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FCC Chairman Lays Groundwork for About-Face on Classification of Broadband Internet Access

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In a pair of statements released simultaneously a little over week ago, the Chairman of the FCC, Julius Genachowski, and its General Counsel, Austin Schlick, began laying the groundwork for more extensive regulation of Internet access than has heretofore been the case. These Statements should be seen as more political than legal documents. Essentially, the Chairman argues that the FCC's new regulatory regime reflects a "consensus" as to what is needed and will reflect a "narrow and tailored" approach. Both Statements attempt to write their way around the significant obstacle posed by the U.S. Court of Appeals for the D.C. Circuit's recent decision in the "*Comcast/BitTorrent*" case, where the court held that the FCC lacked statutory authority for its intrusive dictation to Comcast as to what Comcast's network management practices should be. The catalyst for the case was Comcast's unannounced decision to limit the bandwidth of users employing the BitTorrent file transfer program, which attempts to tap multiple sources for downloading large files in an effort to achieve higher download speeds. The D.C. Circuit held that the FCC, having decided in 2002 that Internet access with a cable modem is an "information service" under Title I of the Communications Act, and not a "telecommunications service" under Title II or a "cable service" under Title IV, lacked statutory authority to impose the regulation at issue.

The Chairman's and General Counsel's Statements reveal a fundamental—but unstated—disagreement with the D.C. Circuit about the scope of the agency's regulatory discretion under the Communications Act. The court's view of the matter is that the FCC is free to regulate only where Congress gives it express authority to do so, or to the extent necessary to flesh out the regulatory scheme established by Congress. By contrast, the FCC's view—expressed in its arguments in the Comcast case and reiterated in the recent Statements of its Chairman and its General Counsel—is that a simple expression of Congressional policy is sufficient license to send the FCC off to implement that policy as it sees fit. Unfortunately for the FCC, the court has the decisive voice on that question; and the court has spoken.

So, the FCC's problem – acknowledged by both the Chairman's and the General Counsel's Statements – is how to accomplish the ambitious agenda laid out in the *National Broadband Plan* in the absence of new legislative authority and in the face of the *Comcast/BitTorrent* decision. While the court did endorse the concept of FCC regulation of Internet access, it did so only to the extent that such regulation could be tied to the FCC's Congressionally-delegated regulatory authority. This "ancillary" regulatory jurisdiction was, in fact, what the FCC had used

to regulate cable television until the Cable Television Communications Policy Act was passed in 1984, giving the FCC express statutory authority. However, such regulation was limited to regulation of cable television signal carriage in order to protect the audiences of local television broadcasters in a market served by a cable system. When the FCC attempted to mandate that cable systems have a certain number channels set aside for "public access" programming, the Supreme Court struck down that regulation as being outside that ancillary authority.

The Chairman and the General Counsel's Statements acknowledge the availability of this "ancillary" pathway, but also recognize that it is too narrow to accommodate the goals set out in the *National Broadband Plan* and in the FCC's prior (2005) *Internet Policy Statement* that Comcast was accused of having violated. Although the Chairman's and the General Counsel's Statements speak about "regulatory uncertainty" resulting from the anticipated court challenges to each such regulatory effort by the FCC as the principal disadvantage of following this path, it is clear that linking every new regulatory initiative in the *National Broadband Plan* and the *Internet Policy Statement* to existing FCC statutory authority—as the DC Circuit said it would require in the *Comcast/BitTorrent* decision—is simply not possible.

However, the Chairman and the General Counsel announce in the Statements that they have discovered a "third path" that will let the FCC reach its regulatory goals without new statutory authority. Upon closer scrutiny, the "third path" is nothing more than a regulatory about-face from the FCC's 2002 *Declaratory Ruling* that Internet access furnished by a cable television company using a "cable modem" is an "information service" under Title I of the Communications Act (and, therefore, essentially unregulated) rather than a "communications service" that would be subject to common carrier regulation under Title II of the Communications Act. Although the *Declaratory Ruling* recognized that Internet access service had a communications component, it declined to unbundle the communications component from the information service component and characterize Internet access services as two separate services. This decision was challenged, and ultimately was upheld by the Supreme Court in the "*Brand X Internet Services*" decision as a permissible interpretation of the Communications Act.

It is in Justice Scalia's dissent in *Brand X* that FCC Chairman Genakowski and General Counsel Schlick find their "third path." Put simply, Justice Scalia rejects the *Declaratory Ruling's* fusion of communications and information service into a package called "Internet access" that should be classified as an information service. He would consider it two separate services, one regulated as a common carrier under Title II, the other not regulated, under Title I. Such an about-face would be judged under the "arbitrary and capricious" standard for review of agency action. Essentially, the FCC would have to show that different facts, not extant in 2002, now justify a different conclusion about the nature of broadband Internet access service than the one the agency reached in the *Declaratory Ruling*. However, if they lead their agency down that "third path," the FCC's Chairman and its General Counsel might want to consider this

portion of Justice Scalia's dissent in *Brand X*, which may turn out to have been surprisingly prescient:

I must note that, notwithstanding the Commission's self-congratulatory paean to its deregulatory largesse . . . [when] it concluded the *Declaratory Ruling* by asking . . . "whether under its Title I jurisdiction [it] should require that cable companies offer other ISPs access to their facilities on common-carrier terms." [citation omitted] In other words, what the Commission hath given, the Commission may well take away – unless it doesn't. . . The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" [in the Act] is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (i.e. its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service!

If the FCC follows the "third path" set out by its Chairman and its General Counsel, whether its proposed regulatory initiatives over Internet service providers are "narrowly-tailored" or otherwise, although perhaps relevant politically, will be of no legal significance. What will be legally significance is the extent to which the FCC, in reversing its prior classification of Internet access as a bundle of telecommunications and information services that should be classified as an "information service" subject only to Title I regulation, succeeds in avoiding the characterization of having cynically "changed the facts" in the manner described by Justice Scalia's dissent in *Brand X*.