The FCC’s Title II “Lite” (as a Lead Balloon!) & the Looming Broadband Tax

by James E. Dunstan

FCC Chairman Genachowski has set forth his vision—a “Third Way”—for overcoming the D.C. Circuit’s recent decision in the Comcast case concluding that the FCC lacked jurisdiction for sanctioning Comcast for allegedly blocking subscribers using peer-to-peer software or otherwise throttling bandwidth to heavy users. The Court concluded that the FCC’s “ancillary jurisdiction” under Title I of the Communications Act was insufficient authority to step in and regulate Comcast’s broadband services. Since then, all of the Washington telecommunications intelligentsia has speculated at the FCC’s next move. Now we have it.

Chairman Genachowski’s “Third Way” is a form of Title II “lite,” where the FCC will reverse its prior decisions dating back decades that declare the Internet and broadband connections “information services,” and instead bifurcate the Internet into two segments: the “Internet” itself, and the “connections to” the Internet. Under the “Third Way,” the FCC would continue to treat the “Internet” itself (whatever that actually means) as an “information service” (Title I) but declare all connections to the Internet to be “telecommunications services” (Title II).

Armed with a ten-page memo from his General Counsel, the Chairman argues that this policy
reversal is on sound legal ground and will instantly reverse the “problem” caused by the Comcast decision.

Setting aside the fundamental question of who caused this “problem” (a Federal Court of Appeals concluded that it was the FCC who violated the Communications Act, not Comcast), the Chairman’s “Third Way” may turn out to be a third rail, with the real potential for destroying the Internet as we know it.

Remember how Voice over Internet Protocol (VoIP) was going to revolutionize the telephone market by offering services for a fraction of the price of traditional telephone companies because it wasn’t saddled with traditional telephone infrastructure costs but instead rode along broadband connections? Unfortunately, VoIP has all but died a slow and painful death on the FCC’s regulatory rack: Over time, the FCC heaped more and more Title II regulation upon VoIP providers, increasing barriers to entry for new competitive services. Without even formally branding VoIP a telecommunication service subject to Title II, the FCC first imposed 911 obligations, then CALEA obligations, and ultimately required interconnected VoIP providers to pay into the Universal Service Fund. What was rolled out as a cheap additional voice alternative for the tech-savvy became just another service under the FCC’s heavy thumb, which drove most small VoIP providers out of business, unable to shoulder the huge regulatory costs of being de facto Title II carriers. Even worse, as of May, 2009, a VoIP provider can’t even go out of business without first getting FCC permission to die, even if it had begun offering service in the era before the FCC stepped into regulate.

While the Chairman asks us to trust him that he’ll handle broadband with a light regulatory touch (so-called “forbearance”), one look at how VoIP was treated must lead us to conclude that all manner of regulatory hell potentially faces each carrier providing an onramp to the Internet, if the FCC goes its “Third Way.” But the part of this proposed regulatory course that’s most disturbing is the way in which this Commission is likely to both grant itself regulatory powers Congress never intended and in one fell swoop impose the largest single new tax in its history. This is a side of the story that has somehow flown under the radar.

When the FCC recently issued its National Broadband Plan (NBP), as required by Congress, the document was long on promise (“100 Mbps to 100 million Americans by 2020”), but short on

---

7. See infra note 12.
8. In the Matter of IP-Enabled Services, FCC 09-40, ¶ 2 (rel. May 13, 2009) (“we extend to providers of interconnected VoIP service the discontinuance obligations that apply to domestic nondominant telecommunications carriers under section 214 of the Communications Act of 1934, as amended (the Act). Consequently, before an interconnected VoIP provider may discontinue service, it must comply with the streamlined discontinuance requirements under Part 63 of the Commission’s rules, including the requirements to provide written notice to all affected customers, notify relevant state authorities, and file an application for authorization of the planned discontinuance with the Commission”).
ways to pay for broadband deployment to the 5-7% of Americans without real access to even slow broadband speeds (below 3 Mbps). As it turns out, the Comcast case provides the FCC with the perfect vehicle to fund aggressive broadband deployment: the Universal Service Fund. As with so much of government, if you want to understand policymaking, just follow the money.

