

What's in a Name? Plenty.
Effects of the "Internet Tax Non-Discrimination Act" on Regulatory Classification of
Internet Access Service
by
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In recent days, Section 2(c) of House Bill H.R. 49 and its Senate counterpart, S. 150, have raised concerns regarding whether the "technical clarification" in Section 2(c) effects any change in the classification of internet access service. As discussed below, the "technical clarification" would (1) potentially deprive the states of telephone excise tax revenues, which the Multistate Tax Commission estimates will cost the states up to \$8.5 billion annually, and (2) potentially muddy the water regarding the regulatory classification of internet access service. This later has profound implications for universal service, CALEA, non-discrimination of Internet content, and open access.

In 1998, Congress passed the "Internet Tax Freedom Act" (ITFA), codified at 47 USC 151 note. The Act prohibited the states from levying any tax on providing Internet access service. In passing the ITFA, Congress had to define the term "internet access service."

This had potentially far reaching consequences because regulation by the Federal Communication Commission (FCC), extends to "all interstate and foreign communications by wire or by radio." 47 USC 152. The Communications Act controls how the FCC regulates these communications. The Communications Act is divided into sections, called "Titles." Title I is the FCC's general grant of authority, Title II is wireline telephones and telecommunications services generally, and referred to as "common carrier." Title VI is cable.

The Communication Act requires certain things based on status. Title I entities have no formal obligations unless the FCC explicitly regulates them. Title VI Cable services are protected from various forms of regulation but are subject to different regulations.

Title II telecommunication providers cannot interfere with any transmissions over their lines, must interconnect with rival telecommunications carriers (what telecom lawyers call "non-discrimination"). Also, many Title II providers pay universal service fund (USF) fees. Title II telecom carriers are subject to CALEA and provisions of the USA Patriot Act that require telecom providers to build their networks so that law enforcement agents can monitor them for criminal or terrorist activity (with a proper warrant).

In 1998, most people used dial-up ISPs. ISPs are "information services," and are subject to Title I. Telephone companies are common carriers and subject to Title II. Many in congress were concerned that developing a definition of "internet access provider" for the ITFA would alter the pre-existing regulatory definitions and might

effect how broadband internet access would be defined. So, in 1998, Congress took considerable care to limit its definition of “internet access provider” to the ITFA and to exclude any suggestion that it included telecommunications services. The definition used in 1998 (and still in effect today) is:

The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

ITFA Section 1104(5), 47 USC 151 note.

Now forward ahead five years. The ITFA is set to expire on November 1, 2003. In the interim, a huge fight has developed on how to classify broadband internet access. Is broadband a telecom service or an information service? At the moment, broadband DSL is a Title II telecom service and therefore subject to common carrier rules. That’s why stand alone ISPs, like Earthlink or MSN, can offer DSL broadband access.

Cable broadband, however, has been defined by the FCC as a Title I service. So cable operators like Comcast don’t have to let anyone else on their systems. That’s why you can’t get Earthlink on Comcast, except in the few markets where Comcast has agreed to do allow Earthlink or other independents on their system. Similarly, that’s why cable operators can block or streaming media or prevent you from setting up a virtual private network or stop you from attaching a wi-fi receiver to your cable modem. Title I is unregulated and they can do whatever they want. The FCC has a number of proceedings on broadband in which they propose to do the same thing for DSL (in which case you won’t be able to get independent ISPs like Earthlink or MSN on DSL either).

A large number of people have challenged the FCC’s cable decision in court. The case is pending before the Federal Court of Appeals for the Ninth Circuit.

The definition of internet access provider therefore remains a hugely important, hot button issue. Even more so than in 1998.

On September 17, 2003, the House of Representatives passed “The Internet Tax Non-Discrimination Act,” or H.R. 49. The thrust of the bill is to remove the expiration date for the ITFA and make it permanent. However, in Section 3(c), it contains the following “technical correction.”

The second sentence of Section 1104(5) and 1101(e)(3)(D) are each amended by inserting ‘except to the extent such services are used to provide Internet access’ before the period.

So the new definition of “internet access provider” will now say “such service does not include telecom service, except to the extent such services are used to provide Internet access.”

What does this do? Well, at the least, it would appear that any telecom service used to provide internet access is now free of state taxes. Since it is impossible to tell what part of a telephone line is used for DSL and what part is used for voice, this means that any household subscribing to DSL is exempt from state telephone taxes. The Multistate Tax Commission (www.mtc.gov) estimates that this “clarification” will cost the states between \$4 billion and \$8.5 billion annually by 2006. Hopefully, the telephone companies will remember to pass this savings along to consumers.

Further implications of the change and how it effects the definition of broadband internet access are unclear. Is it a Congressional endorsement of the FCC’s cable modem ruling? Does it change the Communications Act definitions? Does it effect either the pending challenge to the FCC in the Ninth Circuit or the pending proceedings on defining DSL? This is, at present, unclear. Under one reading, nothing changes except that the states lose about \$8 billion annually. On the other hand, supporters of defining broadband as an information service (the cable companies and the baby bells) will certainly argue to the FCC and the federal courts that this should be read as a Congressional endorsement of the FCC’s current approach and a change in the regulatory status of broadband.

While this might seem a stretch, recall that federal courts have just found that there is a First Amendment right to interrupt your dinner. More to the point, the Court of Appeals for the D.C. Circuit, which has before it the FCC’s latest order on DSL line sharing, has displayed considerable hostility to telecom regulation. Indeed, they struck down the previous FCC order on line sharing for DSL by relying on a Supreme Court *descent*. It does not seem a stretch to say that the D.C. Circuit could spin this straw into deregulatory gold for the cable companies and the baby bells, just have they have previously done for the broadcaster networks and the cable companies.

If that happens, what happens to universal service fund? What happens to CALEA? If broadband is indeed a Title II service, terrorists and pornographers will now be able to use encrypted broadband transmissions that law enforcement will be powerless to intercept. (The FBI has filed at the FCC on this issue several times, urging broadband remain a Title II service for precisely this reason.) What happens when all voice traffic becomes voice over internet protocol (VOIP)? Does Title II just disappear, swallowed by the internet access provision?

For a clarification, Section 3(c) raises a lot of troubling questions. Furthermore, the whole manner in which H.R. 49 passed the House raises the suspicion that someone is trying to sneak something through in the dead of night. Rather than coming from the House Energy and Commerce Committee, which has jurisdiction over Internet issues and telecommunications matters, the bill came from the Judiciary Committee – a committee with no relevant jurisdiction. The bill passed on suspension by voice vote, so there is not a single shred of legislative history to explain what this “clarification” is supposed to do.

Indeed, a critical question is *why* does the definition need any clarification? The ITFA has been in effect for almost five years. No one has had any problems with the definition. This does not need to be part of the bill to extend the ITFA. The relevant provisions are all included in the other sections.

The Senate now has before it an identical bill, S.150. the Senate Bill contains the same “clarification.” Hopefully, the Senate will simply remove the clarification and life will continue as normal. If not, then the legislative history should clarify that the change applies only to the ITFA. The states will still lose \$8 billion annually, but at least Congress will making the existing fights over broadband definitions even murkier.

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