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Communications

Five Months After *Comcast* Ruling, Broadband Remains in Regulatory Limbo

The Federal Communications Commission is facing one of its toughest challenges in its 76-year history: how to regulate broadband internet service under a statute that barely mentions the internet.

Without help from Congress, Chairman Julius Genachowski will try to reverse the market-friendly approaches taken by his predecessors Michael Powell and Kevin Martin and reclassify broadband as a basic utility subject to strict regulation, like telephone service—a feat that could shape national broadband policy for decades.

But even if his efforts prove successful, Congress must still decide whether the Communications Act of 1934, as amended, provides the FCC with adequate authority to regulate a vastly changed communications landscape.

The issue came into focus in April when the U.S. Court of Appeals for the District of Columbia Circuit ruled that the FCC had overstepped its authority in applying a portion of the Communications Act to an internet service provider, leaving the agency's long-running effort to adopt so-called ''net neutrality'' regulations in question and complicating an ambitious agenda to hasten the national adoption of broadband in the United States.

Faced with this legal uncertainty less than a month after the release of his agency's National Broadband Plan, Genachowski proposed to reclassify broadband under a part of the original Communications Act of 1934 known as Title II. As contemplated in his proposal, dubbed the ''Third Way,'' the commission would reregulate high-speed internet service under the more-stringent title, but only the ''transmission'' component—not rates or content (87 DER A-16, 5/7/10).

Currently, broadband is classified as a lightly regulated Title I ''information service.'' Under the Communications Act, the FCC has limited authority over information services, but has vast powers to regulate telephone utilities.

Broadband Providers Flex Political Muscle. The proposal was greeted by a torrent of protest, led by AT&T Inc., Verizon Communications Inc., and Comcast Corp., the biggest broadband service providers in the country. These and other market players have argued that reclassification under Title II would represent an overreach of statutory authority, holding the potential to chill innovation and investment (88 DER A-15, 5/10/10).

On Capitol Hill, nearly 300 members of Congress have voiced opposition to the plan, including 82 Democrats.

Even before Genachowski introduced his proposal, industry lobbyists began calling for a rewrite of the Communications Act. In a high-profile speech in March, Tom Tauke, executive vice president of public affairs, policy, and communications for Verizon, asserted that the Communications Act was ''badly out of date'' and needed ''updating'' (56 DER A-9, 3/25/10).

For their part, the chairmen of the Senate and House commerce committees responded to the D.C. Circuit's *Comcast* decision by scheduling a series of closed-door meetings with industry stakeholders to examine how the Communications Act meets the current needs of consumers, the telecommunications industry, and the FCC (99 DER A-11, 5/25/10).

Those talks, while productive, have not yet yielded a final agreement on possible legislation, sources have told BNA.

In fact, the meetings, which began in June, are not expected to result in any specific legislative language in the short term, but rather are the beginning of a ''measured, incremental approach'' to rewriting the act.

Even a narrowly targeted bill clarifying the FCC's authority over internet access services is not likely to be introduced when Congress returns from recess, much less move through committee by the close of its fall session, according to sources.

Draft Bill Eyes New Internet 'Title.' But while prospects remain dim, legislation is currently being drafted in the Senate to create a new ''broadband internet services'' title under the existing Communications Act, one congressional aide told BNA.

That new title, ''Title VIII,'' would spell out clearly what constitutes a ''reasonable network management'' practice by an ISP, as well as the FCC's role in policing ''bad actors'' on the web. For example, would Comcast's decision to block a bandwidth-intensive peer-to-peer file-sharing application on its network, which interfered with third-party VoIP traffic, be considered ''reasonable''?

The FCC grappled with that very decision in 2008, opting not to levy fines or penalties against Comcast but to require the cable giant to simply fess up about its net-

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work management practices. In censuring Comcast, the commission had relied primarily on Section 4(i) of the Communications Act, which authorizes the agency to ''perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.''

