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Communications

Broadband Ruling Could Shape Direction of FCC Under Wheeler

The direction of the Federal Communications Commission during a second Obama administration may be decided in federal court, where Verizon Communications Inc. is challenging the agency's authority to prohibit internet service providers from giving a faster channel through their pipes for their own content or that of a company that pays them for it.

A ruling by the U.S. Court of Appeals for the District of Columbia Circuit against the FCC would not only vacate the agency's rules for net neutrality, as set out in what is known as the *Open Internet* order, but also cast doubt on the legality of every regulation related to broadband internet service on the agency's books (*Verizon Communications Inc. v. Federal Communications Commission*, D.C. Cir., No. 11-1355, 9/30/11).

Faced with such a defeat, the FCC may try to reestablish authority by reclassifying broadband as a regulated public utility, like telephone service, while Congress may begin the process of rewriting the Communications Act, which barely mentions the internet.

Either way, the incoming chairman of the FCC, Tom Wheeler, will be at the center of the debate over the agency's role in an increasingly broadband-driven world.

''Broadband presents enormous opportunities for our economy and the American people. But there are also real challenges that the U.S. has to tackle in our global economy,'' Julius Genachowski told BNA in an interview May 17, his last day as FCC chairman. ''It's essential that the FCC move quickly and efficiently to tackle those challenges. The more that the agency and industry stakeholders focus on smart solutions to real problems, the better off our country will be. The more that we're not doing that, but debating legal issues, the worse off we are from a global competitiveness perspective.''

Net Neutrality Rules Adopted. Among Genachowski's most notable achievements since assuming the chairmanship was adopting net neutrality rules in December 2010, less than a year after the D.C. Circuit Court struck down an attempt by the agency under Republican Chairman Kevin Martin to censure Comcast Corp. for blocking the file-sharing site BitTorrent on its network (244 DER A-17, 12/22/10; 65 DER AA-1, 4/7/10).

In the wake of that ruling, Genachowski had initially proposed reclassifying broadband internet service as a ''common carrier'' service under Title II of the Communications Act. As contemplated in his proposal, the commission would have applied Title II regulations only to the ''transmission'' component of broadband—not rates or content.

But in the end, Genachowski opted for a different course: He brokered negotiations on principles for rules between Verizon, AT&T Inc., the National Cable and Telecommunications Association and internet companies including Google Inc. And though he failed to secure the votes of his two Republican colleagues, Commissioners Robert McDowell and Meredith Baker, for the order, the final product was ''something everyone could live with,'' one industry source told BNA at the time. On Dec. 21, 2010, the FCC approved the *Open Internet* order on 3-2 party-line vote without making the controversial reclassification. Verizon filed a legal challenge against the order anyway, which could be settled this year.

''Such a broad array of stakeholders supported the *Open Internet* rules three years ago, because there was wide agreement that the right thing to do for the country was to adopt sensible rules to encourage private investment and innovation and move forward,'' Genachowski said. As if in preparation for a court appeal, Genachowski decided to keep the ''Title II docket'' open in the event that the agency lost in the *Verizon* case and was left with no other legal option but to reclassify. That docket is still open. ''I think it's important to continue to move forward . . . and not backward.''

'Encouraged' by Roaming Ruling. Genachowski told BNA that he was ''encouraged'' by the D.C. Circuit Court's December 2012 decision to uphold the FCC's rules that require all wireless carriers to allow customers of their competitors to roam on their networks (233 DER A-16, 12/5/12).

''It's an important broadband policy, and the court said clearly [it] is within the commission's authority,'' Genachowski said. ''The Communications Act gives the FCC broad authority with respect to communications networks, and the FCC has ample authority to continue to drive innovation and investment and protect consumers and promote competition.''

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Still, Genachowski said that he has urged Congress to consider updating the Communications Act to ''increase certainty and predictability.''

