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The FCC's Defining Case for Repealing Internet Regulations

by

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The expected blizzard of social media and online commentary has followed the FCC's announced proposal to repeal public utility regulation it imposed on broadband Internet access back in 2015. Yet much of the online chatter ignores the legal issue upon which the FCC's proposed Restoring Internet Freedom Order will stand or fall. The fate of the agency's repeal proposal, if adopted at its Dec. 14 meeting, will come down to definitions of statutory terms.

If broadband Internet access service fits the definition of an "information service" under Title I of Communications Act, then the FCC has no lawful authority to impose public utility regulation on the service. Information services may only be lightly regulated — if at all — under the act, whereas "telecommunications services" under Title II of the act are subject to an arsenal of public utility-like restrictions. "Network neutrality" sloganeering by companies like Netflix and Google, by celebrities, or by millions of robo-spam comments to the FCC cannot substitute for lack of agency authority. Repeal of public utility regulation is the only proper agency response if broadband Internet access service meets the definition of an information service.

Based on a plain reading of the Communications Act, the FCC's draft Restoring Internet Freedom Order presents a convincing, straightforward explanation for why broadband Internet access service is an information service. Title I of the act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The FCC's proposal rightly finds that broadband Internet service providers routinely offer consumers the capability of engaging in all these functions in connection with third-party websites and applications. For instance, by enabling end users to upload photos to websites or create documents on web-hosted platforms, broadband service providers offer capabilities for "generating" information. And by enabling streaming video or file downloads, such providers offer information "acquiring" capabilities.

Also, the FCC's proposal finds that broadband internet service "provides information processing functionalities itself, such as DNS and caching, which satisfy the capabilities set forth in the information service definition." For end users to surf the Web, DNS or "domain name service" functionality provided by broadband service providers translates domain names typed by end users in their browsers into numerical IP addresses that computers can process. Additionally, caching "enables end users to obtain more rapid retrieval of information through networks" based on "complex algorithms to determine what information to store where and in what format."

These "information service" definitions and descriptions may be mind numbing to casual readers. And they hardly make for exciting policy debates or public relations campaigns about Internet freedom or net neutrality. But the extent of the FCC's regulatory authority over broadband Internet access services hinges on the definitions of those terms.

The 2015 Title II Order manufactured new and significantly narrower interpretations of information service-related definitions in the course of redefining broadband Internet service as a telecommunications service. The Title II Order never sufficiently explained those sudden interpretive shifts. The draft Restoring Internet Freedom Order rightfully calls out the Title II Order for "its seemingly end — results driven effort to justify a telecommunications service classification of broadband Internet access service."

Importantly, the Restoring Internet Freedom Order's conclusion that broadband Internet access service meets the definition of an "information service" is strongly backed by earlier agency and court precedents. The Supreme Court's decision in NCTA v. Brand X (2005) appears to have upheld the classification of cable modem Internet access service as an information service based on straightforward statutory interpretation.

Proponents of public utility regulation have pledged support for lawsuits challenging the draft Restoring Internet Freedom Order once it is adopted. But given the FCC proposal's straightforward reading of the Communications Act as well as the Supreme Court's reasoning in Brand X, the agency's conclusion that broadband Internet service meets the statutory definition of an "information service" will almost certainly be upheld in court.

Moreover, if an appellate court applies the deferential Chevron standard of review for agency interpretations of federal statutes, the Restoring Internet Freedom Order's legal validity should be a foregone conclusion. Under the "Chevron doctrine," an agency's interpretation of a statutory provision will be upheld unless it is unreasonable or impermissible. In practice, Chevron poses a near-insurmountable barrier to challenging federal agencies. Even the Title II Order's imposition of public utility regulation based on far-fetched reinterpretation of statutory definitions received extraordinary deference from the D.C. Circuit Court of Appeals in USTelecom v. FCC (2016). Needless to say, if a future appellate court employs a similarly deferential approach, the Restoring Internet Freedom order passes in a cakewalk.

The significant economic and policy issues surrounding repeal of public utility regulation of broadband Internet services makes it easy to overlook the legal issue upon which the entire matter ultimately will turn. But in the end, the FCC's draft Restoring Internet Freedom Order presents a clearly defined case for repeal that should stand on appeal.

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