

FCC rules against state's rights on net neutrality, faces court challenge

Karl Dickey

February 26, 2015

This morning, February 26, 2015, the Federal Communications Commission (FCC) voted in favor of a net neutrality order which would override state's laws pertaining to Internet speeds of Internet service providers. The issue of net neutrality has been an ongoing issue for years and interestingly, has created reversal in opinions by Republicans, Democrats and Libertarians. Republicans used to be for it, now they are against it. Democrats used to be against it, now they are for it. During yesterday's FCC hearing on net neutrality the most poignant fact was brought up by FCC Commissioner by Ajit Pai. Pai suggested the FCC order will be in violation to a previous U.S. Supreme Court ruling if it went ahead with the order. The order voted yesterday in favor of net neutrality will be challenged in the courts.

Another interesting result of much of the net neutrality talk is that all sides have stated their desire for the Internet to be an open and free market to encourage competition. This talk has come from Libertarians, Republicans and Democrats which often take different sides when it comes to competition and free markets. But this order will only add more bureaucracy to the system and is expected to have unintended consequences.

The Libertarian Party last officially weighed in on the net neutrality issue in 2010 stating, "While the idea of equal consumer access to websites and information is desired, it's important to question whether or not the government should be involved in the first place. Consider this Cato Institute policy analysis by Adam D. Thierer. It asserts that federal regulations on internet access are truly unjustified since providers have not shown any significant signs of web discrimination. The consumer demand for these regulations is minimal, if not absent, within the internet market. This preemptive strike against internet companies is unnecessary and further expands the government's control over our personal actions and those of American businesses. These regulations will transform open internet service into a government commodity with hidden long-term consequences. An article published by The Ludwig von Mises Institute, discusses how net neutrality laws essentially decide who will have the responsibility of managing networks. Should it be the internet service providers (the actual owners of the network) or the government (outside regulators) who control how the internet gets distributed? The owners of the network have an incentive to provide the most open and accessible internet in order to satisfy consumer demand; whereas, the government operates within a policy framework unaffected by market forces."

Tech billionaire Mark Cuban weighed in on the issue today saying, "I don't think anyone is thinking it all the way through. We're all for an open and fair Internet, but let's just take it all the

way through to its logical conclusion. All bits are bits, all bits are equal. If all bits are equal then let's look at what a three bit is, for example.” Cuban went on to explain there is no difference between digital television streaming and Internet streaming. “It is the exact same thing.” So Cuban goes on to explain that the FCC regulates content of television and will soon do the same with the Internet. Playing devil's advocate, Cuban said, “All bits are equal, so why shouldn't CNBC and all TV networks that are delivered on cable and telco and fiber like Verizon; why should they be part of the 'open Internet' as well? And if they are, and all bits are equal, now let's take it one step further, it is the purview of the FCC now. So, the FCC now has to apply their same standards to content don't they, that they do for television? Decency standards. And remember the FCC is the same agency that fought 'nipple gate' for eight years due to a wardrobe malfunction.” Cuban continued, “[FCC] Chairman Wheeler had one position that is different from now. Now the [2010] Verizon decision comes along. Then we get the President of the United States giving his position. Then Chairman Wheeler changes his, now we have the vote that we're having. Does anybody really think that it is going to be any different for a future chairman or a future president to make up the future of the FCC? There is going to be a whack-a-mole environment going forward.”

Henry Blodget, editor and CEO of Business Insider said this morning, “It is tremendously complex and the situation we have now does allow big providers to pay more money to get their content there faster. I think the best answer for most sides is you want to do what encourages competition. Ultimately that is the thing that makes it the best for everybody.” Blodget continued speaking about Comcast, “When we built these pipes it was email. Now Netflix, every night, you are flooding the pipes with all this stuff, we need to put more pipe in the ground. Should you have to pay something extra for that?” Blodget is referring to the greater bandwidth needed to show video content over the Internet which by most reports accounts for 60 percent of bandwidth during evening hours in the United States. Blodget concluded with, “You want a couple of powerful players, at least, in the market. You want a wireless solution. That is why everyone is just drooling at the thought of living in these cities where Google is bringing fiber to the curb, because you have real choice. That will solve it. Because ultimately, if an Internet service provider wants to play games and say 'Hey, we're going to throttle Netflix' and there is someone you can go to [Google] that says 'Whatever you want, it's just a pipe, take it.' That's what everyone is going to go with.”

But let's get down to what exactly was voted on this morning by the FCC. The core of today's order would preempt state laws in Tennessee and North Carolina that prevented broadband providers in the two states from meeting local demand for broadband service. Some states around the country use their influence of control in order to limit competition. Petitions were filed last July by the Electric Power Board (EBP), a community broadband provider in Chattanooga, Tennessee, and the City of Wilson, North Carolina.

In addition to providing electric service, both operate broadband networks providing Gigabit-per-second broadband, voice, and video service. The networks in both areas have attracted major employers, including Amazon and Volkswagen in Chattanooga, and Exodus FX, Regency Interactive, and WHIG TV in Wilson. Wilson's system also provides free WI-Fi downtown.

Tennessee law allows municipal electric systems like EPB to provide telecommunications services anywhere in the state, but limits provision of Internet and cable services to the electrical system footprint. In North Carolina, a 2011 law imposed numerous conditions that effectively precluded Wilson from expanding broadband into neighboring counties, even if requested. One condition, for example, restricted expansion into areas where the private sector delivers service at speeds as slow as 768 kbps in the faster direction – an archaic standard that fails to support modern needs and is a fraction of the FCC’s 25/3 Mbps benchmark.