Net Neutrality

How Did We Get Here?

Adam Peters
NCSL Legislative Summit
July 30, 2018
Legal Background

• The *Computer Inquiries*
  – Establish a regulatory dichotomy between “basic” and “enhanced” services
  – This dichotomy will serve as the legal and intellectual grounding for much of the modern net neutrality debate
1996 Act codified, in part based on Computer II & III, two different classifications of services the Internet might be lumped under.

**Telecommunications v. Information Services** (statutory language)

- “‘[I]nformation service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service”

- “‘[T]elecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”; “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”
A Brief History

- **2000:** Ninth Circuit rules in *AT&T Corp. v. City of Portland* that cable modem service (i.e., Internet-over-cable) is a telecommunications service.
- **2002:** FCC declares cable modem service an information service in a Declaratory Ruling.
- **2003:** Tim Wu coins the phrase “network neutrality”
  - Paper argued generally for the protection of online traffic through both federal anti-discrimination regulations and self-policing by providers.
- **2004:** FCC Chairman Powell articulates four “Internet Freedoms in a speech. These serve as precursors to subsequent regulatory efforts.
  - Powell emphasized that users should be free to (1) access content, (2) access applications, (3) attach personal devices to the network, and (4) obtain service plan information.
2005 (July): Supreme Court upholds cable modem service’s classification as an “information service” in *NCTA v. Brand X*.

- In *Brand X*, a 6-3 majority – writing over a sharp dissent by Justice Scalia – determined that the FCC was entitled to *Chevron* deference in interpreting the meaning of “telecommunications service” under the Act, and as a result had the freedom to classify cable modem service as an information service.

- The FCC would later rely on *Brand X* to declare that wireline broadband, Broadband over Power Line (“BPL”), and wireless broadband are all information services (in 2005, 2006, and 2007, respectively).
A Brief History

• **2005 (March).** FCC enters into consent decree with Madison River, terminating an investigation into allegations that the telephone company was blocking VoIP.

• **2005 (September).** FCC issues a three-page “Internet Policy Statement” adopting four principles entitling consumers to (1) access to lawful content, (2) run applications and services of their choosing, (3) connect legal devices to the network, and (4) competition among various providers.

• The *Policy Statement* claimed these principles were to be incorporated into “ongoing policymaking activities,” and the FCC stressed that it was “not adopting rules.”

• Absent enforceable rules, however, the FCC faced difficulty when it believed violations of these net neutrality principles occurred. In *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), FCC’s first attempt to “compel a broadband provider to adhere to open network management principles” failed. The D.C. Circuit held that the FCC could not rely solely on ancillary authority in taking enforcement action.
A Brief History

- **2010:** Following the *Comcast v. FCC* decision, Chairman Julius Genachowski (D) spearheaded a “Third Way” *Notice of Inquiry* (and subsequent *NPRM*) contemplating whether to:
  - (1) maintain the Internet’s “information service” classification;
  - (2) pivot to a “telecommunications service” classification under Title II; or
  - (3) adopt a “Third Way” approach leaving the Internet generally unregulated, while classifying only the connectivity service portion of wired broadband Internet access as a “telecommunications service” and forbearing from portions of Title II to said services.
The 2010 Order

• “Third Way” approach rejected, setting stage for the 2010 Open Internet Order – which established a formal regulatory framework

• Relied principally on Title I / Section 706 of the Telecommunications Act, which directs the FCC to promote broadband deployment.

• Generally, the 2010 Order:
  – Barred fixed broadband providers from blocking or unreasonably discriminating in the carriage of traffic.
  – Barred mobile broadband providers from blocking certain kinds of content (but did not bar discrimination by those providers).
  – Applied a reporting and transparency requirement to fixed and mobile providers.
The 2010 Open Internet Order was challenged in court, culminating in Verizon v. FCC, 740 F.3d 643 (2014).

The D.C. Circuit struck down the majority of the 2010 Open Internet Order, holding in part that the anti-discrimination and anti-blocking provisions impermissibly imposed common carriage obligations on non-common carrier information services.

The Verizon decision also established that (1) Section 706 did constitute an affirmative grant of authority under which the FCC can promulgate regulations, and (2) that the agency’s transparency rules were permissible even as to non-common carrier services and could remain in place.
NPRM #2 (2014)

• **Wheeler NPRM initially proposes to use §706 rather than Title II**

• **June 1:** John Oliver performs a now-famous 13-minute bit on the open Internet

• **June 2:** ECFS (FCC’s electronic filing system) receives over 45,000 comments to the relevant docket (No. 14-28), and crashes from traffic overload; 4M million public comments total

• **Nov 10:** President Obama issues a statement encouraging a switch to Title II classification
The 2015 Order

- February 2015: 3-2 vote along party lines
- Legal authority: Title II bolstered by §706
- Covers:
  - Broadband Internet access service ("BIAS")
  - Does not apply to enterprise broadband service, VPNs, or data storage services
  - Wireless treated the same as wireline
The 2015 Order

• Reclassified broadband Internet access as a telecommunications service under Title II of the Act.
• Outlawed:
  – (1) blocking,
  – (2) throttling, and
  – (3) paid prioritization by ISPs.
• Enhanced the 2010 Order’s transparency requirements.
• FCC additionally adopted a case-by-case “general conduct standard” prohibiting broadband providers from “unreasonably interfer[ing]” with user and/or edge provider activity, and subjected Internet interconnection to FCC oversight under Title II.
• Held that mobile broadband has evolved to become an essential, critical means of Internet access for consumers.
• Uses preemption to “preclude states from imposing obligations on broadband service that are inconsistent with the [FCC’s] carefully tailored regulatory scheme.”
USTelecom v. FCC

• **2016:** Industry appealed the 2015 *Open Internet Order* – and lost
  – In *USTelecom v. FCC*, the D.C. Circuit upheld the lawfulness of the FCC’s Title II reclassification
  – Court generally gave the FCC the same *Chevron* deference the agency received from the Supreme Court in *Brand X*

• **2017:** D.C. Circuit declines to rehear the case *en banc*

• Government response to petitions for certiorari pending (deadline extended multiple times so far)
At the end of April 2017, FCC Chairman Ajit Pai (R) announced a plan to undo Title II reclassification and opened the “Restoring Internet Freedom” docket.

In December 2017, the FCC voted to approve the *Restoring Internet Freedom Order.*

The order returns BIAS to its pre-2015 “information service” ("Title I") classification, adopts a modified transparency rule, and shifts other oversight duties to the FTC/DOJ.

The *Order* also preempts states and localities from passing their own net neutrality rules.
So, What’s Next?

- **The CRA.** Democrats in the House are currently trying to muster a majority in support of a Congressional Review Act resolution that would effectively strike down the *RIF Order* (but would be subject to Presidential veto).

- **The States.** A number of states are contemplating, or have enacted, Executive Orders or legislation adopting state-specific open internet regimes similar to the FCC’s 2015 *Order.*
So, What’s Next?

- **Litigation.** Appeals of the *RIF Order* were consolidated in the Ninth Circuit, then transferred to the D.C. Circuit ... what happens at the D.C. Circuit is the topic of intense debate.

- **Legislation.** Republicans in the House and Senate have introduced several bills.

- **Re-reversal by a future FCC?**
Adam Peters
apeters@wbklaw.com

Wilkinson Barker Knauer, LLP
1755 Blake Street, Suite 470
Denver, CO 80202
www.wbklaw.com