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### **FCC Weighs Net Neutrality - And Why That Matters**

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The FCC has announced its belated entry into the acrimonious “network neutrality” debate, starting with a Notice of Inquiry aimed at gathering information on how broadband Internet providers charge for services. The Commission must decide whether to mandate a principle of nondiscrimination in the provision of Internet access services, and if so, how it should word the requirement.

The “network neutrality” issue has its origins in 1887, fully a century before the Internet appeared. Back then, the newly-built Western railroads operated on a monopoly basis. Ranchers, who depended on the trains for their business, complained that the railroads played favorites, giving some customers preferential treatment while imposing delays and overcharges on others. Congress responded with the Interstate Commerce Act, which required the railroads to give similar treatment to similar customers, and to charge everyone the same published rates.

Half a century later, Congress again heard the same complaints, this time about telephone service – another monopoly on which businesses had come to depend. The Communications Act of 1934 applied the same solutions. Indeed, its Title II was modeled almost section for section on the 1887 railroad provisions. The monopoly phone provider, AT&T, was barred from unreasonably discriminating among its customers, and had to charge everyone the same FCC-approved rates listed in its public tariffs. The solution worked. AT&T made a consistently good return on investment for decades, while Americans enjoyed the best telephone service in the world.

#### *Broadband Deregulation*

In its early days the Internet relied on those FCC-regulated voice and data lines. But not any more. Most active users have shifted to broadband delivery – largely via cable modem and DSL, soon to include broadband-over-power-line and various wireless options. Over the past few years, the FCC has systematically removed all of these broadband delivery services from Title II. The only users still receiving Title II protection are the rapidly shrinking population of dial-up subscribers.

The current regime leaves broadband Internet providers free to discriminate among users in quality of service, and to charge them different rates. The FCC believes that any tendency toward abuse will be restrained by competition. Customers who feel they are under-served or overcharged can, in principle, take their business elsewhere. In practice,

though, many Americans still have access to only one broadband provider. Even among those having a choice, many are tied into long-term contracts, or receive their phone and TV services in a bundle with Internet, or are reluctant to give up the email address known to their friends and relatives.

At first, the deregulation of broadband mattered mostly to Washington policy wonks. That changed when the executives of two major providers announced they see nothing wrong with giving some customers faster service for a higher price. Those customers' sites would download faster to users. If Amazon.com, say, opted to pay for the premium service, consumers would have a quicker and easier experience browsing at Amazon.com than at its competitors. Conversely, if providers were to charge Apple's iTunes.com an extra dime for each downloaded song – as one provider has threatened to do – either Apple's profits will drop or its customers will leave. Either way, Apple loses.

Like the ranchers of the 1880s, businesses today depend on a facility that has the power to tip some to prosperity and others to failure. Like the ranchers, they have gone to Congress in hopes of getting legislation to keep their playing field level. Now the FCC has stepped in.

### *The Neutrality Debate*

The term “network neutrality” generally refers to a regulatory regime under which Internet providers must treat similar users similarly. But there is room for disagreement as to what that means.

Opponents of network neutrality – generally, the biggest DSL and cable providers – argue that the Internet flourished without regulation, so that regulation now can only cripple it. Apart from being a non sequitur, this ignores the detail that much of the Internet's growth occurred while consumer-end transmission channels were under Title II protection. The deregulated Internet is still new. And so the opponents riposte: since there have been no actual complaints of discrimination, why try to fix a non-existent problem? But it was the providers' own statements, declaring their right to discriminate, that triggered the demands for preventive regulation.

Some network neutrality opponents try to confuse the issue by distorting it. They say, for example, that network neutrality would require charging the same monthly rates to all users. Amazon.com and the one-man corner bookstore would have to pay the same for Internet service. Of course, this would make no sense. Aha! say the opponents. That means network neutrality makes no sense.

The argument is silly. Anyone would agree that providers can properly charge more for heavy traffic. The question is, do the higher rates also entitle high-traffic users to preferential treatment? Today, data packets from Amazon.com pages and from the corner bookstore all line up for the same channels and switches, and are processed the same way. Network neutrality would require that treatment to continue. Network neutrality is violated when Amazon.com, paying a premium, has its packets bumped to

the head of the line, so they consistently reach their destinations faster. That could seriously disadvantage the small bookstore.

Because the FCC has declared broadband Internet service providers to be offerors of “information service,” rather than common carriers, the non-discrimination provisions of the Communications Act do not apply. These providers can therefore favor selected customers for any reason – or no reason. A more egalitarian form of discrimination would still allow faster service for a premium, but would require providers to make that option available to all. The corner bookstore could thus compete packet-for-packet with Amazon.com, if the owner is willing to pay extra.

But even this proposal outrages those who see the Internet primarily as a vehicle for disseminating and sharing ideas, as opposed to selling consumer products. Political organizations, non-profit entities, advocacy groups, crisis-support services, community networks, health-information websites . . . all of these and dozens more would drop to second-class status as commercial users ponied up for the fast lane. The providers insist they would not deliberately impair the others, but speeding up everybody else arguably amounts to the same thing. That does not matter, say the providers. We own the facilities, and we can use them as we wish.

The FCC already has a list of principles to guide its Internet policies. These assure consumers access to lawful content, their choice of applications and services, the ability to connect their own hardware, and the benefits of competition among providers. Now the FCC is assessing whether to add network neutrality to this list. Still at a very preliminary stage, its Notice of Inquiry asks:

- how broadband providers are managing Internet traffic on their networks today;
- whether providers currently charge different prices for different speeds or capacities of service;
- whether FCC policies should distinguish between content providers that charge end users for access to content and those that do not; and
- how consumers are affected by these practices.

Brace yourself, FCC: You are going to hear, at length, from people who feel strongly on both sides. Whatever your decision, many will disagree. Your best hope may be that Congress takes the decision away from you.