Regulatory Reclassification of Broadband Internet Access Service is the Unsurprising Result of ISPs' Inexplicable Challenges to FCC Authority

An Open Internet has long been a bipartisan goal in the United States. Actions initiated during President George W. Bush's administration reflect the widespread agreement that the Federal Communications Commission (FCC) should protect consumers' access to the lawful Internet content of their choice and pursue enforcement actions against service providers that unreasonably interfere with that access. After the Commission classified broadband Internet access service as an information service *not* subject to common carrier regulation, however, two of the country's largest Internet service providers (ISPs) filed separate challenges to the FCC's authority to protect consumers' access to the Internet and its non-controversial Open Internet policy. Both times, the Commission was unsuccessful in convincing an appellate court that its proposed theory of jurisdiction was adequate to protect and enforce consumers' rights to access the lawful Internet content of their choice and run applications and services of their choice and to prohibit broadband Internet access service providers from blocking or throttling traffic or engaging in unreasonable discrimination. As a result of these two resounding judicial defeats in which the D.C. Circuit found that neither Title I nor Section 706 nor any other provision of the Communications Act upon which the Commission relied empowers it to prohibit blocking, throttling or unreasonable discrimination by broadband Internet access service providers, the Commission's recent decision to reclassify Internet access as a Title II telecommunications service and to forbear from enforcement of the many statutory and regulatory provisions that are not relevant to broadband Internet access is a sound and legally sustainable solution.

The Title II reclassification is consistent with, and will allow the Commission to achieve, the goals for which it was aiming when it originally classified broadband Internet access service as an information service: regulating minimally but retaining enforcement authority to curb bad acts and anticompetitive behavior. Title II gives the Commission the authority it needs to preserve and protect the Open Internet and ensure that Internet users can send and receive traffic to any lawful website and use legal applications, services and devices without unreasonable interference from their Internet service provider. Wireless voice service has long been subject to Title II regulation with substantial forbearance from provisions not necessary to protect consumers or serve the public interest. Such light touch regulation has not inhibited investment in or deployment of wireless services and it will not do so for broadband Internet access services either.

I. How We Got Where We Are

The FCC's original Internet Policy Statement[1] was issued simultaneously with its decision to classify wireline broadband Internet access service as an information service subject to a light regulatory touch.[2] At the time, the Commission was under the leadership of Republican Chairman Kevin Martin. In classifying broadband Internet access service as an information service, the Commission expressed the belief that it retained authority under Title I to intervene and take enforcement action in the event of anti-competitive conduct:

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[1] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) ("Internet Policy Statement"). The Commission had earlier classified cable modem Internet access service as an information service. *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,* 17 FCC Rcd 4798 (2002).

[2] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Memorandum Opinion and Order, 20 FCC Rcd 14853 (2005) ("Wireline Broadband Order").

> [T]hrough review of consumer complaints and other relevant information, we will monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary. Similarly, we will continue to monitor the interconnection and interoperability practices of all industry participants, including facilities-based Internet access providers, and reserve the ability to act under our ancillary authority in the event of anti-competitive conduct.[3]

In lieu of implementing rules to govern Internet access service, the Commission adopted the Internet Policy Statement that it said it would incorporate into its ongoing policy making activities.[4] The Internet Policy Statement articulated four principles to protect consumers and ensure that broadband networks are widely deployed:

(1) Consumers are entitled to access the lawful Internet content of their choice;

(2) Consumers are entitled to run applications and use services of their choice, subject to needs of law enforcement;

(3) Consumers are entitled to connect their choice of legal devices that do not harm the network;

(4) Consumers are entitled to competition among network providers, application and service providers and content providers

The Internet Policy Statement also provided that each of the principles was subject to reasonable network management.

While acknowledging that information service providers were not subject to common carrier regulation under Title II, the Commission stated that it could use its Title I ancillary jurisdiction to impose regulatory obligations on providers of telecommunications for Internet access or Internet protocol-enabled services and ensure that they are operated in a neutral manner.[5] In the Wireline Broadband Order, the Commission gave notice that if it saw evidence that providers were violating the Internet Policy principles, it would not hesitate to take action.[6]

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[3] Wireline Broadband Order at ¶ 145; see also, ¶¶ 108-110.

[4] Wireline Broadband Order at ¶ 96; Internet Policy Statement, n.15.

[5] Internet Policy Statement at ¶ 4.

