

THE THIRD WAY: A NARROWLY TAILORED BROADBAND FRAMEWORK

Chairman Julius Genachowski
Federal Communications Commission
May 6, 2010

Many have asked about the FCC's next steps in view of the recent decision in the *Comcast* case. I'll describe here a path forward, which will begin with seeking public comment on a post-*Comcast* legal foundation for the FCC's approach to broadband communications services. The goal is to restore the broadly supported status quo consensus that existed prior to the court decision on the FCC's role with respect to broadband Internet service.

This statement describes a framework to support policies that advance our global competitiveness and preserve the Internet as a powerful platform for innovation, free speech, and job creation. I remain open to all ideas on the best approach to achieve our country's vital goals with respect to high-speed broadband for all Americans, and the Commission proceeding to follow will seek comment on multiple legal theories and invite new ideas.

The FCC's Mission

More than 75 years ago, Congress created the Federal Communications Commission with an explicit mission: "to make available, so far as possible, to all people of the United States . . . A rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting the safety of life and property through the use of wire and radio communication."

In the decades since, the technologies of communications have changed and evolved—from telephone, radio, and broadcast TV to cable, satellite, mobile phones, and now broadband Internet. With the guidance of Congress, the Commission has tailored its approach to each of these technologies. But the basic goals have been constant: to encourage private investment and the building of a communications infrastructure that reaches all Americans wherever they live; to pursue meaningful access to that infrastructure for economic and educational opportunity and for full participation in our democracy; to protect and empower consumers; to promote competition; to foster innovation, economic growth, and job creation; and to protect Americans' safety.

The Consensus Understanding of the FCC's Role with Respect to Broadband

A challenge for the FCC in recent years has been how to apply the time-honored purposes of the Communications Act to our 21st Century communications platform—broadband Internet—access to which is generally provided by the same companies that provide telephone and cable television services.

Broadband is increasingly essential to the daily life of every American. It is fast becoming the primary way we as Americans connect with one another, do business, educate ourselves and our children, receive health care information and services, and express our opinions. As a unanimous FCC said a few weeks ago in our *Joint Statement on Broadband*, "Working to make sure that America has world-leading high-speed broadband networks—both wired and wireless—lies at the very core of the FCC's mission in the 21st Century."

Over the past decade and a half, a broad consensus in the public and private sectors has developed about the proper role and authority for the FCC regarding broadband communications. This bipartisan consensus, which I support, holds that the FCC should adopt a restrained approach to broadband

communications, one carefully balanced to unleash investment and innovation while also protecting and empowering consumers.

It is widely understood—and I am of the view—that the extreme alternatives to this light-touch approach are unacceptable. Heavy-handed prescriptive regulation can chill investment and innovation, and a do-nothing approach can leave consumers unprotected and competition unpromoted, which itself would ultimately lead to reduced investment and innovation.

The consensus view reflects the nature of the Internet itself as well as the market for access to our broadband networks. One of the Internet's greatest strengths—its unprecedented power to foster technological, economic, and social innovation—stems in significant part from the absence of any central controlling authority, either public or private. The FCC's role, therefore should *not* involve regulating the Internet itself.

Consumers do need basic protection against anticompetitive or otherwise unreasonable conduct by companies providing the broadband access service (e.g., DSL, cable modem, or fiber) to which consumers subscribe for *access* to the Internet. It is widely accepted that the FCC needs backstop authority to prevent these companies from restricting lawful innovation or speech, or engaging in unfair practices, as well as the ability to develop policies aimed at connecting all Americans to broadband, including in rural areas.

The Broadband Policy Agenda

Consistent with this consensus view of the FCC's role, Congress last year directed the FCC to develop America's first National Broadband Plan, which we delivered in March. And I have described over the past months the policy initiatives I believe are of crucial importance to our global competitiveness, job creation, and broad opportunity. These include:

- Extending broadband communications to all Americans, in rural and urban America and in between, by transforming the \$9 billion Universal Service Fund from supporting legacy telephone service to supporting broadband communications service;
- Protecting consumers and promoting healthy competition by, for example, providing greater transparency regarding the speeds, services, and prices consumers receive, and ensuring that consumers—individuals as well as small businesses—are treated honestly and fairly;
- Empowering consumers to take control of their personal information so that they can use broadband communications without unknowingly sacrificing their privacy;
- Lowering the costs of investment—for example, through smart policies relating to rights-of-way—in order to accelerate and extend broadband deployment;
- Advancing the critical goals of protecting Americans against cyber-attacks, extending 911 coverage to broadband communications, and otherwise protecting the public's safety; and
- Working to preserve the freedom and openness of the Internet through high-level rules of the road to safeguard consumers' right to connect with whomever they want; speak freely online; access the lawful products and services of their choice; and safeguard the Internet's boundless promise as a platform for innovation and communication to improve our education and health care, and help deliver a clean energy future.