The 333-page Communications Act of 1934, as amended by the Telecommunications Act of 1996, includes the word ''broadband'' three times, and the word ''internet'' only 10 times.

Traditionally, Congress has taken a silo approach to communications law. The Communications Act created separate sections for broadcast television and radio, cable TV, satellite TV, cable-modem internet access service, digital subscriber line internet access service delivered over a copper telephone lines, and telephone service over copper lines. In all, the act consists of seven titles.

Today, the FCC still regulates telecommunications providers under Title II, wireless carriers under Title III, and cable operators under Title VI, even though the distinctions among these companies have blurred as telecom providers now offer video service, cable operators now offer voice service, and wireless carriers offer both voice and data service.

That last major update to the Communications Act, in 1996, focused on opening local telecommunications markets to competition, and did not account for the rise of the internet or mobile devices.

McDowell: Congress Should Start With Blank Slate. ''Congress should start from scratch,'' Robert McDowell told BNA in an exit interview prior to leaving the commission May 17, on whether the title system should be carried forward to a new act. ''Let's start with a blank sheet of paper and figure out what the problems are and how to fix them. And it may not be a law that fixes them.''

When it comes to the internet especially, McDowell believes that Congress and the FCC should take a more consumer-centric approach to new laws and regulations. The Communications Act of 1934 and the Telecommunications Act of 1996, he noted, were largely premised on protecting consumers from a natural monopoly in local phone service.

''What consumer harm is there now, and what is causing that harm, if any?'' he said. ''How can new laws cure that in a narrowly tailored way with a minimal amount of cost, and at what point will that cure be sunsetted or reviewed?''

Further, any new laws and regulations affecting the broadband marketplace should not be based on technology, he said.

But to McDowell, absent a rewrite of the act, the FCC may still be able to modernize its regulations.

Under Title II of the Communications Act, the FCC can grant petitions seeking relief from regulations; it cannot do the same under Title VI, however.

Despite this, McDowell said, the FCC can ''choose to not enforce rules openly as a policy and not write new rules where it is unnecessary to do so.''

On Genachowski's last day in office, the FCC moved to lift 126 requirements on telephone companies, which the agency said were outdated and no longer necessary.

Looking ahead, McDowell said the FCC can maintain its relevance as a regulator in the broadband internet era by conducting audits of rules to better gauge their effectiveness.

''Long term, I think the role of the FCC will be to examine the market with bona-fide market studies . . . that determine where there's market failure,'' McDowell said. ''If there's not market failure that results in consumer harm, then leave things alone and be patient.''

As for net neutrality, McDowell said it would be a ''tragic error'' for the FCC to reclassify broadband under Title II of the Communications Act. If the FCC loses in the Verizon case, McDowell said, the agency should instead defer to Congress. In the interim, consumers would still have recourse under contract and antitrust law, he said.

Following such a result, some expect Democratic lawmakers to introduce legislation to clarify the FCC's authority over broadband internet service.

When Congress considered a Communications Act rewrite in 2005, several discussion drafts included provisions that would have made the blocking and degrading of web traffic an antitrust violation. That language, and the bills, never survived.

The chance of passing any legislation now is seen as extremely slim, at least in the near term. Republicans are vehemently opposed to the FCC rules, and they have tried on several occasions to repeal them legislatively.

Clyburn, Wheeler: Net Neutrality Supporters. Mignon Clyburn, who took over as interim chairwoman May 20, is a staunch supporter of net neutrality.

As for Wheeler, he was among President Obama's earliest backers and biggest fund-raisers. After Obama's first election, he led the Obama-Biden Transition Project's Agency Review Working Group in charge of transitions for the science, technology, space, and arts agencies.

During the 2008 presidential campaign, Obama made net neutrality a central component of his technology platform. Given that the issue is critical to the president, Wheeler will likely either craft a solution at the agency level or urge members of Congress to introduce legislation to restore the agency's authority to impose net neutrality rules.

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