Insight

No Congress Didn't Give the FCC a Broad Mandate to Regulate Privacy

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As the Federal Communications Commission (FCC) considers applying restrictive privacy rules to Internet service, advocates have been looking back to the passage of the 1996 Telecommunications Act to bolster their argument. By connecting the onerous rules with an inventive reading of the statute's history, the hope is to ground current efforts in a Congressional mandate. What is clear from the record is that the proposed rules aren't an expression of the Congressional mandate. Instead, the drive for broad privacy rules are an expression of an FCC that is grasping for more deferential power.

The Federal Trade Commission (FTC) has long been the regulatory cop in privacy matters but cannot bring actions against common carrier. When the FCC reclassified Internet service, it created this problem. Even though Congress could easily change this provision to allow the FTC to police privacy, the FCC is moving to apply a set of privacy rules via Section 222 of the Telecommunications Act.

An emerging myth claims that a split among the House and the Senate bills shows that broad privacy protection was clearly at the heart of Section 222's writing. In what is now being used repeatedly, "the House bill completely reversed the focus of the Senate bill to focus primarily on consumer privacy protection, with competitive interests a secondary focus." This new reading is wildly out of context, and explicitly at odds with all of the available material.

The committee report that came out of the House clearly explains why the section was created and it wasn't primarily for consumer privacy protection. Much like the Senate, Section 222 was meant to competitively constrain local telephone companies, known as local exchange carriers (LECs). At issue was control over customer subscriber information, which was hugely powerful for marketing purposes. As was explained in the House's report on the bill, "LECs have total control over subscriber list information," and were using this power to charge "excessive and discriminatory prices for subscriber listings," and "imposed unreasonable conditions" on their sale to competitors. Much like the broader 1996 update, Section 222 was designed to ensure consumer subscriber information didn't provide a competitive advantage for some of the incumbent providers. When the House report notes that some provisions "needed for customers to be sure that personal information that carriers may collect is not misused," the misuse refers to the misuse of information for competitive reasons, not a broad privacy mandate like some are now claiming.

Indeed, the House bill did go further than what the Senate had offered, and included a provision directing the Commission to review the impact of converging communications technologies on customer privacy. That section echoes what the FCC is now undertaking in the privacy proceeding, as it would have been the Commission's focus to study the nascent technologies along on three principles:

> These principles are: (1) the right of consumers to know the specific information that is being collected about them; (2) the right of consumers to have proper notice that such information is being used for other

purposes; and (3) the right of consumers to stop the reuse or sale of that information.

Yet, this section was cut from the legislation in negotiations between the Senate and the House. What eventually became law was the Senate's version with some modifications, not the House's version. So, it is a misnomer to think that Section 222 provides a broad privacy mandate. Indeed, the rejection of the House's section that would set the FCC down that path shows that Congressional intent was clearly in opposition to the current agency's efforts. It is that Congressional compromise and history that the FCC and some advocates unilaterally want to rewrite.