At the same time, I have been clear about what the FCC should *not* do in the area of broadband communications: For example, FCC policies should not include regulating Internet content, constraining reasonable network management practices of broadband providers, or stifling new business models or managed services that are pro-consumer and foster innovation and competition. FCC policies should also recognize and accommodate differences between management of wired networks and wireless networks,

including the unique congestion issues posed by spectrum-based communications. The Internet has flourished and must continue to flourish because of innovation and investment throughout the broadband ecosystem: at the core of the network, at its edge, and in the cloud.

These policies reflect an essential underlying regulatory philosophy:

- A strong belief in the free market and in private investment as essential and powerful engines of economic growth;
- An embrace of the view that a healthy return on investment is a necessary and desirable incentive to risk-taking and deployment of capital;
- A recognition of the powerful role entrepreneurs, innovators, startups and small businesses must play in fueling American economic success; and
- An understanding that government has a vital but limited role in advancing common goals, for example by helping tackle core infrastructure and public safety challenges; providing basic rules of the road to enable markets to work fairly; acting in a properly calibrated way when necessary to protect consumers and promote competition, investment, and innovation—and otherwise getting out of the way of the entrepreneurial genius and free market that is America’s greatest competitive advantage.

Implications of *Comcast v. FCC*

The recent court opinion in *Comcast v. FCC* does not challenge the longstanding consensus about the FCC’s important but restrained role in protecting consumers, promoting competition, and ensuring that all Americans can benefit from broadband communications. Nor does it challenge the commonsense policies we have been pursuing.

But the opinion does cast serious doubt on the particular legal theory the Commission used for the past few years to justify its backstop role with respect to broadband Internet communications. The opinion therefore creates a serious problem that must be solved so that the Commission can implement important, commonsense broadband policies, including reforming the Universal Service Fund to provide broadband to all Americans, protecting consumers and promoting competition by ensuring transparency regarding broadband access services, safeguarding the privacy of consumer information, facilitating access to broadband services by persons with disabilities, protecting against cyber-attacks, ensuring next-generation 911 services for broadband communications, and preserving the free and open Internet.

The legal theory that the *Comcast* opinion found inadequate has its roots in a series of controversial decisions beginning in 2002 in which the Commission decided to classify broadband Internet access service not as a “telecommunications service” for purposes of the Communications Act, but as something different—an “information service.”

As a result of these decisions, broadband became a type of service over which the Commission could exercise only indirect “ancillary” authority, as opposed to the clearer direct authority exercised over telecommunications services. Importantly, at the time, supporters of this “information services” approach clearly stated that the FCC’s so-called “ancillary” authority would be more than sufficient for the Commission to play its backstop role with respect to broadband access services and pursue all sensible broadband policies.

The Commission’s General Counsel and many other lawyers believe that the *Comcast* decision reduces sharply the Commission’s ability to protect consumers and promote competition using its “ancillary” authority, and creates serious uncertainty about the Commission’s ability, under this approach, to perform

the basic oversight functions, and pursue the basic broadband-related policies, that have been long and widely thought essential and appropriate.

This undermining of settled understandings about the government’s role in safeguarding our communications networks is untenable. Since the decision, lawyers from every quarter of the communications landscape have been debating a difficult and technical legal question: What is the soundest and most appropriate legal grounding to let the FCC carry out what almost everyone agrees to be necessary functions regarding broadband communications?

The Conventional Options

Two primary options have been debated since the *Comcast* decision:

One, the Commission could continue relying on Title I “ancillary” authority, and try to anchor actions like reforming universal service and preserving an open Internet by *indirectly* drawing on provisions in Title II of the Communications Act (e.g., sections 201, 202, and 254) that give the Commission direct authority over entities providing “telecommunications services.”

Two, the Commission could fully “reclassify” Internet communications as a “telecommunications service,” restoring the FCC’s direct authority over broadband communications networks but also imposing on providers of broadband access services dozens of new regulatory requirements.

I have serious reservations about both of these approaches.

The FCC General Counsel advises that under the first option, continuing to pursue policies with respect to broadband Internet access under the ancillary authority approach has a serious risk of failure in court. It would involve a protracted, piecemeal approach to defending essential policy initiatives designed to protect consumers, promote competition, extend broadband to all Americans, pursue necessary public safety measures, and preserve the free and open Internet.

The concern is that this path would lead the Commission straight back to its current uncertain situation—and years will have passed without actually implementing the key policies needed to improve broadband in America and enhance economic growth and broad opportunity for all Americans.

Meanwhile, the second option, fully reclassifying broadband services as “telecommunications services” and applying the full suite of Title II obligations, has serious drawbacks. While it would clarify the legal foundation for broadband policy, it would also subject the providers of broadband communications services to extensive regulations ill-suited to broadband. Title II, for example, includes measures that, if implemented for broadband, would fail to reflect the long-standing bipartisan consensus that the Internet should remain unregulated and that broadband networks should have only those rules necessary to promote essential goals, such as protecting consumers and fair competition.

