



Should the FCC Go Back to Congress for Authority to Regulate the Internet?

Last week the DC Circuit Court of Appeals denied Federal Communication Commission claims that it had authority “implied,” but not expressly granted by Congress, to “manage” network management techniques of Comcast and other broadband network providers. Policy analysts and advocates have already joined in debating next steps for the FCC and Congress. This ConsumerGram (CG) is the first in what will be a series designed to address one by one a variety of issues, some of which are known now but others which will materialize as the debate proceeds. This CG addresses whether or not the FCC should seek clarification from Congress of its broadband Internet goals and the means to be used to fulfill them.

It restates an oft-ignored truism – that the FCC is the agent of consumers and voters via power granted on their behalf by Congress. It emphasizes: a) notwithstanding volumes of commentary and opinion by stakeholders, consumers are not clearly and fairly informed of either the core issues or the stakes involved; b) whether or not the FCC has authority under existing law, resolution of the jurisdiction issue will take a long time and foster an environment of uncertainty; c) even if the Courts agree that the FCC has the necessary authority under current law, administrative and legal resolution of assorted issues that now divide politically and economically powerful stakeholders will consume resources and time in ways that will thwart achievement of the National Broadband Plan. Time consumed by FCC rulemakings might well span generations of “Internet Time” and would put on hold investments and innovations that otherwise make good business sense and serve consumers’ needs.

To Regulate or Not to Regulate the Internet?

The limits of its ancillary authority made clear by the Court, the FCC is being urged, and may be inclined, to reverse a Commission decision made almost a decade ago and to subject broadband network providers to broad regulatory constraints enabled by Title II of the current telecommunications statute. Dubbed the “nuclear option” by one Wall Street analyst, critics are warning of dire consequences for investment and innovation, should the FCC expose the network foundations of the Internet to old style common carrier regulations -- designed first for the railroads and then applied to the old Ma Bell monopoly. Another investment analyst claimed that “investors would head for the hills” should the FCC exercise that option. The pivotal question is whether or not Title II regulation even if selectively applied, would promote the investment and innovations needed for the private sector to fulfill the ambitious goals set out in the recently released FCC National Broadband Plan.

FCC Chairman Genachowski has repeatedly disclaimed any intention or desire to regulate the Internet. Nevertheless, the FCC under his leadership has proposed new and stronger “Net Neutrality” rules restricting broadband network providers in a convergent technological and market environment in which providers of networks, content and applications are diversifying and hence increasingly difficult to segment into old-style regulatory silos.

The FCC Is the Agent of Consumers and Voters

Political scientists and economic policy analysts have studied intensively issues related to delegations of decision making authority by “principals” with whom authority ultimately resides to designated “agents” who act on their behalf. That is precisely the issue here. Principal-agent problems arise, according to Nobel Economics prize winner Joseph Stiglitz in the context of questions about: “. . . what action the agent [FCC] has undertaken or . . . should undertake.”¹ Principal-agent problems are all around us: in the military (where authority is delegated systematically downward through the ranks), in private corporations (owners, boards, managers), in governments (the President and the cabinet) and in families who retain babysitters. We draw comfort from the fact that in the military, the extent of the authority delegated must be clearly stated. So it should be with respect to Congress and the FCC on Internet regulation.

The key questions are what authority has been delegated to the FCC by the people through Congress, but, more importantly, what should be done if the answer is unclear.

Advocates on both sides of the debate over net neutrality claim to represent consumers or voters or that their position reflects the interest of the people. Of course, neither side has compelling evidence. NN advocates hold the rhetorical high ground. Who can oppose neutrality or openness or the absence of walled gardens and instead line up on the side of “cozy duopolists” and “greedy corporations” and wielders of “unchecked market power?” On the other hand, NN advocates have not been very responsive to the call of Chairman Genachowski for facts and data and analysis in support of recommended policy options. Their occasional attempts to support rhetoric and conclusions with data about jobs, innovation, investment, competition and other longstanding elements of the broad public interest have not been very compelling.

In any event, the fact is that citizens as either voters or consumers, who are the ultimate principals whose welfare is at stake, have yet to be heard on the issues in the NN debate.² Consumer surveys are incomplete, not always representative, and by no means conclusive. More importantly, they suggest that citizen perceptions of both the problems and prospective solutions

are largely the product of rhetoric from one side or the other in the context of general attitudes about government or business decision makers.

