

FCC Opens Inquiry In Response to Comcast Decision

Thomas W. Cohen, Henry T. Kelly, Chip Yorkgitis, Michael R. Dover

June 18, 2010

Yesterday, the FCC adopted and released its highly anticipated Notice of Inquiry ("NOI") regarding the potential regulatory reclassification of facilities-based broadband Internet access services. This proceeding will explore the "third way" toward regulation that Chairman Genachowski has suggested in response to the recent decision issued by the U.S. Court of Appeals for the D.C. Circuit in the *Comcast* case. Recall that in *Comcast*, the D.C. Circuit rejected the FCC's attempt to rely upon its "ancillary authority" to enjoin a cable operator from degrading its customers' lawful Internet services. This decision placed in doubt the Commission's regulatory authority over Internet access services and related network management practices. The heart of the problem is that the FCC has made a series of rulings over the past decade that have classified broadband Internet access services as "information services" that are exempt from Title II common carrier regulation (an approach upheld by the U.S. Supreme Court in its *Brand X* decision). If the Commission cannot exert "ancillary authority" to regulate such information services, then the FCC could be left with virtually no control over services provided over a broadband platform. Thus, the Chairman has suggested that the Commission must move to a new regulatory model for Internet access services that is neither the current non-regulated Title I approach nor the full panoply of traditional Title II regulation.

The NOI seeks comment in three main areas. First, the FCC seeks input on whether the current "information service" classification remains adequate for the Commission to perform its mission. Second, it seeks comment on the legal and practical consequences of reclassifying so-called "Internet connectivity" (i.e. establishment of a physical connection to the Internet and interconnectivity with the Internet backbone) as "telecommunications service" and then applying all of the regulatory requirements of Title II. Finally, and most importantly, the Commission seeks comment on an in-between position by which a newly defined "Internet connectivity service" that is offered as part of a wired broadband Internet service would be reclassified as a "telecommunications service", but that the Commission would forbear from applying all Title II regulatory authority over it except Section 201 (requiring common carriers to provide services upon reasonable request at just and reasonable rates), Section 202 (forbidding unreasonable discrimination), Section 208 (authorizing the filing of complaints) and Section 254 (applying universal service fund requirements). The FCC also seeks comment on whether similar treatment should be given to terrestrial wireless and satellite broadband Internet services.

This proceeding is sure to be highly controversial. Even though the proceeding has been established only as an Inquiry, the Notice was adopted by a 3-2 vote along strict party lines. Incumbent LECs and cable operators are sure to contest any attempt to re-impose Title II authority, however limited, vigorously. By contrast, many competitive carriers are likely to contend that the so-called "third way" does not go far enough to re-impose Title II requirements. They are, for example, likely to object to the notion that there would be a blanket forbearance from all Section 251-252 interconnection and

unbundling requirements. Public interest organizations and so-called edge-players, also are likely to push for modifications to the proposed “third way” approach. All industry players need to take the matter seriously as the outcome likely will establish the future roadmap for regulating the broadband platforms that are likely to dominate future communications delivery.

Initial comments are due by July 15, 2010. Reply comments must be filed by August 12, 2010. For further information, please contact your Kelly Drye attorney or any other member of the firm’s [Communications practice group](#).