

Net Neutrality

MICHAEL RIPPERGER

TELECOMMUNICATIONS BUREAU CHIEF

NEW MEXICO PUBLIC REGULATION COMMISSION

SCIENCE, TECHNOLOGY, AND TELECOMMUNICATIONS COMMITTEE MEETING SEPTEMBER 21, 2015

What is Net Neutrality?

Term Coined by Tim Wu, Columbia Law School Law Professor in 2003.

Essentially refers to equal treatment of all internet traffic, with minimal or no interference from third parties. Associated with maintaining an “open internet.”

Background - FCC 2010 Open Internet Order

Result of prior adoption of FCC Internet Policy Statement in 2005, and 2007 FCC Notice of Inquiry asking whether 2005 Policy Statement should be adopted in rules.

Adopted principles of transparency, no blocking, and no unreasonable discrimination.

Transparency – broadband provider disclosure of network management practices, performance characteristics, and terms and conditions of service.

No blocking - access to all lawful destinations on the internet.

No unreasonable discrimination – broadband providers may not unreasonably discriminate in transmitting lawful internet traffic.

FCC did not apply the rules to wireless internet broadband service on the rationale that the market for wireless broadband service was still developing, and applied the transparency and no blocking provisions to the 2010 rules.

Legal Authority - FCC 2010 Open Internet Order

Legal Authority grounded in Section 706 of the 1996 Telecommunications Act (paraphrased):

706(a) In General – FCC and state commissions with authority over telecommunications services shall encourage the deployment of advanced telecommunications capability to all Americans by utilizing in manner consistent with the public interest measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

706(b) Inquiry – Orders FCC to issue notices of inquiry on a regular basis concerning the availability of advanced telecommunications capability to all Americans to be completed 180 days after each notice of inquiry, to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the determination is negative, the FCC is to take immediate action to accelerate such deployment of such capability by removing barriers to infrastructure investment and promoting competition in the telecommunications market.

Challenge to FCC 2010 Open Internet Order

Verizon challenged the FCC's 2010 Open Internet Order (Verizon vs. FCC) in the D.C. Circuit Court (No.11-1335).

On January 14, 2014 the D.C. Circuit struck down the no blocking and no unreasonable discrimination portions of the FCC 2010 Open Internet Order on the grounds that the FCC was imposing Title II (see Communications Act of 1934) (telecommunications) common carrier regulation on broadband services which the FCC had previously designated as Title I (1934 Act) services (information services – see National Cable and Telecommunications Association vs. Brand X Internet Services).

D.C. Circuit Court upheld the Transparency Rules of the 2010 Open Internet Order, which the FCC stated was not contingent on network operators being classified as common carriers.

FCC Net Neutrality Order

Issued by the FCC on April 3, 2015, Docket GN 14-28.

Origins in FCC's December 23, 2010 Open Internet Order, Docket GN 09-191.

Set “bright line” rules for the management of internet traffic by Internet Service Providers (ISPs).

No blocking or throttling of internet traffic, and no paid prioritization.

Blocking – access to all lawful destinations on the internet.

Throttling – degradation of lawful content, applications, services, and devices.

Paid prioritization - accepting payment to manage the network that benefits particular content, applications, services, or devices.

Also continues in effect the Transparency Rule adopted by the Commission in its 2010 Open Internet Order.

For the time being, does not require contributions from broadband providers into the Federal Universal Service Fund, pending further deliberations by the FCC.

Legal Foundation – FCC Net Neutrality Order

Along with the application of Section 706, the FCC determined that broadband services were telecommunications services subject to Title II regulation. The FCC also applied the same Net Neutrality Rules in its 2014 order to wireless carriers, through the additional application of Title III of the Communications Act of 1934 (wireless and broadcast) regulation.

The FCC Net Neutrality Order applied forbearance to most Title II provisions, including rate regulation, with the exception of sections 201 (service), 202 (discrimination), and 208 (complaints) of the Telecommunications Act of 1996.

Network Considerations Regarding FCC Net Neutrality Order - Definitions

Edge Provider – providers of internet content, applications, and services. Ex., Netflix, webpages, cloud computing services.

