



## **Questions for FCC Chairman Genachowski from Informed Consumers: Where Are the Links between Your Policies and Consumer Welfare?**

*In a long, meandering, and hastily prepared statement released May 6, 2010, FCC Chairman Genachowski attempted to explain his rationale for imposing additional regulations on providers of broadband network access services. It is his response to a DC Circuit Court ruling setting aside FCC claims of statutory authority to pursue its net neutrality related regulatory ambitions. Its purpose is to explain the Chairman's logical, public interest rationale for his, and presumably, the FCC's continued pursuit of efforts to regulate rate and service offerings of providers of Internet access in the mode of traditional telephone common carrier regulation.*

*This ConsumerGram considers the logical, analytical and factual elements of the Chairman's statement. It focuses on the "missing links" between what is proposed and a) the goals set out in the statement and b) the facts now before the Commission.*

### **Introduction**

Most of FCC Chairman Genachowski's recent eight page, 3,000+ word statement is classic "Washington Speak" highlighting the obvious and emphasizing the extraneous, while shrouding the underlying purposes and implications of actions being taken. The Chairman mentions consumers one time and then in context of a declaration of market failure that is not supported by facts or analysis in the record: "Consumers do need basic protection against anticompetitive or otherwise unreasonable conduct by companies providing the broadband access service..." There is no mention of the well documented costs to consumers of the regulatory course of action he will pursue.

The Chairman repeatedly refers to long standing, consensus goals of national telecom policies – investment, competition, universal access, reliance on markets, primacy of consumer welfare, and others. He repeats approvingly almost word for word many of the talking points of advocates for free markets. Having done that, the remainder of the statement ignores the voluminous factual record on these matters submitted in response to several past Commission Notices about the negative impact on these goals of a more interventionist FCC approach. The Chairman nonetheless commits the agency to a course of action that will almost certainly undermine the cited goals.

### **The Missing Link**

Notably missing from the statement is any link between means (more FCC regulation) and ends (more investment, more innovation, more competition, greater consumer welfare, etc.) The reason is in equal parts obvious and distressing. There is not a shred of evidence that more

regulation – light, heavy or in between -- will advance any of these goals. None. And, not surprisingly, the statement does not cite any such evidence, despite the Chairman’s repeated insistence that parties provide facts and analysis, while eschewing rhetoric and talking points, in support of their policy recommendations.

The Chairman is burdened by lack of evidence in the record linking more regulation to any of the goals he claims to embrace. With only rare exceptions, advocates of more regulation do not even attempt to provide linkages between regulation and consensus goals. They have chosen instead to invoke the need for and value of *neutrality*; of *openness*; of *nondiscrimination*; of mysterious *network design principles*; and other equally vague, immeasurable and fundamentally irrefutable notions. “Net Neutrality?” How do you argue against that other than by stating the obvious: Nothing is neutral!

The proposed rules the Chairman is defending here are not neutral and he makes no effort to defend them on those grounds. Indeed, the term neutrality does not appear in the entire statement, despite its use for years to characterize the very actions the Chairman intends. One reason the Chairman does not embrace the rhetoric of neutrality is because the proposed rules are clearly not neutral. The record makes clear that they create winners and losers.

### **Winners and Losers from the Chairman’s Proposals**

The big losers are consumers. They lose in the first instance because the proposal requires that they, and only they, must pay effectively the entire bill for building out broadband networks. The rules supported by the Chairman’s proposal will prohibit broadband companies from reducing subscriber rates from revenues received by charging other stakeholders who use networks to create value for their customers. These include companies who provide, and derive revenue and profits from, services offered over broadband networks.

But the consumer damage is not limited to the requirement that they and only they are obliged to pay for the lion’s share of the costs of providing broadband networks. Consumers will be penalized further by delay in building out high capacity, universal broadband networks. Numerous investment analysts have concluded that the rules proposed by the Chairman will diminish returns to broadband investment and raise further questions about their long term financial viability of broadband fiber, wireless and hybrid networks. Higher costs, more delay, more uncertainty will lead to less investment, which of course translates into slower network expansion and delay in realization of the goal of universal, high speed broadband service adoption – the very goal so prominent in all FCC policy emanations. It is not clear how this benefits consumers or the economy more generally. No matter how you slice it, less broadband investment turns consumers into losers from the deal. The Chairman’s statement, while professing support of high rates of capital formation, simply ignores this basic fact.

The big winner is Google. Aided by pro-regulatory groups who have generally opposed Commission forbearance from regulating cable and telephone service provider, Google along with its companion providers of applications that ride on broadband networks – eBay, Amazon, Yahoo and others – are the driving forces behind net neutrality regulations proposed, if not named as such, in the Chairman’s statement. Read on to find out why.

