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The Internet and Municipal Broadband Network Systems

By Michael J. Watza

"The Internet changes everything."[1]

There is a near-endless list of current topics in telecommunications today, but none as central to all of us—municipalities in particular—as the combination of recent changes in Internet regulation and the overwhelming approval of municipal broadband systems providing citizens with true high-speed/low-cost access to that same Internet. Roughly 1,000 pages of new Federal Communications Commission orders and rulings on these two subjects, together with recent changes to Michigan law, make refining the subject for purposes of this article a daunting task. If this primer proves valuable, other important telecommunications issues may be addressed in future articles.[2]

The URLs to the FCC Open Internet Order (also known as the Net Neutrality Order) and to FCC Chairman Wheeler's comments (along with his simple summary of the March 12, 2015, FCC order) may be found in the endnotes to this article.[3] A URL reference to the companion FCC Municipal Broadband Order is also provided.[4]

The Open Internet Order (net neutrality): Five simple rules

The FCC's long-awaited, 400-page Open Internet submission—including its order of 282 pages and 1,777 footnotes as well as certain appendices and supportive and dissenting comments—can be boiled down to a few points. All five of these primary rules emanate from the FCC invocation of Title II of the Federal Communications Act, which is how our landline-based phone companies are still largely governed.[5]

These rules are designed to apply to the largest of the monopolies that own the wires, often referred to as "the pipes," through which all Internet access occurs. These are very generally referred to as broadband providers or, in some cases, Internet service providers or ISPs. They include traditional phone providers such as AT&T and Verizon and cable providers such as Comcast, Charter, and Time Warner.

The order refers to the first three rules as "bright line rules," the fourth as a "general conduct rule," and the fifth as a reiteration of an earlier "transparency rule" that was upheld in a recent federal appeals court ruling.[6]

The five Open Internet rules are:

(1) No blocking of lawful content.

(2) No throttling or "impairing or degrading lawful Internet traffic on the basis of content, application[s], service or use…"

(3) No paid prioritization except for those instances subject to a "narrow waiver" (no "fast or slow lanes").

(4) No unreasonable interference/disadvantage standard designed primarily to protect the innocent consumer and "edge providers" (e.g., those larger entities that populate the Internet with many of the products and applications we wish to use, such as Google and Netflix) from potentially harmful Internet service provider conduct. Alleged violations are to be decided on a case-by-case basis.

(5) Transparency requirements imposed on Internet service providers to disclose accurate information regarding network practices to consumers and edge providers so they, in turn, can make informed choices regarding use of such services.[7]



Note there is no rate regulation imposed or suggested. These rules are deemed to apply generally to mobile network providers such as Sprint as well as landline or fixed systems.[8]

The Open Internet Order became effective June 12, 2015.

A number of parties have challenged the order with appeals consolidated in the United States D.C. Circuit Court. On June 11, 2015, the D.C. Circuit Court rejected U.S. Telecom's request for a stay of enforcement of the rules until the court issued a substantive decision on the merits. The court did agree to expedite the appeal, however, and is expected to issue a final decision in the case (No. 15-1063) by early next year.

By now invoking the FCC's historic telecommunications regulatory jurisdiction, it imposes these broad but firm rules on the provider monopolies regarding a variety of actual and potential abuses of Internet end users like you and me as well as the interests of edge providers. There have been a number of public fights between these two groups over additional fees or premiums the pipe owners wanted to charge these large bandwidth users for premium access to the Internet. The resulting differential is sometimes referred to as the creation of fast and slow lanes. Consumers and edge providers argued

Fast Facts

Municipal broadband systems, as recently expressly authorized by the Federal Communications Commission, serve at least two functions to the benefit of all U.S. citizens: to provide much needed high-speed/low-cost Internet access and to spur traditional broadband providers to do so also.

this was a "double dip" by the monopolist providers holding all the connective wires between all Internet users; end users already pay access fees, and to charge content providers another fee would unfairly increase overall charges, not to mention monopoly profits.

