

April 9, 2010

Court Overturns FCC Order In Net Neutrality Case

Efforts by the FCC to codify its 2005 net neutrality principles were cast into doubt on Tuesday by a three-judge panel of the D.C. Circuit Court of Appeals, which determined that the FCC lacked the authority to enforce those principles. The ruling relates to a 2008 FCC order that held Comcast liable for interfering with peer-to-peer file transmissions between users of the BitTorrent web site. Handed down unanimously, the court's order represents a major victory for Comcast and for other cable and phone-based ISPs that say the practice of temporarily slowing web transmissions from high-bandwidth users constitutes a valid and legal means of maintaining optimal network capacity for the majority of subscribers. In addition to spurring efforts toward a legislative fix that could give the FCC statutory authority to regulate the Internet, the ruling is also expected to fuel the current debate on whether broadband should be reclassified as a Title II service that is subject to common carrier and other regulations imposed by the FCC upon landline phone carriers (see story below). Dismissing FCC arguments that the order holding Comcast responsible for violations of the agency's net neutrality principles represents a valid exercise of the FCC's Title I "ancillary" jurisdiction, Circuit Judge David S. Tatel wrote that the FCC had not demonstrated that the 2008 order is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities." In particular, the court deemed as insufficient various statutory provisions that were used by the FCC in support of its notion that its exercise of ancillary jurisdiction was reasonable. Taking issue with the FCC's reliance upon Section 706 of the 1996 Telecommunications Act, which directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability," Tatel cited the FCC's findings in a 1998 order that Section 706 "does not constitute an independent grant of authority" but directs the agency "to use the authority granted in other provisions . . . to encourage the deployment of advanced services." Similarly, the court found that the FCC's assertion of ancillary jurisdiction under Section 256 of the 1934 Communications Act "suffers from the same flaw," as that provision stipulates that "nothing in this section shall be construed as expanding . . . any authority that the Commission otherwise has under law." An FCC spokesman stressed that the court "in no way disagreed with the importance of preserving a free and open Internet, nor did it close the door to other methods for achieving this important end."

Court Order Reveals Partisan Split At FCC, Congress On Net Neutrality And Title II Regulation Of Internet

Reaction of the FCC's commissioners to Tuesday's D.C. Circuit ruling was as divided as the agency's 3-2 vote on the 2008 order that was the subject of Comcast's successful appeal. Both FCC Republicans voiced support for the court's decision, while two of the agency's three Democrats urged renewed efforts toward the adoption of rules that would mandate net neutrality and/or Title II regulation of broadband services. That call for

IN THIS ISSUE:

- **Court Overturns FCC Order In Net Neutrality Case** [read more](#)
- **Court Order Reveals Partisan Split At FCC, Congress On Net Neutrality And Title II Regulation Of Internet** [read more](#)
- **FCC Tees Up Agenda To Implement National Broadband Plan** [read more](#)
- **Verizon Chief Comments On Vodafone Partnership, iPhone, And National Broadband Plan During NY Speech** [read more](#)
- **Malone Resigns From DirecTV Board, Cuts Voting Stake** [read more](#)
- **AT&T To Spend \$1 Billion On Enterprise Network Enhancements** [read more](#)
- **Shareholder Files Suit To Block Megafon Deal** [read more](#)

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action was also seized upon by Democrats in Congress who promised to push through pending legislation that, in the words of Representative Ed Markey (D-MA), “provide[s] the Commission any additional authority it may need to ensure the openness of the Internet for consumers, innovators, and investors.” Although FCC Chairman Julius Genachowski declined official comment, all four of his colleagues issued written responses to Tuesday’s appellate decision. Lamenting the court’s order as “a blow to all Americans who rely on an open Internet,” Commissioner Michael Copps declared: “the only way the Commission can make lemonade out of this lemon of a decision is to . . . treat broadband as the telecommunications service that it is.” Copps’ Democratic colleague, Commissioner Mignon Clyburn, hinted at agreement as she asserted: “we now have the kind of guidance that will enable us to develop the most effective and legally sound rules . . . to preserve Internet openness.” In contrast, Republican Commissioner Meredith Baker said she was pleased with the decision, while Commissioner Robert McDowell—a dissenter against the 2008 order—voiced hope that the decision “will provide certainty in the marketplace and will not lead to the unnecessary classification of broadband service as a monopoly phone service under Title II of the [Communications] Act.” That sentiment was echoed by key Republicans in Congress such as Representative Fred Upton (R-MI), who told reporters: “I . . . hope that the court’s decision will not lead the FCC down the misguided path of attempting to regulate broadband providers under Title II.” As Senator Kay Bailey Hutchison (R-TX) called on Genachowski to “reconsider his decision to pursue expanded Commission authority over broadband services in current proceedings before the agency,” Markey—a co-sponsor of the pending Internet Freedom Preservation Act (HR-3458) with Reps. Anna Eshoo (D-CA) and Henry Waxman (D-CA)—encouraged the FCC to “take any actions necessary to ensure that consumers and competition are protected.”

