

## Knee-jerk reactions to FCC on net neutrality?

April 2014

### Speed read

Net neutrality advocates don't like where the FCC is moving. But they may be reacting too soon, or not focussing on the key issues. In Telco regulation, the devil is almost always in the detail. FCC indicates it would allow discrimination only if that is "*commercially reasonable*", for which a high bar is to be set. If it is truly high, contrary to what has happened in NZ on similar issues, the approach could work well. On its present path, expect NZ to take an insufficient approach.



Over my years of being involved in this net neutrality debate, it has struck me how emotive and simplistic some of the debate can be, from those supporting net neutrality (whatever that is). It has never realistically been as linear as "*net neutrality: yes or no*". This is a far more complex issue, and it is hard to see how "*pure*" net neutrality in the sense of 100% equal treatment could be in the best interests of end users, as we've explained in the past, such as in our article, [Net Neutrality and Online Content](#).<sup>1</sup> (For an article neatly setting the scene for net neutrality advocates, see Professor Timothy Wu's piece in the New Yorker, *Goodbye Net Neutrality, Hello Net Discrimination*.)<sup>2</sup>

So it is no surprise to see the FCC Chair trying to debunk what he sees as misapprehensions in his blog piece, [Setting the Record Straight on the FCC's Open Internet Rules](#).<sup>3</sup>

Key is this comment the Chair makes:

*"The Court of Appeals made it clear that the FCC could stop harmful conduct if it were found to not be "commercially reasonable." Acting within the constraints of the Court's decision, the Notice will propose rules that establish a high bar for what is "commercially reasonable."*

As so often is the case in telco regulation, the devil is in the detail. If there is truly a "*high bar*" the outcome may be a good one for net neutrality supporters, in the real world of Telco regulation.

But we don't know yet where FCC will set the bar, even if there are suspicions.

Here in NZ, in the Telecom separation area, we have had this "*commercially reasonable*" type of approach. It gave steamroller room for Telecom and Chorus as the bar was low enough for a hedgehog to crawl over. Will FCC do something different? Maybe yes and maybe no. We don't know yet but in the real world that will be a big area for net neutralists to lobby hard on.

Will NZ do something different going forwards as net neutrality climbs the agenda? Based on past experience, the approach may be hedgehog friendly. NZ is not good at dealing with these issues save for the separation nuclear bombs themselves (but even they have problems in this area).

It'll be interesting to see how Telecom's loosely stated traffic management policies for its new unlimited service are handled by interested parties.... not quite a net neutrality issue but starting to get into overlapping territory.

1. <http://www.wigleylaw.com/assets/pdfs/2009/net-neutrality-and-online-content.pdf>

2. <http://www.newyorker.com/online/blogs/elements/2014/04/the-end-of-net-neutrality.html>

3. <http://www.fcc.gov/blog/setting-record-straight-fcc-s-open-internet-rules>

*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

Wigley+Company  
PO Box 10842  
Level 6/23 Waring Taylor Street, Wellington  
T +64(4) 472 3023 E [info@wigleylaw.com](mailto:info@wigleylaw.com)  
and in Auckland  
T +64(9) 307 5957  
[www.wigleylaw.com](http://www.wigleylaw.com)

©Wigley & Company 2014