Insight

Congress Should Dismantle Net Neutrality

SAM BATKINS | OCTOBER 31, 2011

In 2008, candidate Barack Obama promised, "I will take a backseat to no one in my commitment to network neutrality, because once providers start to privilege some applications or websites over others, then the smaller voices get squeezed out, and we all lose." Following his election to the Presidency, he threw the democratic process in the backseat when his appointees implemented net neutrality without congressional approval.

Thanks to this regulatory end-around, net neutrality is currently law, but it doesn't have to be. Courts could strike it down before they review the President's health care mandate, or Congress could take the first bite, rescinding the regulation under the little-known Congressional Review Act.

Net neutrality has received intense scrutiny for more than five years but the arguments against the Federal Communications Commission's (FCC's) power grab have hardly changed, and given the current economic climate, the arguments have only gotten stronger. The only thing that has changed is the FCC's evolving justification for its implementation.

First, the FCC's new net neutrality rules regulating Internet providers are price controls, plain and simple. Anyone paying more for their debit card or noticing the paucity of free checking these days ought to know the consequences of government rate-setting.

Net neutrality explicitly bans "pay for priority" arrangements between broadband providers and other parties noting that "a commercial arrangement … would raise significant cause for concern." Price controls alone should be "cause for concern," not arrangements between private companies competing for subscribers.

Let's imagine for a second if the general ban on "pay for priority" extended to mass transit; highways for example. Traditional city roads are free and open to all, which has led to mass

urban congestion. Northern Virginia traffic planners rejected this one-size-fits-all approach and adopted "HOT Lanes," raising the social value of the traffic system by creating priorities and a chance for commuters to choose—or not.

Even the FCC couldn't avoid the harsh reality of market forces, conceding in their rule, "[W]e recognize that some network congestions may be unavoidable." If only price controls were equally unavoidable.

Second, this action is 100 percent speculation, with the Commission listing a few "alleged" violations. For example, the FCC mentioned the words "may," "might," and "prophylactic" (poor word choice, bureaucrats) more than 200 times in a 44-page rule. If the Internet were truly in danger, they'd list 200 instances of service providers blocking content; they cannot.

What's more troubling, despite the vibrant, innovative history of the Internet, is that the FCC dares to declare, "The record does not enable us to make a predictive judgment that the future will be more competitive than the past." Really?

Adding to the speculative and unnecessary nature of the rulemaking, the FCC admits "current industry practices" already promote the open Internet and provide a dynamic marketplace for consumers. If it's already "industry practice" to allow consumers high-speed unfettered access to content, and these rules are merely "prophylactic," why implement them at all?

Which bring us to the third reason why government regulation of the Internet is a horrible idea: it is likely illegal. The D.C. Circuit Court already struck down the FCC's attempt to regulate Verizon's broadband management.

Last year the FCC argued that Section 706 of the Communications Act, generally promoting broadband, gave the Commission sufficient authority to implement net neutrality without a vote of Congress. Now the FCC is taking the kitchen sink approach, citing nine separate sections and three separate titles of the Communications Act for that authority. The Commission claims that it isn't concerned about court review, but if its power to enact net neutrality by fiat is so cut and dry, wouldn't it need only one clear cut provision to cite?

Instead, the FCC argues, "multiple Sections which, viewed as a whole, provide broad authority to promote competition, investment, transparency, and an open Internet…." You've heard of the "Living Constitution." This is the living Communications Act, and the consequences are equally dire.

Congress never got a chance to formally decide net neutrality. Now they will. Choosing between government rate-setting and allowing "current industry practices" to continue

should be an easy decision, even for Congress.

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