FCC Tees Up Agenda To Implement National Broadband Plan

The FCC unveiled its roadmap yesterday for implementing the National Broadband Plan (NBP), with the release of an ambitious quarterly agenda that prescribes more than 60 rulemaking notices (NPRMs), notices of inquiry, and other proceedings that the NBP recommends for FCC action. In an agency news release, FCC Chairman Julius Genachowski explained that the agenda sets forth a schedule for, among other things, “reforming universal service to connect all Americans to broadband . . . unleashing spectrum, promoting competition and supporting small businesses.” The FCC’s agenda outlines four specific goals: (1) the promotion of “world leading mobile broadband infrastructure and innovation,” (2) the acceleration of universal broadband access and adoption, (3) the promotion of competition and the maximization of consumer benefits across the broadband ecosystem, and (4) the advancement of “robust and secure public safety communications networks.” During the current quarter, and as part of the NBP’s goal of freeing up 500 MHz of spectrum during the next decade for wireless broadband use, the FCC intends to revise technical rules to allow sharing of the 2.3 GHz band between wireless communications service licensees and satellite digital radio service provider Sirius XM Radio. Further strides toward that goal are expected during the third quarter when the FCC intends to issue NPRMs to (1) accelerate terrestrial broadband deployment in the mobile satellite service bands, and (2) “seek comment on proposals to increase spectrum efficiency and innovation” in the broadcast TV bands. Among other things, the FCC will also take initial steps toward the establishment of the “Connect America” fund with the release of an NPRM and notice of inquiry this month that proposes reforms to the Universal Service high-cost fund.

Verizon Chief Comments On Vodafone Partnership, iPhone, And National Broadband Plan During NY Speech

In remarks on Tuesday, Verizon Communications CEO Ivan Seidenberg quelled speculation of a possible merger between his company and Verizon Wireless joint venture partner Vodafone, while confirming that Verizon Wireless would be “open” to carrying the Apple iPhone, which is currently offered to U.S. customers exclusively through AT&T. At a New York conference hosted by the Council on Foreign Relations, Seidenberg addressed recent speculation of Verizon’s plan to pursue a merger with Vodafone—the global wireless giant based in Great Britain—or a buyout of Vodafone’s 45% stake in Verizon Wireless. While confirming that Verizon and Vodafone

are continuing to evaluate their options for the Verizon Wireless partnership, Seidenberg admitted, “a merger doesn’t seem to have a lot of appeal.” Citing the difficulties of achieving economies of scale and the current trend of telecom firms worldwide joining their fixed and mobile telephony businesses, Seidenberg added: “this notion of a global wireless-only carrier is no longer the preferred model.” With respect to reports that a CDMA version of the iPhone is being developed for use on the Verizon Wireless network, Seidenberg noted that Verizon is interested in carrying the iPhone, especially after Verizon begins commercial service on its fourth-generation Long Term Evolution network later this year. Seidenberg stressed, however, that “it’s [Apple’s] call” as to when that will happen. Seidenberg also voiced support for the National Broadband Plan (NBP) that was unveiled last month by the FCC, although he warned that the NBP could result in regulatory “overreach” that could stifle private investment. As such, Seidenberg cautioned: “we have to be careful that well-intentioned policies don’t become burdensome rules and regulations.”

