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Opinion: FCC Doing Its Job — And Well — By Preserving Broadband Competition

Preventing ISP giants from squeezing out the likes of Netflix isn't a 'power grab.'

Robert M. Cooper, The National Law Journal

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Tom Wheeler, chairman of the Federal Communications Commission, has described his overarching agenda for federal telecommunications policy as "competition, competition, competition." Late last month, the FCC delivered a one-two punch that will advance this agenda in the realm that matters most to American businesses and consumers — broadband Internet access service.

In back-to-back party-line votes, the FCC passed two items that are designed to, and will, catalyze further broadband competition in the United States. The first item — and by far the lesser known of the two — was a vote to pre-empt state laws in North Carolina and Tennessee that limit the ability of municipal entities to deploy broadband networks that could compete against those provided by incumbent cable or telephone companies. The second item — and the one that has drawn an extraordinary amount of attention — is the adoption of new open Internet or "net neutrality" rules.

As of this writing, neither landmark order has been released to the public. However, enough information is known to see how these decisions, both individually and in tandem, will advance broadband competition. To do so, one must first appreciate the incentives and abilities of Internet service providers (ISPs) that can, if left unchecked, harm competition.

Most consumers and small businesses in the United States get their broadband Internet service from either a cable or telephone company. Although these ISPs use different technologies to deliver their service, they share a common and important attribute: Both cable and telephone companies, generally speaking, sell more than broadband Internet access service. Specifically, they tend to bundle their broadband service with video programming packages and voice services. In theory, this could lead to efficiencies for both the companies and their customers. In practice, this suite of services creates incentives to limit broadband effectiveness.

The reason these limits occur is actually a product of the dynamic Internet economy. Recent years have witnessed an explosion in disruptive Internet content providers and applications. Once obscure entities like Netflix and Skype have become household names in high demand by consumers. Critically, however, these services pose a direct competitive threat to — and are increasingly a substitute for — the ISPs' legacy video and voice businesses. For example, often a movie that consumers want to watch is available on Hulu or Amazon Prime as well as consumers' ISPs' on-demand platform. ISPs that are focused on selling those services as an integral part of their business model have incentives to make life more difficult for their online competitors. And, as importantly, they have the ability to do so.

SERIES OF NETWORKS

Remember that the Internet is not a single network, but rather a series of interconnected networks. As a result of that architecture, for consumers to access any Internet content of their choosing (which is what they are sold and pay their ISP for) the ISP must be interconnected, directly or indirectly, with the other networks that comprise the global Internet. Likewise, for an Internet content provider such as Facebook or YouTube to reach a consumer, it must be interconnected, directly or indirectly, with that consumer's ISP. This web of interconnection, which offers Internet users an almost limitless array of content, also provides the means by which an ISP can impair access to that content.

Many paths exist to reach an ISP's network, but all of those paths lead to a proverbial gate controlled by the ISP. There simply is no way to reach an ISP's customers otherwise. Accordingly, Internet access can only be as robust as an ISP will let it be. The recent FCC votes cannot change an ISP's incentives, nor can they change the technical ability to act on those incentives. What they can change, though, is the competitive landscape in which such decisions are made.

Turning first to municipal broadband, the FCC recognized that telecommunications firms — like any enterprise — respond to competition. The federal government is not making a power grab, as some detractors have claimed, nor is it a case of the government telling a municipality what it must do. Rather, it is an exercise of the authority delegated to the FCC by Congress to remove barriers to the deployment of broadband services.

Although the decision, by its terms, will apply only to the challenged North Carolina and Tennessee laws, it sends a broader message that the FCC will not stand idly by as states — often at the behest of legacy cable or telephone companies — enact laws antithetical to broadband competition.

Not every municipal entity will want to deploy its own broadband network. Doing so poses administrative, financial and technical challenges. However, the ones that wish to do so — because their residents and local businesses are not being well served by the incumbents — now know that the FCC will not allow state governments to impede this inherently local choice.

The very possibility that this may occur might spur incumbent ISPs to improve their service.

Even so, for the foreseeable future most Americans will continue to obtain broadband service from private firms, and that is where the new net-neutrality rules come into play. While presumably those rules will apply to municipal networks as well, such networks lack the incentives that the legacy providers have to act in a manner contrary to open Internet principles. For those ISPs that have such incentives, the new rules ideally will deter such conduct and, should such deterrence fail, provide a strong remedial mechanism.

Taken together, the FCC's vote last month amounts to a ringing endorsement for competition and the principle that the market — not incumbent ISPs — should pick winners and losers in the

Internet economy. In other words, it is all about "competition, competition, competition."

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