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Why the FCC's Broadband Plans Got Smacked Down

by

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On April 6, a federal appeals court in Washington handed the Federal Communications Commission a significant defeat when it ruled the agency lacks authority to regulate the network management practices of broadband Internet service providers like Comcast and AT&T. The court vacated an FCC order sanctioning Comcast for what the agency asserted was unjustified interference with a peer-to-peer file sharing video application. Comcast claimed its action had been aimed at managing its network in a way that provided a satisfactory experience for all its subscribers.

While a defeat for the FCC, the unanimous decision was a victory for the rule of law. The court affirmed the fundamental principle that an administrative agency cannot act outside the scope of authority delegated by Congress. The Commission argued that, even though Congress might not have delegated specific authority to regulate Internet providers, it possesses "ancillary" jurisdiction to do so in order to fulfill other statutory responsibilities.

For the court, this claim constituted a bridge too far. If the agency's argument were accepted, the court said, "it would virtually free the Commission from its congressional tether." Under the agency's theory, "we see no reason why the Commission would have to stop there."

Beyond its rule of law implications, the court decision is significant because the FCC had no intention of stopping "there." Indeed, last October it proposed a broader set of so-called net neutrality regulations dictating Internet provider practices. In essence, these new regulations would strictly prohibit Internet providers from "discriminating" in any way in handling traffic on their networks, including charging differential prices for carrying Internet transmissions.

The Commission's problem is that, as the legal basis for the new net neutrality regime, it is relying on the same ancillary jurisdiction theory that the Comcast court just shot down. While the court did not expressly rule out all future such claims, its decision is written in a way as to make it unlikely they would succeed.

So what should the FCC do now? First, reject outright the argument being foisted upon it by the most rigid net neutrality advocates that it should change the regulatory classification of Internet providers to common carriers. The idea is that the Commission's jurisdiction over common carriers is clear.

But in 2002, after thorough examination, the FCC ruled broadband providers should be classified as information services providers so they could avoid the regulatory straightjacket that characterizes common carriage. Since then, the marketplace has thrived. In 2002, approximately 15% of American households had access to broadband; now 95% do. Approximately 90% have a choice of two broadband providers - not even counting satellite or wireless operators. In the last five years, broadband providers have invested over $200 billion building out their networks.

In the face of this success, the FCC would be foolish to take a radical turn backwards by putting Internet providers into a public utility-like regime designed to regulate last century's Ma Bell telephone monopoly. This would discourage investment and innovation and impede the providers' ability to develop new business models responsive to changing consumer demands.

And while classifying Internet providers as common carriers might avoid the ancillary jurisdiction issue, it certainly would not be free from legal doubt. Justifying such an abrupt about-face after the Supreme Court so recently affirmed the agency's 2002 classification decision would not be easy.

The reality is there is no present threat to the openness of the Internet, and the fact that almost all consumers now have a choice of multiple providers makes one unlikely to arise. When the FCC proposed the new net neutrality regulations, it cited only two isolated instances - one of which was the Comcast case - in which allegedly abusive practices had occurred. So there is no need for the Commission to do anything.

But if a majority of the five-member commission nevertheless believes the agency needs some regulatory authority over Internet providers, it should ask Congress to establish a new legislative framework. Any new legislation should restrict the FCC's authority to promulgate overly broad anticipatory restrictions. Instead, the FCC should be granted narrowly-circumscribed authority, upon the filing of a complaint and after an on-the-record adjudication, to prohibit Internet providers that possess substantial, non-

transitory market power from engaging in practices determined to cause demonstrable harm to consumers.

A rule such as this would provide the FCC with a principled, economically-sound basis for adjudicating fact-based complaints alleging that Internet providers have acted in ways that injure consumers. Indeed, this type of market-oriented legislative framework could become a model for refashioning the FCC's mission in a way that recognizes that, in today's dynamic competitive communications marketplace, all FCC regulatory activity should be tied closely to findings that a proven market failure has caused consumer harm.

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