The FCC now appears to have barred this parceling out of the Internet and what would likely have resulted in Internet-based haves and have-nots, where the haves would (and in some cases already did) pay for greater speed and access of their products while newer or smaller entrepreneurs who could not afford these faster lanes would be shut out of the Internet-based marketplace. This issue of fast and slow lanes should largely be resolved now, benefitting users and consumers.

Municipal broadband order

Meanwhile—and particularly appropriate to the extent this article is designed to address telecommunications issues unique to municipalities—the FCC also struck down state laws in North Carolina and Tennessee, which purported to limit the ability of municipalities to build and provide broadband fiber networks for the benefit of their own and neighboring residents.[9] Such laws have been erected in dozens of states at the behest of provider monopolists to reduce competition in the Internet access business.

Although Michigan's laws,[10] which technically allow such systems, impose certain hurdles to municipal broadband networks and were not specifically addressed in the FCC order, the statement of preemption applicable to North Carolina and Tennessee law is equally applicable here and in other states, at least in principle. Whether Michigan communities will have to specifically seek the shelter of a similar FCC order is yet to be determined and, hopefully, unnecessary.

The combined effect of the two orders

By releasing two Internet-related orders on March 12, 2015, the FCC has agreed to regulate the Internet under Title II of the Federal Communications Act and start the process of allowing some serious competition in the Internet marketplace.

In the Open Internet Order, the FCC addressed an urgent subject in this country concerning the state of Internet access both in terms of speed and cost for small businesses and residents. Up to this point, the Internet has been "regulated" almost exclusively by the monopolies that own the wires connecting all of us to the Internet—for the most part, in their own respective territories. Without competition, there has been little incentive for these monopolies to upgrade their networks or keep prices fair and reasonable. As a result, the U.S. has fallen from first in broadband speak to 35th globally.[11]

Michigan already has its first gigabit community network in Sebewaing.

This fall from dominance in a broadband world is perhaps best exemplified by South Korean school children, who this year are scheduled to fully abandon their textbooks for entirely electronic notebooks or similar network-dependent devices, given that every home in South Korea is connected with high-speed, low-cost fiber networks.[12]

While the FCC backed away from directly imposing Internet rate regulation for the benefit of consumers in its Open Internet Order, what it left on the cutting-room floor in that Title II-driven order it provided more quietly in the companion proceeding concerning the encouragement and unshackling of municipal broadband networks from restrictive state laws. Across the country, more than 100 communities have built their own Internet access systems or partnered with private entities to achieve the same goal in the face of overpriced and slow bandwidth access offered by monopoly providers.[13]

This is a comparable model followed by communities 100 years ago in the face of similar problems with the electric industry's slow provision of that essential service at a reasonable pace and price.

However, many communities interested in building their own broadband systems have been stymied by state laws written by and for the influential provider industry that either barred such systems or imposed onerous conditions on them. Michigan is one of a couple dozen states with these laws. By striking down such laws, the FCC has authorized and encouraged a significant economic tool for these communities. And perhaps most importantly, by freeing these communities to build on their own or partner with high-speed, low-cost, Internet-friendly private partners like Google (which has been actively pursuing such systems when incumbent monopoly providers have not), it is clear that the FCC is aggressively supporting rate control by the best alternative option in a free market: competition!

Michigan already has its first gigabit community network in Sebewaing. Another system is also evolving with the Midwest Energy Cooperative near Adrian, and other municipalities across the state are actively following their lead. There is also a new private network in downtown Detroit in the form of Dan Gilbert's Rocket Fiber, which is not wildly different from Google's Fiber project being rolled out in several cities in other states.

In Michigan and a number of other states where an organization of universities known as GIG-U exists, local communities have another advantage in the form of a state university Internet backbone (think large, fiber-based networks available to communities at or near cost). MERIT is the Michigan component of GIG-U and available to assist with Internet access in almost any Michigan community seeking a wholly owned broadband system or a public-private partnership.