FCC Authority. According to the D.C. Circuit Court, the commission may only exercise this ''ancillary authority'' if it demonstrates that its action—here barring Comcast from interfering with customers' use of peer-to-peer networking applications—is ''reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.'' The commission failed to make that showing, the court said.

A Title VIII bill—which some industry sources have referred to as a ''Title I clarification bill''—would likely resolve any uncertainty surrounding the FCC's authority over broadband services providers, and negate the need for a reclassification of the service under Title II.

So far, the idea to add a new broadband ''title'' to the act has piqued a ''strong level of interest'' in Congress, one industry source told BNA. Though still being finalized, a Title VIII bill will likely define ''nondiscrimination''—a general concept embraced by Genachowski and net neutrality advocates, under which all ISPs would be barred from prioritizing, discriminating against, or charging premiums for certain services or applications on the web—and establish a procedure by which the FCC would adjudicate disputes related to discriminatory or anticompetitive network management practices.

''It will ultimately happen, but it's not something that's going to happen overnight,'' an industry source told BNA, commenting on an update to the Communications Act. ''Even targeted legislation that would only address the short-term question of authority for the FCC over the open internet is not going to happen this year. But the framework could be put in place so they could hit the ground running next Congress.''

But in the meantime, Genachowski is showing no indication of backing down from his Third Way proposal. Thirteen months into his tenure as FCC chairman, he appears ready to usher in a new era at the agency—with or without Congress.

Congress Takes Closer Look at 'Silos.' Traditionally, the federal government has taken a ''siloed'' approach to communications regulation. The Communications Act created separate silos for broadcast television and radio, cable TV, satellite TV, cable-modem internet access service, DSL internet access service over a copper telephone lines, and telephone service over copper lines.

In all, the act consists of seven major sections, or ''titles.'' Historically, plain old telephone services, or ''POTs,'' were regulated as ''common carrier'' services under Title II. In 1984, Congress gave the FCC the authority to regulate cable TV services under a new title—Title VI.

How the commission has interpreted the act since—and classified ''internet'' services under those titles—is another matter entirely, one that some Washington lawyers argue created the complex legal and political situation in which the agency now finds itself.

A Sorted Regulatory History. Prior to August 2005, phone companies that provided an ''information service'' to customers, such as DSL internet service, were required to separately offer the underlying ''transmission'' component as a ''common carrier'' service. Under those rules, known as the *Computer Inquiry* rules, phone companies offered DSL ''local transport'' as a common carrier service under Title II and DSL-based internet access as an information service under Title I.

The FCC had at that time required AT&T and Verizon—the two largest descendants of the old Bell system—to lease the transmission component of their DSL service to rival ISPs. The phone companies could not even offer DSL or other internet access services directly to end-user customers. AT&T and Verizon were required to have a separate company affiliate to ensure they each sold their DSL service at the same rates and terms to rival providers as they did to themselves. AT&T's and Verizon's separate ISPs were subject to Title I, but the FCC refrained from regulating them.

Cable modem internet service, meanwhile, was given vastly different regulatory treatment by the FCC. In 2002, under Chairman Michael Powell, the agency classified cable modem service as an information service (rather than a telecommunications service covered by Title II or a ''cable service'' covered by Title VI), a ruling that was ultimately upheld as within the FCC's discretionary authority by the Supreme Court in 2005 in *National Cable and Telecommunications Association v. Brand X*.

These ''titles'' provided a neat and orderly regulatory structure when a telephone company only offered telephone service and a cable company just offered cable service. But in most markets today, one large telephone company (AT&T or Verizon) and one large cable company (Comcast, Time Warner, Cox) compete head-to—head for prospective subscribers of three different types of communications services: telephone, cable, and internet.

Convergence Undermines Old Categories. ''It really [raises] the question of whether or not we shouldn't be examining a completely different way of thinking about how to regulate this space,'' said Kyle McSlarrow, president and CEO of the National Cable and Telecommunications Association, the cable industry's collective lobbying group.

