

FREE PRESS
SUMMARY OF COMMENTS FILED IN
FCC'S OPEN INTERNET RULEMAKING PROCEEDING (GN 09-191)
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Though the debate around network neutrality is heated and contentious, all sides agree that the abstract quality of “openness” is the defining characteristic of the Internet, and is why the Internet has risen from its original status as an obscure technology to become an essential infrastructure in a matter of years, not decades. Where the sides diverge is how to preserve this abstract quality of openness. Here, we believe the path is clear, and traces its way through decades of regulatory history -- history that teaches us a very important lesson: two-way communications networks are so critical to the basic functioning of our society that they must be operated in a non-discriminatory fashion, one that preserves open and efficient interconnection. Indeed, this lesson is at the heart of the Communications Act, and to deviate from it is to invite a peril that is so great and so costly, that it is nearly unfathomable.

Network Neutrality embodies the basic principle of open nondiscriminatory interconnection that the Communications Act seeks to promote. Thus, Network Neutrality unquestionably should be the cornerstone of America’s broadband policy. Network Neutrality makes it possible to have an open market for speech and commerce on the Internet, and it is the Commission’s fundamental duty to protect this openness for consumers, citizens and businesses alike. Ultimately, the Commission has the responsibility to ensure that the content market that sits adjacent to the access market retains maximum competitiveness, as it always has, by precluding market power in network ownership from distorting the market for Internet content. This is the successful legacy of the *Computer Inquiries* that the Commission must uphold.

This economic space at the “edge” of the network architecture has been a remarkable engine of economic growth in the last decade. In addition, this is the space where network technologies meet democratic discourse and open cultural expression. Because of the open marketplace at the edge of the network, an open sphere for public speech has developed that rivals the printing press as the most important development in modern political communication. Policies aimed at the application layer should recognize its centrality to the economic and democratic health of the nation.

Simply stated, there is a reason millions of citizens have told Congress to preserve Net Neutrality. The importance of the Internet ecosystem exceeds the sum of its parts; its basic DNA of openness must not be destroyed in the shortsighted pursuit of monopoly profits on the part of the private companies who have made billions by selling access to this common good resource.

With these comments, Free Press offers evidence that these rules will promote efficient investment, promote innovation, create jobs, and promote competition. We also offer evidence rebutting the major claims of hypothetical harms that openness policy might cause. We then provide extensive discussion on exactly how the Commission should structure these rules in order to effectively preserve and promote the open Internet.

Highlights of these comments include the following:

Investment

- Network Neutrality will not deter ISP investment, and will promote edge economy Investment. This in turn will feed the virtuous cycle where ISPs will continue to Invest in network infrastructure as the Internet economy grows.

- ISPs major stated opposition to Network Neutrality is that without the right to earn new discriminatory-based revenues they will not invest in their networks. However, we explore the likely shape of these hypothetical business models, and find that the true motive beneath ISPs desire to discriminate is not the possibility of earning new third-party revenues, but the protection of legacy voice and video services from the disruptive competition enabled by the open Internet.
 - There are three types of discriminatory-based business models:
 - “Pay-for-Play” -- This model would have ISPs refusing to carry certain traffic unless the content originator pays additional fees above normal transit costs. We find that ISPs are unlikely to pursue this model due to the high likelihood that premium content providers would then emulate the Cable TV model, and refuse to let the ISP carry the content unless the ISP pays the content provider for the privilege of offering this content to its customers.
 - “Pay-for-Priority” -- Under this scheme, third-party content and applications providers would compensate ISPs for prioritizing their traffic over all other traffic flowing across the ISP’s network. But this model is faced with an immovable barrier: the routing of Internet packets is a zero-sum-game; during times of congestion, prioritizing one packet deprioritizes all others. This practical reality firmly bounds the possibilities of the pay-for-priority business model. In practice, this means that in order for this model to work, congestion will have to be widespread. It also means that ISPs will only be able to form a small number of paid-priority business relationships. This in turn means that ISPs will likely form exclusive paid-priority relationships, resulting in the Balkanization of the Internet. This, along with competition from CDN services also means that the total potential revenues that can be earned from the “Pay-for-Priority” model will be relatively low. Therefore, because this model only works when congestion is commonplace, and because its revenue potential is limited, the notion that it will prove superior to the status quo at stimulating ISP investment is highly dubious.
 - “Vertical Prioritization” -- This model is one where an ISP simply prioritizes its own vertical content and services over all other content. This prioritization can be achieved either by flagging their traffic for priority, or by more subtle ways, such as de-prioritizing applications that are used to deliver classes of content that compete with the ISPs vertical content; or by the outright blocking of an IP application that competes with the ISPs own adjacent market services. Unlike the pay-for-play or pay-for-priority models, this business model involves no new income streams, only the insulation of old streams from network-facilitated competition. But allowing ISPs to insulate their legacy vertical voice and video industries from the natural forces of competition is no recipe for investment -- with reduced competition comes reduced investment incentives.
- Therefore, abandoning network neutrality would enable ISPs to reduce investment in the core market, and leverage power into the edge markets, further reducing investment there as well. Abandoning Network Neutrality is certain to stifle growth in the U.S. information economy at a time when this sector serves as our best hope for a productive future.
- Historical financial data strongly suggest that network neutrality rules will not deter ISP investment. At the end of 2006, AT&T, as a condition of its acquisition of BellSouth, was required by the FCC to operate a neutral network for two years. During this period, while operating under network neutrality rules, AT&T’s overall gross investment increased by \$1.8 billion -- more than any other ISP’s in America.
- Without Network Neutrality, ISPs will have a strong incentive to reduce investment and make congestion commonplace in order to extract revenues from content providers willing to pay to avoid traffic delays.

