

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Broadband Industry Practices) WC Docket No. 07-52
)

COMMENTS OF THE MEDIA INSTITUTE

The Media Institute appreciates the opportunity to comment in response to the Notice of Inquiry¹ (April 16, 2007) regarding the above-captioned proceeding dealing with the nature of the market for broadband and related services, and the Commission’s appropriate role, if any, in regulating such services.

The Issue

The issue at hand centers on the concept of “net neutrality,” the principle (loosely defined) that the Internet should be open equally to all consumers, and that providers of Internet broadband access, services, and content should not engage in business practices that have the effect of restricting consumers’ access to any of these Internet elements.

In September 2005, the Commission issued a Policy Statement² that outlined its position on broadband and stated its desire “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.”³ Toward this end, it enumerated a set of four consumer “entitlements:” (1) “to access lawful Internet content”; (2) “to

¹ *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, FCC 07-31 (rel. April 16, 2007) (“Notice of Inquiry”).

² *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (“Policy Statement”).

³ *Id.* at para. 4.

run applications and use services of their choice, subject to the needs of law enforcement”; (3) “to connect their choice of legal devices that do not harm the network”; and (4) “to competition among network providers, application and service providers, and content providers.”⁴ These four consumer entitlements have come to be viewed generally as the foundational components of net neutrality.

“Rights” Versus Goals

By casting these components as consumer entitlements (“consumers are entitled to...”), the Commission has infused each of these with the stature of a “right.” And once a “right” has been created, announced, or otherwise brought to life, the next question becomes “How do we protect and enforce this right?” Legislators have already tried to write these Internet “rights” into legislation.⁵ The Commission itself has coerced AT&T and SBC Communications, Inc., and Verizon Communications Inc. and MCI, Inc., to affirm these “rights” as a condition of their mergers.⁶ This very Notice of Inquiry has been issued to help the Commission collect more information to see if it should play an active role in regulating the enforcement of these “rights.”⁷ Some commissioners, in fact, have argued that the Commission should have gone directly to a Notice of Proposed Rulemaking.⁸

⁴ *Id.* Commissioner Copps refers to these as “the basic rights of Internet end-users.” *Concurring Statement of Commissioner Michael J. Copps*, Notice of Inquiry, *supra* note 1 (“*Copps Concurring Statement*”).

⁵ No legislation has yet been enacted, but the House did pass a bill (“Barton-Rush”) that contained a net neutrality provision. Net neutrality has also been advanced as a provision in other proposed telecommunications bills and in stand-alone bills in the House and Senate. Some bills (*e.g.*, “Stevens-Inoye” in the Senate) would require further study rather than a mandate.

⁶ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18368 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18509 (2005).

⁷ “We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.” Notice of Inquiry, *supra* note 1 at para. 1. The Commission also wonders if it should add another as-yet-undefined principle of “nondiscrimination” to the Policy Statement. If such a principle were intended to address potential “discriminatory” practices by access providers toward rival providers of services and content it would be unnecessary – because any such practices would be manifested to the detriment of consumers, whose “rights” in this regard are already enumerated in the existing Policy Statement.

⁸ “We proceed too leisurely here.... We should be building on what we have already approved and going with at least a Notice of Proposed Rulemaking with a commitment to move to an Order within a time certain.” *Copps Concurring Statement*, Notice of Inquiry, *supra* note 1; “I would have preferred a more pro-active approach, including the adoption of a Notice of Proposed Rulemaking.... Given the importance

So the first question we pose is this: Is consumer access to Internet content, services, interconnectivity, and competition truly a collection of “rights” as the Commission has asserted in its Policy Statement, or more in the nature of goals in furtherance of a vibrant and flourishing Internet? An individual has a constitutionally guaranteed right to free speech, but there is no comparable “right” to broadband access, just as there is no inalienable “right” to own a telephone or to watch a television program. Ironically, for most of the 20th century this country existed with a government-created telephone monopoly, even though the Commission now asserts a consumer “right” to competition among Internet providers (some of which are phone companies). Our caution here is that the Commission not rush to regulate the Internet in an attempt to protect consumer “rights” that are not really rights at all in the constitutional sense, but rather are the well-intentioned goals of dedicated public servants, born out of a spirit of fairness and egalitarianism. There *is* a difference.

There Is No Need for Regulation

Our next concern goes to the nature of the alleged problem. The evidence shows, and the Commission confirms, that in the current marketplace no practices have been identified that would disadvantage or otherwise injure consumers.⁹ In short, there is no problem – no clear and present danger to the openness of the Internet – that requires regulatory action.

What is driving the push for regulation, then, is nothing but speculation and fear – the fear that Internet providers *might* engage in discriminatory practices of some type, at some point in the future, if allowed to continue operating without regulatory shackles. As Commissioner Michael Copps stated: “I haven’t taught history for many years, but I remember enough of it to know that if someone has both the technical capacity and the commercial incentive to control something, it’s going to get tried.”¹⁰

of this issue ... the time is ripe for an NPRM,” *Concurring Statement of Commissioner Jonathan S. Adelstein*, Notice of Inquiry, *supra* note 1 (“*Adelstein Concurring Statement*”).

⁹ “In several proceedings evaluating wireline mergers, the Commission found that no commenter had alleged that the entities engage in packet discrimination or degradation, and that, given conflicting incentives, it was unlikely that the merged companies would do so.... Likewise, in its review of the Adelphia-Time Warner-Comcast transaction, the Commission ... found no evidence that the applicants were operating in a manner inconsistent with the Policy Statement.” Notice of Inquiry, *supra* note 1 at para. 3 (citations omitted).