The NCTA has been an active participant in the bicameral, bipartisan meetings convened by the commerce committees in June, as well as closed-door stakeholder meetings at the FCC aimed at finding common ground on the issue of net neutrality, which were called off last month following news reports that Google Inc. and Verizon had been negotiating their own agreement on how to handle internet traffic (150 DER A-1, 8/6/10).

''The risk of a service being tagged as a Title II service or a Title VI service or a Title III service, each with different requirements, is that increasingly we will have companies competing against each other with different regulatory burdens,'' McSlarrow told BNA. ''I don't think the world's ending because we have a siloed, title-by-title approach for different services. But because of this convergence of communications networks, the actors in the marketplace are changing shape.''

Rep. Rick Boucher (D-Va.), chairman of the House Communications, Technology, and the Internet subcommittee, has indicated support for a new, ''non-siloed'' approach, but some within the industry question whether Congress has the will and the energy to start from scratch and write a completely new Commu-

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nications Act, however antiquated the current laws may be.

The 333-page Communications Act of 1934, as amended, mentions the word ''broadband'' three times, and the word ''internet'' only ten.

The Telecommunications Act of 1996 defines ''advanced telecommunications capability,'' without regard to any transmission media or technology, as ''high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.'' The 128-page act mentions ''broadband'' only once, in the aforementioned definition.

''There's recognition on Capitol Hill that the telecommunications industry has evolved in a way that we've outgrown the bounds of what was done in [the] 1996 [Telecommunications Act],'' said Jot Carpenter, president of government affairs for CTIA-The Wireless Association, the major trade group for U.S. mobile carriers, which has also been active in Hill meetings. ''Those amendments were really useful, but there's a need to make further updates to the act.''

''There's genuine interest on both sides of the Capitol in getting something done,'' Carpenter told reporters during a discussion at CTIA's Washington headquarters in August. ''I don't know if the calendar is such that it will make it possible to get it done this year, but there's a lot of interest.''

Like many industry stakeholders who have attended the Capitol Hill meetings, Carpenter described the discussions so far as ''productive,'' but noted that the limited time in the congressional calendar, constrained by the upcoming midterm elections, make passage of legislation this year unlikely.

'96 Act Looms Large. The series of roundtable discussions convened by Sen. John D. Rockefeller IV (D-W.Va.), chairman of the Senate Commerce, Science, and Transportation Committee, and Rep. Henry Waxman (D-Calif.), chairman of the House Committee on Energy and Commerce, have focused in part on whether aspects of the last update to the Communications Act, in 1996, should carry forward.

The Telecommunications Act of '96 was designed to open up the telephone market in the United States to competition from more local and regional carriers. The law required the Bell companies for the first time to lease out their wires and switches to competitors such as MCI Worldcom and Sprint so that they could enter the market for local service. In return, the Bell companies were permitted to offer long-distance service to their end-user customers.

The act did spur competition, but not the kind lawmakers had envisioned.

Cable companies, whose internet service offerings had already been deregulated, began offering internet-based phone service, known as VoIP. Over the next decade, upstart competitive local exchange carriers either consolidated with other telcos or left the market entirely. Those that survived tended to be the ones that invested in their own telecommunications networks—rather than continuing to lease access from the incumbent phone company.

A Title II reclassification would, on its face, give the FCC greater leverage to impose ''unbundling'' requirements, meaning broadband network providers would be forced to share their pipes with competitors, providing access to the ''last mile'' between their facilities and peoples' homes. Under the '96 act, incumbents like Bell Atlantic (now Verizon) and SBC (now AT&T) were required to ''unbundle'' certain elements of their copper telephone networks and offer them to competitors on a wholesale basis—but not on their fiber networks, because those networks didn't exist yet. (Interestingly, the Communications Act, as amended, mentions the word ''fiber'' only twice.)

