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**Stimulus Applicants Can't be
Neutral on "Net Neutrality"**
Funding tied to expanded principles of "neutrality"

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The concept of "network neutrality", still in a long gestation, is gradually finding its way into the law – most recently, as a condition of participating in the broadband stimulus program.

Though lacking a widely-accepted definition, the term "network neutrality" generally refers to the concept that Internet users should have unfettered access to content and services – in other words, that service providers should not be allowed either to impede or to favor access to particular sites. Most proponents agree on two exceptions: for legitimate law enforcement (to block, say, child pornography), and for "reasonable network management." The latter, in practice, usually amounts to finding ways of throttling back the small percentage of people who take up a large percentage of the available bandwidth.

Service providers, by and large, dislike the whole idea. Some want the option of charging sites extra money for delivering their content faster to consumers, or of offering consumers content that is not available through competitors. None wants the government probing into its network management practices. If the country decides it wants network neutrality as a matter of policy, regulation will be necessary.

The FCC made a start in 2005, when it adopted four "principles" of neutrality. These declare that consumers are entitled to:

- access the lawful Internet content of their choice;
- run applications and use services of their choice;
- connect their choice of devices; and
- have competition among providers.

As usual, the principles are subject to the needs of law enforcement and reasonable network management.

The list is fine, as far as it goes. Some observers would like to have seen an additional principle barring discrimination among content providers. The biggest omission, however, is not in the list itself, but rather in the FCC's having skipped the step of adopting the list as enforceable rules.

The legal effect of the principles, if any, is the topic of a lawsuit now pending in the U.S. Court of Appeals. A year ago the FCC determined that Comcast, which provides both cable service and Internet service, had selectively interfered with an Internet application called BitTorrent which, among other uses, helps subscribers to download movies. Comcast claimed this was reasonable network management. Skeptics noted that BitTorrent offered a free alternative to Comcast's on-demand cable TV offering. Citing its four principles, the FCC ordered Comcast to stop targeting particular applications. Comcast said it had already stopped, but went to court anyway, to assert that the principles, not being actual rules, were legally inadequate to support an order. The court has not yet issued a decision in the case.

In the meantime, two government agencies not usually associated with private-sector telecommunications regulation have written a form of network neutrality into law, for all practical purposes.

The BIP and BTOP stimulus programs propose to hand out \$7.2 billion with an important catch. Applicants taking funds under either BTOP or BIP *must* commit to a specific form of network neutrality. It has five requirements:

- Adhere to the FCC's four principles.
- Do not favor particular content or applications over others (the "fifth principle" missing from the FCC's original formulation).
- Publicly explain any network management policies (to head off Comcast-type problems).
- Connect to the public Internet (disqualifying projects that consist entirely of closed private networks).
- Offer interconnection on reasonable rates and terms (a throwback to the FCC's "Computer II/III" rules to open the market for Internet access to competition).

On point (4), the funding agencies are quick to clarify that awardees may use private networks rather than the public Internet for "managed services" such as telemedicine, public safety, and distance learning, where necessary for quality of service. The document is not entirely clear, but we think point (4) means that an awardee proposing to use funds for a private network must also offer a public Internet connection. We also

note that the four principles apply to all “Internet access or Internet Protocol-enabled (IP-enabled) services,” presumably including a private network that uses IP-based communications, as many do.

The agencies emphasize that awardees are free to manage their networks responsibly. They can use caching and bandwidth allocation (without discriminating among content or applications), and can take reasonable measures to combat spam, denial of service attacks, illegal content, and other harmful activities.

The network neutrality obligations are binding not only on awardees, but also on contractors and subcontractors who build or operate funded systems. And the obligations continue to apply for the life of the facilities, not just the particular networks that run on them. If company *A* builds network facilities with stimulus money, and at some later time transfers the facilities to company *B*, which wants to use them for some other purpose, all of the above conditions nevertheless carry over.

Any disputes over the requirements are referred to the FCC for action based on “any FCC rules implicated in the dispute.” Today, of course, there are none. An aggrieved party’s next stop is the funding agency, which may “exercise all available remedies to cure the default.” Vague threats are always the worst.

If the FCC maintains its disinclination to adopt actual rules on network neutrality, we will have the awkward situation of systems being subject to different requirements, depending on whether they were built with stimulus money or otherwise. A content provider that suspects discrimination would have to inquire into the origins and funding of the facilities used by the network in question. This will become difficult as various companies buy and sell and interconnect both publicly and privately funded networks, and even parts of networks, in ever-more-complex configurations. Worse, content moving from the provider to the end user may traverse both stimulus-funded and other facilities. Pinpointing where the discrimination occurs, for purposes of bringing a complaint, may well be impossible.

Many observers – this author included – think that the best solution is for the FCC to step up and do its job of requiring all broadband service providers, however funded, to treat content suppliers and end users even-handedly. A good start would be simply to adopt as rules the four principles, plus two more from the stimulus list: no content discrimination, and mandatory disclosure of network management policies. Those of us favoring this view are surprised there might be any serious question that this is the right thing to do.