

FHH Telecom Law

May 2007

Service Classifications: What's In A Name?

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The FCC at its March meeting adopted an order classifying wireless broadband Internet access as an “information service” rather than a telecommunications service. This may seem like “non-news,” given that the Commission had already adopted a similar classification for wireline broadband Internet access, cable modem internet access and Broadband over Power Line Internet access, but it gives us an opportunity to address, as Commissioners Capps and Adelstein did in their concurring statements, the curious anomalies created by the Commission’s action. A customer can be making a call over a broadband access device that looks and feels pretty much like a cell phone and can be connected in what seems to be a functionally identical way, but the regulatory regime and the rights and obligations underlying that call – both from the customer’s standpoint and the service provider’s – may be radically different.

Basically, an “information service” under the 1996 amendments to the Telecom Act is not a common carrier service. Because it’s not common carriage, it’s free from most of the rules and regulations that apply to common carriers such as rate regulation, non-discrimination obligations, reports, liability for complaints and damages under Title II, etc. This used to be universally considered a good thing because freedom from regulation is the Garden of Eden-like state that telecom companies used to most fervently long for. The FCC’s decision regarding wireless broadband Internet access was a foregone conclusion given its earlier determinations – upheld by the Supreme Court – that other forms of similar Internet access should be classified as information services.

The FCC’s heart here is in the right place: it wants to regulate the Internet with a “light touch” as opposed to the ham-fisted regulatory scheme applicable to common carriers (which itself was a throw-back to regulation of railroads). In reaching this goal, however, the FCC has had to do some contorted statutory interpretations worthy of Gumby. These analyses seem totally result-oriented and could just as easily, if not more easily, have come out the other way. As more and more data and voice services are delivered over the Internet by common carriers as well as ISPs, the distinction between those services and traditional “telecommunications services” (*i.e.*, common carriage) begins to disappear. One begins to wonder if *anything* qualifies as common carriage anymore.

What carriers are increasingly discovering, however, is that many of the privileges and rights they used to enjoy as carriers – the ones that came with unpleasant duties and responsibilities – are endangered by the new classification. Consider the following:

Commercial mobile service providers are deemed to be common carriers, but they have been unregulated as to rates since 1992 and are exempt from much traditional common carrier regulation. The classification of wireless broadband access as non-common carriage thus affords them little added relief from the regulations that currently apply.

On the other hand, new entrants who wish to provide Internet-based services via the Internet – say, for example, Clearwire using 2.5 GHz spectrum – have no obligation to contribute 10% or more of their income to the Universal Service Fund, do not have to file annual and quarterly financial reports, can discriminate in price and services between customers, are exempt from strict protections for customer proprietary information, have reduced obligations to provide access to the disabled, and have limited CALEA and 911 obligations.

But on the third hand, these seemingly footloose and fancy free Internet access providers have no automatic right to pole attachments, are not entitled to be free from discriminatory zoning decisions, do not have an established right for their customers to roam on other providers' systems, do not have a right to non-discriminatory interconnection, may have liability exposure for the content of material transmitted over their systems, and have no absolute right to interconnection. Those are all rights that come only with being a common carrier. At the same time, an information service provider may be obligated to allow any non-harmful device to connect with its network, which may complicate service issues immeasurably.

On the fourth hand – you begin to see how difficult this juggling process is – the FCC's solution to those latter problems is to declare that as long as you are a common carrier for some purpose (such as a CMRS provider), your associated "information services" also qualify for most of the other rights of common carriers. While that approach solves the practical problem for many existing companies who merely want to supplement existing common carrier services with additional information services, it leaves pure information service providers in the cold.

The inevitable fifth hand is that the FCC recognizes that some things like E-911, CALEA, CPNI protection, and access for the disabled are too important to be left unregulated, even though the statute technically does not apply these requirements to information services. So the FCC has had to regulate these types of things under its generalized authority to regulate communications without any clear statutory mandate. The FCC's authority to impose what amounts to common carrier regulation on entities which are not common carriers rests on very thin regulatory ice, and it is only a matter of time before the courts step in to articulate at what point the FCC has gone too far.

Many hands make light work – as Confucius may have said and as 16th Century British proverbist John Heywood reportedly did say – but here many hands make a regulatory hodge-podge which is not intellectually honest and which is inherently unfair to *all* of the industry participants in one way or another. The ultimate solution, of course, is to change the statute to eliminate the disparate treatment between information service

providers and telecommunications carriers. This might easily be accomplished by eliminating altogether the classification of companies as information service providers, treating everybody instead as common carriers, but then layering the attendant rights and duties in accordance with the market power held by different categories of carriers and the importance of the duties to the public.

That particular solution must probably await Congressional intervention. In the meantime, the FCC continues to patch together a collage of regulatory classifications to try to achieve the level of regulation it thinks each service deserves, and it is not a pretty picture.