Has the FCC given up on President Obama?s Broadband Agenda While Pretending to Carry It Out?
While campaigning for the presidency, Barack Obama promised he would ?take a backseat to no one in my commitment to Net Neutrality.?
Well, it appears the president is now content not only to take a backseat, but willing to hand the keys over to the chairman of the Federal Communications Commission and let him drive the entire Obama broadband agenda off a cliff.
This pattern of a campaign priority tossed aside in the face of intense industry lobbying is nothing new in Washington. But in the case of broadband and Net Neutrality ? the fundamental principle that keeps the Internet open and free from discrimination ? the Obama FCC appears to be throwing in the towel before the fight even starts.
In the face of a court decision that has called the agency?s authority over broadband into doubt, FCC sources told the Washington Postthat FCC Chairman Julius Genachowski won?t ?reclassify? broadband under the law to ensure his agency has the authority to protect Internet users. Instead, he?s relying on a legal strategy that?s politically safer in the short term but doomed in the long run.
This new strategy is essentially a retreat that abandons most of the Obama administration?s broadband policy platform, including Net Neutrality.
This reversal seems to be such an epic flip-flop, that it is hard to imagine how the Obama administration could pull it off with a straight face.
But their strategy is simple: Publicly, they will pretend to maintain their commitment to these policy priorities while quietly moving forward with a legal strategy that will implode the president?s entire broadband agenda further down the road.
It?s important that those who care about these issues understand how this will transpire, because the FCC?s strategy is designed to look like they are taking up the good fight, when, in reality, they are bending to the will of Comcast, AT&T and Verizon. If we don?t pay attention, the Internet will have been long lost before everyone realizes what happened.
A Brief History of Internet Law: In the Beginning, There Was Openness
Going back more than 40 years, regulators have placed special requirements on the telecommunications companies that provide the physical means for consumers to connect to the Internet. Following a bedrock principle of the law, the FCC long ago recognized that access to the Internet ? as a potentially limitless two-way communications medium ? must be provided in a non-discriminatory fashion. Without non-discrimination, the Internet would end up like cable TV, where the providers get to choose who gets to speak.
When the Internet was first open to commercial activity, consumers used their phone lines to dial into AOL, Compuserve, Earthlink, Juno and a whole assortment of other ?Internet Service Providers? (ISPs). The phone companies got a cut of this new market from selling secondary phone lines. But they wanted more, once petitioning the FCC to allow them to levy tolls on what had always been a ?free? local call to a customer?s ISP modem bank. The FCC fortunately squashed this bad idea, keeping the phone companies from killing the Internet in its infancy.
By the mid-1990s, cable companies started getting into the Internet business. , But they didn?t want

to share their lines with the AOL?s and Earthlinks of the world like the phone companies had been doing. Essentially, the cable industry asked the FCC to treat their cable modem service with a total hands-off approach that, conveniently, shielded them from competition and gave them the ability to discriminate against online content.

It might have been a bad idea to saddle cable modem providers with the exact same rules meant to apply to legacy monopoly telephone companies. But Congress anticipated this problem and gave the FCC the ability to ?forbear? from applying any ill-fitting rules to any communications company.

Of course, Congress never intended to abandon the basic non-discrimination and interconnection obligations that must be placed on these carriers in order for our communications markets to function properly. But the cable industry got the Bush-era FCC to declare cable modems to be an ?information service? rather than a telecommunications service under the law. This word game meant that the FCC now had no direct authority over cable modem service.

This decision was originally overturned by a court of appeals who viewed such definitional trickery as being contrary to the plain language of the law. However, in the 2005 Brand X case, the Supreme Court upheld the FCC?s classification decision -- not on substantive grounds, but on the grounds that the FCC had the flexibility to decide such matters. In a now infamous dissent, Justice Scalia that in its clumsy attempt to deregulate cable modem, ?the Commission has attempted to establish a whole new regime of non-regulation ? through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.?

Following the Brand X ruling, the phone company got the FCC toreclassify their DSL, fiber optic and wireless Internet access services as fully integrated ?information services,? too, effectively ending the FCC?s ability to govern in any way in the broadband Internet access market.

The Court Forces the FCC?s Hand

The Bush-era FCC did leave behind a fig-leaf when it finally removed broadband access from its purview: four policy principlesthat were supposed to signal the FCC?s intent for the Internet to remain an open forum, where no ISP could block content or applications.

Then Comcast got caught actually blocking the file-sharing application BitTorrent. The FCC investigated and ordered Comcastto stop discriminating. The FCC asserted authority to act based on ?Title I ancillary authority,? meaning that even though Congress gave the FCC no express authority to regulate information services, stopping Comcast?s blocking was ?ancillary? to its other express obligation under the law.

Comcast sued, arguing the FCC?s ancillary authority theory was bunk. In court, the FCC said (among other things) that a section of the 1996 Telecom Act ? known as 706(a) -- gave it the authority it needed to act in the broadband Internet access market. This section of the law states that the FCC ?shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans? by utilizing? measures that promote competition in the local telecommunications market or other methods that remove barriers to infrastructure investment.?

The FCC argued that by preventing Comcast from blocking BitTorrent, it was carrying out its duty

under the law to ?encourage the deployment? of broadband by ?promoting competition? through the regulation of a discriminatory network management practice.
The D.C. Circuit court saw things differently, ruling that the FCC?s use of Section 706(a), along with several other assertions of ancillary authority, failed the basic legal test that the use of such authority has to be in support of the FCC?s exercise of a specifically delegated power.
Since the Bush-era FCC had relinquished its authority by calling broadband a fully integrated ?information service? and not a ?telecommunications service,? the court was left with little choice but to side with Comcast.