A note on municipal Wi-Fi

Municipal Wi-Fi can be a good beginning to a community Internet access network. Though not capable of the high speeds provided by fiber networks, a number of municipal-sponsored and operated Wi-Fi systems are popping up around Michigan. Traverse City, for example, has such a system at or near operational status. The rules applicable to installing wireless networks are not necessarily the same as landline broadband networks; nonetheless, care should be taken in establishing these hybrid systems.

Conclusion

The combination of closer regulation of the current dominant monopolists in the Internet business and the development of these municipal systems and even new private-sector systems such as Rocket Fiber or Google's Fiber Program should serve to spur the historic telecommunications monopoly providers, like the electric monopolists a century ago, to build the high-speed/low-cost broadband systems all of us need. That is a good thing as we all find ourselves competing and playing increasingly on the information super highway. ■



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Thank you to PROTEC, whose member financial support allows me to address these issues on behalf of Michigan communities and residents. Visit http://www.protec-mi.org for more information.

ENDNOTES

1. Cortese, *The Software Revolution—Part 1*, Business Week (December 4, 1995), quoting J. Neil Weintraut, managing director for technology research at Hambrecht & Quist Inc.
2. One of those issues is cell towers, including the FCC's treatment of Distributed Antenna Systems, the problems caused as they pop up in municipal rights of way, and the interplay between the federal pronouncements and recently enacted Michigan law changes. See, e.g., *In the Matter of Acceleration of Broadband Deployment*, Report and Order of the FCC, released October 21, 2014 (WT Docket Nos. 13-238 and 13-32; WC Docket No. 11-59) <http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/FCC-14-153A1.pdf>; MCL 28.283 *et seq.*, as amended by 2014 PA 564; MCL 125.3205(a), as added by 2014 PA 556; MCL 125.3514, as added by 2012 PA 143; 2014 PA 86/88. All websites cited in this article were accessed August 24, 2015.

   Another subject is cable law, including a discussion of the $26.7 million settlement of a U.S. District Court case, and the Michigan attorney general's position there, regarding the ability of local communities to reject the Michigan Uniform Video Services Act Uniform Franchise Agreement, a review of the Comcast/Time Warner and AT&T Direct TV proposed mergers, a review of the AT&T audit recently conducted by a dozen Michigan communities, and finally, a look at pending decisions that could redefine the definition of cable and over-the-top (IP-based) video.
3. *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order of the FCC, released March 12, 2015 (GN Docket No. 14-28) <http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf>; FCC, *Statement of Chairman Wheeler* <http://www.fcc.gov/article/doc-327104a2>.
4. *In the Matter of City of Wilson and The Electric Power Board of Chattanooga*, Memorandum Opinion and Order of the FCC, released March 12, 2015 (WC Docket Nos. 14-115 and 14-116) <https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A1.pdf>.
5. 47 USC 201 *et seq.*; see also 47 USC 154. Interesting, too, will be the impact of the FCC Internet regulation under Title II on Michigan's 2014 effort to deregulate local phone service requirements, scheduled to occur January 1, 2017. MCL 484.2313 *et seq.*, as amended by 2014 PA 52.
6. *In the Matter of Preserving the Open Internet*, 25 FCCR 17905, 17911 (2010) aff'd in part, vacated in part by *Verizon v FCC*, 408 US App DC 92; 740 F3d 623 (2014).
7. *In the Matter of Preserving the Open Internet*, Report and Order of the FCC, released December 23, 2010 (GN Docket No. 09-191, WC Docket No. 07-52), pp 45–47 and 82, ¶¶ 104–109 and 185.
8. *Id.* at p 35, ¶ 88.
9. *The Electric Power Board of Chattanooga* (WC Docket No. 14-116).
10. See MCL 484.3114 and MCL 484.2252.
11. World Economic Forum, *The Global Competitiveness Report 2013–2014* <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.
12. Broadband Commission Working Group on Education, *Technology, Broadband and Education: Advancing the Education for All Agenda* (January 2013), p 26.
13. See Institute for Local Self-Reliance, *Broadband: Building Publicly Accountable Broadband Networks* <http://ilsr.org/overview-broadband/>.