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Net Neutrality and Broadband: A New Way Forward?

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Introduction

On December 1, 2010, U.S. Federal Communications Commission Chairman Julius Genachowski announced that the FCC would pursue enactment of rules to ensure unblocked, non-discriminatory access to the Internet, a regulatory scheme known as "Net Neutrality." Net (for "Network," not "Internet") Neutrality is an idea that has emerged during the last five years or so, as so-called "broadband" - wide bandwidth, high speed – Internet service has penetrated the U.S. market, allowing increasing access to rich content applications such as streaming video and music and social media like Facebook and MySpace, which in turn strain the available bandwidth on the networks that carry Internet traffic. Whether Net Neutrality should be guaranteed by law or regulation is one of the most contested issues in communications law and policy.

In essence, Net Neutrality opponents, the owners of the "Internet backbone" - the fibre optic and coaxial cables, routers and switches over which Internet traffic travels, such as Verizon, AT&T and the major cable operators - have argued that they should be free to charge differential rates for high bandwidth users of their networks, and in some cases block some users in favor of others who pay to be hosted. On the other side of the debate, Net Neutrality proponents, the high traffic, content and application providers, such as Google/YouTube, Amazon, E-bay, and Facebook, who do not pay the backbone owners to host their traffic on the networks, joined by consumer groups, have argued that the Internet must remain, as it has been since it emerged as a mass market medium of communications, information storage and information dissemination, an open network that guarantees non-discriminatory access to all users. The Obama Administration and the Genachowski FCC are officially pro-Net Neutrality.

In the December 1 announcement, Chairman Genachowski stated that the FCC would proceed without attempting to reclassify broadband from its existing classification as Communications Act of 1934 Title I "Information Service" to Title II "Telecommunications Service," reversing the FCC's previous position that it would seek broadband reclassification. The decision not to reclassify is a victory for Net Neutrality proponents and common sense, as well as a vindication of the public position this writer took in May in print and in FCC filings. The new rules may be adopted at a full Commission meeting on December 21.

The FCC, in making its announcement, tacitly abandoned the "third way" approach it proposed on May 6, 2010, that of attempting to reverse its own winning position before the U.S. Supreme Court in the 2005 *Brand X* decision, in which it successfully argued that broadband service was Information Service, not subject to telephone-like

common carrier regulation. At the time, the FCC saw the substantially unregulated Information Service classification as the best way to preserve the Internet's open access, low entry barrier structure.

Subsequent events convinced the FCC that it had made a mistake. The April 6 D.C. Circuit U.S. Court of Appeals *Comcast v. FCC* decision threw out the FCC's claim of "ancillary authority" under Title I to impose common carrier-like regulation on broadband service providers, in a case in which the FCC had taken action against cable operator Comcast for blocking the use by subscribers on its cable modem lines of certain peer-to-peer networking software.

The FCC a month later announced the "third way" plan, by which the data transport part of broadband service would be re-classified as Telecommunications Service, but with the FCC exercising its authority to forebear from all but the most basic access-assuring regulation. The data processing aspect of broadband service would be "unbundled" from the data transport part, and would continue to be treated as Information Service. The plan was based on the dissenting opinion in *Brand X*, which contemplated that kind of unbundling.

During the following comment period, this writer published an analysis and filed a public comment with the FCC, that took the position that the FCC's effort was doomed to fail, but not before subjecting the Net Neutrality proponents, opponents and consumers to ten years of litigation much like that which followed the FCC's ill-fated 1996 "Local Competition Order," another attempt at "unbundling" packaged services which ultimately failed to achieve a competitive local telecommunications market. Many other commentators took similar positions.

In particular, I argued that the FCC, having pushed successfully for a broadband Information Service classification only five years ago, and having at the time refuted opponents' attempts to impose a Telecommunications Service classification, taken together with the forty-year history of the "Computer Inquiries" FCC regulatory proceedings, which led inexorably to the *Brand X* decision, would doom the third way reclassification attempt. The new opponents would put before the Court the FCC's own arguments and record of five years ago. I argued instead that the FCC should follow the majority decision in *Brand X,* that the FCC's classification of broadband as Information Service was reasonable and that it should be accorded deference in asserting its statutory ancillary authority. The *Brand X* majority recognized not only ancillary authority as a legitimate way to regulate broadband service but the right of an administrative agency to change its position on regulatory paradigms based on changing conditions and still be afforded judicial deference. It is this position that the FCC has now adopted as the way to proceed in its Net Neutrality rulemaking.

