ISPs were 100-300 Mbps in September 2015 as compared to 12-30 Mbps in March 2011; the median download speed across all fixed broadband consumers in 2015 was 39 Mbps, as compared to 11 Mbps in 2011. ISPs increasingly are deploying one gigabyte fixed broadband services, and, with the transition to 5G, mobile broadband speeds are expected to rival many fixed broadband services. In short, as broadband services become more robust, websites and

applications may have little need to pay for a “fast” path to consumers. And, consumers would have little desire to pay for robust broadband service if the content they want is being “slowed” by an ISP.

Nevertheless, several consumer

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groups and various state attorneys general are lining up at the courthouse steps ready to challenge the order. In defending the rules adopted by the FCC in 2015, however, some of these parties argued that the D.C. Circuit was required to defer to the FCC as the expert agency in interpreting and applying federal law. Parties challenging the order will have to explain why such deference is not warranted here, which will be no easy task. Indeed, in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Supreme Court expressly upheld the FCC’s discretion to subject ISPs to light-touch regulation, which should pose a significant hurdle to parties challenging the order.

Some members of Congress, including Sen. Ed Markey (D-Mass.) and Rep. Mike Doyle (D-Pa.), have threatened to invoke the Congressional Review Act, which allows Congress to prevent agency rules from taking effect. Beyond the obvious political obstacles — Congress would have to enact and the president would have to sign any CRA resolution — the CRA only governs rules that federal agencies are required to submit to Congress. Because the only rule promulgated by the order imposes disclosure requirements, it would be anomalous for Congress to disapprove of transparency. Nor would the CRA mech-

anism address the chief complaints about the order by net neutrality advocates — the elimination of Title II regulation and rescission of the 2015 rules.

A more productive exercise would be for Congress to adopt legislation that resolves these issues once and for all. Congress is the only branch of government that can provide consumers and the industry with regulatory certainty. Although Congress specifically directed that the internet remain “unfettered by Federal or State regulation,” 47 U.S.C. Section 230(b)(2), this directive has been interpreted differently by the FCC and the courts. Whether Congress is able to craft legislation remains to be seen, particularly in today’s highly charged partisan environment, when members of Congress and their supporters appear more interested in making political points than solving regulatory problems.

Absent congressional action, the net neutrality saga will continue, as challenges to the order play out and — depending upon the outcome of the 2020 presidential election — a future FCC seeks to revisit the order. Whether this saga will be as entertaining as future installments of “Star Wars” is highly doubtful.

Bennett Ross is a partner at Wiley Rein LLP in Washington, D.C., which represented parties that challenged the FCC’s net neutrality rules in *US-Telecom v. FCC*. The views in this article represent those of the author.



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