



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Broadband Industry Practices) **WC Docket No. 07-52**
Notice of Inquiry)
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February 13, 2008)
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Comments of the Competitive Enterprise Institute

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“You know who owns your pipes? Your customers. You have no right to set up a tollbooth.”

---Sen. Byron Dorgan (D-North Dakota), September 17, 2007.

Sen. Dorgan’s statement refers to the broadband infrastructure built up by telecommunications companies over the years, as well as to the infrastructure not yet built. It is more candid about “net neutrality” than most recent commentary.

Activists seek just such a perpetual “open access” business model imposed on Internet service, as well as energized oversight and regulation of the extent to which online providers must disclose their business practices regarding traffic flow management. A major success of this campaign to institute neutrality as a *principle* was the linking future wireless spectrum auctions to accommodating the concept.

Complaints against access providers’ efforts to manage traffic flows are mounting, and fuel this current inquiry. Comcast Corporation received letters of inquiry from the FCC in response to a petition filed by a coalition averse to what it regards as unjustified data discrimination against file-sharers. They seek fines in the millions. Meanwhile experiments in tiered data services have been undertaken by Time-Warner cable. Other experiments are underway.

The neutrality movement has reached the level of the presidential campaign. One candidate pledged, “I will take a backseat to no one in my commitment to network neutrality. Because once providers start to privilege some applications or web sites over others, then the smaller voices get squeezed out, and we all lose.”

Sen. Dorgan, naturally, sees another opening for his net neutrality legislation (co-sponsored with Sen. Olympia Snowe, R-ME). Rep. Ed Markey (D-MA), with Rep. Pickering (R-MS), has re-introduced legislation to implement net neutrality.

We regard net neutrality as a flawed concept, and see the modern telecommunications industry as a “victim” of the failure of policy makers to properly (and philosophically) define property rights in an information-based, advanced technical society. There exists no “John Locke for the information age,” so to speak. The effort to impose neutrality on communications networks—networks that largely don’t even exist yet, one must always remember—is one incarnation of a wider phenomenon: the inability to come to terms with and legitimize private ownership in networks more generally (such as electricity), or private ownership in intangible assets such as computer operating systems or proprietary digital information-sharing models. (The iPod/iTunes complex is an example of the latter.)

Fundamentally, net neutrality rests upon the fallacy that infrastructure and content companies are naturally at odds, and that competition and customer service thus require political force. In reality, the sides are being driven—even coaxed—into this unnatural conflict by a highly charged political environment that hews to a flawed philosophy of how network wealth is created; and worse, that has something to offer politically. The very existence of the current federal regulatory regime offers the lucrative prospect of transferring untold billions of dollars in wealth via political means. Government does not create communications wealth; but it can move it around, and assign rights that might otherwise be negotiated differently.

The full and damaging implications of this fallacy—directly applicable to the current debates over neutrality, disclosure, and legislator and FCC roles—may be found in [earlier](#)

[CEI comments to FCC](#).¹ *Non-discrimination, properly understood, is not a positive state of affairs.* No one, not even net neutrality proponents, truly regards every bit as equal. One real difficulty is that because it must “discriminate,” (again, properly understood) business cannot defend itself within the parameters of Internet Policy Statement upon which the FCC’s Notice of Inquiry is based; those very parameters regard “discrimination” as negative, and “openness” as the cardinal virtue. Given that framing of the issue, the prospects for the full openness and communications services that future generations need are undermined.

Everybody agrees openness is good; nobody wants their favorite websites or activities blocked.

But it’s not acceptable to condemn the very possibility of adopting proprietary, exclusionary business models—especially at this critical point in business and communications history. It’s only 2008.

All wealth—infrastructure and content alike—must be created, often over decades. Net neutrality, by turning existing pipes into passive, regulated husks, is as fantastic as “Search Neutrality” imposed upon a company like Google would be. (“All search results must appear first!”) It’s just not as obvious.

A world safe for mandatory net neutrality, one in which investors can’t “own” their pipes or spectrum, is a world far less attuned to the infrastructure wealth creation that we actually need.