FCC General Counsel Austin Schlick’s legal memorandum supporting the “Third Way” makes no mention of the Universal Service Fund. In contrast, Chairman Genachowski’s statement talks about USF three times. It is the goal of this FCC, he says, as part of the National Broadband Plan, to overhaul the USF and transform a $9 billion program subsidizing basic telephone service to homes and broadband connections to schools and libraries, into a program to subsidize deploying broadband to rural areas and subsidize subscriber fees in high cost areas and for those with low incomes.

Of course, this is the same USF with some of the largest percentages of waste, fraud, and abuse of any government program. The GAO estimates that in 2008 alone, some $1.3 billion was improperly paid out, with some 23.3% of payments made under the High Cost program being made in error.\(^\text{10}\) This is also the same fund where the “contribution factor” (a fancy word for tax, since all contributing carriers pass that amount right along to you and me in our monthly bills) has increased from around 5% in 1999 to a current contribution factor of 15.3%,\(^\text{11}\) and that contribution factor would be far higher had not the FCC capped out-of-control payments from the High Cost program to avoid bankrupting the fund. And this is going to be the funding mechanism for the National Broadband Plan?

Most likely, it will. If the FCC gets its way and is able to grant itself new jurisdiction over broadband by declaring it a “telecommunications service” under Title II, with or without forbearance, all broadband connections will become subject to USF contributions.\(^\text{12}\) According to the Organization for Economic Co-Operation and Development (OECD), the average subscription price for broadband in the United States in 2009 was $49.25 a month.\(^\text{13}\) Applying the 15.3% contribution factor, the average broadband subscriber in the United States may soon have to pay $7.50/month more for service—a new $90 annual tax. With approximately 80

---


\(^{11}\) Since telecommunication rates themselves have increased over the past 10 years, the actual amount paid by consumers into the USF has increased close to four-fold.

\(^{12}\) 47 U.S.C. § 254(d) requires that “Every telecommunications carrier that provides interstate telecommunications services shall contribute [to the USF].” The FCC imposed this requirement on VoIP providers in 2006 after concluding that interconnected VoIP providers are “providers of interstate telecommunications” under this section, but without even finding it necessary to reach the issue of Title II classification. Yet the FCC made clear that, “To the extent interconnected VoIP services are telecommunications services, they are of course subject to the mandatory contribution requirement of section 254(d).” Report and Order & Notice of Proposed Rulemaking, Universal Service Contribution Methodology, ¶¶ 34-36, June 27, 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf.

\(^{13}\) www.oecd.org/dataoecd/22/42/39574970.xls.
million broadband connections in the United States, that’s a cool $7.2 billion in new funds available to USF—instantly nearly doubling its size to over $16 billion a year. *Eurekal!* The FCC has just figured out how to pay for its National Broadband Plan without having to go back to Congress (which, in theory, holds the sole power to tax).

As the somewhat esoteric legal debate rages over the FCC’s jurisdiction under Title I or Title II, this “Third Way” of Title II “lite,” or the legality of reclassification, keep a close eye out for any mention of “Universal Service Fund reform.”¹⁴ That’s a clever code phrase for bringing broadband connections into the USF, and sticking you and me with the bill.

**Related PFF Publications**

- *Ancillariness, the Definition Wars, and the Next Communications Act*, Barbara Esbin, Progress on Point 17.8, May 6, 2010.

¹⁴ As John Steele Gordon noted recently in *Commentary*: Roscoe Conkling, senator and Republican political boss of New York State in the 1870s and 1880s, once remarked that “when Dr. Johnson said that ‘patriotism is the last refuge of a scoundrel,’ he was obviously unaware of the possibilities inherent in the word ‘reform.’”