### **The “Nondiscrimination” Proposals Discriminate against Consumers in Favor of Google**

The key to the controversy, and the identity of winners and losers, is found in the Chairman’s pledge to apply only a “handful” of Title II Sections -- 201, 202, 208, 222, 254, and

255. A handful? Aside from the transparent effort to minimize his regulatory intentions, it is beyond dispute that Sections 201 and 202, while less than a “handful” of the Act’s sections, are nevertheless the heart of the Act’s common carrier rate regulatory schemes. And, they are the slippery slope to tariffs, cost accounting schemes, and endless litigation over what constitutes a just and reasonable rate.

Notwithstanding his pledge to minimize regulatory creep and pursue a “narrow and tailored approach”, the Chairman will have little or no long run control over how regulation will evolve. That will be decided by his successor, by Congress and/or by the Judiciary. The Chairman, the Commission, and the Commission’s General Counsel have very limited discretion to pick and choose what parts of the law to enforce should they set out on the Chairman’s proposed path.

The motivation and implications for consumers of this whole exercise can be found in the application of Section 202 of Title II which forbids network providers to: “... make any *unjust* or *unreasonable discrimination* in charges...or services ... or to make or give any *undue* or *unreasonable preference* or advantage to any particular person, class of persons...” (Italics added to the language of the Act.)

We all discriminate with every choice and decision we make. The issue that will be placed repeatedly before Commission under the Chairman’s proposal is where and how to draw a bright dividing line between what is just and reasonable discrimination or preference and what is not -- in the context, not of ethnic or racial or social preference, where the line is pretty distinct, but in consideration of thousands of business decisions and activities which will inevitably favor and disfavor some “person or class of person.”

Under Net Neutrality rules the Chairman is proposing, the Commission does indeed draw a bright line between some kinds of discrimination, which it bans, and other types which it pledges to bless. The Commission’s Rulemaking Notice last year indicates the nature of its intention to enforce the nondiscrimination provision – and the differences in application to different stakeholders. Consider the following taken verbatim from the recent FCC Notice of Proposed Rulemaking (with italicized parentheticals added):

“Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner...” (*Translation: In some cases discrimination is permissible; in some cases not!*)

“We understand the term ‘nondiscriminatory’ to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider...” (*Translation: It is bad discrimination if access providers charge different applications or content providers for improved service quality; or, alternatively, to offer a lower price for a lower quality of service.*)

“We propose that this rule would not prevent a broadband Internet access service provider from charging subscribers different prices for different services.” (*Translation: It is OK to discriminate among--charge different rates for different service quality to -- consumers who subscribe to Internet access services.*)

No matter how you read it, the FCC's proposed nondiscrimination rule a) will not apply to charges to consumers, b) may apply in the case of network management practices and c) will absolutely apply so as to prevent broadband operators from offering prioritized service to a content or application provider who might so desire; or, to offer at discount a reduced QoS version.

Under these rules network operators can charge consumers for preferred service, but are forbidden to do the same with respect to content or applications providers. The Commission is in essence commanding a zero price rule in the context of a two sided market for one side of the market (applications, content providers), but permitting full operator pricing discretion for the other side (subscribing consumers).

### **Informed Consumers Would Like to Know! Why?**

How does this differentiation in rules, or discrimination in favor of applications and content providers, benefit consumers? Fair question, but the record contains no answers from regulatory advocates who prefer instead to retreat to the secure, if blurry, confines of rhetoric about the value of openness and neutrality. In context of arguments about "neutrality", how is it "neutral" to permit network providers to discriminate among their subscribers, while preventing the very same conduct with respect to providers of applications, like Google, who derive enormous value from the networks that are indispensable to their business?

Why is protecting Google and other applications and content providers more important than protecting consumers from the same set of pricing practices? Why do Google and other applications or content providers deserve a zero price for increasing service quality? How does that create value for consumers to offset the losses they suffer from the prohibition on conventional two-sided market pricing practices? If it is permissible to discriminate among subscribers, why is it bad to do the same with respect to applications providers? Why is one presumptively unfair, unjust, and unreasonable, while the other is just fine, thank you? How does this rule advance our global competitiveness and preserve the Internet as a powerful platform for innovation, free speech, and job creation. How does it contribute to any of the following objectives listed by the Chairman?"

- Extending broadband communications to all Americans;
- Protecting consumers and promoting healthy;
- Empowering consumers to take control of their personal information;
- Lowering the costs of investment;
- Advancing the goals of protecting Americans against cyber-attacks;
- Safeguarding consumers' right to connect with whomever they want;
- Improving our education and health care, and helping deliver a clean energy future.

The answer is simple. It does not. These are not rhetorical questions. They deserve answers from public officials who are charged with acting on our behalf. But, none are to be found in the Chairman's statement. And that is the missing link between the proposed FCC policies and our national goals; between means and ends; and, between fact and fantasy. No amount of fuzzy reference to the value of neutrality or openness or the like can answer these questions. But, informed consumers want to know and every citizen deserves it.

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