THE FREE STATE FOUNDATION
A Free Market Think Tank for Maryland......Because Ideas Matter

Perspectives from FSF Scholars
September 18, 2012
Vol. 7, No. 27

The Psychology of Abundance and the Realities of Regulatory Micromanagement

by

Randolph J. May *

The Daily Caller
September 17, 2012

In a Silicon Valley speech last week, Federal Communications Commission Chairman Julius Genachowski appeared to back away from his oft-stated position that broadband Internet providers should be free to experiment with various business models, including usage-based pricing options that incorporate various data caps.

Mr. Genachowski's rationale for the apparent back-tracking? "We should all be concerned with anything that is incompatible with the psychology of abundance."

The "psychology of abundance" may be a nice catch phrase, even though it is hard to know what Chairman Genachowski really means. But this much I know: There are no "free" goods in the real world, and, ultimately, abundance, at least with respect to physical goods, is created by reliance on sound economic principles.

With regard to broadband capacity, it is the negative consequences of regulatory micromanagement, not the business experimentation that characterizes a free marketplace, which imperils the “psychology of abundance.

Abundance depends on capital investment. Investment depends on the existence of a sound regulatory environment conducive to the commitment of private capital. And a sound regulatory environment depends on sufficient regulatory certainty so that marketplace participants know the “rules of the game.”

Indeed, the FCC, under Chairman Genachowski’s direction, makes much of the virtues of regulatory certainty in its recently filed brief in Verizon’s court appeal of the agency’s net neutrality regulations.

This paean to regulatory certainty is highly ironic for two reasons.

First, consider Mr. Genachowski’s comments in his Silicon Valley speech regarding data caps in light of what the FCC said when it adopted the net neutrality regulations and in light of Mr. Genachowski’s own previous statements. In its net neutrality decision, the FCC specifically said it was not prohibiting data tiers or usage-based pricing because this “would force lighter end users of the network to subsidize heavier end users” and “it would also foreclose practices that may appropriately align incentives to encourage efficient use of networks.”

Mr. Genachowski reiterated this position again at the Cable Show in May 2012, when he said:

“Business model innovation is very important particularly in new areas like broadband. There was a point of view that said a couple of years ago that really there was only one permissible pricing model for broadband, and I didn’t agree with that and the Commission didn’t agree with that. And we said that business model experimentation and usage based pricing could be a healthy and beneficial part of the ecosystem that could help drive efficiency in networks, increase consumer choice and competition and increase fairness because it can we said result in lower prices for people who consume less broadband.”

So, for Mr. Genachowski now to express concern about data caps creates the very regulatory uncertainty he professes to disdain.

Now consider the second reason why the FCC’s regulatory certainly claim is not only highly ironic, but disingenuous. The FCC now suggests adoption of net neutrality regulations removed regulatory uncertainty, but before the agency embarked upon its crusade to adopt the Internet regulations there was little uncertainty. This is because the Commission previously had determined – and defended its determination all the way up to the Supreme Court – that Internet providers should operate in a “minimal regulatory environment.” It was only the years-long effort to adopt Internet regulations that created the regulatory uncertainty the FCC now, wrongly, seeks to claim credit for dispelling.

And now that net neutrality regulations have become final, unless overturned, regulatory uncertainty almost certainly has only just begun. Internet providers are likely to face ongoing complaints regarding their pricing and other practices. The complaints, many from rivals in the Internet ecosystem, will allege “discrimination” or claim the providers’ practices are not “reasonable” under the agency’s rules. It blinks reality to ignore the uncertainty that will be created as cases involving these amorphous terms are litigated far into the future.

That’s why it is doubly disturbing that Mr. Genachowski may be back-tracking on the propriety of usage-based data caps, a point on which the FCC’s order had seemed to be clear.

Of course, all this bears directly on the amount of broadband capacity available, which, I suppose, is what Mr. Genachowski had in mind in musing about the “psychology of abundance.” Without regulatory certainty, there won’t be sufficient risk capital invested in expanding broadband networks to meet the rapidly rising demand.

But there is another key element to creating a sound regulatory environment, in addition to regulatory stability, and that is avoiding regulatory micromanagement. The FCC made no attempt to show a market failure before adopting net neutrality mandates, nor could it had it tried. Rather, it claimed its new regulations were adopted to preserve what it characterized as the open Internet.

The FCC simply fails to acknowledge that regulation necessarily imposes costs on Internet providers that create disincentives to invest in new facilities. Even a casual reading of the agency’s D.C. Circuit brief indicates that when it refers to investment stimulated by net neutrality mandates, it is referring primarily to so-called incentives for “edge providers” like Google and other content providers that use broadband providers’ facilities. This primary focus on edge providers rather than the infrastructure providers is highly problematical.

Indeed, after the net neutrality regulations were adopted in late 2010, USTelecom reports capital investment for all broadband infrastructure providers remained level during 2011. This is at odds with the rosy picture the Commission attempts to paint.

At bottom, Mr. Genachowski, however well-intentioned, is wrong to think the FCC can create a “psychology of abundance” divorced from sound regulatory policies that promote private sector investment in new network facilities. The mere adoption of net neutrality mandates, which inevitably invite ongoing regulatory micromanagement of Internet provider practices, creates disincentives for broadband infrastructure expansion.

If Chairman Genachowski now begins to cast doubt on the FCC’s commitment to allow business model experimentation regarding usage-based pricing and various forms data caps, the existing investment disincentives will only be heightened.

That will not only be psychologically damaging, but damaging to the real world prospects for the availability of sufficient broadband capacity to meet ever-growing consumer demands.

***** Randolph J. May is President of the Free State Foundation, a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.