¹⁰ *Copps Concurring Statement*, Notice of Inquiry, *supra* note 1.

The underlying assumption here is that big Internet access companies will seek to maximize their market share and economic advantage at any cost (and at the expense of consumers), and that only government regulation can keep them from doing so. There is a concern that access providers that also offer services and content will create vertically integrated networks that discriminate against (*i.e.*, restrict the access of) competitors' services and content over their networks. This assumption is flawed, however, because it ignores the competitive marketplace that already exists for broadband pipes and services. It also ignores the fact that Internet access providers prosper by giving their customers access to more and better services – not by limiting choices among services and driving customers away.

The pro-regulatory argument based on speculation does have one great advantage: It cannot be disproved. Speculation is nothing more than “what if.” And no one sitting here in the present can prove with certainty that something will happen in the future, or prove that it will not. So those who favor an unregulated Internet cannot absolutely disprove Commissioner Capps' assertion that a bad scenario will inevitably take place – any more than the commissioner can prove with certainty that it will. Fear of the “what if” is a great motivator, but it should not be used as the motive for imposing a regulatory regimen on a dynamic and well-functioning industry.

Broadband Providers Need Not Be Common Carriers

An underlying theme of net neutrality is that the Internet should function as a common carrier – that is, broadband providers should carry all bits of information without making any distinctions about type, source, destination, or content of those bits, and should provide the same speed and quality of carriage to all comers. A corollary is that vertically integrated broadband providers (*i.e.*, those who also supply services or content) should neither give priority to their own services and content over their pipes, nor discriminate against competitors' services and content traveling over their pipes.

The common carriage model has a long history in United States commerce, marked by the creation of the Interstate Commerce Commission in 1887 to regulate railroads and later the trucking industry and other surface transportation carriers. This ICC model, in fact, was the basis for the evolution of the American Telephone & Telegraph Co. into a common carrier of

telephone traffic; the company also provided “neutral” cables and microwaves to carry the program content of radio and television networks.¹¹

But in today’s rapidly evolving and competitive Internet environment, a regulated common carrier model for broadband is not appropriate for several reasons: (1) Marketplace pressures and existing antitrust laws are sufficient to prevent and/or correct anticompetitive practices; (2) locking the Internet into a common carrier model will be a disincentive to investing in new infrastructure and technologies, effectively freezing the Internet in time; and (3) consumers will be deprived of new and innovative opportunities that might otherwise be available if broadband providers were able to work creatively with providers of services and content.

Proponents of net neutrality equate “differentiation” with “discrimination.” That is, they see any variations in service offerings or pricing as attempts to discriminate against certain consumers. Far from being a source of discrimination, however, such distinctions are at the very heart of our free enterprise system. One can buy clothing at Wal-Mart, or Macy’s, or Saks. One can get around town by walking, taking a bus, or hiring a limousine. The price of virtually every transaction is linked to factors like quality, convenience, speed, and service. Why should the Internet be any different?

And yet proponents of net neutrality would argue that Internet providers should be restrained from developing new models of pricing and service that consumers might welcome – for example, paying extra for a burst of capacity to download a movie quicker. Commissioner Jonathan Adelstein notes that the founder of the Internet envisioned a “neutral communications medium.”¹² But that is no reason to conclude that the Internet should be prevented from evolving into something far more useful and dynamic, with synergies among pipe, services, and content tailored to customer preferences. In this Notice of Inquiry, no doubt, Internet providers of all types will furnish the Commission with specific examples of innovative services they might offer along these lines. Suffice it to say that we strongly recommend an open and unfettered marketplace approach, where providers at all levels are free to innovate and

¹¹ *For a general discussion see* Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, Mass.: Harvard University Press, 1983) at 34-35, 136-137.

¹² *Adelstein Concurring Statement*, Notice of Inquiry, *supra* note 1, *quoting* Tim Berners-Lee, “Neutrality of the Net,” Decentralized Information Group (May 2, 2006).

experiment with new combinations of content, distribution, and pricing to meet customers' evolving wants and needs.

Conclusion

Regulating Internet providers for the purpose of enforcing "net neutrality" is a bad idea. The Commission in its Policy Statement enunciated a set of four consumer benefits, which it elevated to the stature of "rights." The Commission now contemplates whether it should undertake some type of regulatory scheme to protect and enforce these "rights" of its own creation. This appears to be little more than a circular exercise designed to expand regulatory clout. Moreover, as the Commission itself acknowledges, there is no demonstrated need for any regulation. No instances have been reported of consumers suffering directly or indirectly from the discriminatory practices of Internet providers – neither practices aimed directly at consumers, nor practices of access providers aimed at providers of services and content. Nor has the Commission found any evidence of such behavior in the merger applications it has reviewed. Net neutrality is a solution in search of a problem.

Furthermore, enforced net neutrality is a solution that would harm, rather than help consumers. It would stifle innovation in infrastructure and technology, and it would prevent Internet providers from offering new combinations of services, distribution, and pricing that would give consumers more choices. Net neutrality would freeze the Internet in an antiquated common carrier model that is not in the best interests of today's consumers.

The Media Institute strongly recommends that the Commission continue to encourage openness and innovation in broadband services without resorting to regulation.

Respectfully submitted,

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