Cable lobby asks for net neutrality law allowing paid prioritization

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Cable industry chief lobbyist Michael Powell today asked Congress for a net neutrality law that would ban blocking and throttling but allow Internet providers to charge for prioritization under certain circumstances.

Powell—a Republican who was FCC chairman from 2001 to 2005 and is now CEO of cable lobby group NCTA—spoke to lawmakers today at a Communications and Technology subcommittee hearing on net neutrality (see a transcript of Powell's prepared testimony).

Powell said there is "common ground around the basic tenets of net neutrality rules: There should be no blocking or throttling of lawful content. There should be no paid prioritization that creates fast lanes and slow lanes, absent public benefit. And, there should be transparency to consumers over network practices."

Despite Powell's claim of "common ground," his statement on paid prioritization illustrates a divide between the broadband industry and proponents of net neutrality rules. Obama-era Federal Communications Commission rules banned paid prioritization as well as blocking and throttling, while Trump's FCC overturned the ban on all three practices. Net

neutrality advocates are trying to restore those rules in full in a court case against the FCC, and any net neutrality law proposed by Democrats in Congress would likely mirror the Obama-era FCC rules. Republican lawmakers are preparing legislation that would impose weaker rules.

Powell's proposal for paid prioritization is full of caveats: "There should be no paid prioritization that creates fast lanes and slow lanes, absent public benefit." His testimony to Congress didn't explain how ISPs can charge online services for prioritization without dividing Internet access into fast lanes and slow lanes, and his statement seems to indicate that slow lanes would be allowed as long as the paid prioritization creates some "public benefit." How "public benefit" would be defined or who would determine which paid priority schemes benefit the public are not clear.

Powell complains about endless debate

Powell also complained that the net neutrality debate has "swirled endlessly without a stable conclusion" over the past 15 years and "is caught in an infinite loop."

"Net neutrality rules have moved into the courts now four different times, each taking years of exhausting and expensive litigation to complete," Powell said.

But that "infinite loop" didn't just come from nowhere—the cable industry helped create it. Comcast challenged the FCC's authority to prevent throttling a decade ago, ultimately leading to the imposition of net neutrality rules. NCTA and other industry groups sued the FCC to overturn the rules but lost in 2016.

The FCC's court win over the industry could have been the end of the net neutrality debate. But NCTA and others kept pushing

for the rules to be overturned, and the FCC obliged after Trump appointed Ajit Pai chairman.

But now, Pai's repeal is in danger of being overturned by the same court that upheld the Obama-era net neutrality rules. Congress could end the debate with a law, but it's probably a long shot, since Democrats control the House and Republicans control the Senate.

Net neutrality and public safety

Pai's repeal of net neutrality rules "has been a disaster for consumers," Commerce Committee Chairman Frank Pallone, Jr. (D-N.J.) and Communications and Technology Subcommittee Chairman Mike Doyle (D-Penn.) said before today's hearing.

Rep. Anna Eshoo (D-Calif.) discussed Verizon's throttling of firefighters from Santa Clara County during last year's Mendocino Complex Fire.

"People's lives were at stake, and firefighters weren't able to communicate with each other to get the directions they needed to do their jobs," Eshoo said at the hearing. "The 2015 Open Internet rules [that were repealed] could have prevented this because there were specific exemptions for public safety."

Public safety continued to play a role in today's hearing as Powell and former FCC Chairman Tom Wheeler debated paid prioritization. Powell claimed—falsely, according to Wheeler—that a ban on paid prioritization could prevent prioritization of public safety services.

"When I was chairman, I was a huge champion of public safety, and I think it's a perfect example of why we should be careful about what we mean by 'no prioritization,'" Powell said. "There are societal uses that we will all agree should enjoy a higher priority over other uses."

Wheeler responded to Powell, saying, “there’s just one thing you left out… prioritization of public safety activities was specifically allowed for under the 2015 rules.” Wheeler led the FCC when it implemented the net neutrality rules. The Pai-led FCC’s repeal of those rules allows ISPs to throttle data services and deprives consumers of an agency to lodge complaints with, Wheeler said.

“It’s not just the firefighters and policemen who are affected by the lack of an open Internet,” Wheeler said. “It’s also the people who are the victims of those emergencies who themselves need to get online and are experiencing the same blocking or throttling realities and, as a result of the decision by the FCC, have nowhere to go.”

Powell said that ISPs would support net neutrality rules if they aren’t imposed using the FCC’s Title II authority over common carriers. Wheeler argued that supporting an open Internet without supporting common carrier rules “is kind of like saying, ‘I’m for justice; I’m just not for the courts overseeing it.'”

Wheeler further argued that Title II common carrier rules are important to safeguard Internet openness in the future, because broadband providers could unveil harmful practices that aren’t addressed by the bans on blocking, throttling, and paid prioritization.

“We do not know what the Internet is going to be, and we can’t sit here and make Netflix-era decisions that we assume will apply tomorrow,” Wheeler said.

If Congress creates a net neutrality law, it should allow for “a referee on the field with the ability to throw the flag for unjust and unreasonable activity,” Wheeler said.

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