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FCC faces hurdle of Brand X ruling

Five years ago, agency won in its effort to classify broadband as 'substantially unregulated' to preserve free and open Internet; now it seeks opposite classification to achieve same result.

BY OWEN D. KURTIN

On March 16, the Federal Communications Commission issued its National Broadband Plan, a compendium of lofty goals for extending broadband penetration throughout the United States and targeting specific industries and sectors, such as health care and education. See www.broadband.gov. As part of the plan, the FCC explicitly supported the principle of "net neutrality," that of ensuring that Internet backbone providers may not impose premium pricing or discriminatory access upon content and applications providers that use their networks, no matter how heavy their use of the available bandwidth.

Three weeks later, the plan's future was thrown into doubt by the U.S. Court of Appeals for the D.C. Circuit's decision in *Comcast Corp. v. FCC,* No. 08-1291 (D.C. Cir. April 6, 2010). The court ruled, in a major victory for Internet backbone providers such as AT&T Inc., Verizon Communications Inc. and the leading cable operators — and a setback for net-neutrality proponents, including major content and application providers such as Google Inc./YouTube Inc., Amazon.com Inc., eBay Inc. and Facebook Inc. and the FCC itself — that the FCC exceeded its "ancillary authority" under the Communications Act of 1934 in attempting to restrict Comcast's network management practices. The case arose when Comcast subscribers discovered that the cable operator was blocking their use of certain peer-to-peer networking applications, which allow sharing of files without passing through a central server.

On May 6, in reaction to the *Comcast* decision, the FCC announced its intention to reclassify broadband service as Communications Act Title II "telecommunications service," subject to common-carrier nondiscriminatory access rules. Although the decision to reclassify was a victory


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for net-neutrality proponents, it faces the hurdle of the U.S. Supreme Court's decision in *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005), which explicitly upheld the FCC's prior classification of broadband service as a Communications Act Title I "information service" not subject to common-carrier regulation. At the time, the FCC saw the substantially unregulated information-service classification as the way to ensure a free and open Internet, and it sought and received the Supreme Court's approval of that interpretation. Now, five years later, the FCC will be asking courts right up to the Supreme Court to reclassify broadband service as highly regulated telecommunications service for the same reason: to preserve a free and open Internet. It does not figure to be an easy sell.

On May 6, concurrently with the reclassification announcement, Austin Schlick, the FCC general counsel, published an analysis of the *Comcast v. FCC* dilemma in which he advocated basing the reclassification justification on Justice Antonin Scalia's dissent in *Brand X*, which was joined by justices Ruth Bader Ginsburg and David Souter. In essence, Scalia had disputed the *Brand X* majority's decision that the FCC's classification of broadband service as an information service was technologically, and as a matter of statutory interpretation, reasonable; and that the reasonable interpretation of an administrative agency in construing the statute it is charged with administering should be treated with deference by courts and not second-guessed, a doctrine known as the *Chevron* doctrine after the Supreme Court's decision in *Chevron USA v Natural Resources Defense Council*, 467 U.S. 837 (1984).

Scalia, by contrast, took the position that because the "telecommunications," or data transport, aspect of cable modem broadband service could be technically and functionally unbundled from its "information," or data processing, aspect (a conclusion not conceded by the majority), the two aspects should be unbundled legally as well, with the data-transport aspect treated as a telecommunications service subject to Title II common-carrier regulation and the data-processing aspect treated as information service subject to Title I. Scalia did not think much of the administrative agency deference argument, either.

'A THIRD WAY'

The FCC is proposing what it terms "a third way" of dealing with *Comcast* and *Brand X*, between the Title I and Title II poles, effectively appropriating the "administrative agency deference" piece of the *Brand X* majority and the "functional separation should yield legal separation" piece of the *Brand X* dissent. Under the proposal, Title II would apply solely to the data-transport aspect of broadband service, leaving the data-processing aspects subject to Title I and whatever regulatory jurisdiction the "ancillary authority" power provides.

The FCC would then use its "forbearance" power (the mandatory power to forbear from imposing regulation otherwise authorized by statute when forbearance is consistent with the public interest) to tailor the level of Title II regulation as narrowly as possible both to preserve a mostly unregulated Internet but also the net-neutrality policy goal. The FCC enumerates six core Title II provisions that it would seek to apply as part of that tailoring and points out the successful history of similarly tailored Title II forbearance in the case of commercial wireless telecommunications services. In particular, as with wireless, it proposes to forbear from Title II rate regulation.