On June 8, 2006, the Executive Office of President George W. Bush issued a Statement of Administration Policy ("SAP") on H.R. 5252 – Communications Opportunity, Promotion, and Enhancement Act of 2006. That SAP expressed support for the Commission's Internet Policy Statement, stated that the Administration believed that the Commission had authority to address potential abuses and that creating a new legislative framework for the Internet was premature:

> The Administration supports the broadband policy statement of the Federal Communications Commission (FCC) and appreciates the bill's sponsors' efforts to incorporate these concepts into the legislation. However, the Administration believes the FCC currently has sufficient authority to address potential abuses in the marketplace. Creating a new legislative framework for regulation in this area is premature.[7]

Two years later, the Commission tried to exercise its Title I ancillary authority when it asserted jurisdiction over a complaint filed against Comcast for interfering with its customers' use of peer-to-peer applications in violation of the Internet Policy Statement.[8] The Commission found that Comcast's network management practices were not reasonable and that they discriminated among applications and protocols rather than treating all equally. The Commission further found that Comcast's interference with peer-to-peer protocols violated the Internet Policy Statement by impeding consumers from running applications of their choice and limiting their ability to access the Internet content of their choice. In his separate statement accompanying the decision, Chairman Martin reiterated that the Commission had the ability to

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[6] Wireline Broadband Order at ¶ 96.

[7] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 5252 – Communications Opportunity, Promotion, and Enhancement Act of 2006 (June 8, 2006), available at http://www.presidency.ucsb.edu/ws/index.php?pid=24934

[8] *In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications,* 23 FCC Rcd 13,028 (2008).

adopt and enforce the net neutrality principles set forth in the Internet Policy Statement and that it could and would enforce the principle that consumers should be able to access any content and any application.

Three months before the Comcast complaint decision was released, Chairman Martin testified before the Senate Commerce Committee on the future of the Internet and the Commission's role in protecting consumer access to the Internet.[9] In his testimony, Chairman Martin stated that it was appropriate for the Commission to adopt, and that it was the Commission's role to enforce, the Internet Policy Statement. He also told Congress that:

> I do not believe any additional regulations are needed at this time. But I also believe that the Commission has a responsibility to enforce the principles it has already adopted. Indeed, on several occasions, the entire Commission has reiterated that it has the authority and will enforce these current principles.

He noted that he had testified before the Committee in 2006 that the Commission had authority under Title I of the Act "to enforce consumer's access to the Internet." He added that:

> the Commission must remain vigilant in protecting consumers' access to content on the Internet. Thus, it is critically important that the Commission take seriously and respond to complaints that are filed about arbitrary limits on broadband access and potential violations of our principles. Indeed, I have publicly stated that the commission stands ready to enforce this policy statement and protect consumers' access to the Internet.[10]

Comcast appealed the Commission's decision to the U.S. Court of Appeals for the D.C. Circuit. The Court vacated the decision on the grounds that the Commission could not use Title I authority to assert jurisdiction over network management practices. It determined that the

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[9] Written Statement of the Honorable Kevin J. Martin, Chairman, Federal Communications Commission Before the United States Senate Committee on Commerce, Science and Transportation (April 22, 2008), a copy of which was attached to Chairman Martin's separate statement in the Comcast complaint proceeding.

[10] *Id.*

Commission had failed to tie its assertion of ancillary authority over Comcast's Internet service to any statutorily mandated responsibility.[11]

In response to the Court's decision, the Commission adopted rules pursuant to Section 706 of the Act that it characterized as enforceable, high-level, prophylactic rules that follow directly from the Commission's bipartisan Internet Policy Statement. Among other things, the rules prohibited blocking consumer access to lawful Internet websites and unreasonable discrimination in the transmission of lawful Internet traffic, again subject to reasonable network management practices.[12] Almost all ISPs were willing to abide by these rules and the Commission's authority to enforce them. Verizon, however, challenged the rules, arguing that Section 706 did not give the Commission the authority to adopt the rules. While finding that Section 706 did give the Commission regulatory authority, the D.C. Circuit vacated the no-blocking and nondiscrimination rules on the grounds that the Commission's classification of broadband Internet service providers as information service providers exempted them from treatment as common carriers and that the no-blocking and nondiscrimination rules unlawfully imposed common carrier obligations on information services.[13]

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[11] *Comcast Corporation v. FCC,* 600 F.3d 642 (D.C. Cir. 2010). The Court rejected the Commission's attempts to tie its Title I ancillary authority to various other provisions of the Communications Act finding that Sections 151 and 230(b) were statements of policy that delegated no regulatory authority; Section 154(i) was incidental to, and contingent upon, specifically delegated powers; Section 256 did not expand any authority that the Commission otherwise had; and Section 257 did not dictate the operation of an otherwise unregulated service.

