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How to Solve the Net Neutrality Problem

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As we have reported (*see* Paul Feldman's article in the November, 2009 issue of *FHH Telecom Law*), the FCC has proposed rules to mandate "network neutrality." Those rules would bar a broadband Internet service provider (ISP) from, among other things, discriminating for or against a provider's content.

The big ISPs are implacably opposed to all such rules. We own the networks, they say, and we can run them any way we want. On the other side, in favor of the rules, are content providers who fear discrimination by the ISPs. The big providers in particular, like Google, not only want to compete with the cable and telephone companies, but they want to do it through the cable and telephone companies' own ISPs.

Ironically, the problem that network neutrality would solve is one of the FCC's own making.

In the dial-up days, there were two kinds of ISPs: (a) the ones run by the phone companies, and (b) all the others. The phone company ISPs had an enormous potential advantage in easy access to the innards of the phone system. Other things being equal, they could have out-performed and undersold everyone else and had the industry to themselves. But the FCC wanted a competitive market. In the 1985 *Computer III* proceeding, it required the phone companies to offer to all ISPs the same functional network access available to the phone companies' own ISPs. (This oversimplifies a very complex ruling.)

The result of *Computer III* was a lot of ISPs. Customers in many areas could choose from hundreds. Eager to preserve clientele in such an intensely competitive environment, no ISP would dare tamper with any customer's content. What we now call network neutrality was such a pervasive fact of life as to not even need a name.

With the advent of broadband, the FCC changed course. Phone-company DSL, in the early days of broadband, still implicitly came under the *Computer III* rules, and thus had to be shared with competing ISPs. But cable TV companies, which had never been subject to *Computer III*, had no such obligations. Non-cable ISPs clamored for access;

the cable companies fought back. The FCC settled the issue in 2002: cable TV is not like telephone service and need not share its facilities. A cable company could require its broadband subscribers to use the cable company's ISP.

That decision outraged the phone companies, who still had to share their broadband channels. But in 2005, the FCC extended the same ISP exclusivity to the phone companies. The Commission decided that DSL is a lot like cable after all, and so abolished the DSL sharing rules. If you wanted DSL, you took the local phone company as your ISP.

Now, having let the broadband ISPs lock in their customers with nowhere else to go, the FCC is shocked to learn that some of those same ISPs are blocking or slowing content that might compete with their parent companies' offerings. How can the Commission protect broadband customers from the undesirable circumstances which the Commission's own regulatory decisions have unintentionally fostered?

It is too late for the FCC to re-apply *Computer III* to broadband Internet. That opportunity has passed. And so the FCC goes to Plan B: duct-tape network neutrality rules over the problem and make discrimination victims run the gauntlet of lengthy and possibly expensive enforcement proceedings.

There may be another way. The ISPs cannot easily be forced into giving access to competing ISPs. But perhaps they might be persuaded to give that access voluntarily.

Here is how it might work.

The FCC lays out a set of detailed, no-nonsense network neutrality rules that specify clearly what ISP behavior is banned. (Not like the newly proposed rules which are vague and general.) The FCC also sets up a swift and certain enforcement procedure that penalizes violations. But it gives each broadband ISP a choice: (a) the ISP can opt to abide by the network neutrality rules; or (b) it can offer competing ISPs access to the broadband channel, equivalent to its own. If an ISP chooses network neutrality, it keeps the entire customer base for itself, but must be neutral as to content. If it opts to open its network, it can block or favor content as it chooses, although it risks losing customers who dislike the discrimination.

Many details remain to be worked out. Could a cable or telephone company use its relationships with subscribers to market ISP services? Could an ISP reject network neutrality, yet still hold in customers with optional long-term contracts and early termination fees? How would the rules operate in a rural area with no competing ISPs?

But the principle is simple enough. A provider that chooses to abide by network neutrality must live up to that commitment, in exchange for its role as the exclusive ISP. Another that chooses to open its network will have to work with competitors as promised, in exchange for the right to play favorites with customer content.

In short, a broadband provider can have all the customers, or it can manipulate their content. It just can't do both.