

November 29, 2010

Dear Chairman Genachowski:

Two weeks ago, I had the opportunity to participate in a public meeting in Albuquerque on the future of the Internet, and give comment to your colleague, Commissioner Michael Capps. As a state regulator with jurisdiction over traditional telephone services (among many other industries), I find myself in the somewhat awkward position of closely observing the deficiencies in access to broadband in my state of New Mexico, while lacking jurisdiction to effectuate solutions. Nevertheless, I was very heartened to read the FCC's National Broadband Plan when it was released this spring, especially Section 4. It was clear to me that the FCC "gets it" when it comes to understanding the challenges affecting states like New Mexico that are not dense or affluent enough to attract sufficient private offerings of affordable broadband.

Thus, I support the FCC's plan to collect more detailed data on access to broadband, as in my own experience, the current statistics overstate access. (E.g., many residential and commercial units in a zip code or county that appears to have multiple broadband providers may, in reality, only have access to a single provider.) I also support the Commission's plan to support policies that encourage the development of market-based solutions, particular those involving wireless technologies. My only concern with the NBP is that in the event that the strategy of watchful-waiting fails to produce sufficient access to affordable broadband in all areas, the "further steps beyond those already described in th[e] plan" have not been developed or specified.

My purpose in attending the Albuquerque meeting were to advocate for policies supporting access to affordable offerings in New Mexico and active regulation, where indicated. However, much of the focus of the program was on net-neutrality. Today, I'd like to take the opportunity of this letter to briefly share my thoughts with you on that topic.

As I understand them, the pure positions on both sides of this debate are wrong. Extreme net-neutrality, in which all Internet traffic is equally privileged, is contrary to the cost-causation principles we deal with everyday in the regulatory arena. We need a regulatory structure in which services like streaming video and VoIP can get priority over content that is less sensitive to being delivered in real-time. We need a regulatory structure in which users of services that benefit from prioritization can pay network operators for it, and therefore create the incentives for the network operators to invest in the necessary infrastructure. But while the network should

provide for discrimination between categories or tiers of services, it must be non-discriminatory with respect to the identity of the users/providers. A network operator should be prohibited from forming agreements with content or service providers offering that provider preferential terms not available to all similarly situated providers or users.

For an example, using providers and services my household uses, Comcast (my ISP and network operator) should not be able to execute an exclusive deal for preferential transport with the Pandora Internet radio service that is not available to other Internet radio providers such as Last.FM. If this was to occur, not only would my family be stuck with the ISP's choice for our Internet radio (or our VoIP, streaming video, etc.), rather than our own choice, we would ultimately find ourselves paying excessive revenues to the ISP ("rents" in free-market speak).

From my perspective, operators of the Internet are common carriers. Even in regions where there is effective competition for broadband to the home/business, and competition for backhaul and long-distance transport, if we allow tying arrangements between network operators and content providers to proliferate, competition will be severely stifled. Consider the hypothetical in which my family has a choice of three Internet providers, however, each provider comes with its own suite of preferred content. I can no longer select my Internet provider based on price, quality of service, and speed of the connection, but rather I'm stuck with the one that has the package of content that is closest to my needs. This is what the industry has done with Cable TV, to the detriment of consumers.

What is needed is something akin to the old-fashioned notion of common carrier tariffs. This will ensure healthy competition amongst network providers and amongst content providers – a true free market. Tying needs to be prohibited. Open access tariffs will also prevent network operators from discriminating against content and services that they dislike for either business or ideological reasons, a legitimate concern felt by many net-neutrality proponents.

Lastly, while competition and market-based solutions are very important factors in the growth of modern telecom networks, our values tell us that we mustn't leave disadvantaged communities and individuals behind. The FCC has been a champion for universal access; first for telephone, and now for access to affordable broadband. Applying this principal to the prioritization of network traffic, I urge the FCC to make sure providers do not relegate lowest tier users to a "slow lane" that falls below minimal levels of functionality.

Thank you for your consideration of this matter.

Jason Marks

Cc: Commissioner Michael Copps