[12] *In the Matter of Preserving the Open Internet,* GN Docket No. 09-191, Report and Order, FCC 10-201 (rel. Dec. 23, 2010).

[13] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The Court let stand the Commission's network disclosure and transparency rule.

II. Title II Authority Is Necessary To Protect The Open Internet

In light of the two judicial decisions holding that the Commission cannot use either its Title I ancillary authority or Section 706 to prohibit unreasonable practices that Internet service providers may use to block or degrade consumer access to legal websites or discriminate in the transmission of lawful Internet traffic, reclassification of Internet access service as a Title II telecommunications service is necessary to ensure that the Commission maintains legally sustainable authority to preserve and protect consumers' access to lawful Internet content. The D.C. Circuit agreed with the Commission's assessment that absent no-blocking and nondiscrimination rules, broadband Internet service providers have the technical ability and economic incentives to discriminate against and among third-party Internet based services and Internet traffic in a manner that would inhibit the speed and extent of future broadband deployment.[14] The Commission's inability to impose such rules on information service providers or take action against information service providers that block or degrade consumers' access to lawful Internet content under Title I or Section 706 left the Commission no choice but to reclassify Internet access service as a Title II service.[15] Pursuant to Title II, the Commission has clear authority to prohibit blocking, throttling and paid prioritization, monitor consumer-related problems and take enforcement action where necessary.

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[14] *Verizon v. FCC,* 740 F. 3d at 645-46.

[15] Although a divided Supreme Court deferred to the Commission's classification of cable modem Internet access service as an information service, it found that the Commission's interpretation was a "reasonable policy choice," but not the only permissible one. *National Cable Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005). In a concurring opinion, Justice Stevens found that the Commission's decision fell "within the scope of its statutorily-delegated authority – though perhaps just barely." 545 U.S. at 1003. In a strongly worded dissent, in which Justice Ginsburg joined, Justice Scalia found the Commission's reading of the statutory term "telecommunications service" to exclude cable modem Internet access service "implausible." 545 U.S. at 1005.

The Commission's determination to forbear from enforcing 27 provisions of Title II and over 700 regulations that are not relevant to modern broadband service means that broadband providers will not be subject to burdensome "utility" type regulation, including rate regulation, that may inhibit investment or deployment. Congress specifically authorized the Commission to use an analogous light touch regulatory approach with respect to wireless services. Section 332(c)(1)(A) of the Communications Act provides that commercial mobile service providers shall be treated as Title II common carriers but specifies that the Commission may forbear from applying any provision of Title II to such providers or services except Sections 201, 202 and 208. Under this framework, the Commission continues to apply only those provisions of Title II to wireless carriers that are necessary to protect consumers. The Commission will follow a similar approach with respect to broadband Internet access service and has determined to forbear from even more Sections of Title II than it has for mobile voice services.[16] The light touch regulatory approach has not inhibited the deployment of or investment in wireless services[17] and there is no reason to believe that it will inhibit the continued deployment of or investment in wireline broadband services. On the contrary, many Internet service providers have observed that the Commission's decision will have *no* impact on their plans to invest. We fully expect the

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[16] *See* "Good News for Consumers, Innovators and Financial Markets," February 26, 2015 Blog Post of FCC Chairman Tom Wheeler available at http://www.fcc.gov/blog/author/Tom%20Wheeler.

[17] *See, In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993,* WT Docket No. 13-135, Seventeenth Report, DA 14-1862, at ¶ 1 (rel. Dec. 18, 2014) ("In recent years, mobile wireless services have gone from a luxury to a convenience to an absolutely central part of Americans' daily lives. . . ." making "mobile wireless one of the most important sectors in the national economy.") Wireless providers have made more than $134 billion in capital investments in the last five years alone. *Id.* at ¶ 170. That investment will continue as demonstrated by the recent AWS-3 auction, which raised more than $41 billion in net winning bids. See FCC Public Notice, Auction of Advanced Wireless Services (AWS-3) Licenses Closes, DA 15-131 (Jan. 30, 2015).

Commission's action will provide additional incentives to continue to invest for all those using and relying upon and Open Internet.