

## FCC Law Blog

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### [Comments Received In FCC Reclassification Proceeding](#)

The FCC received thousands of comments last week in response to its Notice of Inquiry (NOI) regarding the appropriate regulatory classification for broadband Internet service. At issue is the hotly-debated topic of whether and how broadband services should be regulated after the DC Circuit's recent *Comcast* decision, which held that the FCC lacked the authority to regulate a broadband service provider's network management practices. See [FCC Law Blog Post](#) (Apr. 7, 2010).

At issue in the NOI are three regulatory alternatives:

1. Maintain the status quo and continue to classify broadband service as an "information service" under Title I, thereby effectively ensuring that the regulation of broadband Internet services will remain extremely light to non-existent.
2. Reclassify broadband service as a "telecommunications service" under Title II and apply the full weight of "common carrier" regulations to broadband providers.
3. Reclassify broadband service as a "telecommunications service" under Title II, but simultaneously forebear from all but a handful of the Title II regulations (an approach that has commonly been referred to as the "Third Way").

The NOI also asks how wireless broadband services should be treated. That is, the NOI does not assume that terrestrial wireless and satellite-based broadband Internet services will necessarily be treated the same as wireline and cable-based technologies.

The Commission is currently split (3-2) on which approach to pursue. The three Democratic Commissioners (Chairman Genachowski and Commissioners Copps and Clyburn) favor the "Third Way." They believe that only through reclassification will the Commission be able implement President Obama's (and Chairman Genachowski's) communications policy initiatives. In particular, in the wake of the DC Circuit's *Comcast* decision, they believe that the FCC needs the additional regulatory authority provided by Title II to achieve its universal service and net neutrality objectives, to advance the goals of the National Broadband Plan, and to implement a variety of consumer protection initiatives.

The two Republican Commissioners (McDowell and Baker) favor the first approach. They prefer maintaining the status quo, keeping broadband service classified as an "information service," and pursuing a largely hands-off approach to regulating the Internet. They fear that reclassification under Title II – even if the "Third Way" is adopted – would create unacceptable regulatory uncertainty, lead to years of litigation, and reduce incentives for investment in broadband infrastructure.

The comments received last week largely mirror these concerns. Public interest groups such as The Center for Media Justice, Consumers Union, and internet search engine giant, Google, support reclassification under Commissioner Genachowski's "Third Way." Some groups, such as the Media Access Project, argue that the "Third Way" does not go far enough. Under Genachowski's proposal, the FCC would forbear from all Title II provisions except Sections 201, 202, 208, 222, 254 and 255. These groups claim that the Commission should go further and "may not and need not forbear from any provisions that place an obligation on the Commission itself and do not constitute regulations applicable to a telecommunications carrier or telecommunications service."

Those in favor of maintaining the currently minimal approach to broadband regulation vigorously object to reclassification of any kind. These commenters predict that any move to reclassify broadband services under Title II will be subject to almost certain legal challenge, and that protracted litigation will inevitably ensue. Opponents also note that the public interest groups that favor reclassification are expected to challenge any attempt by the FCC to restrict the reach of Title II regulation through forbearance. If such a challenge is successful, the broadband industry may experience the worst of both worlds – not only will it now be regulated, but it would be subject to the full array of requirements and prohibitions under Title II. These commenters also note that, even if such challenges to forbearance were to fail, the composition of the FCC is certain to change over time, creating great uncertainty as to whether future Commissioners will choose not to forbear.

Members of Congress have also weighed in. Notably, in a single week, 282 members of Congress (171 House Republicans, 74 House Democrats and 37 Republican Senators) sent letters to Chairman Genachowski urging him to abandon his plans to reclassify broadband as a Title II service. These lawmakers believe that, before any action is taken by the FCC, Congress should be given the opportunity to revise the Communications Act and clarify the FCC's authority in this area – a position with which parties such as AT&T agree, arguing that "the Commission should work with Congress to bring the Communications Act into the 21<sup>st</sup> century." Other Members have threatened to eliminate any funds from the FCC's budget that may be used to implement Chairman Genachowski's "Third Way."

The FCC is asking for reply comments by August 12, 2010 – a deadline that should provide the Commission sufficient time to vote on reclassification before the November mid-term elections.

Authored By:

[Christopher S. Huther](#)

and

[Megan H. Troy](#)

and

Jennie Eskin Ekdahl