The Best Option: Reclassification

The court essentially told the FCC either to reverse the prior classification decisions, or come to terms with the reality that the agency has no authority to protect the open Internet, no authority to promote universal broadband access in rural and low-income communities, and no authority to promote broadband competition.
Reclassifying broadband under the law as a ?telecommunications service is the only viable and most sensible option left for the FCC. Yes the phone and cable companies will squeal because they of course don?t want any government involvement in any aspects of their business. But contrary to their scorched-earth tactics in this debate, reclassification merely puts the FCC?s regulatory framework back in harmony with the law.
It won?t mean that DSL and cable modem services are saddled with any legacy phone-era regulations. All it will do is allow the FCC to proceed with implementing its National Broadband Plan and give it clear authority to protect the open Internet.
But according to the Post, Genachowski doesn?t have the stomach for this fight and is instead aping industry talking points about how reclassification will harm investment, a blatantly false threat thrown around anytime the FCC contemplates acting in this market.

The FCC?s Plan for Boastful Retreat

So now that the appeals court has told the FCC that asserting ancillary authority via Section 706(a) is a no-go, and now that we know the FCC is unlikely to reverse the Bush-era decisions, what exactly is the agency?s strategy to give its National Broadband Plan and its plan for open Internet rules a firm legal grounding?
Once again, they apparently plan to rely on ancillary authority under Section 706(a).
Huh? Doing the same thing over and over and expecting a different result is the definition of insanity, but that?s apparently the FCC?s strategy.
The Post reports that is Genachowski is ?leaning toward keeping in place the current regulatory framework for broadband services but making some changes that would still bolster the FCC's chances of overseeing some broadband policies.? Reading between the lines of this statement and others, it appears that Genachowski is going to hang his entire legacy on the one possible opening left by the recent D.C. Court opinion in the Comcast case.

It all boils down to this: In 1998, the FCC issued a ruling saying that Section 706(a) ?does not constitute an independent grant of authority.? Because of this precedent, the D.C. Court in the Comcast case declined to entertain the FCC?s ancillary authority argument based on its obligations under Section 706. The FCC now appears to be ready to reverse that 1998 ruling, so it can then try again to convince the court that Congress? directive that the FCC ?shall encourage? timely broadband deployment is a specific delegation of regulatory power that gives them the authority to carry out its national broadband plan and protect the open Internet.

But given that the D.C. Court just handed the FCC its hat while making similar arguments, it?s hard to see how this argument won?t be as big a loser as the one created by the Bush-era FCC. But if it fails this time, as it almost inevitably will, nearly every broadband-related decision the agency makes from here forward will be aggressively challenged in court, and the FCC will likely lose.

Genachowski: Let Someone Else Clean Up This Mess

So why would Chairman Genachowski move forward with a legal theory that is certain to be struck down, imploding his and President Obama?s entire broadband agenda? The answer really boils down to nothing more than fear.

Genachowski may think that he has found a way to avoid a fight with the powerful phone and cable companies, and save face ? while his newly created regulatory time bomb ticks away, waiting explode long after he?s headed for greener pastures.

The FCC will move forward with its slow implementation of its National Broadband Plan, grounding authority over broadband in the corpse of Section 706(a). Because Section 706(a) is at its heart about promoting broadband deployment, the first test case of this new legal theory will be Genachowski?s plan to transform the Universal Service Fund into a ?Connect America Fund,? which will shift tens of billions of dollars over the next decade to funding the construction of broadband networks in rural America. A noble idea to be sure, but one that, due to the practical realities of the rulemaking process, won?t be decided on for at least two years.

This means that the first test case of the new Title I theory won?t likely come until sometime in 2012 or 2013. By then Obama?s promise to protect Net Neutrality will be dead. This is not only because of the delay in waiting for the test case, but also because of the weakness of the argument that 706(a) gives the FCC the authority it needs to uphold the basic principle of non-discrimination.

Even if universal service reform is upheld based on this new legal theory (which is doubtful), it is very hard to imagine the skeptical D.C. Circuit Court allowing a section of the law that discusses broadband deployment to be a green light for the FCC to govern the management of networks in areas where broadband is already available.

So, with his new plan, Chairman Genachowski gets to avoid the nasty political fight with Comcast, Verizon and AT&T, which will pull out all the stops to ensure they remain completely unregulated. But he also gets to maintain the appearance of caring about Obama?s campaign promises and the millions of Americans who have weighed in on behalf of strong Net Neutrality rules. He can slowly move forward with never-ending inquiries and comment periods and process, assuring everyone that all is well, but knowing full well that the day of reckoning won?t come until after he?s gone.

?Where Are the Results??

A glimpse at this cowardly strategy came in a recent exchange between Genachowski and Senate Commerce Committee Chairman Jay Rockefeller (D-W.Va.). Rockefeller noted that the FCC had found that Comcast engaged in a willful and deceptive practice of blocking consumer access to legal applications and content, but that the recent D.C. Circuit Court opinion called into question the FCC?s authority to stop such bad actions. Rockefeller then put it directly to Genachowski: ?My question is simple ? As a result of the court decision, what happens if Comcast engages in the same practices today??

After rattling off a stock answer about how the court case had created some ?complications,? Genachowski said, ?I think it?s essential that the freedom, the openness of the Internet for consumers, for speakers, for entrepreneurs continues.?

Rockefeller wryly responded: ?That?s impressive, almost elegiac, but where are the results? When are we going to see things happening??

Unfortunately for Senator Rockefeller and the millions of American?s wanting the FCC to take a stand for consumers in the face of the powerful incumbents, the answer appears to be sometime shortly past never.