Some clarity in war over Internet access

June 8 2010, By Tyrone Brown

The fight over open access to the Internet has turned into a public relations war and a political football in Congress.

Last month, FCC Chairman Julius Genachowski announced his proposal to clarify the agency's authority to oversee the likes of AT&T, Verizon and Comcast in their critical roles as providers of transport links to high-speed Internet access. His approach has strong support from fellow Commissioners Michael Copps and Mignon Clyburn.

Since that announcement, opponents of his proposal have recruited proxies to mount a major disinformation campaign. Separate groups of Democratic and Republican congressmen have communicated their opposition to the proposal while others in Congress have supported it. Civil liberties and civil rights groups have weighed in for or against the proposal, depending on whether they see it as promoting or slowing broadband deployment and adoption.

At issue is how best to restore FCC oversight of major telephone and cable companies when they provide access to the Internet. They serve as gatekeepers because of their unique role in providing such access, but FCC oversight of these gatekeepers has been in doubt since an April federal appellate court decision in Comcast v. FCC rejected the agency's prior oversight approach.

Genachowski called for a "Third Way" approach, using a "light touch" version of statutes and rules that always have governed the provision of communications transport services. Citizens groups that see the Internet

as a tool of free expression and high-tech companies that need an open Internet to grow and innovate generally support the proposal. Major telephone and cable companies now challenge the FCC's ability to adopt this approach.

The FCC and these gatekeepers agree on at least one thing: the regulatory approach in place for a decade prior to Comcast v. FCC benefited everyone, including Internet users, telephone and cable companies that have spent billions of dollars on high-speed Internet infrastructure, and the thousands of content generators who use the open Internet to disseminate messages and conduct business. The gatekeepers' remaining arguments and rhetoric create more confusion than clarity. The fact is that the gatekeepers, not the FCC, are the ones pressing for fundamental change in the regulatory status quo.

Some proxy opponents argue that Genachowski's proposal foreshadows a government takeover of the Internet. No FCC commissioner has ever proposed, and no U.S. law would permit, government control of Internet content. That is not the aim of the current chairman, nor could it be accomplished using his proposal. Public interest advocates would oppose vociferously any such attempt.

Other proxy opponents claim that Congress withheld from the FCC the power to oversee broadband Internet access service, even if a gatekeeper were unreasonably to deny access to some consumers, or unreasonably to block or exorbitantly price a competitor's offerings. None of the gatekeepers publicly advocate this unreasonably narrow view of FCC authority over the transmission component of Internet access services, generally arguing instead that the FCC would have difficulty devising appropriate rules.

The proxies and engineers of this disinformation campaign want a toothless FCC, one powerless to address consumer privacy needs,

prevent arbitrary denials of access to customers, prohibit unreasonable discrimination against competitor offerings, require truth in advertising and billing, steer Universal Service Funds to broadband in high-cost rural and urban areas, or require reasonably customized access services and equipment for the disabled.

The gatekeepers do not focus on these likely results of Comcast v. FCC, but seek to change the focus of the debate. A May 24 letter to Chairman Genachowski circulated by Congressman Gene Green, D-Texas, and a May 28 letter circulated by Congressman Joe Barton, R-Texas, illustrate this tactic.

Rep. Green's letter claims the "Third Way" will create "expanded FCC jurisdiction over broadband" through an "unprecedented" and uncertain regulatory regime that "will jeopardize jobs and deter needed investment for years to come." It concludes that the proposal should not be implemented "without additional direction from Congress."

The Barton letter argues, "Whether the country should stray from (the present) legislative posture -- which has produced 200 million broadband subscribers in the last 10 years -- is a matter best left to Congress."

Both letters purport to maintain the status quo, as do civil rights groups that oppose Genachowski's proposal because of concern that purported changes will deter investment in expansion of broadband to unserved and underserved communities. However, it is these congressional letters and civil rights opponents that advocate radical change.

They fail to recognize that the status quo was changed when Comcast v. FCC struck down the agency's reliance on indirect, or "ancillary," statutory authority to maintain light oversight of broadband access. The Genachowski proposal would restore the balance with an equally light touch, relying on provisions of the statute that give the FCC authority to

accomplish directly what the court said it could not do indirectly.

Broadband providers argue such provisions are unnecessary because they will not engage in harmful practices. But for content providers and Internet users, this is flimsy assurance. It is a far cry from the approach to oversight that prevailed prior to the court decision. None of the major broadband access providers, and none of their major investors, could reasonably have anticipated this kind of regulatory vacuum.

In 1996, at the dawn of the Internet age, Congress comprehensively rewrote the law to give the FCC discretion and flexibility to tailor its regulatory approach for a rapidly shifting communications landscape. Chairman Genachowski's proposal to restore appropriate regulatory oversight of high-speed Internet access does no more than Congress intended.

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