

Threatening The Telecom Detente

Law360, New York (August 09, 2010) -- After a decade of regulatory warfare, the telecommunications market has enjoyed five years of relative peace and quiet. With the Federal Communications Commission now preparing to impose net neutrality rules, however, all bets are off.

The regulatory wars began in earnest in August 1996, when the FCC published a 700-page final rule implementing the unbundling provisions of the Telecommunications Act of 1996, signed into law by President Clinton just six months earlier.

Supporters argued that the rules, which required incumbents to lease portions of their networks to competitors at controlled prices, would bring real competition to the market for local phone service. Opponents warned they would destroy incentives to invest and dramatically slow the introduction of broadband.



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The debate still rages over which side was right, but what neither side can deny is that the issuance of the 1996 rules marked the beginning of nearly a decade of intense politicking, regulatory maneuvering, and nonstop litigation, ultimately producing a stinging rebuke from the D.C. Court of Appeals, which in 2004 chastised the commission for its “failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.” [USTA v. FCC, March 2, 2004, at 62]

The result, as FCC Chairman Michael Powell said at the time, was a “prolonged period of uncertainty and market stagnation.” [Statement of Chairman Michael Powell, WC Docket 04-313, Released Feb. 4, 2005] Not until a series of 2005 decisions scaling back the unbundling regime and establishing a “light touch” regulatory regime for broadband was a modicum of stability established.

In the intervening five years of relative regulatory certainty, telecom markets in the U.S. have grown rapidly. Telecom firms (including cable companies) have invested hundreds of billions of dollars, much of it in new broadband infrastructures. Over 95 percent of U.S. households now have access to one or more wireline broadband services with at least 4 Mbps of downstream bandwidth, and 97 percent have access to 3G wireless services.

Competition has intensified, the price per megabit for entry-level broadband has dropped by roughly 75 percent, and broadband penetration has risen from 41 percent in 2005 to 70 percent in 2010. [Robert C. Atkinson and Ivy E. Schultz, “Broadband in America: Where It Is and Where It Is Going” (Columbia Institute of Tele-Information, November 2009);

Shane Greenstein and Ryan McDevitt, "Evidence of a Modest Decline in US Broadband Prices" (Northwestern University, January 2010), Tables 3a, 3b.]

Unfortunately, it now seems likely that this period of regulatory stability will be seen by history as nothing but the calm between two storms. The FCC appears determined to enact "net neutrality" regulations imposing highly ambiguous nondiscrimination requirements on broadband providers. And, thanks to a critical decision by the D.C. Court of Appeals, the commission seems to have concluded its only choice is to base the new rules on an untested and risky legal theory. The result is likely to be another decade of litigation and attendant regulatory uncertainty.

The root of today's problem can be traced back to 2005, when the FCC unanimously adopted a two-part compromise. The first part of the compromise was to declare DSL services — like other broadband services — to be "information services," and thus exempt from traditional telephone-style regulation, such as unbundling and price controls. The second part of the compromise was to issue a Policy Statement endorsing "Four Principles of Internet Freedom," including declaring that consumers had the right to view all lawful Internet content, to use the applications and services of their choice, and to connect any (non-harmful) device to the network.

While the Principles were arguably enforceable under the FCC's "ancillary" authority, the commission declared at the time that it was "not adopting rules in this policy statement." [In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Policy Statement, Released Sept. 23, 2005] Accordingly, most observers understood the Principles to be non-binding expressions of policy.

That changed in early 2008, when the FCC issued its so-called BitTorrent Order. Responding to complaints that Comcast had interfered with some of its subscribers' access to peer-to-peer services, the commission found in BitTorrent that the Principles, while not exactly rules, were enforceable nonetheless; and, moreover, that Comcast was violating them. [In re: Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R.13,028 (2008)].

While Comcast had already abandoned the practices at issue, the FCC ordered it not to resume them, and to disclose more fully its network management practices to consumers. Comcast appealed, arguing, among other things, that the commission's ancillary authority does not extend to regulating information services, and that, in any case, the Principles were not rules and could not be enforced as if they were.