Discussion: The National Broadband Plan and the Comcast Decision

On March 16, the FCC issued its National Broadband Plan[1], a compendium of lofty goals for extending broadband penetration throughout the United States and targeting specific industries and sectors, such as health care and education. Three weeks later, the Plan's future was thrown into doubt by the U.S. Court of Appeals for the D.C. Circuit's April 6 decision in *Comcast Corp. v. FCC*.[2] The Court ruled, in a major victory for Internet backbone providers, and setback for Net Neutrality proponents, that the FCC exceeded its "ancillary authority" under the 1934 Communications Act[3] (the "Communications Act") in attempting to restrict Comcast's (the largest U.S. cable provider and prospective acquirer of NBC Universal) network management practices. The case arose when Comcast subscribers discovered that the cable operator was blocking their use of certain peer-to-peer networking applications, which allow

sharing of files without passing through a central server.

The FCC Reaction: A "Third Way"

On May 6, 2010, in reaction to the Comcast decision, the FCC announced its intention to reclassify broadband service as Communications Act Title II "Telecommunications Service," subject to stringent and detailed common carrier non-discriminatory carriage, access and pricing rules, the way landline telephone service is treated. While the decision to reclassify was a putative victory for Net Neutrality proponents, it was a dead letter because it faced the hurdle of the U.S. Supreme Court's 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,[4] which explicitly upheld the FCC's prior classification of broadband service as Communications Act Title I "Information Service," not subject to common carrier regulation. At the time, the FCC saw the substantially unregulated Information Service classification as the way to ensure a free and open Internet, and it sought and received the Supreme Court's approval of that interpretation. Now, five years later, the FCC proposed to ask courts right up to the Supreme Court to reclassify broadband service as highly regulated Telecommunications Service for the same reason: to preserve a free and open Internet. It did not figure to be an easy sell.

On May 6, 2010, concurrently with the reclassification announcement, Austin Schlick, the FCC General Counsel, published an analysis of the *Comcast v. FCC* dilemma in which he advocated basing the reclassification justification on Justice Scalia's dissent in *Brand X*, which was joined by Justices Ginsburg and Souter. In essence, Justice Scalia had disputed the *Brand X* majority's decision that (i) the FCC's classification of broadband service as Information Service was technologically and as a matter of statutory interpretation reasonable; and (ii) that the reasonable interpretation of an administrative agency in construing the statute it is charged with administering should be treated with deference by courts and not second-guessed, a doctrine known as the *Chevron* doctrine after the Supreme Court's decision in *Chevron USA v Natural Resources Defense Council*.[5] Justice Scalia, by contrast, took the position that because the "telecommunications," or data transport, aspect of cable modem service could be technically and functionally unbundled from its "information," or data processing, aspect (a conclusion not conceded by the majority), the two aspects should be unbundled legally as well, with the data transport aspect treated as Telecommunications Service subject to Title II common carrier regulation and the data processing aspect treated as Information Service subject to Title I. Justice Scalia did not think much of the administrative agency deference argument, either.

The FCC proposed what it termed "a third way" of dealing with *Comcast* and *Brand X*, between the Title I and Title II poles, effectively appropriating the "administrative agency deference" piece of the *Brand X* majority and the "functional separation should yield legal separation" piece of the *Brand X* dissent. Under the proposal, Title II would apply solely to the data transport aspect of broadband service, leaving the data processing aspects subject to Title I and whatever regulatory power the "ancillary authority" power provides. The FCC would then use its "forbearance" power (the power to forbear from imposing regulation otherwise authorized by statute when forbearance is consistent with the public interest) to tailor the level of Title II regulation as narrowly as possible both to preserve a mostly unregulated Internet but consistent with the Net Neutrality policy goal. The FCC enumerated six core Title II provisions that it would seek to apply as part of that tailoring, and pointed out the successful history of similarly tailored Title II forbearance in the case of commercial wireless telecommunications services. In particular, as with wireless, the FCC proposed to forbear from Title II rate regulation.

