[US] Network Neutrality Rules Remain Alive

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On 10 November 2011, the United States Senate voted against a resolution disapproving the Federal Communications Commission's ("FCC") net neutrality rules (or Open Internet rules) adopted in December 2010. Regardless of the outcome, a United States Senate resolution is an expression of opinion, and is not binding on the FCC.

Net neutrality stands for the principle that consumers should be able to access the lawful Internet content of their choice without content-based discrimination. In December 2010, the FCC (the federal agency majorly responsible for overseeing and regulating the majority of telecommunications in the United States) adopted the highly controversial Open Internet rules for the purpose of preserving consumers' open access to lawful content on the Internet. Not surprisingly, the rules stirred up much commotion within the industry and split the United States Congress. The result: Senate Joint Resolution 6 ("S.J. Res. 6" or "Resolution")—a joint resolution sponsored by 43 Republican Senators disapproving the rules submitted by the FCC with respect to regulating the Internet and broadband industry practices.

On 3 November 2011, the Resolution was placed on the Senate calendar and the Resolution was scheduled for debate and vote on 10 November 2011. Unfortunately for Senate Republicans and others advocating disapproval of the FCC's net neutrality rules, the White House threatened to veto the Resolution, if passed, only days prior to the 10 November 2011 debate and vote.

Leading the debate for those in opposition of the Resolution, Senator Leahy (Democrat, Vermont) argued that the FCC's Open Internet rules allow "the online marketplace to evolve into the vibrant and competitive system..." and ensure "that the Internet remains the ultimate free market place of ideas, where better products or services succeed on their own merits and not based on special financial relationships with providers."

Leading the debate for those in support of the Resolution, Sen. Ayottee (Republican, New Hampshire) argued that the FCC engaged in regulatory overreach due to lack of legal authority to promulgate the Open Internet rules, that the FCC did not justify its rulemaking with a cost-benefit analysis, and that there are "consistent court rulings showing the lack of FCC legal authority to implement net neutrality…”

Sen. Ayottee argued that the Open Internet rules are a “misguided attempt to regulate a dynamic industry into a static platform,” that the rules will stifle innovation, and that the rules should only be implemented in the case of market failure—which Sen. Ayottee claims does not exist.

For a more in-depth discussion and analysis of net neutrality in the United States—including a discussion on whether the FCC had authority to promulgate its Open Internet rules—please see “Net Neutrality” in the United States of America - Who Can Stop the FCC, and Should They? by Michael Erzingher, Law Student, New York Law School, published in Why Discuss Network Neutrality?, IRIS plus 2011-5 (available for purchase at www.obs.coe.int).The article also includes an overview of the FCC’s legal authority and role within the legal framework of the United States federal government. The lead article in IRIS plus 2011-5, Net Neutrality and Audiovisual Services by Nico van Eijk of the Institute for Information Law (IViR), Faculty of Law at the University of Amsterdam, provides an in-depth and unique discussion on net neutrality in Europe.

FCC Open Internet Order 2010

http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf