The Daily Dish

Net Neutrality Again

DOUGLAS HOLTZ-EAKIN | FEBRUARY 4, 2019

Eakinomics: Net Neutrality Again

Yet again the Federal Communications Commission (FCC) finds itself in court (the DC Circuit Court) defending its actions on network neutrality. This time the key question is whether its u-turn on net neutrality — the Restoring Internet Freedom (RIF) Order — was arbitrary and capricious. Recall that in 2015, the FCC reclassified broadband service as Title II service — the moral equivalent of making the Internet a 1930's telephone service — and then applied a series of regulations on the service. It was a drastic change from decades of previous FCC stances and from Congress' own interpretation of the law. When Trump Administration FCC Chairman Pai changed course in late 2017, he put broadband Internet back under Title I, and a number of groups sued. The key issue before the DC Circuit Court was whether the RIF Order was arbitrary and capricious.

In making this decision, the court must first ask: Is the statute's meaning clear? If so, then that meaning is binding. But if the law is ambiguous, then the agency has a wide latitude to interpret the law. This latitude is known as Chevron deference, in reference to the Supreme Court case that set the precedent. If the court isn't satisfied that the agency's interpretation is consistent with the legislative record, the FCC's interpretation can be shot down as being arbitrary and capricious. Historically, the courts almost always side with the agency.

Indeed, when the 2015 Order was under litigation, the judges deferred to the agency's expertise when it reclassified broadband service under Title II, despite the fact that one of the DC Circuit judges pointed out that the 2015 policy was paradoxical, lacked economic and analytical rigor, and was likely to hurt innovation. It would be odd for a court to not rely on the agency's opinion again. The wild card is that this is a new court, so the outcome could be different.

The larger issue is that yet another need for the court to be parsing the arguments means

that the law is ambiguous. At heart, the problem is that Congress has never passed a law making network neutrality legal. It is past time for Congress to step up and solve this problem, putting in place a legal foundation that grants consumers control while still allowing for innovation to flourish on the Internet.