



TELECOMMUNICATIONS

SNAP UPSMdate

June 24, 2010

By: *Jessica Davison*

The Future of Broadband: “The Third Way”

Washington, DC: The FCC continues to seek the best way to regulate broadband and bring it to all Americans. Currently, there are about 100 million Americans who do not have broadband at home. The FCC is striving to increase access to broadband in order to improve businesses, education, healthcare, energy efficiency, and improve safety through faster communication and data services.

In May 2010 FCC Chairman Julius Genachowski proposed the next steps the FCC would take in light of the [Comcast case](#). That case stemmed from a series of FCC decisions starting in 2002 in which the FCC declared that broadband Internet access services were not “telecommunications services” under the Communications Act. This meant that the FCC had only ancillary jurisdiction over broadband Internet access services. The *Comcast* decision declared that because the FCC only had ancillary authority, it could not regulate these services as it had previously ordered. In fact, the Court vacated the FCC’s Order barring Comcast from interfering with its customers’ use of peer-to-peer networking applications. *Comcast Corporation v. Federal Communications Commission, et. al.*, No. 08-1291, 36 (D.C. Cir. April 6, 2010).

In his [May 2010 statement](#), Chairman Genachowski reviewed two prevalent ideas as to how the FCC should move forward in light of *Comcast*. He then outlined reasons for

SNAP UPdate is a free service of Technology Law Group

A complete set of SNAP UPdates can be accessed at our website, tlgdc.com

If you would like to be removed from our email list, please notify us at mail@tlgdc.com

rejecting both, and proposed a new “Third Way.” Chairman Genachowski first rejected the notion that the FCC should regulate broadband Internet access services using ancillary jurisdiction. He noted that this “piecemeal approach” would not be beneficial in serving the purposes of, among other things, extending broadband to all Americans, protecting consumers, and promoting competition. Chairman Genachowski also rejected the idea of reclassifying broadband services as “telecommunications services.” He noted that while this would clarify the FCC’s authority over broadband service providers, there are many FCC regulations that broadband service providers would be subject to that would create inefficient competition and stifle the FCC’s consumer oriented goals.

Thus, Chairman Genachowski argued for a “third way.” He proposes:

- Recognizing only the transmission component of broadband access service as a telecommunications service;
- Applying only a handful of provisions of Title II that, prior to the *Comcast* decision, were widely believed to be within the FCC’s purview for broadband;
- Not applying many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and
- Setting up clear boundaries to guard against regulatory overreach.

(May 2010 Statement, Page 4)

The Chairman argues that this narrow approach toward broadband service providers will effectively accomplish the regulatory purposes of the FCC while preventing overreach and inefficiencies, such as stifled competition, that would result from other policies.

However, the Chairman’s proposal still leaves a number of questions unanswered. For example, where does the “transmission component” of broadband begin and where does it end? If this is not narrow definition then perhaps the Chairman is really just proposing to add a technicality to try to get around the *Comcast* decision without truly defining the FCC’s regulatory power over broadband. If this is the case, then does that also mean regulating the “transmission component” of broadband will ultimately result in broadband being regulated as a telecom service? Arguably, this result is plausible if the FCC does not carefully limit its definition of the “transmission component” of broadband. Perhaps at the end of the day what the Chairman is really proposing is an amendment to the Communications Act to set up an entirely different regulatory scheme meant specifically for broadband.

The FCC is pushing forward with the “third way.” On [June 17, 2010](#), the FCC took steps to solidify this approach to broadband regulation by seeking public comment on it. The

SNAP UPdate is a free service of Technology Law Group

A complete set of SNAP UPdates can be accessed at our website, tlgdc.com

If you would like to be removed from our email list, please notify us at mail@tlgdc.com

© 2010 Technology Law Group All Rights Reserved.

first round of public comments ends July 15, 2010 and reply comments are due by August 12, 2010.

Let us know what you think about these issues. Please join our interactive blog and share your thoughts.

* * *

Technology Law Group LLC (TLG) (www.tlgdc.com) is a Washington, DC-based law firm specializing in telecommunications transactional, litigation issues and regulatory issues. TLG's Managing Partner, Neil S. Ende, may be reached by phone at +1 202 895 1707 and by email at nende@tlgdc.com.

* * *

SNAP UPdate is a free service of Technology Law Group
A complete set of SNAP UPdates can be accessed at our website, tlgdc.com
If you would like to be removed from our email list, please notify us at mail@tlgdc.com