Legislating 'Open Access.' A question of concern within the industry is whether Congress will attempt to legislate ''open access''—imposing the same unbundling obligations on Verizon's FiOS network, for instance—as the '96 Act did on Verizon's copper network.

''That was a miserable failure at the end of the day,'' said Robert Atkinson, founder and president of the Information Technology and Innovation Foundation, a Washington-based research institution, of the '96 Act. ''It never worked.''

Atkinson, who has attended several Capitol Hill stakeholder sessions, said any rewrite of the act should be narrowly focused to clear up the legal ambiguity surrounding the FCC's authority to regulate the network management practices of broadband providers. At this point, adding a new title—Title VIII—makes more sense than completely overhauling the act, Atkinson said.

''It's neither fish nor fowl,'' Atkinson said of ''broadband internet service.'' ''Is it an information service under Title I or, as Chairman [Genachowski] has proposed, a telephone service under Title II? . . . It's not a telephone service.''

''It would be a mistake to go down the path of trying to legislate competition policy in this act . . . to do what the '96 [act] tried to do, which was to open the [telephone company's] networks and drive this total industry restructuring,'' Atkinson told BNA.

What to Do About VoIP. Another thorny issue Congress must tackle in a rewrite of the act is the FCC's regulation of VoIP service.

In 2005, the FCC imposed ''911'' obligations on providers of ''interconnected'' VoIP services, which are any IP-based phone services that allow users to make calls to and receive calls from the public-switched telephone network. The FCC has also required interconnected VoIP providers to comply with the Communications Assistance for Law Enforcement Act of 1994 and contribute to the Universal Service Fund, which subsidizes the cost of providing phone service in rural and low-income areas.

But the regulatory classification of VoIP has been the subject of fierce debate in Washington for several years: Is it a telecommunications service or an information service?

To Lawrence Spiwak, president of the Phoenix Center for Advanced Legal & Economic Public Policy Studies, this emergence of IP-based communications networks has complicated the FCC's regulatory role.

As currently constructed, the intercarrier compensation regime—which sets forth the charges one carrier must pay to another carrier to originate, transport, and terminate telecommunications traffic—is based on interstate and intrastate switched-access minutes, while the Universal Service Fund is based on switched-access lines.

''The world is moving both to all-IP-based networks, which doesn't fit into the statutory definitions, and the world is also moving to a lot of wireless substitution [for telecommunications],'' Spiwak said. ''How do you then, when you have an overall statute that is designed for one set of technologies, and it specifies it, adapt that to the broadband world?''

Spiwak, who attended several Hill stakeholder meetings himself, said that in the 1990s, requiring ''unbundling'' made sense, but not necessarily today.

When Rates Increase, Congress Likely to Act. If Congress decides to implement new broadband competition policies, precedent can be found in the Cable Television Consumer Protection Act of 1992, which essentially re-regulated the cable industry.

Following the enactment of the Cable Communications Policy Act, in 1984, the number of households subscribing to cable TV service dramatically increased, but competition among providers did not, and in many communities, the rates for cable services far outpaced inflation.

Susan Crawford, a professor at Cardozo Law School and a former special assistant to President Obama for science, technology, and innovation policy, said the growing power of incumbent cable providers like Comcast, Time Warner, and Cox Communications may compel Congress to act sooner on a Communications Act rewrite.

''We're getting to the point where a cable monopoly will be controlling most Americans' access to a big pipe over which all of these services are carried: broadcast, radio, cable, and voice,'' Crawford told BNA. ''It will make sense for the future to ensure that that big pipe is available to all Americans at a reasonable price and that competition will flourish over it. That's a different form of regulation than we've seen in the past, but that's where 'convergence' is taking us.''

