

Internet Regulation, Network Neutrality, and the Role of Markets in the Future of the Internet



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Organizing Inquiries

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- **What is Network Neutrality?**
 - What are its motivations?
 - What problem are we trying to solve?
- **What Authority Does the FCC Have to Implement, Administer, and Enforce Network Neutrality?**
 - Title I Ancillary Authority?
 - Title II Authority (Reclassification)
 - Title VII (A New Law)?
- **What are the Likely Consequences of Network Neutrality Regulation**
 - What is the specific rule?
 - Does it solve the problem, whatever that is?
 - How solid is the legal footing?
 - What are the unintended consequences?

What is the Motivation?

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- **Protection Against “Anticompetitive” Acts by ISPs**
 - Amazon fears ISP favoring it’s own bookstore or movie store
 - VOIP Providers fear blocking
 - NETFLIX fears impeded access to their video
 - (NOTE: Blocking is a result of price regulation, not profit maximization by the ISP)

What is the Motivation?

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- **Media Concentration**

- Some groups (Free Press/Public Knowledge) fear that ISPs will control the flow of information in a manner similar to radio/TV/newspapers.
- ... the Internet enables users to engage, create, and participate as speakers -- not merely as passive recipients of others' speech. This is particularly true for new entrants and underrepresented groups, such as women and people of color, who historically have lacked access to the resources that make participation on traditional media platforms possible. [T]he comparative failure of traditional media to provide outlets for speakers and audiences of color is plain on its face. [B]roadcast radio, broadcast television, and cable television [] failed to decentralize control over the platform, permitting powerful gatekeepers to control access, largely excluding women and minorities from ownership and participation. [If] non-discriminatory access to, and provision of, content online is not protected, the Internet will be relegated to the same fate and format as those media from which underrepresented citizens have been shutout for decades. FP Comments at 134-6.

What is the Motivation?

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- **Protect Free Access to an Essential Input of Production**
 - Google does not want to share profits with an essential input of production (broadband)
 - Standard Rent-seeking motivation for regulation
- **Raise Rivals' Costs**
 - Google wants to lock in the status quo so that its embedded investments cannot be “mimicked” by us of prioritized service by smaller content rivals
 - Standard Rent-seeking motivation for regulation

What is Network Neutrality?

Network Neutrality means ... *a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider.*

Open Internet NPRM ¶106.

Network Neutrality is ...
price regulation.

What are the Consequences?

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- **The “Non Discrimination” Rule encouraged ISPs to favor their own content**
 - *Sabotaging Content Competition: Do Proposed Net Neutrality Regulations Promote Exclusion?*, Phoenix Center Policy Perspective 10-03
 - Permits a two-tiered Internet, but only with an affiliate
 - “Sabotage” is a result of price regulation, not anticompetitive intent.
 - Proposed rule not directed at the Anticompetitive nor Media Concentration motivation for Network Neutrality. Its incents favoritism.

What are the Consequences?

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- **The “Non Discrimination” Rule prohibits voluntary contracts**
 - The rule permits consumers to seek enhanced delivery. What if welfare-enhancing prioritization is more efficiently handled between two firms rather than an ISP and millions of customers?
 - *Network Neutrality and Foreclosing Market Exchange: A Transaction Cost Analysis*, PHOENIX CENTER POLICY PAPER No. 28 (Higher Prices for Consumers, Lower Profits for ISPs, Lower Sales for Content Providers, Favoritism to ISP Affiliates)
 - Similar findings in:
 - ✦ Kraemer and Wiewiorra, *Network Neutrality and Congestion-Sensitive Content Providers: Implications for Service Innovation, Broadband Investment and Regulation* (March 15, 2010).
 - ✦ Jamison and Hauge, *Getting What You Pay for: Analyzing the Net Neutrality Debate* (April 20, 2008).

What are the Consequences?

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- **The “Non Discrimination” Rule is inconsistent with both economics and communications jurisprudence**
 - *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC’s New Net Neutrality Principle, Phoenix Center Policy Perspective 10-03*
 - Standard and Enhanced Services are not “like” services.
 - The rule forces same prices for different services.
 - Section 202 non-discrimination and the Non-Discrimination Principle are in conflict. All actions are discriminatory.

What are the Consequences?

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- **What is the effect on “Investment”?**
 - What is the rule?
- **What is the effect on “Jobs”?**
 - What is the rule?
- **Does it Matter?**
 - If we could build 100 Mbps to every house for \$1 billion would that be a good thing, even though that’s \$349 billion less Capex?
 - If we required all trenching to be done with shovels would that be a good thing?
- **Efficiency in the creation of output is the goal, not capex or job count.**

What Authority?

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- **Title I Ancillary Jurisdiction**
 - Possible if tied to a service with clear regulatory authority
 - You could drive a truck through the hole created by the Comcast Decision
- **Title II (Likely FCC Path)**
 - Option 1: Reverse Brand X Decision (and subsequent DSL decision), making broadband transport a telecommunications service (unbundling lite, since prices are not regulated at TELRIC)
 - Option 2: Classify VOIP as a telecommunications service, use Title I to go further
 - In both cases, Title I is hook to Reasonable Network Management
- **USF subsidies for broadband require something in “broadband” be a telecom service, so reclassification of some type is viewed by some as inevitable**

What Authority?

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- **Title II Lite**
 - Title II regulation with forbearance from many regulatory obligations
 - Which ones?
 - Section 201 price regulation?
 - Is the “non discrimination principle” switched out for Section 202 “undue discrimination”?
 - Is “Reasonable Network Management” regulation permissible under direct or only ancillary authority?
 - Do you trust the FCC to forbear? Earlier efforts have not gone smoothly, even with a less regulatory agency
 - Does the forbearance standard permit such a plan with legal confidence?

Fundamental Ignorance of Network Neutrality

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Firm A can make a \$10 investment that generates \$100 in social gain.

Q: Under what conditions will Firm A make the investment?

A. If Firm A can extract at least 10% of the social gain.

Fundamental Ignorance of Network Neutrality

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If the “free and open” Internet creates so much benefit, then why preclude the most significant participants in the creation of those benefits from sharing in the gain?

If you want an open Internet, then make it in the interest of ISPs to have one.