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Expert Analysis

FCC Offers 'Third Way' On Authority Over Internet Service

The U.S. Court of Appeals for the D.C. Circuit recently ruled that the Federal Communications Commission (FCC) lacked jurisdiction over Comcast's Internet service. *Comcast Corp. v. FCC*, Docket No. 08-1291 (D.C. Cir. April 6, 2010). Therefore, the FCC lacked authority to impose upon Comcast non-discriminatory obligations regarding such services. Meanwhile, as this case wound through the courts, the FCC issued an ambitious National Broadband Plan to increase broadband access, speed, and adoption. As the FCC seeks congressional action to implement many of the plan's recommendations, it might well add a threshold request: clarify the FCC's authority over Internet services.

In 2007, Comcast was challenged by several Internet service subscribers who claimed that Comcast interfered with the subscriber's use of applications for transferring large files. These subscribers alleged that such interference violated

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the FCC's Internet policy statement issued in 2005, in particular the FCC's stated principle (neither a statute nor rule) that consumers using Internet services (i.e., cable modem or DSL) should have the unfettered right to "run applications and use services of their choice." Appropriate

The issue is how far the FCC can go if it lacks clear jurisdiction over major aspects of wireline broadband services at the outset.

Framework for Broadband Access to the Internet Over Wireline Facilities, FCC 05-150, 2005 WL 2347773 (Sept. 23, 2005). In response to the subscribers' petition, the FCC found that Comcast contravened the FCC policy. Comcast then brought suit alleging that the FCC lacked jurisdiction over these services. The D.C. Circuit agreed.

In the Communications Act, as amended, 47 U.S.C. §151 et seq., Congress gave the FCC express jurisdiction over three types of communications services: (1) cable television (video) services (Title

VI), (2) radio transmission services, which encompasses radio and television over the air broadcasting and mobile/wireless telephone service (Title III), and (3) traditional landline telephony (Title II). Congress did not give Internet services a specific regulatory scheme.

In 2002, however, the FCC ruled that cable Internet service constituted neither a Title II "telecommunications service" nor a Title VI cable television service. Instead, the FCC labeled the service as a relatively unregulated "information service."¹ The FCC concluded that it could enforce its net neutrality principles, including the principle cited above by the petitioning Comcast subscribers, through the grant of ancillary jurisdiction to the FCC set forth in Section 4(i) of the act.

In *Comcast Corp.*, the D.C. Circuit held that the FCC's ancillary authority failed to vest it with expansive and plenary power over Internet service providers.

The FCC Responds

The FCC has apparently decided not to appeal the *Comcast Corp.* decision. It also decided not to seek reclassification of cable modem service as a Title II telecommunications service. Such reclassification would have imposed the common carrier obligations developed for telephone networks upon broadband networks. The FCC rejected this approach as too heavy handed.

The FCC also rejected as insufficient a “stay the course” approach of maintaining the information service classification. The *Comcast Corp.* decision rendered the FCC’s authority over certain aspects of regulating broadband too uncertain. Such an approach could have resulted in many important issues, such as universal service and consumer protection, being found to fall outside of the FCC’s reach.

On May 6, FCC Chairman Julius Genachowski announced—via online video—that the FCC would open a proceeding to follow “The Third Way.”² The Third Way consisted of a “light touch” policy course to (i) keep the Internet unregulated (under Title I) while (ii) exercising some supervision of the access connections (under Title II).

The FCC general counsel simultaneously released the agency’s analysis of the Third Way’s legal basis for this bifurcated approach.³ This basis stems from Justice Antonin Scalia’s dissent in *Brand X*, in which he argued that the “computing functionality” and broadband transmission portions of Internet service create a dichotomy of “two separate things.”

Mr. Genachowski, supported by the FCC general counsel, concluded that this approach would allow the FCC to tailor certain requirements of Title II strictly to the transmission portion of Internet service. Under Title II authority, the FCC can forebear from applying the entirety of Title II’s requirements, and instead essentially pick and choose those aspects of Title II that it determines should apply to the transmission portion of broadband Internet access.

The chairman described this as a legitimate compromise, keeping a hands-off approach to Internet content, rates and the “information services” aspects of the broadband Internet access. Broadband Internet access service providers, however, will likely challenge

any attempt by the FCC to apply Title II to broadband Internet access. As the National Cable and Telecommunications Association warned in a statement on the Third Way: “...any Title II approach is still fraught with legal uncertainty and practical consequences which pose real risk to our ability to provide high-quality and innovative broadband services...”

At its meeting on June 17, the FCC formally opened a Notice of Inquiry to consider the adequacy of the current legal framework regarding regulation of broadband Internet services. The FCC currently seeks public comment on: (1) whether broadband Internet service should be treated as an unregulated “information service”; (2) whether broadband Internet service should be treated as a telecommunications service subject to full Title II common carrier regulation or (3) whether the commission’s “third way” is a viable option that would reaffirm that Internet content and applications should remain generally unregulated under Title I and that Internet connectivity should be treated as a telecommunications service under Title II (but applying only such provisions of Title II that are needed to support important public interest goals).⁴

Moving Forward

Ultimately, Congress could step in and explicitly determine the extent of FCC authority over Internet service or, more particularly, broadband service.⁵ While congressional action would give the clearest road map, Congress has other priorities, such as financial services, immigration and energy legislation and may not be prepared to take on another pitched battle in the near future.

Meanwhile, the FCC began moving forward on the National Broadband Plan and its many recommendations.⁶

In fact, the FCC can implement many recommendations in areas in which it has express statutory authority (i.e., spectrum availability, data collection, wireless services). The issue is how far the FCC can go if it lacks clear jurisdiction over major aspects of wireline broadband services at the outset.

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1. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 02-77 (March 14, 2002). The Supreme Court supported the FCC’s determination in a challenge brought by competitive Internet service providers who wanted common carrier type access to the cable TV broadband infrastructure. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In a series of subsequent proceedings, the FCC extended the “information service” classification to Digital Subscriber Line, broadband over power line, and wireless broadband technologies.

2. <http://www.youtube.com/watch?v=5aiRoZ63UeE>.

3. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.

4. *In the Matter of Framework for Broadband Internet Services*, GN Docket No. 10-127, FCC 10-114.

5. In fact, Senator John D. Rockefeller and Representative Henry Waxman have begun this process. Edward Hyatt, “Communications Laws to be Reviewed,” *New York Times*, May 24, 2010.

6. The National Broadband Plan acknowledged the ambiguity over the FCC’s broadband services authority. See National Broadband Plan, <http://www.broadband.gov/plan/>, §17.3.