Congress Must Act to Clarify FCC Jurisdiction over Broadband Internet Access

The D.C. Circuit Court of Appeals decision in the Comcast case has put into question the FCC’s legal authority to protect an open Internet and accelerate broadband deployment and adoption. In an attempt to resolve the issues, Chairman Genachowski has proposed reclassification of the transmission portion of broadband Internet access as a Title II common carrier telecommunications service.

CWA believes the “reclassification path” will lead to years of litigation and regulatory uncertainty that will reduce broadband investment and industry jobs. As a result, CWA supports Congressional action to pass narrow, targeted legislation that would affirm FCC authority to protect an open Internet and promote broadband deployment and adoption.

Background: Regulatory Treatment of Broadband Internet Access
Prior to 2002, there was a debate regarding the proper regulatory treatment of broadband Internet access. Was it a Title II telecommunications service like voice telephony subject to extensive common carrier regulation, a more lightly regulated Title I information service, or a hybrid service with Title II (transmission) and Title I (computing functionality) characteristics?

Beginning in 2002, the FCC classified first cable modems (2002), then DSL (2005), and later wireless broadband and broadband over powerline as Title I information services. At the time, the FCC indicated that it would use its “Title I ancillary authority” to protect broadband consumers. [Ancillary authority refers to the FCC’s discretion to adopt rules over Title I communications services that are “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”]

After the FCC classified DSL as a more lightly regulated information service, telecom carriers significantly increased broadband investment, spurring healthy competition between cable and telecom carriers stimulating first-generation broadband expansion.

Comcast as a Test Case of the FCC Open Internet Principles
In 2005, when the FCC deregulated DSL as an information service, it also adopted the Open Internet principles. These principles state that consumers are entitled to access the legal Internet content of their choice; attach any device that does not harm the network; run legal applications and services of their choice; and to have competition among network, application, service, and content providers (all subject to reasonable network management).

May 27, 2010
In 2008, the FCC found Comcast in violation of the Open Internet principles for blocking peer-to-peer large file sharing (the Comcast/BitTorrent case). Comcast challenged the FCC’s legal authority to enforce its Open Internet principles. In April 2010, the D.C. Circuit Court of Appeals ruled in favor of Comcast and found that the FCC had not properly justified its legal authority to enforce the Open Internet principles.

The Comcast decision implicates more than open Internet regulation. Most important, it raises questions regarding the Commission’s legal authority to transform the Universal Service Fund to support broadband.

The Commission’s Three Options
In light of the Comcast decision, the FCC faces three choices to assert jurisdiction over broadband Internet access.

Option 1: Title I – The Regulatory Path Not Chosen
The Comcast court rejected the way the prior FCC justified its Title I ancillary jurisdiction, but left open the possibility that the agency could pass legal muster if it more directly linked its Title I ancillary jurisdiction over broadband to Title II statutory obligations. Many observers believe there is ample legal justification to select this option. For example, the Commission could link its Title I ancillary authority over broadband to its Title II statutory authority to promote universal service. On the other hand, Chairman Genachowski’s general counsel has argued that this path will lead to court challenges and implementation delay. Further, some question whether any Court would uphold universal service support – which the statute limits to “telecommunications carriers” – for Internet access if classified as an information service.

Option 2: Reclassification as Title II – What Chairman Genachowski Proposes
On May 6, Chairman Genachowski proposed to re-classify the transmission portion of broadband Internet access as a Title II telecommunications service. Simultaneously, he proposed that the FCC should “forbear” (not apply) the vast majority of Title II’s 48 provisions to broadband access services. (Because Chairman Genachowski couples reclassification with forebearance, he calls this a “Third Way.”) He proposes to apply only these six sections:

Sections 201, 202, and 203. These are the sections that deal with regulation of rates and practices of telecommunications providers, require interconnection with other carriers, and prohibit “unjust and unreasonable discrimination.” These are the sections that the telecom carriers fear would lead to massive regulation that would reduce their incentives to invest in broadband.

Section 254. This is the section dealing with universal service.

Section 222. This section protects consumers’ confidential information
Section 255. This section requires telecom carriers to make their services and equipment accessible to people with disabilities.

The FCC will initiate a rulemaking process on June 17 with comment period, and then deliberation time preceding an Order.

Reclassification will lead to legal challenge and regulatory uncertainty (up to two years through Supreme Court review) during which time the broadband providers will shift capital away from investment in broadband networks, with serious implication for jobs.

Reclassification with forbearance faces considerable legal hurdles. To justify reclassification, the FCC will have to argue that the market has become less competitive in the five years ago since it ruled that broadband was an information service. Yet, to justify forbearance, the FCC will simultaneously have to argue that the market is sufficiently competitive to relax most of its Title II rules. This Catch-22 legal predicament opens up years of litigation.

**Option 3: Go to Congress – The CWA Proposal**
Given the legal uncertainty, the alternative is to have Congress pass a new statute clarifying the appropriate Commission authority over broadband access. CWA advocates for this approach. On May 24, the chairmen of four Congressional committees and subcommittees that deal with issues pertaining to regulation of broadband Internet access announced that they plan to begin action to update the Communications Act.

CWA welcomes Congressional engagement to clarify regulatory authority over broadband Internet access, and supports passage of a *stand-alone bill* that would establish in the near-term FCC authority to protect an open Internet and promote broadband expansion, investment and job creation.