- Without open Internet rules, ISPs will be granted license to abuse their positions as terminating access monopolies, which is in direct conflict with the Act's goals for nondiscriminatory interconnection. This abuse will lead to even more complicated regulatory issues than are currently faced by the Commission in the Intercarrier Compensation (ICC) debate.

Competition

- Economic theory and market experience indicate that nondiscriminatory rules are necessary even in access markets with robust competition. It is in recognition of this basic fact that Congress structured the Communications Act such that the Commission was granted the authority to forbear from applying much of the regulations in Title-II to wired and wireless telecommunications providers, but was expressly forbidden from removing nondiscriminatory interconnection obligations.
- Network Neutrality will have no impact on certain ISPs already pending desires to gouge their customers using Internet overcharging billing schemes. These schemes are not rooted in efficient recovery of costs, but in the desire to earn supracompetitive profits by abusing market power. Certain ISPs may choose to pursue such practices, but they will not do so because the presence or absence of Network Neutrality rules.

Employment

- Network Neutrality will not harm ISP employment. ISPs have for years been earning higher revenues and simultaneously slashing jobs. Since 1996, AT&T, Qwest and Verizon have collectively seen a 32 percent increase in revenues while jobs have dropped 25 percent. In short, the ISPs pro-consolidation era pattern of destroying good jobs while reaping higher profits will likely continue with or without the existence of Network Neutrality rules.

The Digital Divide

- Network Neutrality will not widen the racial/ethnic digital divide, and allowing ISPs to operate discriminatory networks will not result in a narrowing of this digital divide. These arguments are based in the false arguments that Network Neutrality will deter ISP investment, and the factually inaccurate belief that somehow any additional revenues will be used to lower prices thereby attracting consumers from low-income and marginalized communities. The digital divide is a real problem, but the imposition of Network Neutrality will not do anything to exacerbate it; and in fact, without Net Neutrality the supply of diverse content that will be needed to attract new users will be reduced.

Crafting Rules - Nondiscrimination and Reasonable Network Management

- In crafting the open Internet policy framework, the Commission must establish a clear, unambiguous rule against all discrimination. This will be essential to protect consumers and competition from harmful behavior. While paid-prioritization is a particularly harmful form of discrimination, any application bias poses a great threat to the long-term health of the innovation economy.
- A clear reasonable network management standard must buttress the Commission's nondiscrimination rule. Such a standard will permit good behavior without creating arbitrary loopholes.
- Contrary to assertions by AT&T, a weak standard of "unjust and unreasonable" discrimination would not be sufficient to protect the open Internet.
- Rather than creating a prescriptive list of reasonable network management practices, we recommend a standards-based test of simple factors or criteria to judge reasonableness. Reasonable network

management must have a very high standard. Discriminatory practices must meet a high bar of legitimacy and must achieve their remedy in a manner among the least restrictive of consumer choice.

- We suggest that any discriminatory network management practice should be held to a two-pronged test. First, does it serve a public interest purpose, and are the means for achieving that purpose valid in geography, time, and proportion.

Crafting Rules - Managed Services

- We are quite skeptical of this concept. However, we suggest that Managed Services must be sold and marketed separately from Internet access services. They should be provisioned on virtually or physically dedicated bandwidth. They should be constrained such that they do not cannibalize or reduce bandwidth expansion in the Internet access service.
- We recommend that Title-II voice and Title-VI video services provisioned over managed IP networks receive the proper regulatory treatment dictated under those portions of existing law.
- The Commission must recognize that Managed Services are currently not subject to Title-I regulations in the same way that broadband Internet Access Services are. Non-broadband Internet access services were not deregulated in the Wireline Broadband Order, and are such still subject to the *Computer Inquiry* rules for the telecommunications component of the information service. As such, the bandwidth made available on a network for a Managed Services must be sold to any provider on reasonable rates, terms, and conditions.
- The issues surrounding Managed Services are not pressing, and clearly there is not enough of an evidentiary basis for the Commission to establish a new regulatory regime for such hypothetical services outside of what already exists (i.e. the *Computer Inquiry* framework). We recommend the Commission study this issue further.

Crafting Rules - Wireless

- The rules should apply in a symmetric manner to all methods of broadband Internet access. The principles and rules of nondiscrimination and reasonable network management can and should be applied directly and immediately to all forms of wireless networks and devices. To the extent that many mobile broadband networks face demonstrably greater challenges than many fixed networks, the range of options considered proportional in response to these challenges will be greater. Any alternative approach, particularly a categorical permission to block high-bandwidth applications or to block low-bandwidth VoIP or other uses, would permit substantial anti-competitive (and anti-consumer) behavior -- and is simply unnecessary.
- The Commission should require mobile broadband Internet access service providers to permit attachment of any compatible device to their networks, and should ensure that its rule is not rendered meaningless through inefficient, obstructive processes.

We believe that through this open and transparent public process of debating these rules that much of the disinformation, scare tactics and outright falsehoods leveled at Network Neutrality will give way to a basic truth: that nondiscriminatory protections are essential to promoting innovation and investment, as well as facilitating more informed citizenry and greater democratic participation. We urge the Commission to quickly move to adopt rules and bring certainty to the marketplace.