

UTILITIES AND TELECOMMUNICATIONS ALERT

FCC ADOPTS CONTROVERSIAL PROPOSAL TO REGULATE INTERNET SERVICE PROVIDERS

The FCC announced a new Notice of Inquiry proceeding on Friday “to identify the legal approach that will best support its efforts to ensure universal access to affordable, high-quality broadband services; promote broadband innovation, investment, and competition, and protect and empower consumers.” The Notice of Inquiry was passed with a vote of 3-2, with Commissioners Baker and McDowell dissenting. The announcement comes in further response to a recent decision in the United States Court of Appeals for the D.C. Circuit in which the Court rejected the FCC’s position that it had authority to regulate Comcast’s network management practices using the ancillary jurisdiction provided under Title I of 47 U.S.C. §154. This decision had clear and significant implications for the FCC’s ability to regulate broadband, and particularly the massive National Broadband Plan, using only its ancillary jurisdiction.

FCC Chairman Genachowski issued a statement last month proposing that the FCC reclassify the transmission of data as a “telecommunications service,” which would give the FCC direct authority to regulate it under Title II of the Communications Act. Title II contains 48 provisions, but the proposed reclassification will likely forbear broadband service from all but 6. Proponents of this approach believe that it will eliminate uncertainty by placing the federal policies recommended in the National Broadband Plan on the soundest legal foundation possible, i.e., under the FCC’s direct authority to regulate telecommunications services. Proponents also argue that it is narrowly tailored to regulate only the transmission component of broadband access as opposed to online content.

Opponents counter that only Congress can reclassify services, and that a large bipartisan majority of Congress comprised of at least 291 Members has already asked the FCC to wait for Congress to act. Opponents like the National Cable & Telecommunications Association, which represents the cable industry, argue that there is “little benefit to changing course and great danger in attempting to shoehorn modern broadband services into a Depression-era regulatory regime without serious collateral effects to investment, employment, and innovation.” Similarly, the Small Business & Entrepreneurship Council criticized the proposal by stating “Today’s vote opens the door to a future where government dictates the price and operational models on broadband providers. Such regulation will severely limit small business choices, raise prices, deter broadband deployment and hurt our innovative capacity.”

Comments from the public are due on July 15, 2010, and reply comments are due on August 12, 2010. The Notice of Inquiry, as well as instructions for parties wishing to provide comments to the FCC, will be available at broadband.gov.

The Utilities and Telecommunications Alert is intended to keep readers current on matters affecting utilities and telecommunications issues and is not intended to be legal advice. If you have questions, please contact Daniel Clearfield at 717.237.7173 or dclearfield@eckertseamans.com or Charles Zdebski at 202.659.6605 or czdebski@eckertseamans.com, or any other attorney with whom you have been working.