



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

July 26, 2010

The Honorable John D. Dingell
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Dingell:

Thank you for your letters regarding the legal framework for implementing advanced broadband communications in America. I appreciate your longtime leadership on telecommunications issues, and I regret the delay in getting back to you. As you are aware, I have a concern that the recent decision of the United States Court of Appeals for the D.C. Circuit, in *Comcast v. FCC*, has cast doubt on the legal framework that the Commission chose for broadband Internet services about a decade ago to achieve core broadband policies. These policies include reforming USF, protecting public safety and promoting homeland security, protecting consumers and their private information, and preserving the free and open Internet.

To address these critical issues effectively, the FCC has begun an open, constructive public-comment process launched by release of the *Notice of Inquiry* to ask hard questions, find a solution, and resolve the uncertainty that has been created. To answer your last question first, I welcome the process that Chairmen Rockefeller, Waxman, Kerry, and Boucher have announced to develop proposals updating the Communications Act. A limited update of the Communications Act could establish an effective broadband framework to promote investment and innovation, foster competition, and empower consumers. I have committed Commission resources to assisting Congress in its consideration of how to improve and clarify our communications laws. Meanwhile, in view of the court decision, and as the Congressional Chairs have requested, the Commission has an obligation to move forward with the public proceeding initiated by our *Notice*, which is complementary to Congress's own efforts.

The *Notice* seeks public comment on all options and invites any ideas for how the Commission should proceed, including: maintaining the current "information service" classification of services such as cable modem and DSL Internet access; classifying broadband Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply; and the "third way" – similar to the highly successful approach that has been used for cell phone services since 1993 – under which the Commission would identify the Internet connectivity service that is offered as part of wired broadband Internet service as a telecommunications service and forbear from applying all provisions of Title II other than the small number that are needed to implement fundamental

universal service, competition and market entry, and consumer protection policies. I am enclosing a copy of the *Notice*.

I would like to address your other questions, as well. On your first question asking about the 1998 *Report to Congress*, my understanding is that the *Report* addressed the narrow issue of whether non-facilities-based providers of Internet access should be required to contribute to the Universal Service Fund. This is one of the specific areas on which the *Notice* seeks comment, and I look forward to reviewing the record that develops. Similarly, the *Notice* seeks comment on the issues that you pose in your second question – whether the underlying technologies or facts associated with facilities-based Internet service technologies have changed since the Supreme Court’s *Brand X* ruling regarding cable modem services.

In your third question, you suggest that the “third way” proposal relies on the view of Justice Scalia in *Brand X*, and you ask whether the Commission has in the past “relied” on a minority opinion of the Supreme Court, or whether the other Justices would have to reverse themselves to support classifying broadband transmission as a telecommunications service. The majority opinion in *Brand X* held that “the term ‘telecommunications service’ is ambiguous,” and that the “Commission’s construction was a ‘reasonable policy choice for the [Commission] to make’” (quoting *Chevron*). The majority also explained that the Commission’s interpretation of the Act is not “carved in stone,” but rather that “the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis” (quoting *Chevron*). The *Notice of Inquiry* seeks comment on whether the majority opinion provides the Commission discretion to interpret the statutory term “telecommunications service” to include broadband transmission (as Justice Scalia believed was *required*), based on current marketplace facts and the legal challenges *Comcast* has created to effective implementation of our goals for broadband.

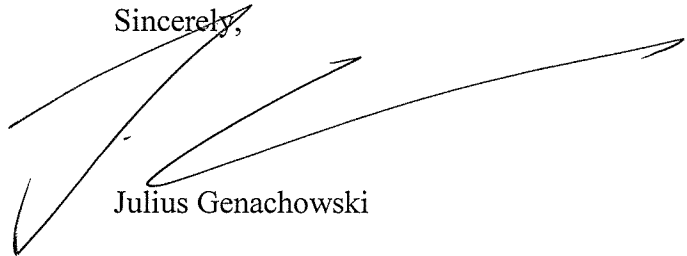
Your fourth question asks whether the Supreme Court’s *FCC v. Fox Television Stations, Inc.* decision would require the Commission to provide a more detailed justification for changing course with regard to the statutory classification of broadband Internet service and broadband transmission. *Fox* held that to depart from a prior policy, an agency must acknowledge that it is doing so, and explain why the new policy is acceptable under the statute and that the agency believes it to be the better course. The agency need not provide a more detailed justification unless its new policy rests on factual findings that contradict those that underlay its prior policy, or when its prior policy has engendered serious reliance interests that must be taken into account. The *Notice* seeks comment on the relevant facts, and I look forward to evaluating the record. I am confident that whatever path the Commission chooses after careful thought will be more than adequately supported by the full record that I anticipate the *Notice of Inquiry* will generate.

I look forward to working closely with you and the other Members of Congress as we address the issues that emerged in the wake of, and seek a solution to the problems created by the *Comcast* decision. As I have indicated previously, I would welcome clarifying legislation, and

the FCC will certainly seek to be a constructive resource to any Congressional consideration of relevant legislation.

Please do not hesitate to contact me if I can be of further assistance as Congress begins its effort to clarify the statutory framework for a twenty-first century technological world.

Sincerely,

A handwritten signature in black ink, consisting of several sweeping, connected strokes that form the name Julius Genachowski.

Julius Genachowski

Enclosure