



***Perspectives from FSF Scholars
December 21, 2010
Vol. 5, No. 30***

[National Review Online](#)

FCC Regulators Turn Their Eyes to the Internet

by

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The FCC is poised to take a significant step today to regulate Internet providers in the name of so-called net neutrality. If it does, its action will say a lot about what's wrong with an agency that was created in 1934 to regulate telephone and telegraph monopolies.

I had always held out hope that the FCC wouldn't really move to regulate the Internet, not until hell froze over. I guess the fact that the temperature here in Washington has been not much above freezing for about two weeks now is not a good sign.

The nub of the problem with what the FCC is poised to do can be neatly summed up this way: The commission is acting on dubious legal authority, in the face of widespread and bipartisan opposition, to adopt a new Internet regulatory regime to "fix" a problem that doesn't exist.

Indeed, at least up to now, no one, not even the FCC, has suggested that there is any present market failure or consumer harm resulting from the absence of net-

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neutrality mandates. Rather, from the beginning, it has cast its regulatory initiative as an effort to “preserve” and “maintain” the openness that already exists on the Internet.

The most harmful aspect of these new rules is likely to be the prohibition of (in the words of FCC chairman Julius Genachowski) “unreasonable discrimination in transmitting lawful network traffic.” The common-carrier provisions in Title II of the Communications Act of 1934 -- which was designed to regulate telephone and telegraph monopolies -- centered on a similar provision prohibiting “unjust or unreasonable discrimination.” Does anyone remember Western Union and the “Bell System”?

But there are a number of ways that these anti-discrimination provisions can be rendered less harmful. For one thing, they can be qualified and limited by the commission’s order -- the FCC might, for instance, explicitly affirm that premium pricing for a higher grade of service is not generally to be considered unreasonably discriminatory. This should be done.

By the same token, the new rules should make clear that their anti-discrimination and other neutrality mandates do not apply to providers of wireless Internet. Wireless providers already face substantial spectrum constraints, and they need to be able to manage their networks with flexibility, free from worries about discrimination complaints.

Most importantly, the FCC’s new rules should require a showing of the Internet provider’s market power and a showing of consumer harm resulting from the provider’s practices as prerequisites to any finding of discrimination. In other words, absent a showing of dominant market power and consumer harm, the actions of Internet providers would be deemed presumptively reasonable. In this way, the commission could acknowledge, at least in some fashion, that it realizes the competitive, dynamic marketplace of today’s digital environment is different from the monopolistic marketplace that prevailed at the time the ’34 law was adopted.

The FCC’s actions today -- if the agency goes through with it -- simply confirm its central failing as it moves into the second decade of the 21st century: Rather than devoting its resources to reducing or eliminating analog-age legacy regulations or jettisoning such outdated regimes as universal service subsidies and command-and-control spectrum policies, or reforming delay-prone and unseemly “regulation-by-condition” merger-review policies, the FCC is stuck in a mindset of extending regulation into new areas, even where there is no market failure and no evidence of consumer harm.

I don’t want to give up hope, and I’m willing to be surprised. But, frankly, the commission’s prevailing mindset is unlikely to change meaningfully and materially until Congress adopts a new regulatory framework for communications. Without something along the lines of Sen. Jim DeMint’s [Freedom for Consumer Choice Act](#),

which he introduced this session and which is based on the [Digital Age Communications Act](#) he presciently introduced in 2005, the FCC's efforts to expand its regulatory power will probably continue.

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