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Net Neutrality Paranoia
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The paranoid style is endemic across the political spectrum, for sure, but lately in the policy realm haunted by the shambling zombie known as "net neutrality," the pro-Title II set are taking the rhetoric up a notch. This time the problem is, apparently, that the FCC is not repealing Title II classification *fast enough*, which surely must mean … nefarious things? Actually, the truth is probably much simpler: the Commission has many priorities and is just trying to move along its docket items by the numbers in order to avoid the relentless criticism that it's just trying to favor ISPs.

Motherboard, picking up on a post by Harold Feld, has opined that the FCC has not yet published its repeal date for the OIO rules in the Federal Register because

> the FCC wanted more time to garner support for their effort to pass a bogus net neutrality law. A law they promise will "solve" the net neutrality feud once and for all, but whose real intention is to pre-empt tougher state laws, and block the FCC's 2015 rules from being restored in the wake of a possible court loss…As such, it's believed that the FCC intentionally dragged out the official repeal to give ISPs time to drum up support for their trojan horse.

To his credit, Feld admits that this theory is mere "guesses and rank speculation" — but its nonetheless disappointing that Motherboard picked this speculation up, described it as coming from "one of the foremost authorities on FCC and telecom policy," and then pushed the narrative as though it were based on solid evidence.

Consider the FCC's initial publication in the Federal Register on this topic:

> Effective date: April 23, 2018, except for amendatory instructions 2, 3, 5, 6, and 8, which are delayed as follows. The FCC will publish a document in the Federal Register announcing the effective date(s) of the delayed amendatory instructions, which are contingent on OMB approval of the modified information collection requirements in 47 CFR 8.1 (amendatory instruction 5). The Declaratory Ruling, Report and Order, and Order will also be effective upon the date announced in that same document.

To translate this into plain English, the FCC is waiting until OMB signs off on its replacement transparency rules before it repeals the existing rules. Feld is skeptical of this approach, calling it "highly unusual" and claiming that "[t]here is absolutely no reason for FCC Chairman Ajit Pai to have stretched out this process so ridiculously long." That may be a valid interpretation, but it's hardly *required* by the available evidence.

The 2015 Open Internet Order ("2015 OIO") had a very long lead time for its implementation. The Restoring Internet Freedom Order ("RIF Order") was (to put it mildly) created during a highly contentious process. There are very good reasons for the Commission to take its time and make sure it dots its i's and crosses its t's. To do otherwise would undoubtedly invite nonstop caterwauling from Title II advocates who felt the FCC was trying to rush through the process. Case in point, as he criticizes the Commission for taking too long to publish the repeal date, Feld simultaneously criticizes the Commission for rushing through the RIF Order.

The Great State Law Preemption Conspiracy

Trying to string together some sort of logical or legal justification for this conspiracy theory, the Motherboard article repeatedly adverts to the ongoing (and probably fruitless) efforts of states to replicate the 2015 OIO in their legislatures:

> In addition to their looming legal challenge, ISPs are worried that more than half the states in the country are now pursuing their own net neutrality rules. And while ISPs successfully lobbied the FCC to include language in their repeal trying to ban states from protecting consumers, their legal authority on that front is dubious as well.

It would be a nice story, if it were at all plausible. But, while it's not a lock that the FCC's preemption of state-level net neutrality bills will succeed on all fronts, its a surer bet that, on the whole, states are preempted from their activities to regulate ISPs as common carriers. The executive action in my own home state of New Jersey is illustrative of this point.

The governor signed an executive order in February that attempts to end-run the FCC's rules by exercising New Jersey's power as a purchaser of broadband services. In essence, the executive order requires that any subsidiary of the state government that purchases broadband connectivity only do so from "ISPs that adhere to 'net neutrality' principles." It's probably fine for New Jersey, in its own contracts, to require certain terms from ISPs that affect state agencies of New Jersey directly. But it's probably impermissible that those contractual requirements can be used as a lever to force ISPs to treat third parties (i.e.,

New Jersey's citizens) under net neutrality principles.

Paragraphs 190-200 of the RIF Order are pretty clear on this:

> We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork of separate state and local requirements…Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here… We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.

The U.S. Constitution is likewise clear on the issue of federal preemption, as a general matter: "laws of the United States …[are] the supreme law of the land." And well over a decade ago, the Supreme Court held that the FCC was entitled to determine the broadband classification for ISPs (in that case, upholding the FCC's decision to regulate ISPs under Title I, just as the RIF Order does). Further, the Court has also held that "the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."

The FCC chose to re(re)classify broadband as a Title I service. Arguably, this could be framed as deregulatory, even though broadband is *still* regulated, just more lightly. But even if it were a full, explicit deregulation, that would not provide a hook for states to step in, because the decision to deregulate an industry has "as much pre-emptive force as a decision to regulate."

Actions, like those of the New Jersey governor, have a bit more wiggle room in the legal interpretation because the state is acting as a "market participant." So long as New Jersey's actions are confined solely to its own subsidiaries, as a purchaser of broadband service it can put restrictions or requirements on how that service is provisioned. But as soon as a state tries to use its position as a market participant to create a *de facto* regulatory effect where it was not permitted to explicitly legislate, it runs afoul of federal preemption law.

Thus, its most likely the case that states seeking to impose "measures that would effectively impose rules or requirements" are preempted, and any such requirements are therefore invalid.

Jumping at Shadows

So why are the states bothering to push for their own version of net neutrality? The New Jersey order points to one highly likely answer:

> the Trump administration's Federal Communications Commission… recently illustrated that a free and open Internet is not guaranteed by eliminating net neutrality principles in a way that favors corporate interests over the interests of New Jerseyans and our fellow Americans[.]

Basically, it's all about politics and signaling to a base that thinks that net neutrality somehow should be a question of political orientation instead of network management and deployment.

Midterms are coming up and some politicians think that net neutrality will make for an easy political position. After all, net neutrality is a relatively low-cost political position to stake out because, for the most part, the downsides of getting it wrong are just higher broadband costs and slower rollout. And given that the unseen costs of bad regulation are rarely recognized by voters, even getting it wrong is unlikely to come back to haunt an elected official (assuming the Internet doesn't actually end).

There is no great conspiracy afoot. Everyone thinks that we need federal legislation to finally put the endless net neutrality debates to rest. If the FCC takes an extra month to make sure its not leaving gaps in regulation, it does not mean that the FCC is buying time for ISPs. In the end simple politics explains state actions, and the normal (if often unsatisfying) back and forth of the administrative state explains the FCC's decisions.

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