If the BitTorrent Order raised questions about the viability of the 2005 compromise, the 2008 election answered them. President Obama's appointment as chairman, Julius Genachowski, is a strong supporter of net neutrality regulation. Backed by two fellow Democratic commissioners, he moved quickly to issue a Notice of Proposed Rulemaking proposing to both formalize and expand on the 2005 Policy Statement. [In the Matter of Preserving the Open Internet and Broadband Industry Practices, Notice of Proposed Rulemaking, GN Docket No. 09-191; WC Docket No. 07-52, Oct. 22, 2009].

The NPRM was issued, on a 3-2 vote, in October 2009, and it was widely anticipated that the commission would adopt the proposed new rules in mid-2010, if not earlier.

Re-enter the D.C. Circuit. In April 2010, the court ruled on Comcast's appeal of the BitTorrent Order. Not only did it side with Comcast, but it did so on the broadest possible grounds, finding that the FCC's ancillary authority does not extend to imposing nondiscrimination rules on information services. Thus, the decision not only voids the BitTorrent Order and renders the Policy Statement unenforceable, but also deprives the commission of its presumed authority to issue the proposed new net neutrality regulations.

The FCC reacted swiftly. Rather than simply appeal the D.C. Circuit's decision, it decided in June — again, on a 3-2 vote — to issue a Notice of Inquiry proposing to resolve the issue by simply reclassifying broadband from an information service to a telecommunications service, and thus subject it to regulation under Title II of the Communications Act. [In the Matter of Framework for Broadband Internet Service, Notice of Inquiry, GN Docket No. 10-127, June 17, 2010]

If the FCC proceeds on this course — and a final decision is possible as early as September 2010 — it would impose on broadband, at least potentially, the full force of a traditional economic regulatory regime previously reserved for natural monopolies.

And, while the members of the commission majority insist they would forbear from imposing the most onerous rules (including unbundling and price controls), they are not proposing to forbear from the proposed net neutrality rules. To the contrary, the net neutrality rules are the only significant commission regulations — existing or proposed — that seem to be clearly threatened by the D.C. Circuit’s decision.

The FCC majority describes its “reclassify and forbear” approach as a “Third Way,” which, according to Chairman Genachowski “rejects both the extreme of applying extensive legacy phone regulation to broadband, and also rejects the extreme of eliminating FCC oversight of broadband.” [Genachowski Statement, Reclassification NOI, June 17, 2010]

But while this approach may seem “moderate” to its supporters, it is far from clear that the courts will allow the commission to reverse field so dramatically, especially given the fact that broadband markets are by all accounts more competitive today than in 2005 when the FCC first decided on its “light touch” approach. The only real certainty is that the commission is embarking on a trip down a well-worn and familiar path: Regulate, litigate, appeal, remand, repeat.

Even before the D.C. Circuit’s decision, the net neutrality regulations were certain to generate protracted litigation. As proposed, the rules ban any discriminatory conduct which does not constitute “reasonable network management,” which is, in turn, ultimately defined as “reasonable steps to maintain the proper functioning of [carriers’] networks.” [Net Neutrality NPRM at ¶140.]

Such ambiguous and circular language — especially, as here, when it is not circumscribed by traditional limiting principles such as requirements to show the existence of market power or to assess a decision’s impact on consumer welfare — is an invitation to challenges from all sides. It is, as Chairman Powell put it in 2005, a recipe for a “prolonged period of uncertainty and stagnation.”

According to the FCC, communications carriers are expected to invest nearly \$250 billion in broadband infrastructure between 2008 and 2015. Whether they will choose to do so in the face of the commission’s decision to embark upon such an adventurous and uncertain regulatory path remains to be seen. The alternative, as so many U.S. corporations are already demonstrating, is to simply “sit on the cash” and wait for things to sort themselves out.

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