As noted in the FCC's National Broadband Plan, within a few years, 90 percent of the U.S. population will have access to broadband networks capable of peak download speeds in excess of 50 megabits per second, as cable systems continue to upgrade to what is known as DOCSIS 3.0. However, those providers still offering fiber-to-the-node and then DSL from the node to the premises, or FTTN, while potentially much faster than traditional DSL, may not be able to match the peak speeds offered by fiber-to-the-premises technology (like Verizon's FiOS) and DOCSIS 3.0. So, in other words, in only a few short years, most Americans will likely have access to only one broadband provider that can offer very high peak download speeds: the cable companies with DOCSIS 3.0-enabled infrastructure.

''As the country realizes the strength and market power of the cable monopoly, that's going to start changing the dialogue, particularly if the Comcast-NBC Universal merger goes through without many conditions,'' Crawford said. ''There will be a backlash when Americans wake up and realize that they're paying more and more for services that don't include an 'open' high-speed internet.''

Reclassification Seen as 'Short Term' Fix. It's for this reason that the pressure has never been greater for the FCC to extend its regulatory oversight over access to broadband.

Public-internet groups including Free Press, Public Knowledge, and the Media Access Project have been among the most vocal supporters of Genachowski's proposal to reassert authority over broadband internet access services. They argue that while an update to the Communications Act would provide much-needed clarity, the FCC can reconcile the major questions raised by the *Comcast* decision on its own, without Congress.

''The Communications Act has been a remarkably supple instrument,'' says Andrew Schwartzman, senior vice president and policy director of the Media Access Project. ''As originally enacted, it didn't include the words 'television,' 'microwave,' 'cable,' 'laser,' and the FCC adopted rules and principles to deal with those technologies before those words were ever added to the law.''

Precedent for FCC to Act First. The FCC first enacted rules in 1965 for cable TV systems. Congress did not pass legislation establishing policies for cable ownership, channel usage, franchise provisions and renewals, rates, and privacy until 1984.

''The word 'television' wasn't added to the Communications Act until the 1950s,'' added Schwartzman, who has been active in stakeholder meetings on the Hill. ''Television had to be regulated by the FCC as a form of radio, which worked fine. You needed to adjust it, but the FCC managed just fine.''

While Schwartzman believes the FCC has broad authority to interpret the act and make changes over time, the threat of legal challenges makes a congressional ''fix'' all the more desirable.

''Anything the FCC does is going to be subjected to litigation,'' Schwartzman said.

Joel Kelsey, a political adviser to media watchdog Free Press, told BNA that he sees a Title II reclassification as ''workable,'' but only in the short term.

''I don't think it's something that works for the next five to ten years,'' Kelsey told BNA. ''It works for the amount of time that it will take Congress to reform the Communications Act, which is multiple years.''

Free Press, which has also actively participated in stakeholder sessions on the Hill, was one of the earliest supporters of a Title II reclassification.

Like others, the group views the current Communications Act as outmoded and in need of revisions, but does not believe Congress should ''throw it out'' entirely.

Fundamental Concepts May Still Be Valid. Free Press has been pressing Congress to retain some ''fundamental concepts'' of the last update to the act, such as interconnection—the need and the ability for communications networks across the country to interconnect with one another—as well as the mandate to charge ''just and reasonable'' rates, empower the FCC to adjudicate complaints, and require direct subsidies to help pay for the cost of service in rural and low-income parts of the country.

A major area of concern to Free Press and other public-interest groups is whether the FCC, under a new Communications Act, will retain the same enforcement and rulemaking authority.

''You want an FCC that has the ability to make rules and react swiftly,'' Kelsey said. ''Technology changes extremely rapidly, much faster than Congress can act. You need an agency to act when there's a problem in the marketplace. You need an agency with teeth.''

Meanwhile, Democratic and Republican members of Congress continue to pile on the pressure against Gena-

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chowski over his plan to reclassify broadband under Title II of the Act.

Many within the industry had been bracing for a full commission vote on Genachowski's Third Way proposal on Sept. 23, the date of the agency's next open meeting, but the item has been left off the agenda.

However, sources told BNA that the move does not mean Genachowski has abandoned the proposal.

BY PAUL BARBAGALLO