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The FCC's Fatal Conceit

by

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With a nod to F. A. Hayek, there is a "[fatal conceit](#)"-ish quality to FCC Chairman Julius Genachowski's Ahab-like pursuit of net neutrality regulation.

The conceit is nicely exposed in this one key line from Mr. Genachowski's [December 1 statement](#) announcing his plan to schedule a vote on his Internet regulation proposal: "*No central authority, public or private, should have the power to pick which ideas or companies win or lose on the Internet; that's the role of the market and the marketplace of ideas.*"

Unless you are smoking something that is only permitted in certain states with proper medical dispensation, it is difficult to square this statement with the reality of what Mr. Genachowski is proposing. Here's why: *The FCC is a government agency. It is a central authority. Hence, it is a public central authority that will have the power to pick Internet winners and losers.*

Yet Mr. Genachowski says "no central authority" should have the power to pick which ideas or companies win or lose on the Internet. He says this should be the role of the market.

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His proposal – which I acknowledge appears to be less harmful than perhaps it could have been based on prior iterations – has the FCC, *the public central authority*, playing the role of decider, not the marketplace. In other words, it is at odds, in a most fundamental respect, with his core assertion.

I don't know why Mr. Genachowski doesn't forthrightly acknowledge the FCC itself is a *public authority*, and simply state, consistent with the realities of his proposal, that he believes the government should have the role of decider. What he does, instead, is to assert that "consumers and innovators have a right to a level playing field" and, thus, "the proposed framework includes a bar on unreasonable discrimination in transmitting lawful network traffic."

A few observations on Mr. Genachowski's justification, so we will know where we are heading if his proposal is implemented.

First, even though Mr. Genachowski has backed away from formally applying to Internet service providers the entire "Title II" common carrier regime, the prohibition against "unreasonable discrimination" that he highlights is, in fact, central to traditional common carrier regulation. Hence, this from the Communications Act's [Title II, Section 202\(a\)](#): "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services...." While proceeding on a basis other than formally classifying Internet providers as Title II common carriers may be preferable to actually classifying them as such, it blinks reality to ignore that Mr. Genachowski's proposed net neutrality rules would incorporate Title II's core non-discrimination mandate.

Now what is the likely practical effect of all this? We need look no further than the [current Level 3–Comcast dispute](#) to glimpse the future if net neutrality mandates are adopted as proposed. Emboldened by the rhetoric regarding "level playing fields" and "discrimination," Level 3, no stranger to Washington's regulatory playing fields, has converted what heretofore has been an ordinary commercial negotiation over the fees, if any, applicable to peering arrangements between two interconnecting Internet providers into a complaint sounding in – surprise! – net neutrality.

Almost all independent observers have recognized that when Level 3 recently became a primary carrier of Netflix's exploding streaming video traffic, now estimated to constitute a whopping 20% of all primetime Internet traffic, the existing peering arrangement governing the exchange of traffic between Level 3 and Comcast might need to be revised to reflect the increased costs incurred by Comcast in handling a suddenly unbalanced traffic exchange. Such revision would be consistent with [Comcast's established interconnection policy](#). Rather than negotiating an agreement reflecting the changed circumstances, Level 3 saw an opportunity to cry "toll booths" on the Internet and "discrimination" by Comcast. While tossing around net neutrality-like jargon, Level 3 ignores the fact that disputes like the one with Comcast previously have been worked out on a commercial basis without FCC intervention, including at the insistence of Level 3 itself.

The point here is not to resolve the Comcast–Level 3 dispute because I can't do that. It is rather to show that, if the FCC adopts new net neutrality mandates in the form proposed, the agency will be inviting regulation in a part of the Internet ecosystem that has functioned nicely without such regulation, and in many other parts as well.

And here is a key point: Despite any protestations to the contrary by the FCC, such regulation will set *prices*. For that is exactly what Level 3 wants the Commission to do – intervene to set a zero-price for the exchange of traffic, or at least a price lower than Level 3 can negotiate with Comcast.

Now, assuming Mr. Genachowski's net neutrality mandates were in effect, on what basis is the FCC going to determine what the "right" price ought to be to "level the playing field" or prevent "unreasonable discrimination"? In the old days of traditional common carrier regulation, the FCC conducted what were invariably lengthy rate proceedings to determine, among other things, a provider's costs. Surely we don't want a rerun of these never-ending rate proceedings in the rapidly evolving Internet environment.

Even granting Mr. Genachowski's proposal may be less harmful than it could have been, "less harmful" is not good enough. At a minimum, any new Internet regulation – which really should be pursued only with congressional sanction – should require a demonstration that a complained-against Internet provider possesses market power as a prerequisite to agency intervention. Mr. Genachowski's proposal apparently does not require such a market power determination.

In sum, it is very difficult to square Mr. Genachowski's statement that the marketplace rather than a central public authority – the FCC – should pick winners and losers on the Internet with the realities of his net neutrality proposal.

If net neutrality regulation is adopted, especially without an explicit market power test as a condition, the FCC might as well hang a banner over its headquarters proclaiming: "Welcome to the Internet Picking Winners and Losers Agency."

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