



Net Neutrality: Time for Evidence-Based Policy

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A federal appeals court has bopped the Federal Communications Commission yet again. In *Comcast v. FCC* – the “network neutrality” case – the agency was found to be making up the law as it went. In sanctioning the cable operator for broadband network management it found dubious, the Bush-era FCC exceeded its charter. Cable modem services and digital subscriber line (DSL) connections provided by phone carriers compete – officially – as unregulated “information services.”

Congress could now mandate broadband regulation. This could have happened four years ago, when the Democrats took majority control and announced that they would impose network sharing mandates. That has not happened, and – with unemployment running at above 9 per cent – is not likely now. Net neutrality is seen, bluntly, as a jobs killer. That’s one take Congress has actually gotten right.

Alternatively, the FCC could flip its own rules, going back to a DSL regime discarded in 2005. But it would have to go further, extending “open access” to cable broadband, something it has always rejected. In 1999, when AOL and phone carrier GTE lobbied hard for cable regulation, Clinton-appointed regulators stood firm. “We don’t have a monopoly, we don’t have a duopoly,” stated FCC Chair Bill Kennard, “we have a noopoly.” Forget regulation, encourage investment, get amazing new stuff.

But “open access” rules for DSL remained. These permitted phone company rivals to lease capacity at rates determined by regulators. It was not until February 2003 that the major requirements were ended. In August 2005, remaining rules were scrapped. A test was created. Deregulation would further investment and deployment, or quash competition and slow broadband growth. FCC member Michael Copps predicted the latter. He challenged the Commission to see if the policy would “yield the results” anticipated. “I’ll be keeping tabs,” he warned.

Yet, the market’s verdict is in – and the proponents of regulation have ignored them. Obama economic adviser Susan Crawford, arguing in the *New York Times* for broadband re-regulation, said that ending government DSL mandates was “a radical move... [that] produced a wave of mergers,” raising prices and lowering quality.

It is simply untrue. Mergers, governed by the FCC and antitrust agencies, have had no material impact on broadband rivalry. And the rate of broadband adoption significantly increased following deregulation. This pattern continued a trend.

Cable, unregulated, led DSL in subscribers by nearly two-to-one through 2002. Then, with DSL deregulated, phone carriers narrowed the gap, adding more customers, quarter-to-quarter, than cable operators by 2006. The spurt in DSL growth relative to cable modem usage takes place at precisely the time the former was shedding “open access” mandates, and cannot be explained by overall changes in technology. In short, DSL subscribership was up 65 per cent by year-end 2006 compared to the predicated (pre-2003) trend under regulation.

The story in ultra-high-speed fiber-to-the-home (FTTH) services is similar. There was virtually no deployment until the Commission, in late 2004, declared that fiber networks would not be subject to access regulation. That move, according to industry analysts, unleashed investment. FTTH is now offered to over 15m homes, and networks are capable of supplying 100 MBPS downloads, on a par with services delivered anywhere.

Not only has access regulation been shown to retard advanced networks, the Internet is loaded with “non-neutral” business deals where Internet Service Providers (ISPs) give preference to favored firms or applications. These negotiated contracts rationalize resource use, and drive incentives for innovation.

Data flows, unregulated, across large backbone networks that pay no fees to exchange their traffic, but collect billions from smaller networks that must fork out to inter-connect. This pay-to-play structure pushes networks to invest, grow, and cooperate.

Cable TV systems reserve broadband capacity for their own branded “digital phone” services. This special “fast lane” provides a premium service not available to independent VoIP applications. It has also transformed the competitive landscape, helping to forge fixed line competition for over 100m US households -- what the 1996 Telecommunications Act tried failed to do via network sharing mandates (tossed out by a federal court in 2004).

And the corporate history of Google offers a landmark date: on Feb. 1, 2002, the company’s search engine popped up as the default choice on 33m AOL subscribers’ home page. The coveted spot was purchased; the young firm mortgage its future to outbid search engine rivals. An application provider paying the country’s largest ISP for preferred access to its customers. That may not be a violation of net neutrality. But if not, many lawyers will be very busy explaining why.

Today’s FCC Chair, Julius Genachowski, has made a pledge: the Commission’s “processes should be open, participatory, fact-based, and analytically rigorous.” That would be a refreshing approach. In addressing new regulations for broadband, let’s first see how these markets actually work, and how well the last batch of network sharing mandates performed.

Let’s all keep tabs.

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