

# WebMemo



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## Red Tape Under the Tree: FCC Plans Internet Regulation for Christmas

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*We have two branches of government—Congress and the courts—expressing grave concerns with our agency becoming increasingly unmoored from our statutory authority. By seeking to regulate the Internet now, we exceed the authority Congress has given us, and justify those concerns.*

—FCC Commissioner Meredith Atwell Baker<sup>1</sup>

Should regulators in Washington, D.C., set the rules for the Internet? Julius Genachowski, Chairman of the Federal Communications Commission (FCC), thinks so. He has crafted a plan to impose so-called net neutrality rules on Internet service providers, setting an FCC vote on the proposal for next Tuesday.<sup>2</sup>

Details of the plan are not yet known outside of the commission and will likely not be released until after the commission votes. It is reportedly based on a net neutrality plan floated a month ago in Congress. That plan, however, was soundly rejected by Congress. The Genachowski plan—which would end-run Congress—should be rejected as well.

**What Is Net Neutrality?** Generally, “net neutrality” refers to the principle that owners of broadband networks should treat all traffic on their networks equally.<sup>3</sup> This has long been an operational principle on the Web, although in practice there have always been exceptions, and the principle has never been enshrined in any law or regulation.

In 2005, the FCC took the first steps toward making the net neutrality principle mandatory, adopting a set of four “guidelines” regarding neutrality on the Web. These guidelines declared that consumers are “entitled” to run applications, connect to devices, and access content of their

choice on the Web and enjoy a choice of broadband providers. While these guidelines were ostensibly non-binding, the commission relied upon them in an action against Comcast in 2008, when—in an effort to stop “bandwidth hogs” from interfering with Internet use by less intensive users—the Internet service provider slowed download rates for users of certain peer-to-peer software.

After Genachowski took over the chairmanship last year, the commission quickly moved to expand the guidelines, adopting a proposal to make them explicitly binding and enlarge their scope.

**Lack of Legal Authority.** In taking these steps toward neutrality regulation, however, the FCC faced an inconvenient obstacle: Nothing in any statute gives the FCC authority to regulate the Internet. To get past this jurisdictional gap, the FCC relied on an odd legal theory known as “ancillary jurisdiction.” Under this doctrine, the FCC may regulate in areas where it has not expressly been granted power

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so long as such regulation is “reasonably ancillary” to areas where it does have authority. In other words, the argument went, as in a game of horseshoes, close is good enough for FCC jurisdiction.<sup>4</sup>

In April, however, a federal appeals court rejected this argument, finding that the FCC does not have “untrammeled freedom to regulate activities over which the statute fails to confer.”<sup>5</sup> While the court did not reject outright the concept of ancillary jurisdiction, it did allow it to be used only when necessary for the agency to achieve a goal explicitly mandated by law.

**Legislation Rejected.** Various proposals to provide the FCC with the missing authority have been advanced in Congress. Most recently, Representative Henry Waxman (D-CA) floated a proposal to allow the FCC to stop “unreasonable” discrimination.<sup>6</sup> This failed to get support, however, as has every other proposal to grant the FCC regulatory power over the Internet.

The proposal to be voted on at the FCC on Tuesday is an attempt to move forward with regulation despite the absence of congressional approval. Like the Waxman plan, it is expected to forbid “unjust” or “unreasonable” discrimination, leaving the exact practices to be banned to case-by-case decision making.

Many hard-core regulation supporters are disappointed with the plan and are instead urging that the FCC ban discrimination outright. That would be dangerous, as there are many reasons that differentiation among different types of content could

make economic sense or even be critical to managing a network. With increasing demands on the Internet, certain types of prioritization common in other industries—such as selling premium or discount access to content providers—could be beneficial to users. More immediately, growing use of the Web is making active management of that traffic (such as controlling bandwidth-hogging) critical.

While the FCC plan would not bar all discrimination, it would vest vast discretion in the FCC to determine what is allowed and what is not. Critical decisions as to what is permitted and what is not would be left to the political whims of five FCC members. At best, that will create an unpredictable atmosphere, with firms left unsure whether their activities will be deemed acceptable. At worst, it will lead to abuse and political game-playing.

