THE DAILY CALLER

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FCC Internet regulation: A ‘third way’ or third rail?

05/20/10 at 12:00 AM

Since 2005, the Federal Communications Commission classified broadband Internet access as an “information service,” and effectively deregulated it; your phone company via DSL, your wireless provider via whatever generation of network speed that it offered, and your cable provider via cable modems, could offer access without regulation as a telecommunications service provider under what is known as “Title II” of the Communications Act. Instead, the FCC declared it would regulate only as necessary under its Title I “ancillary authority.” In a Policy Statement the FCC espoused principles of good sportsmanship it would expect of market participants.

In was only a matter of time before this perhaps well intentioned but not well fleshed out framework hit the reality of many broadband access providers making independent judgments about how to manage their piece of the “ecosystem” and that terrarium transformed into a hothouse. In 2008, the FCC determined that Comcast had stepped over the “good sportsmanship” line by making an undisclosed decision to throttle back the bits permitted to its users in an action which degraded or blocked some bandwidth-intensive peer-to-peer file sharing applications. Comcast appealed, suggesting that the FCC might lack the authority to prohibit its practice.

The battle ensued. Proponents of a “free and open Internet” pitted themselves against others who argued that Comcast had not violated the FCC’s Policy Statement and even if it did, the FCC had abandoned its enforcement of any substantive rules by its 2005 deregulation decision. The U.S. Court of Appeals for the District of Columbia in mid-April issued its decision in *Comcast Corp. v. FCC*, concluding that the FCC exceeded any ancillary authority it might have in directing Comcast to end its particular practice.

The FCC’s expectations concerning its authority over issues such as the fate of “Net Neutrality” and a number of significant policy recommendations in the FCC’s recently released National Broadband Plan were thrown into disarray overnight. The FCC faces a choice between continuing to assert ancillary authority or reclassifying some or all aspects of the service as a “telecommunications service,” subject to regulation under Title II. Assuming the FCC can make the case for Title II regulation, then it would proceed to develop appropriate regulations, but this exercise could have unintended side effects, including potential attempts at revival of concurrent state regulation.

On May 6 the FCC’s Chairman announced that the FCC – or at least its three Democratic members—intends to pursue a “third way.” The FCC would reclassify the transmission component of Internet access as a Title II service, but would forbear from applying other unnecessary regulations. The thinking is that this would allow the FCC to impose those regulations it deems necessary in support of Net Neutrality and other policies, but would avoid entering the thicket of unnecessary regulation that might stifle investment and innovation. At the 10,000 foot level, it sounds pretty good, the trade off is avoidance of uncertainty and delay associated with litigation over what other ancillary authority actions might fly, while promising a light regulatory touch. For now at least.

The announcement pleased few stakeholders. The beating that cable stocks initially took underscores market fears that they have something to learn about this brave new world – telephone companies until 2005 had their broadband access regulated under Title II, so they ought to know how to play that game. Those who wanted wholesale reclassification are left wondering if the FCC is going far enough – if you regulate transmission of a communications provider, can you reach the unfair or unreasonable actions of a still unregulated Internet Service Provider? Thus, the third way may turn out to be more like an electrified third rail for some of the Obama Administration's most cherished communications policy goals.

Notwithstanding the description of a third way, the FCC has only two choices—it can try to reassert Title II authority over broadband access or not. Setting aside how broadly the net of regulatory forbearance is cast initially, the Chairman put his stake in the ground for reregulation. If the FCC musters three votes in favor of "carrier lite" and is upheld by a reviewing court, only then will the true effects emerge. The Chairman can make no guarantees that future FCC's will continue light application of discrimination and unfair practices regulations. Over time, there may be mission creep designed to achieve policy goals such as that of the National Broadband Plan—competitively provided high speed Internet for everyone everywhere.

Uncertainty is never a good omen in capital-intensive markets. Once the FCC reclassifies broadband access as a telecommunications service, there is plain prospect of a wave of potential regulations, whether they come in the form of a slow trickle or a sudden surge. Initial reactions suggest that the clean up of a policy decision taken in 2005, applied in 2008, and derailed by a court in 2010, will not be a tidy and uncomplicated "third way" but a messy fight that may make the last few years of squabbling about Net Neutrality look like a well-mannered cotillion.

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