Malone Resigns From DirecTV Board, Cuts Voting Stake

Fulfilling a condition set by the FCC when Liberty Media acquired its 41% stake in DirecTV from News Corp. in 2008, DirecTV chairman John Malone agreed this week to slash his voting stake in DirecTV while relinquishing his seat on the DirecTV board. Announced on Tuesday, the restructuring of Malone’s interest in DirecTV alleviates concerns raised by the FCC over Malone’s control of rival multichannel video service providers—DirecTV and Liberty Global—that both do business in Puerto Rico. (Liberty Cablevision Puerto Rico is owned by Liberty Global, which is controlled, in turn, by members of the Malone family.) Under the arrangement, Malone, his wife and two trusts for the benefit of the Malone’s children would exchange 21.9 million DirecTV Class B shares that carry 15 votes each for 26.5 million Class A DirecTV shares that carry one vote each. Although the exchange will boost the economic value of the Malones’ stake by \$161.6 million, the move will slash the Malones’ voting control of DirecTV from 24.3% to 3% and will also result in the elimination of DirecTV Class B shares that are owned exclusively by the family. Malone, who also serves as chairman of Liberty Media, will then resign from the DirecTV board along with Greg Maffei (the current CEO of Liberty Media) and Paul Gould (a Liberty Global director). A DirecTV spokesman noted that the agreement will enable DirecTV to integrate its Puerto Rican operations with the rest of the company’s business in Latin America.

AT&T To Spend \$1 Billion On Enterprise Network Enhancements

Defying what it calls “the continuing challenges of today’s economic environment,” AT&T unveiled plans on Tuesday to invest upwards of \$1 billion this year on the deployment of new or enhanced network capabilities and applications that would be targeted toward small business customers in the U.S. and large enterprise customers around the world. Noting that the planned outlay forms a part of AT&T’s overall existing capital plan, an AT&T press release said the investment responds to “the opportunities created by the continued proliferation of high speed communication networks and mobile computing devices worldwide.” To achieve consistency in network capabilities that customers need to boost their efficiency and competitive viability AT&T said it would take steps to enhance global managed network Internet services across ten European nations, eleven Asia-Pacific countries, and six countries in North and South America. In addition to expanding Ethernet over copper facilities throughout its U.S. network, AT&T will also introduce a new metro switched Ethernet service across its 22-state local exchange area and increase broadband download speeds to 24 Mbps in 120 markets. AT&T also intends to deploy 350 gigabytes of new submarine cable capacity between the U.S. and Asia, 180G of new capacity to the Caribbean and South America, and 70G of new capacity between the U.S. and Europe. Including the \$1 billion investment planned for this year, AT&T will have spent more than \$4 billion since 2006 on the improvement of network services, systems and applications it provides to more than 3.6 million business customers.

Shareholder Files Suit To Block Megafon Deal

Plans by TeliaSonera of Finland and Russia’s Alfa Group to pool their respective stakes in MegaFon hit a potential roadblock, as Russian tycoon Alisher Usmanov—a 31% shareholder in MegaFon through his vehicle, Telekominvest—asked a Moscow arbitration

court this week to block the deal. The agreement involving MegaFon, the third-largest wireless carrier in Russia, forms half of a two-prong transaction that also involves the combination of Telia's and Alfa's respective stakes in Turkish mobile phone operator Turkcell. Announced in November, the deal is intended to resolve a dispute between Telia and Alfa over Turkcell's control and to transform MegaFon into a major international operator. In addition to owning 43.8% of MegaFon and 37.3% of Turkcell, Telia also holds a 26% stake in Telekominvest. (Through its subsidiary Altimio, Alfa holds stakes of 25.1% and 4.99% in MegaFon and Turkcell, respectively.) Telia and Alfa also invited Usmanov to contribute Telekominvest's stake to the proposed venture, but he declined on grounds that the merger would not contribute to MegaFon's capitalization. Arguing that the ultimate breakdown of ownership stakes in MegaFon will remain the same in spite of the merger of Telia's and Altimio's holdings, Alfa has maintained that the deal complies with Russian anti-monopoly and foreign investment laws. The complaint filed by Usamov on Tuesday, however, contends that the deal violates a recently-enacted law that bars foreign investors from assuming control of "strategic" Russian companies. While declining further comment until a copy of the lawsuit is received, an Alfa spokesman emphasized: "we consider there to be no breach of the law."

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