**Level 3.** Case in point: Earlier this month, communications provider Level 3 got into a business spat with Comcast over how much it will pay, if anything, Comcast to handle traffic from Level 3’s network. Such negotiations are common among networks, and the longstanding system of private interconnection agreements has worked quite well. Yet Level 3 claimed that Comcast’s request for payment to carry Level 3’s traffic violates net neutrality rules. The claim caused a political stir that promises to help Level 3 in its ongoing negotiations. The incident is likely a harbinger of rent-seeking to come under a net neutrality regime, as firms—as well as political advocates of all stripes—use vague neutrality rules to advance their interests.<sup>7</sup>

1. Meredith Atwell Baker, “Net Neutrality: The Wrong Path for a Pro-Jobs, Pro-Investment Agenda,” 28th Annual Institute on Telecommunications Policy and Regulation, December 9, 2010, at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1209/DOC-303457A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1209/DOC-303457A1.pdf) (December 17, 2010).
2. James Gattuso, “FCC’s Christmas Gift for the Internet: Net Neutrality Regulation,” The Foundry, December 1, 2010, at <http://blog.heritage.org/2010/12/01/fcc%e2%80%99s-christmas-gift-for-the-internet-net-neutrality-regulation>.
3. See James L. Gattuso, “Broadband Regulation: Will Congress Neuter the Net?,” Heritage Foundation *Background* No. 1941, June 2, 2006, at <http://www.heritage.org/Research/Reports/2006/06/Broadband-Regulation-Will-Congress-Neuter-the-Net>.
4. See James Gattuso, “The FCC and Broadband Regulation: What Part of ‘No’ Did You Not Understand?,” The Foundry, April 15, 2010, at <http://www.heritage.org/research/reports/2010/04/the-fcc-and-broadband-regulation-what-part-of-no-did-you-not-understand>.
5. *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), at <http://www.scribd.com/doc/29489974/Full-Text-Comcast-vs-FCC-Federal-Court-Ruling> (December 17, 2010).
6. See James Gattuso, “Waxman Net Neutrality Plan: Internet Regulation Lite, Anybody?,” The Foundry, September 29, 2010, at <http://blog.heritage.org/2010/09/29/waxman-net-neutrality-plan-internet-regulation-lite-anybody>.

The overall result would be bad news not just for Web surfers but also for the economy as a whole. Investment in broadband today is one of the few bright spots of the economy, with providers expected to invest some \$30 billion per year in private capital into their networks annually for the next five years, creating hundreds of thousands of jobs.<sup>8</sup> Neutrality rules would threaten that investment and those jobs by hindering efficient network management and creating uncertainty.

**Strained Connections.** At the same time, it is still unclear how the FCC will manufacture the necessary legal authority to do any of this. While the commission may point to various parts of the Communications Act that cover some aspects of broadband Internet service—such as regulation of

cable TV and licensing wireless transmissions—the connections between these and regulation of the Web are tenuous and strained. As a result, whatever is voted on will likely be quickly struck down in court.

Yet it appears that Genachowski intends to ignore Congress, ignore the law, and ignore the potential damage to the economy and the Internet itself in order to impose regulation. Policymakers should not wait for the courts to strike down this ill-conceived regulation. The commission should vote it down on Tuesday. If it does not, Congress should use its power to intervene and nullify the rule.

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7. See Todd Spanger, “Level 3 Plays Politics in Internet Spat with Comcast,” Multichannel News, November 30, 2010, at [http://www.multichannel.com/blog/BIT\\_RATE/31830-Level\\_3\\_Plays\\_Politics\\_In\\_Internet\\_Peering\\_Spat\\_With\\_Comcast.php](http://www.multichannel.com/blog/BIT_RATE/31830-Level_3_Plays_Politics_In_Internet_Peering_Spat_With_Comcast.php) (December 17, 2010).
8. Charles M. Davidson and Brett T. Swanson, “Net Neutrality, Investment and Jobs: Assessing the Potential Impacts of the FCC’s Proposed Net Neutrality Rules on the Broadband Ecosystem,” Advanced Communications Law and Policy Institute, June 2010, at [http://www.nyls.edu/user\\_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf](http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf) (December 17, 2010).