

With FCC Vote, Net Neutrality Moves To Next Act: Litigation

By **Bill Donahue**

Law360, New York (February 26, 2015, 9:37 PM ET) -- Federal Communications Commission Chairman Tom Wheeler finally got his new net neutrality rules on the books Thursday, but writing and enacting them was always just the opening act. Now he has to defend them.

Each of the last two times the commission has tried to enact net neutrality rules, a major Internet service provider has taken the agency to court. In 2006, Comcast challenged the Bush-era FCC's effort to penalize the company for throttling its subscribers' use of peer-to-peer software. In 2010, Verizon sued over the FCC's first formal neutrality regime, known as the Open Internet Order. Both times, the ISP won.

The rules that passed Thursday by a party-line vote, over scathing criticism from the commission's Republicans, are unlikely to avoid litigation, either. The vote reclassifies Internet service so that the agency can regulate it with Title II of the Communications Act of 1934, a law that bars "common carriers" from "unreasonable practices."

The text has yet to be released, but AT&T Inc. and Verizon Communications Inc. have both all but come out in recent months and said they're going to sue. Many ISPs decried "inevitable litigation" in responding to Thursday's vote.

So whether the FCC will be sued over net neutrality isn't really in doubt — it's more useful to ask who, how, when and where.

"Today's ruling is certainly an important step in the process of determining the future of the Internet, but of course this is by no means the end of the net neutrality debate," said Brian J. McGinnis, an Internet and technology attorney with Barnes & Thornburg LLP.

"Litigation got us to today's ruling, which has set the framework for the fight to come," he said.

Who's Going To Sue?

Everyone's assuming service providers are going to sue over the new rules — and they're almost certainly right about that. But exactly which one, or which ones, is a tougher question.

Does Verizon sue again after **the January 2014 decision** that shot down the Open Internet Order, which

was a victory but was also seen by many as leading to the unpalatable present situation? Comcast, meanwhile, would face the awkward situation of suing the very agency that's deciding whether to approve its merger with Time Warner Cable Inc. Ditto for AT&T, which is currently asking the agency to approve its acquisition of DirecTV.

Another open question is whether the rules will draw lawsuits from the wireless industry, which will be subjected to net neutrality regulations for the first time but also faces complicating circumstances. T-Mobile and Sprint, for instance, have both publicly said they don't oppose regulation under Title II; Verizon and AT&T have the problems mentioned previously.

"They may be more likely to use a trade organization to do it, rather than suing themselves," said Jennifer Bagg, a partner at D.C.-based telecom and technology specialists Harris Wiltshire & Grannis LLP. The cable industry is represented by the National Cable & Telecommunications Association, the wireless industry is represented by CTIA - The Wireless Association, and the phone company ISPs are represented by The United States Telecom Association.

While the big guys are getting the focus, another potential plaintiff could come from the ranks of small broadband providers. They've publicly commented in recent weeks that Title II is particularly inappropriate for little networks like them, saying they have neither the market power that neutrality advocates fear nor the resources to comply with new government requirements.

"It's possible those smaller providers could be even more aggressive, because they'll really be facing a new burden," Bagg said. "Some of these smaller guys will really have a much bigger increase in regulatory burden."

On the flip side, separate challenges for the FCC might come from consumer advocacy groups who think the agency should have gone even further. The FCC is, after all, waiving many of Title II's provisions that it feels would be too onerous — a process known as forbearance.

Some public advocates or other pro-neutrality groups might think the agency should have left more of those rules on the books.

"There are plenty of issues here that will invite suits, and not just from ISPs, but from consumer groups and other interested parties," said Howard Waltzman, a partner in Mayer Brown's government relations group.

How Does It Go Down?

As with the previous round of litigation over net neutrality, cases challenging the new rules will likely center on whether the FCC has the statutory authority to act the way it did.

The rules passed Thursday use what Wheeler is calling "double barrel" authority: Because the January ruling by the D.C. Circuit said the FCC was trying to impose neutrality under one authority, Title II, while citing another, Section 706 of the Telecommunications Act of 1996, the agency's new rules simply invoke both sources of legal muscle.

