

On 2014, the United States Court of Appeals-District of Columbia Circuit held that under Section 706 of the Telecommunications Act of 1996, the Federal Communications Commission has "affirmative authority to enact measures encouraging the deployment of broadband infrastructure."

The court also held that the FCC "reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here-that they will preserve and facilitate the "virtuous circle" of innovation that has driven the explosive growth of the Internet-is reasonable and supported by substantial evidence."

While the FCC's has general authority to regulate broadband providers, it cannot impose rules that go beyond what is authorized in the Telecommunications Act. The FCC is prohibited from treating broadband providers as common carriers, according to the court's holding.

The question is, should the FCC impose rules that compel broadband providers to treat traffic the same, no matter the source. Given the role that the Internet in general and broadband providers in particular play in the knowledge markets, the answer is no. When we cut through all the discussions regarding apps, edge providers, content providers, blogs, websites, backbone providers, etc., what we have is an issue of commerce, producers of product, and consumers of product.

Resources used to transport this product, knowledge, like all resources are finite and the FCC should exercise the regulatory humility necessary to allow consumers to determine what types and forms of knowledge are in greatest demand and allow broadband access providers and content and edge providers to establish the strategic partnerships, interconnection agreements, and facilities necessary for getting knowledge to consumers at the speed and capacity agreed upon as the most appropriate given consumer need, willingness, and ability to pay.

As presently written, section 706 of the Telecommunications Act gives the FCC plenty of latitude to to focus on creating an oversight framework that would encourage continued investment in broadband deployment. Section 706(a) reads as follows:

"The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, and in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

The FCC's focus, given its authority to promote deployment of broadband, should be on removing barriers to investment. Onerous, old school, silo-based Title II regulation would create uncertainty in the investment community. Will the FCC delay approval of new devices? Will the FCC weigh in on the pricing of wireless data services? Will the FCC, state, and local authorities channel tax dollars to support municipal broadband to the point where estimated returns on private investment are driven toward negative? These are just a few of the questions entrepreneurs, access providers, and investors will ask themselves if the FCC pursues a regulatory framework that assumes it knows what innovations will be introduced in the future; a framework that assumes a "one size fits all" approach to the broadband industry.

Rather the rules pursuant to the language in Section 706 should lay out how deployment of broadband infrastructure will be measured and determine the level of capital inflows to the markets. Edge and content providers should be able to interconnect to the open architecture of the Internet in ways that best promote their business models. Interconnection agreements should be entered into with utmost autonomy between edge or content providers and broadband access providers. Rules should not discourage strategic partnerships between upstart edge providers and broadband access providers.

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Net neutrality advocates will argue that non-discrimination and non-blocking rules are necessary to codify open Internet principles. I beg to differ. Unless transparency, non-discrimination, and non-blocking rules can be shown to have a direct and substantial impact on the removal of barriers to broadband infrastructure investment, then there is no need for such rules. I have a hard time seeing such a case being made and for the past four years proponents of net neutrality have not even attempted a substantive treatment of the impact of net neutrality rules on investment or job creation in the Internet eco-system.

The FCC should take the opportunity to not only encourage more broadband development by the private sector but to focus on creating a true political economy paradigm that encourages private sector investment unimpeded by ex-ante scrutiny of every network management decision made by broadband access providers.

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