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The FCC and Broadband Regulation: What Part of "No" Did You Not Understand?

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Last week, the Federal Communications Commission's (FCC) plans to regulate broadband Internet services were derailed by a U.S. appeals court, which ruled that the FCC lacks authority over broadband. The decision, while not unexpected, was a crushing defeat for the agency, which has proposed far-reaching "neutrality" rules for Internet providers.

Nevertheless, supporters of Internet regulation are already pushing a Plan B: redefining broadband service as a type of "telecommunications service," a service regulated by the FCC. Such a move would involve some fancy bureaucratic footwork and would be of questionable legality. Even more critically, such a step would threaten the growth of broadband itself. The FCC should instead accept "no" as an answer and allow the Internet to continue to thrive without interference.

Proposed Rules. The general idea behind the FCC's "net neutrality" rules is that the networks providing access to the Internet should be passive (or "dumb") conduits of information and should not filter or differentiate content being sent through them in any way. Proponents argue that such rules are necessary to keep the Internet open to all. Without them, they argue, broadband network owners could slow or even block content from competitors or even content they disagree with politically.

Such concerns are misplaced. Network carriers certainly have the technical capability to block or impede particular services or Web sites. But the fact is that if they abused that capability, users would flock to other providers. This is a real constraint—in most communities consumers have at least two providers offering them service, typically their local telephone company and their local cable company—who compete fiercely. At the same time, a one-size-fits-all ban on differential treatment would hinder efforts to protect networks from congestion and other problems.[1]

Nevertheless, in 2005, the FCC adopted a set of informal guidelines articulating neutrality principles. This past October, the agency proposed codifying and expanding the neutrality mandates as binding regulations.[2]

Horseshoes Jurisdiction. In proposing the new rules, however, the FCC faced a problem. Simply put, no statute gives the FCC any explicit power to regulate the Internet. The Communications Act of 1934—the primary law under which the FCC operates—grants the agency power to regulate "telecommunications service" but not "information services." And in a series of decisions beginning in 2002, the commission ruled that broadband Internet service is the second, not the first. The first of these decisions was litigated up to the Supreme Court, which upheld the commission's judgment.[3]

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To get past this inconvenient jurisdictional gap, the FCC has up until now relied on an odd legal theory known as "ancillary jurisdiction." Under this doctrine, the FCC may regulate in areas where it has not expressly been granted power so long as such regulation is "reasonably ancillary" to areas where is does have authority. Thus, for instance, the FCC in the 1960s was allowed to regulate the then-nascent cable TV industry because of its potential effects on broadcast television. In other words, as in a game of horseshoes, close is good enough for FCC jurisdiction.

Last week, the Court of Appeals for the D.C. Circuit—in a case stemming from an FCC action against Comcast for violating the 2005 guidelines—completely, and correctly, rejected the use of ancillary jurisdiction to justify regulation of broadband service. Citing an earlier precedent, a unanimous panel of judges concluded that the FCC does not have "untrammeled freedom to regulate activities over which the statute fails to confer…Commission authority."

The ruling was a clear victory for the rule of law: No agency should be allowed to impose mandates unless authorized by Congress to do so.

Plan B: Title II. The decision also leaves the FCC searching for a "Plan B" for its efforts to regulate the Internet. The most direct step would be to ask Congress to specifically confer authority. Yet any such legislation would face substantial opposition and be unlikely to pass without significant conditions and delay.

Instead, the most widely discussed approach is for the FCC to reverse its earlier decision and rule that broadband service is a type of "telecommunications service" after all. Then, the FCC would be allowed to regulate broadband comprehensively (as provided under Title II of the Communications Act).

Substantively, it is unclear whether the statute would allow such an interpretation. The definition turns on whether the content being transmitted is modified or processed—a technical test subject to interpretation. But to find now that broadband service is telecommunications would involve a direct reversal of the agency's prior decisions, ones that took years to reach. While there is no rule prohibiting the commission from changing its mind, if it did so precipitously and without offering some rationale, the courts would likely look askance at the move.

A Solution in Search of a Problem. More importantly, a reclassification of broadband service would be the wrong move for consumers and for the future of the Internet. Unlike the monopoly telephone companies for which Title II was crafted, broadband Internet providers operate in a thriving, dynamic, and growing industry. Neither the commission's proposed neutrality rules nor the comprehensive regulation that reclassification would make possible are necessary to protect consumers. The restrictions, however, would limit providers' ability to innovate and manage their networks effectively. And the uncertainty caused by sudden change in the regulatory structure would chill investment in broadband, threatening the FCC's own goal (as expressed in its recent Broadband Plan) of universal access to this new technology.

The FCC should take "no" as an answer, and drop plans to regulate broadband Internet service.

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1. See James L. Gattuso, "Broadband Regulation: Will Congress Neuter the Net?," Heritage Foundation *Backgrounder* No. 1941, June 2, 2006, at *http://www.heritage.org/Research/Reports/2006/06/Broadband-Regulation-Will-Congress-Neuter-the-Net*.
2. See James Gattuso, "Will (and Can) the FCC Regulate the Internet?," The Foundry, September 21, 2009, at *http://blog.heritage.org/2009/09/21/will-and-can-the-fcc-regulate-the-internet*.
3. *National Cable and Telecommunications Association v. Brand X Internet Services*, 535 U.S. 467 (2005).