Accordingly, I directed the FCC General Counsel and staff to identify an approach that would restore the status quo—that would allow the agency to move forward with broadband initiatives that empower consumers and enhance economic growth, while also avoiding regulatory overreach. In short, I sought an approach consistent with the longstanding consensus regarding the limited but essential role that government should play with respect to broadband communications.

I am pleased the General Counsel and staff have identified a third-way approach—a legal anchor that gives the Commission only the modest authority it needs to foster a world-leading broadband

infrastructure for all Americans while definitively avoiding the negative consequences of a full reclassification and broad application of Title II.

A Third Way

As General Counsel Austin Schlick explains more fully in his statement today, under this narrow and tailored approach, the Commission would:

- Recognize the transmission component of broadband access service—and only this component—as a telecommunications service;
- Apply only a handful of provisions of Title II (Sections 201, 202, 208, 222, 254, and 255) that, prior to the *Comcast* decision, were widely believed to be within the Commission’s purview for broadband;
- Simultaneously renounce—that is, forbear from—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and
- Put in place up-front forbearance and meaningful boundaries to guard against regulatory overreach.

This approach has important virtues.

First, it will place federal policy regarding broadband communications services, including the policies recommended in the National Broadband Plan, on the soundest legal foundation, thereby eliminating as much of the current uncertainty as possible. From reorienting the Universal Service Fund to support broadband in rural America, to adopting focused consumer protection and competition policies, to promoting public safety in a broadband world, this approach would provide a solid legal basis. In particular, it would allow broadband policies to rest on the Commission’s direct authority over telecommunications services while also using ancillary authority as a fallback.

Second, the approach is narrow. It will treat only the transmission component of broadband access service as a telecommunications service while preserving the longstanding consensus that the FCC should not regulate the Internet, including web-based services and applications, e-commerce sites, and online content.

Third, this approach would restore the status quo. It would not change the range of obligations that broadband access service providers faced pre-*Comcast*. It would not give the FCC greater authority than the Commission was understood to have pre-*Comcast*. And it would not change established policy understandings at the FCC, such as the existing approach to unbundling or the practice of not regulating broadband prices or pricing structures. It would merely restore the longstanding deregulatory—as opposed to “no-regulatory” or “over-regulatory”—compact.

Fourth, the approach would establish meaningful boundaries and constraints to prevent regulatory overreach. The FCC would invoke only the few provisions necessary to achieve its limited but essential goals. Notably, these are the very same provisions (sections 201, 202, and 254, for example) that telephone and cable companies agree the FCC should invoke, albeit indirectly under an “ancillary authority” approach. The Commission would take steps to give providers and their investors confidence and certainty that this renunciation of regulatory overreach will not unravel while also giving consumers, small businesses, entrepreneurs and innovators the confidence and certainty they need and deserve. Since Congress gave the Commission forbearance authority 17 years ago, the Commission has never reversed or undone a forbearance decision.

Fifth, the approach is familiar and has worked well in an analogous context—wireless communications. In its approach to wireless communications, Congress mandated that the FCC subject wireless communications to the same Title II provisions generally applicable to telecommunications services while also directing that the FCC consider forbearing from the application of many of these provisions to the wireless marketplace. The Commission did significantly forbear, and the telecommunications industry has repeatedly and resoundingly lauded this approach as well-suited to an emerging technology and welcoming to investment and innovation. In short, the proposed approach is already tried and true.

Sixth, this approach would allow the Commission to move forward on broadband initiatives that are vital for global competitiveness and job creation, even as it explores with Congress and stakeholders the possibility of legislative clarification of the Communications Act. The Communications Act as amended in 1996 anticipated that the FCC would have an ongoing duty to protect consumers and promote competition and public safety in connection with broadband communications. Should congressional leaders decide to take up legislation in the future to clarify the statute and the agency's authority regarding broadband, the agency stands ready to be a resource to Congress as it considers any such legislative measures. In the interim, however, this approach would ensure that key initiatives to address pressing national challenges can move forward.

I will ask my Commission colleagues to join me in soon launching a public process seeking comment on this narrow and tailored approach. The proceeding will seek comment regarding the Title I and Title II options discussed above, will seek input on important questions such as whether wired and wireless broadband access should be treated differently in this context, and will invite new ideas. As we move forward, my focus will be on the best method for restoring the shared understanding of FCC authority that existed before the *Comcast* decision and for putting in place a solid legal foundation for achieving the policy goals that benefit consumers and our economy in the most effective and least intrusive way.

The state of our economy and recent events are reminders both of the need to be cautious and the necessity of a regulatory backstop to protect the American people. I stand ready to explore all constructive ideas and expect those who engage with us to do so constructively as well. The issues presented by the *Comcast* decision are a test of whether Washington can work—whether we can avoid straw-man arguments and the descent into hyperbole that too often substitute for genuine engagement.

The *Comcast* decision has created a serious problem. I call on all stakeholders to work with us productively to solve the problem the *Comcast* decision has created in order to ensure a solid legal foundation for protecting consumers, promoting innovation and job creation, and fostering a world-leading broadband infrastructure for all Americans.

--FCC--