Why the "Third Way" Was Doomed to Fail: The Computer Inquiries Legacy

This author argued in a published articleand a public comment filed with the FCC that the third way would be a tough sell.[6] The argument to separate the "telecommunications/data transport" and "information/data processing" components of cable modem service (as well as DSL - digital subscriber line – service, which the FCC had classified as Information Service shortly after the *Brand X* decision, to give it regulatory parity with the cable modem service at issue in *Brand X*) might have been persuasive had the FCC made them at the time of *Brand X*. Instead, the Commission took the position that the components were inseparable. The Supreme Court majority in *Brand X* accepted that view, and held that because there was no Title II authority over the integrated service, there was none over any of its components.

But there was a deeper problem in the proposed third way. Also critically missing from the FCC's analysis was that the disparate treatment of Telecommunications Service and Information Service and deemed inseparability of services with aspects of both in the legislative and regulatory structure is not a recent development, which the FCC now regrets, but a dichotomy long pre-dating the mass market Internet. Beginning in 1966, the FCC examined the convergence of telecommunications and computer technology in a series of administrative proceedings called the "*Computer Inquiries*." In the *First Computer Inquiry* decision, in 1971,[7] the FCC distinguished between communications services in which information was transmitted unaltered, as with simple voice telephony, and data processing services, in which information was stored, retrieved, or altered before, after, or during transmission. Communications services were subject to Title II common carrier regulation, while data processing services were not. Common carriers were required to provide "maximum separation" between ordinary communications services and data processing services in order to prevent them from using revenues from their regulated but market-dominant common carrier activities to subsidize and unfairly compete in data processing activities. For "hybrid" services that combined communications and data-processing functions, the Commission decreed a case-by-case analysis to classify the service as regulated or unregulated based on whether it was "primarily" or "essentially" data processing or communications. In other words, the fish-or-fowl determination had to be made; no "unbundling" was allowed.

This formula was updated and the case-by-case approach to "hybrid" services was eliminated in the *Second Computer Inquiry* in 1980.[8] The FCC established a new, ostensibly "bright line" distinction between regulated "basic" services, in which the transmitted information was not processed or altered in transmission, and unregulated "enhanced" services, in which processing altered the transmission.[9]

The 1996 Telecommunications Act,[10] structured as an amendment to the Communications Act, preserved the bright line distinction drawn by the FCC, separately defining "Telecommunications Service,"[11] which corresponds with "basic services," and "Information Service,"[12] which corresponds with "enhanced services." The former is subject to common carrier regulation; the latter is not. In other words, the *Brand X* majority, in treating cable modem service as both indivisible by nature and as unregulated Information Service, was upholding not merely a recent FCC rulemaking, but a consistent line of administrative decisions of nearly forty years' pedigree. By accident of history, the 1996 Telecommunications Act, the first comprehensive piece of telecommunications and broadcasting legislation since the 1934 Communications Act, was debated, passed out of Congressional committee and enacted at the very time that Mosaic, the first consumer Internet browser, was turning the Internet and World Wide Web into the mass market phenomenon that it has become, a scant fifteen

years later. Consequently, the 1996 Act takes virtually no account of the Internet, and was functionally obsolete from the moment it became law.

A Better Prescription

As this writer warned, the "third way" approach was a dead letter, given the *Brand X* and *Computer Inquiries* precedents. It risked provoking a period of prolonged litigation over the regulatory territory, reminiscent of the post-1996 Telecommunications Act "local competition" wars, with the backbone Internet providers cast in the incumbent local exchange provider ("ILEC") role, and content and application providers cast in the losing competitive local exchange carrier ("CLEC") role. All the arguments and evidence the FCC and its allies marshaled in support of the broadband Information Service classification in *Brand X* and the history of the *Computer Inquiries* would have been brought into play in opposition to the reclassification effort. Because of the *Brand X* precedent, the reclassification case could not be won without going back to the Supreme Court, where reversals of recent decisions are nearly always long shots.