As he told reporters after Thursday's vote, Wheeler believes this overlapping approach was exactly what the appeals court asked for, and he said it gave him "great confidence" that these rules would survive where others had fallen.

Still, he's going to have to prove that the move to use Title II — technically, reclassifying Internet service as the kind of “telecommunication service” that the provision is designed to regulate — was warranted. Remember, the old classification, calling the Web an “information service,” was chosen in 2002 after significant deliberation and was upheld by the U.S. Supreme Court in 2005.

“There's going to have to be a very reasoned legal analysis for why suddenly the FCC has changed course,” said John Beahn, a communications attorney in Skadden Arps Slate Meagher & Flom LLP's D.C. office. “They just can't say it is what they say it is, and if they try to take some shortcuts, a court will call them on it.”

Complicating Title II even further is that tricky issue of forbearance. The agency says its forbearing from more 700 provisions of the statute to avoid overregulation, but it's going to have to explain, in detail, why each provision was waived. That's no easy task.

“From what I understand, it's going to be a fairly novel forbearance process,” Mayer Brown's Waltzman said. “There might well be interested parties who object to the way that's going to unfold.”

It's worth noting, though, that under Wheeler's scheme, even if the switch to Title II is overturned, a court could still uphold the rules under Section 706. How exactly that might work is anybody's guess, but the January 2014 ruling did give a strong endorsement for the agency to write neutrality rules using Section 706, just not the way it had done in 2010.

“The rules seem likely to survive appellate scrutiny,” said Pantelis Michalopoulos, the head of Steptoe & Johnson LLP's technology, Internet and media group. “[The FCC] has used the Verizon v. FCC court precedent to fortify the rules against challenges with a formidable body of legal armor.”

When Is This Going To Be Over?

Last time around, more than three years went by between the passage of the FCC's 2010 Open Internet Order and the D.C. Circuit's ruling striking it down. Attorneys surveyed on Thursday are expecting a drawn-out fight in court this time around, but not that drawn out.

For one thing, it's important to note that due to procedural rule-making requirements involving the Office of Management and Budget, the FCC took a particularly long time — more than seven months — before it formally published the 2010 rule in the Federal Register. Only then could Verizon to file its lawsuit.

This time around, the FCC needs to take into account dissenting opinions from its Republican members and deal with similar regulatory requirements, but Wheeler told reporters Thursday he doesn't believe the process will take as long as last time.

For another thing, according to Skadden's Beahn, folks on both sides of the issue are just plain tired of the uncertainty surrounding net neutrality regulation. It's been 10 years since the FCC first started talking about it.

“If there's a way to fast-track this thing, I think everybody would agree to it,” Beahn said.

Where Will This Be Filed?

Comcast and Verizon filed the last two net neutrality cases at the D.C. Circuit, which is tasked with reviewing orders and rule-making from many government agencies, but they didn't necessarily have to. FCC rulings can be appealed in other federal courts, and there might be a good reason to do so this time.

As mentioned previously, the January 2014 ruling was something of a half-victory for Verizon: The court found the 2010 Open Internet Order invalid, but it also endorsed the agency's use of Section 706 as an affirmative grant of power and said the agency could, if done differently, use it to write neutrality rules in the future.

With that jurisprudential landscape, an ISP that's gearing up to sue over net neutrality might think about choosing another circuit — one that hasn't already explicitly approved some of the FCC's fundamental arguments about the right to regulate the Web.

“Given the money that's in play and the ramifications for the industry, they will certainly look at which circuits have ruled favorably or unfavorably on this kind of government action,” Beahn said.

“The D.C. Circuit is usually one of the better ones [for that], but parts of the 2014 order do seem to indicate that the court might bless some kind of net neutrality regulations,” he said. “It'll be really interesting to see where the FCC's opponents try to go.”

--Editing by Kat Laskowski and Chris Yates.