

June 2010

FCC Seeks Comment on “Third Way” to Ensure its Authority Post *Comcast v. FCC*

On June 17, 2010, the Federal Communications Commission (“FCC”) issued a Notice of Inquiry seeking comment on the legal framework it can use to regulate broadband. The FCC issued the NOI in response to the D.C. Circuit’s opinion in *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”), in which the Court held that the FCC could not rely on its “ancillary authority” under Title I of the Communications Act of 1934, as amended (the “Act”) to regulate Comcast’s network management practices. The Court’s decision, which arguably delineated the scope of the FCC’s authority under Title I of the Act, presented challenges to the FCC’s ability to carry out its National Broadband Plan.

The FCC’s actions in response to the feedback it receives from the NOI may have a profound impact not only on telecommunications providers, but also on internet service providers (ISPs). In the NOI, the FCC seeks comment on three specific approaches to revamping its legal framework for regulating broadband:

- Whether the FCC should maintain its “information service” classification for broadband Internet services;
- The legal and practical consequences of classifying Internet connectivity service as a “telecommunications service” to which all Title II requirements would apply; and
- The “third way” approach – under which the FCC would (1) reaffirm that Internet services should remain generally unregulated; (2) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (3) apply only the universal service, competition and small business opportunities, and consumer protection policies provisions of Title II to this connectivity service while forbearing from applying all other provisions.

The FCC also seeks comment on any original suggestions in addition to these three approaches. The FCC seeks comment on these same issues also as they relate to terrestrial wireless and satellite broadband Internet services. The FCC also seeks comment on the states’ role with regard to broadband Internet services.

Within each broader category the FCC seeks comment on numerous issues, including, without limitation, the following:

Maintaining Information Services Classification: Under this approach, the FCC seeks comment on whether it could rely on its ancillary authority under Title I to implement the National Broadband Plan, particularly in light of *Comcast*. Among other issues, the FCC seeks comment on the following:

- Whether its ancillary authority, in combination with Section 254 of the Act, is sufficient to reform its universal service program to include broadband Internet service;
- The best approach for ensuring privacy for broadband Internet users and any legal obstacles to protecting privacy if the FCC retains the information services classification for broadband;
- The best approach to extending disability-related protections to broadband Internet service users, and whether the FCC could exercise ancillary authority to ensure access for people with disabilities;
- Whether there are any bases for asserting ancillary authority over broadband Internet service providers for purposes of advancing homeland security and national safety issues; and
- Whether the FCC could address harmful practices by ISPs under its current ancillary jurisdiction and existing provisions of the Act such as sections 251 (interconnection) and 256 (network interoperability).

Reclassification as a Telecommunications Service: Under this approach, the FCC seeks comment on whether the broadband marketplace, and the issues discussed above (*e.g.*, universal service, privacy, disability, homeland security, etc.) necessitate that the FCC reclassify broadband Internet as a telecommunications service. In conjunction with this line of inquiry, the FCC seeks comment on the following:

- Whether reclassification would be consistent with its goals of promoting innovation and investment in broadband, or whether reclassification would result in overregulation;
- The manner in which broadband Internet service (or any telecom component thereof) is offered (*e.g.*, is it offered to the public for a fee), and, whether the FCC has the authority to compel the offering of a broadband Internet service that is not currently offered;
- How consumers use and perceive broadband Internet service;
- How ISPs market their services;
- The technical and functional characteristics of broadband Internet service;
- The level of competition in the marketplace; and
- The consequences of classifying Internet connectivity as a telecommunications service.

“Third Way” Approach: The FCC seeks comment on whether the third approach will constitute a framework for broadband Internet service that is consistent with what the FCC, Congress, consumer groups, and the industry believed the FCC could pursue under Title I before *Comcast*. The FCC also seeks comment on the forbearance prong of this approach, namely identifying the relevant telecommunications services and telecommunications carriers, defining the geographic scope, and identifying the provisions of Title II from which the FCC would forbear.

Each commissioner issued a separate statement in this contentious proceeding. In particular, the FCC's NOI drew sharp criticism from Republican Commissioners McDowell and Baker who both advocate an unregulated Internet. In separate statements, but echoing similar views, Commissioners McDowell and Baker argued that reclassification of broadband under Title II is not only unnecessary but also harmful.

Comments in this proceeding are due July 15, 2010, and reply comments are due August 12, 2010.

Please contact [Jennifer Kashatus](#), [Eric Breisach](#), [Mark Palchick](#) and [Sarah Miller](#) or a member of the [Communications Practice Group](#) if you have any questions regarding this alert.

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