As stated before, this will be a tough sell. The argument to separate the "telecommunications/data transport" and "information/data processing" components of cable modem service — as well as DSL (digital subscriber line) service — might have been persuasive had the FCC made them at the time of *Brand X*. Instead, the FCC took the position that the components were inseparable. The Supreme Court majority in *Brand X* bought into that view and held that, because there was no Title II authority over the integrated service, there was none over any of its components.

But there is a deeper problem in the proposed third way. Also critically missing from the FCC's aspirational analysis is that the disparate treatment of telecommunications service and information service and deemed inseparability of services with aspects of both in the legislative and regulatory structure is not a recent development, which the FCC now regrets, but a dichotomy long predating the mass-market Internet. Beginning in 1966, the FCC examined the convergence of telecommunications and computer technology in a series of administrative proceedings called the "Computer Inquiries." In the First Computer Inquiry decision, in 1971, the FCC distinguished between communications services in which information was transmitted unaltered, as with simple voice telephony, and data-processing services, in which information was stored, retrieved or altered before, after or during transmission. Communications services were subject to Title II common-carrier regulation, while data-processing services were not.

Common carriers were required to provide "maximum separation" between ordinary communications services and data-processing services in order to prevent them from using revenues from their regulated but market-dominant common-carrier activities to subsidize and unfairly compete in data-processing activities. For "hybrid" services that combined communications and data-processing functions, the FCC decreed a case-by-case analysis to classify the service as regulated or unregulated based on whether it was "primarily" or "essentially" data processing or communications. In other words, the fish-or-fowl determination had to be made; no "unbundling" was allowed.

This formula was updated and the case-by-case approach to "hybrid" services was eliminated in the Second Computer Inquiry in 1980. The FCC established a new, ostensibly "bright line" distinction between regulated "basic" services, in which the transmitted information was not processed or altered in transmission, and unregulated "enhanced" services, in which processing altered the transmission.

The Telecommunications Act of 1996 that amended the Communications Act of 1934 preserved the bright-line distinction drawn by the FCC, separately defining "telecommunications service," which corresponds with "basic service," and "information service," which corresponds with "enhanced service." 47 U.S.C. 153(46), 153(20). The former is subject to common-carrier regulation; the latter is not. In other words, the *Brand X* majority, in treating cable modem service as both indivisible by nature and as an unregulated information service, was upholding not merely a recent FCC rulemaking, but a consistent line of administrative decisions of 40 years' pedigree.

A period of prolonged litigation over the regulatory territory may be unfolding, reminiscent of the post-1996 Telecommunications Act "local competition" wars, with the backbone Internet providers, such as AT&T, Verizon and leading cable operators cast in the incumbent local exchange carrier (ILEC) role, and content and application providers and bandwidth users such as Google/YouTube, Amazon, eBay and Facebook cast in the competitive local exchange carrier (CLEC) role. Needless to say, facing the FCC and the other net-neutrality proponents will be all the arguments and evidence they adduced in support of the opposite position in *Brand X*, the history of the Computer Inquiries and the near certainty that, because of the *Brand X* precedent, the case cannot be won without going back to the Supreme Court.

ANOTHER APPROACH

To avoid that prospect, rather than looking to Scalia's *Brand X* dissent, the FCC could rely upon Justice Clarence Thomas' majority analysis, conducted under the *Chevron* rules. There, Thomas stated: "[A]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice....For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.' "

Net-neutrality proponents would be better served by the FCC accepting the Title I framework, going back to court and taking the position that the still-emerging ramifications of its prior information-service classification of broadband were not clear five years ago, and that deference to its assessment of changing circumstances should be respected in upholding its Title I ancillary authority for carefully tailored broadband regulation. Net-neutrality opponents would probably also prefer the earlier closure that would bring.

The explosive growth in the past 15 years of the Internet as a revolutionary medium of information dissemination, information storage and communication is due to the low barriers to entry that content and applications providers have enjoyed, coupled with the reasonable incentives to invest in building out broadband networks that backbone providers have had. Net neutrality is a critical policy value; it has to be achieved and preserved. The right outcome here is a moderate level of carrierlike regulation that prevents discriminatory access and blocking and preserves low barriers to entry, while avoiding rate regulation. Nondiscriminatory fees do not mean no fees. We can test incentives to invest in broadband networks on an ongoing basis, and the disincentivizing effects of net neutrality claimed by its opponents may be overstated, as they were when the "fiber glut" of 10 years ago was developing.

Of course, what is really needed is legislative action to amend the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to grant the FCC reasonable and limited authority to regulate the network management practices of broadband providers when necessary in the broader public interest. If Congress is ambitious, and a long view is taken, it might even be the occasion to impose the cross-platform and technology-neutral parity that our patchwork and obsolete legislative and regulatory framework so badly needs.

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