Does the FCC Need New Congressional Authorization?

The FCC has no clear authority to speak for Congress or voters. Legal experts disagree about whether the FCC can in fact *lawfully* reverse its earlier decision holding that Internet access services are “information” services and therefore not subject to Title II, old style, monopoly regulations. The Commission can do so. But whether, and when, such a decision would pass muster with reviewing courts is a big gamble. Some say current law gave the Commission symmetrical authority to either forebear from, or decide to, regulate. Others call attention to the paucity of evidence of market failure, abusive conduct, and the inherent subjectivity of net neutrality as a regulatory standard and conclude that the Courts would overturn such rules.

Judicial review of an FCC decision to reclassify broadband access as Title II services, no matter what its outcome, would launch an era of uncertainty about FCC constraints on future development of the Internet, in particular as the discourage financial market support of the necessary high rates of investment. Capital investment programs would be muddled by uncertainty about what managers’ discretion. Regulatory risk would reduce the already uncertain, and by no means handsome, expected returns from broadband network investments.

Even if reviewing courts went along with a decision to treat Internet access as a common carrier service, the FCC victory would be a Pyrrhic one. All consumers, as well as providers of applications and content using underlying broadband networks, would suffer delays in achievement of universal broadband access.

If past FCC regulatory performance is prologue, the costs of uncertainty and regulatory risk would not end with FCC success in reviewing courts. Even as it was focusing on the National Broadband Plan, the Commission failed to act on several docketed rulemakings that will impact broadband network expansion. Some have languished for a decade or more. Core issues over which they have clear authority – several in relation to universal service, intercarrier compensation, access charges, spectrum assignment, and others – beg for disposition. Resolution of these issues will have enormous economic impact on powerful stakeholders and they are just the kind of issues that would arise in the context of Title II rulemakings in which Google and other applications providers, the large cable and large telcos, various content providers, free market groups, well funded regulatory advocates, seasoned academics, government bodies and

others would actively participate. The recent Notice proposing new net neutrality rules attracted over 150 major responses with one set of comments running to 280 pages and several in excess of 50 pages. And, that is just the opening salvo in a single proceeding which may run for years.

Conclusion

The Communications Act of 1934 was last amended substantially in 1996 at which time Congress modified the Law to reflect the implications of, and to resolve issues associated with, the breakup of the old Bell System and the introduction of competition. Notably, the 1996 Law mentioned the Internet in passing and in contexts quite immaterial to the debates of today. The terms “Net Neutrality”, “open” networks and others in current vogue are not mentioned, never mind, bounded and motivated by Congress. Bills have been introduced to address Net Neutrality issues, but there is no clear consensus. Indeed, the differences in Congress mirror those in comments to the FCC.

Consumers and voters would be well served by an open and extensive debate on the issues raised by the potential for Title II Internet regulation. At a minimum, hearings would provide a much needed forum for parties to confront each other in open debate, rather than lobbying arguments and talking points and rhetoric from afar. They would provide a forum for open discussion of alternative dispute resolution mechanisms to complement or replace the time consuming FCC procedures that no matter how successful in the past are simply out of sync with “Internet Time” and our ambitious National Broadband goals.

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The American Consumer Institute Center for Citizen Research is a nonprofit educational and research institute. For more information or to contact us, visit www.theamericanconsumer.org.

¹ Joseph E. Stiglitz, “Principal and Agent,” *The New Palgrave: Allocation, Information, and Markets*, John Eatwell, Murray Milgate, and Peter Newman (eds.), W.W. Norton, New York and London, p. 241.

² A particular manifestation of the “principal-agent” problem has been dubbed, somewhat misleadingly, the problem of “moral hazard” which arises when the agent, in the context of this discussion, the FCC or its staff, makes decisions based on their own values and inclinations rather than those of Congress or voters. Y. Kotowitz, “Moral Hazard,” *The New Palgrave: Allocation, Information, and Markets*, John Eatwell, Murray Milgate, and Peter Newman (eds.), W.W. Norton, New York and London, p. 207. The moral hazard problem was noted by Adam Smith who called attention to “negligence and profusion” in the case of private managers of “other people’s money” by the directors of public companies. “[With some notable exceptions] “the consequences of moral hazard in political processes have been largely neglected by economists.” p. 212.