Now that the "third way" approach and reclassification has been abandoned, the FCC should, as this writer suggested, rather than look to Justice Scalia's *Brand X* dissent, rely upon Justice Thomas' majority analysis, conducted under the *Chevron* rules. There, Justice Thomas stated that:

> [A]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice . . . . For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'

Net Neutrality proponents will be better served by the FCC accepting the Title I framework, going back to court and taking the position that the still-emerging ramifications of its prior broadband Information Service classification were not clear five years ago, and that deference to its assessment of changing circumstances should be respected in upholding its Title I ancillary authority for carefully tailored broadband regulation. Net Neutrality opponents will probably also prefer the earlier closure that would bring.

Conclusion

The explosive growth in the last fifteen years of the Internet as a revolutionary medium of information dissemination, information storage and communications is due to the low barriers to entry that content and applications providers have enjoyed, coupled with the reasonable incentives to invest in building out broadband networks that backbone providers have had. Net Neutrality is a critical policy value; it has to be achieved and preserved. It must be possible to structure a moderate level of carrier-like regulation that prevents discriminatory access and blocking and preserves low barriers to entry, while avoiding rate regulation and preserving incentives to build out high speed networks. In any event, the disincentivizing effects of Net Neutrality may be overstated, as they were when the "fiber glut" of ten years ago was developing.

The FCC's December 1 announcement opens the way to a rulemaking guaranteeing basic principles of Net Neutrality that Internet backbone providers may hesitate to categorically oppose, lest the Supreme Court, once revisited, decide that they are overreaching and that the *Brand X* decision can be reasonably extended by affirming to that limited extent the FCC's Title I ancillary authority. The rulemaking will probably also rely on 1996

Telecommunications Act's. 706 authority to ensure broadband deployment (one of the 1996 Act's only treatments of the Internet). It is not a guarantee of Net Neutrality, but it offers better odds than did the reclassification third way proposal. Industry leaders on both sides of the debate have expressed cautious support. A wildcard is the new Republican majority in the U.S. House of Representatives, which may categorically oppose any Net Neutrality rules, even ones supported by the backbone providers.

Of course, what is really needed is legislative action to amend the 1934 Communications Act, as amended by the 1996 Telecommunications Act, to grant the FCC reasonable and limited authority to regulate the network management practices of broadband providers where necessary in the broader public interest. If Congress is ambitious, and a long view is taken, it might even be the occasion to impose the cross-platform- and technology-neutral parity that our patchwork and obsolete legislative and regulatory framework so badly needs and which this writer has for so long urged.

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[1] National Broadband Plan, *available at* www.broadband.gov (last visited Dec. 8, 2010).

[2] 600 F.3d 642 (D.C. Cir. 2010).

[3] Pub. L. No. 73-416, 48 Stat. 1064 (1934), codified as amended at 47 U.S.C. § 151 *et seq*.

[4] 545 U.S. 967 (2005).

[5] 467 U.S. 837 (1984).

[6] "FCC Faces Hurdle of 'Brand X' Ruling," The National Law Journal, May 31, 2010, available at http://www.kurtinlaw.com/articles-whitepapers(last visited Dec. 8, 2010).

[7] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973).

[8] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980), *reconsideration*, 84 F.C.C.2d 50 (1981), *further reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom*. *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *aff'd on second further reconsideration*, 56 Rad. Reg. 2d (P&F) 301 (1984).

[9] In the *Third Computer Inquiry*, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 F.C.C.2d 958 (1986), the FCC attempted to relax its *Second Computer Inquiry* structural separation requirements, which mandated "separate" subsidiaries for non-regulated activities, and replace them with non-structural safeguards. The U.S. Court of Appeals for the Ninth Circuit overturned the FCC, ruling that no justification for the relaxation of the structural separation requirement had been shown (*California v. FCC*, 905 F.2d 1217 (9th Cir. 1990)). However, separate subsidiaries were never restored.

[10] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[11] 47 U.S.C. § 153(46).

[12] 47 U.S.C. § 153(20).