Insight

FCC Fully Staffed: Priorities for the Fall

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Executive Summary

- In early September, the Senate voted to approve the nomination of Anna Gomez, giving the Biden Administration's Federal Communications Commission (FCC) a 3–2 Democratic majority and breaking the two-plus year partisan 2–2 gridlock.
- With a Democratic majority, the FCC will likely take on the more politically contentious policy issues over which the agency has thus far been deadlocked, such as network neutrality, digital discrimination, and reviewing broadcast ownership rules.
- As the FCC begins to take on these more challenging issues, lawmakers should continue to engage in oversight of the agency to ensure it doesn't go beyond its congressionally granted authority.

Introduction

The Biden Administration's Federal Communications Commission (FCC) has for over two years operated with two Democratic and two Republican commissioners. While the agency has moved on a variety of the administration's policy priorities under this regime, partisan deadlock has left it unable to take on more politically challenging policy issues. On September 7, however, the Senate voted to confirm Democratic nominee Anna Gomez, giving Democrats a 3–2 majority.

As the Biden Administration has largely relied on the administrative state to push policy priorities, Congress should continue to engage in oversight of the FCC to ensure it doesn't go beyond its congressionally granted authority – and if it does, invalidate illegal rules. This insight examines three potential issues the agency could choose to tackle post-confirmation, how it would proceed, and Congress' role in overseeing the agency's actions.

Network Neutrality and Broadband Classification

The FCC has long relied on its general authority under Title I of the Communications Act to regulate broadband. The law, however, was written in 1934 and, even with its numerous amendments since then, grants only limited authority to the agency to regulate broadband. Early during the Obama Administration, the FCC issued rules protecting network neutrality – the general concept that broadband providers should treat all Internet traffic equally and not unfairly block legal traffic – but courts struck down these rules under the logic that broadband couldn't be regulated as a common carrier such as voice telephony unless the agency reclassified broadband as a Title II telecommunications service (the designation for common carriers). Proponents of strong network neutrality rules argue that the agency should reclassify broadband as a common carrier, giving the agency significant control over the technology.

If the FCC decides to push forward on the reclassification of broadband as a Title II communications service, lawmakers should exercise stronger oversight of the agency to ensure that it does not go beyond its congressionally granted authority and that, further, it works to produce good policy.

Congress' role here will be vital. First, despite the lack of Title II authority over broadband outside of a brief two-year period from 2015—2017, almost no evidence exists that broadband providers unfairly block or throttle traffic. Broadband providers depend on connecting consumers to the websites and services they wish to see, and blocking or throttling that traffic would anger their users. What's more, as competition in broadband continues to increase, consumers will simply choose to switch to another broadband service if their provider violates the core principles of net neutrality. To the extent broadband providers may design networks in ways that harm consumers, current rules under Title I require them to give consumers information into their network management practices, again incentivizing companies to adhere to network neutrality principles or face market consequences. This market-based approach ultimately allows firms to design their networks in a way that maximizes efficiency and provides the best possible service to consumers.

Second, and more important, the FCC likely lacks the authority to designate broadband a Title II service without a clear grant of such authority from Congress. The broadband classification debates largely stem from disagreements over the definition of telecommunications service, the term used to describe voice telephony. Courts have traditionally deferred to the FCC on its interpretation, but the Supreme Court's decision in *West Virginia v. EPA* casts doubt as to whether the FCC can find the authority to regulate broadband as a utility service using a statute that, for most of its history, primarily applied to voice telephony. If Congress intends for FCC to regulate broadband as a utility, it would

need to do so explicitly.

Of note, reclassification of broadband would not stop at the application of network neutrality regulations and would instead open the door to a wide range other utility regulations. For example, Title II provides for rate regulation of telecommunications service, and the agency has already begun to explore different approaches such as an inquiry into data caps that could prevent internet service providers (ISPs) from charging customers who use the most bandwidth more than other customers. By limiting usage-based billing practices, ISPs may need to charge more across the board, raising costs for customers that utilize less bandwidth. Title II also includes universal service obligation and privacy requirements for common carriers, which again were primarily designed to regulate utility voice telephony service. The FCC previously forbore application many of these provisions to broadband providers, but it could reverse that position in the future. Congress should strike down any rules that exceed the FCC's authority to treat broadband as a common carrier.

Digital Discrimination

In the Infrastructure Investment and Jobs Act (IIJA), Congress directed the FCC to facilitate equal access to broadband, preventing digital discrimination based on income level, race, ethnicity, color, religion, or national origin. Congress also required the FCC to promulgate rules by November 15, 2023, meaning the agency will almost certainly finalize at least an initial set of rules before the end of the year.

At the core of the proceeding is what standard the FCC will use for determining digital discrimination: discriminatory treatment or disparate impact. Discriminatory treatment focuses on intent and whether a firm intended to discriminate based on a protected criterion. Disparate impact, on the other hand, ignores intent to focus solely on whether the effect of a practice results in unequal treatment. The specific directive of the FCC is to facilitate equal access, and a key tool for facilitating such access is further investment in broadband networks. A disparate impact standard could jeopardize this investment as providers would be required to operate under the assumption that any deployments that could have a discriminatory effect, regardless of intention, would violate the law. It is unclear if either Republican commissioner at the FCC would vote in favor of a disparate impact standard, but with a Democratic majority the agency will almost certainly go that direction.

Regardless of the standard the FCC adopts, some progressive advocates suggest the statute gives the agency broad authority to enact rules deemed necessary to facilitate equal access to broadband. Congress should carefully oversee how the FCC attempts to use the statutory authority granted by the law to ensure that it does not engage in rulemakings unrelated to

digital discrimination. Specifically, Congress should overturn rules if the FCC were to use this statute to require universal service or otherwise treat broadband as a regulated utility, even though the provision was a minor part of the IIJA's larger strategy to direct investments into broadband and expand coverage. Even if legal challenges resolve broad regulatory overreach, the costs derived from uncertainty and potential regulation could stifle the fierce competition growing in the broadband market.

Broadcast Ownership

The FCC undergoes a quadrennial review of the media marketplace and examines whether regulations regarding broadcast ownership still serve the public interest. Due to litigation and delays, the 2018 review is still open and the 2022 review has begun. In these reviews, the FCC is primarily looking at limitations on how many broadcast licenses a firm can own in a local market and the effect that consolidation could have on minority- and female-owned stations. Because of the limited number of licenses in a market, if large firms obtain multiple stations, fewer licenses would be available to smaller firms that also wish to broadcast. Preventing consolidation, therefore, could make more licenses available to minority- and female-owned firms.

Nevertheless, these rules stem from an era in which broadcast was the only way to deliver audio and video media to consumers, and there were no alternatives for communities to find content that appealed to them if it was not on broadcast radio or television. Now, with the proliferation of cable television and the Internet, content has never been more accessible, and restrictions on ownership could prevent broadcasters from creating efficiencies through mergers that would allow them to better compete with cable and digital alternatives.

With a Democratic majority, the FCC may go in the other direction and apply additional regulations to broadcasters. For example, the Multicultural Media, Telecom and Internet Council suggests applying cable procurement requirement rules to "[e]ncourage minority and female entrepreneurs to conduct business with all parts of its operation." Additional rules on broadcasters could be warranted, but Congress should keep a close eye on where the FCC decides to take this review. Broadcasters face fierce competition among digital alternatives, and while broadcasters should not get special treatment, they also shouldn't be subject to industry specific regulations unnecessary to promoting interesting and diverse content to consumers.