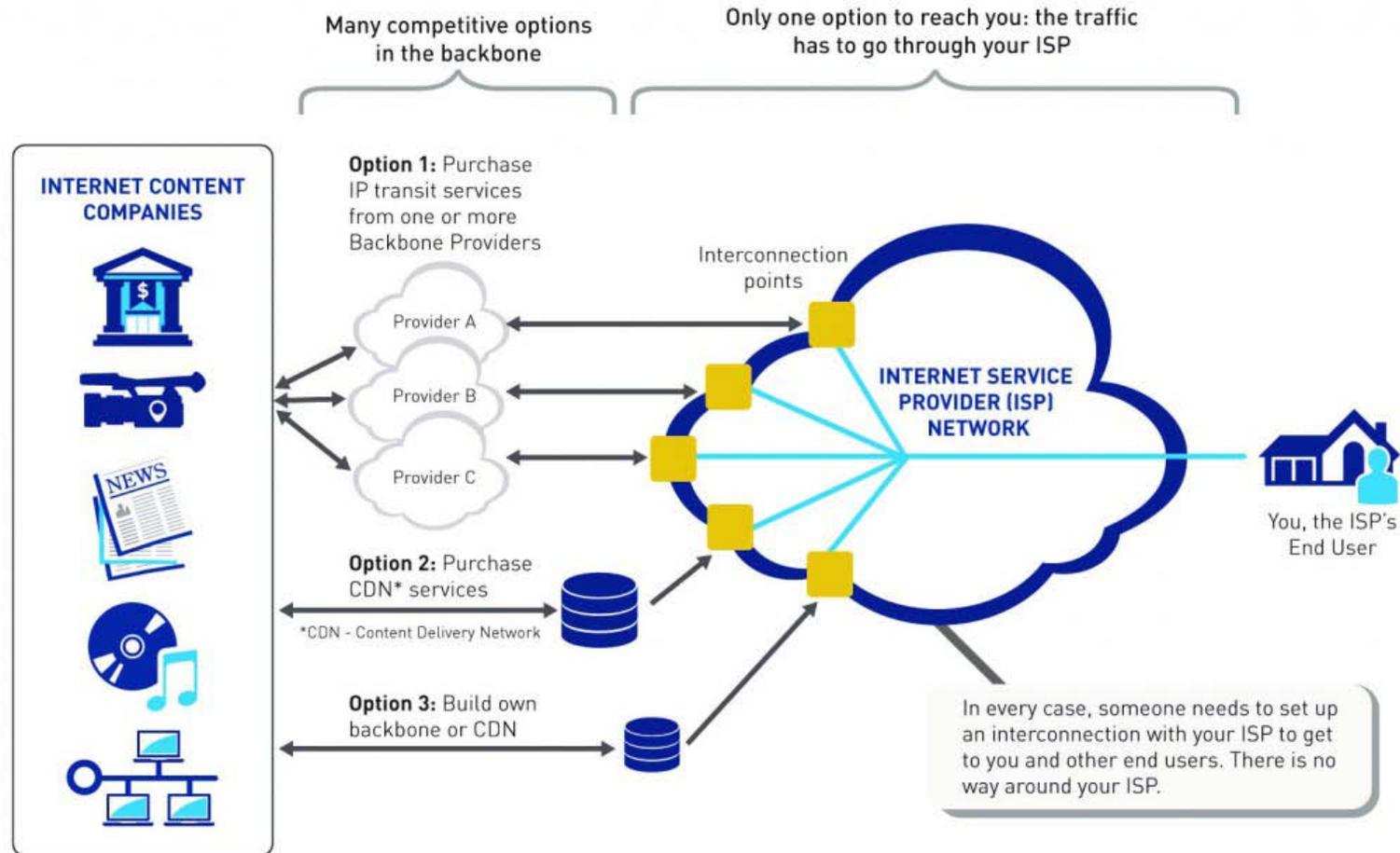
Internet Service (Access) provider - company that provides broadband service to end users so those end users may access the internet. Example, Comcast, Verizon, CenturyLink. Can be provided through wireless, fiber, DSL, dial-up.

Transit provider – provider that allows for the transiting of internet traffic between the internet service provider, customers, and edge providers. Example, Level 3, CenturyLink, Tularosa Basin Telephone Company.

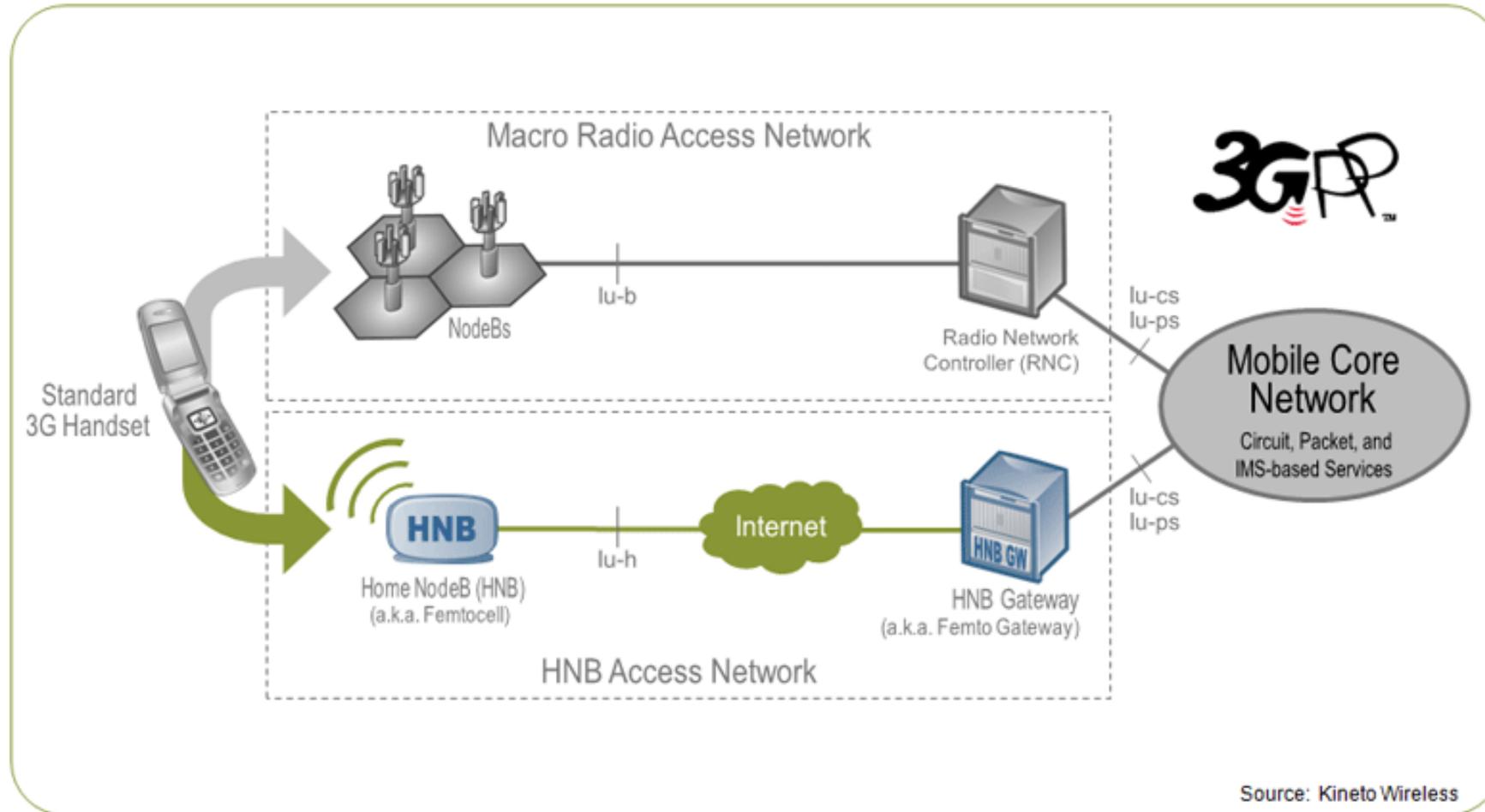
Virtuous Cycle (see FCC Net Neutrality Order) – innovation of edge providers enhance consumer demand, which lead to investments in internet network infrastructure, which in turn leads to further innovation by edge providers.

Note - Internet service providers may also provide transit provider service to other internet service providers.

Internet Access – Single ISP Example



Wireless Broadband Internet Access



What the Net Neutrality Order Attempts to Do

Blocking or throttling can happen at the customer level, or the transit provider level, or with an edge provider. The FCC Net Neutrality Order prohibits the blocking of a consumer's right to lawful content, applications, services, and to use non-harmful devices.

FCC attempt to keep an "open internet", and maintain the virtuous cycle of innovation, investment, and customer demand.

Transparency requirements mandates that carriers disclose to customers the characteristics of the services they are purchasing. Not easy as network performance metrics such as speed, latency, and downtime can be affected at many points in the network and for a variety of reasons.

Stop the creation of fast and slow lanes by eliminating paid prioritization whereby some traffic is given higher priority over other traffic through payment arrangements with an internet service provider or transit provider. Example, Netflix contract with Comcast.

Arguments for Net Neutrality

Pros:

- 1) Equal Treatment of all content and applications for all customers.
- 2) Access to content, applications, etc is a digital right.
- 3) Answer to lack of competition among internet service providers.
- 4) Will not create slow lanes through paid prioritization.
- 5) Spurs competition and innovation by encouraging the virtuous cycle.
- 6) Net neutrality proponents include content providers (Yahoo, Vonage, Microsoft) and public interest groups (Public Knowledge).

Arguments against Net Neutrality

Cons:

- 1) FCC net neutrality rules will stifle innovation and investment by reducing opportunities for revenue streams.
- 2) Restricts Internet service provider ability to exclude or give different treatment to certain types of content.
- 3) Restricts speed tier pricing.
- 4) The internet is competitive or becoming more competitive – will reduce competition.
- 5) Will lead to taxation of the internet – Federal Universal Service Fund.
- 6) Regulations are unnecessary – Internet does not need fixing.
- 7) Those against the Net Neutrality Order include wireless providers (AT&T, Verizon), cable providers, local exchange providers (CenturyLink), and network equipment manufacturers (Cisco, Intel).

Challenges to the FCC's Net Neutrality Order

On May 13, 2015, Appeals of the Net Neutrality Order by US Telecom, National Cable & Telecommunications Association, CTIA, AT&T, American Cable Association, CenturyLink, and Wireless Internet Service Providers Association at the D.C. Circuit Court.

Oral Arguments scheduled for December 4, 2015.

Party arguments state the new rules will stifle innovation, harm consumers, and the internet. Also, classification of broadband as a common carrier service is arbitrary and capricious and violates federal law.

Possible D.C. Circuit Court decision by spring 2016. Will see which provisions are struck down or stand. Then?