If private ownership rights are suspect or easily over-ruled simply because property is long and thin (or intangible like spectrum), governments, commissions or heavily regulated utilities will dominate infrastructure rollout. I submit this is not a desirable state of affairs, not even for those seeking neutrality.

The neutrality movement’s demand for such centralized management is all the more incomprehensible since enhanced power will render *everyone*—including those now seeking neutrality—more vulnerable to political predation in the U.S. and abroad. (Google’s own antitrust vulnerabilities, goaded by competitors, in the DoubleClick acquisition is a preview.)

Precisely how neutrality proponents think *government control* over *communications* infrastructure squares with the First Amendment is another marvel. It’s an issue apart from the specifics of current inquiry, yet is equally important and should color one’s conclusions in the current debate.

In reality, for the FCC or Congress to advance net neutrality regulation is to discriminate in favor of one side in a battle of equals. From Adam Smith we know that government

¹ Comments of the Competitive Enterprise Institute before the Federal Communications Commission, In the Matter of Broadband Industry Practices Notice of Inquiry, WC Docket No. 07-52. <http://www.cei.org/pdf/5979.pdf>.

that avoids taking sides in private disputes (here, infrastructure and content companies) enables more prosperity for all.

Ultimately, the Internet is too slow and needs to evolve into or be superceded by something better. Internet-type *technology* matters; not necessarily the Internet's specific configuration today. Calling the Internet "dead and boring," Mark Cuban recently noted that we've "reached the point of diminishing returns" given today's broadband capabilities.

The idea of future multimedia-saturated generations getting by on the existing "pipes" inventory is a non-starter. *Competition in creation of core networks is as important as competition in the creation of content delivered over the networks later.*

We need to discard the idea that networks themselves cannot be regarded as a competitive unit. The religion that only the movement of bits from point A to point B on an *existing* network counts as competition must be jettisoned.

Neutrality advocates invoke the sanctity of "dumb pipes," but we would more properly acknowledge a competitive dimension upholding the possibility of the "genius" of pipes. Price and service differentiation will become increasingly critical to well functioning network services. The very content providers now complaining will *themselves* likely seek "preferential" treatment, or to pay less for non-vital transmissions, down the road.

But such "discrimination" is perfectly consistent with even greater openness than we enjoy now; nothing about fostering smart pipes is incompatible with retaining "dumb" ones as consumers desire.

That's because the "background hum" of today's commodity Internet can also grow in concert with proprietary services that use Internet technology, but may or may not ride the same pipes as the "capital-I" Internet. Policy should not discourage the possible emergence of such a "Splinternet" by catering to an obsolescent model of infrastructure socialism and doctrinaire "openness."

Fostering infrastructure wealth—of *both* the proprietary and open kinds—is the only valid public policy goal, the only avenue to *a constant escalation in the basic capabilities of the Internet as a whole*, much as we've already witnessed without net neutrality interrupting the process. (We've put the days of dialup behind us without neutrality mandates.)

There's already a colossal task at hand—to demolish regulatory silos to foster cross-industry partnerships (power, water, rail, sewer) to fund cripplingly expensive national infrastructure development. This—and replacing FCC oversight with competitive discipline—should occupy policymakers.

Net neutrality, and similar and philosophically related predatory schemes like compulsory licensing, would never emerge in a free market, and is inoperable without a permanent, priestly regulatory commission.

It's so misguided that it might be worth Congress stepping in to prevent its application in upcoming wireless auctions until it gets answers, particularly regarding how FCC acknowledges "discrimination's" elemental role in infrastructure and bandwidth creation, consumer welfare, and cybersecurity—all the desirables of content and service.

To hold in 2008 that pipes should henceforth be dumb exemplifies the risks of political regulation, how the very ones in charge of communications policy can most threaten it.

Nothing important can be known today about proper pricing and routing of content on the networks of tomorrow; and nothing can be gained and a lot can be lost by prescribing it now, or imposing conditions on how producers make their decisions or disclose information. Most of the allegedly problematic behaviors indicated in the NOI actually signify healthy economic activity, whether carried out by access providers or content providers. (Again, content providers seem not to appreciate their own vulnerability in a world of instituted "neutrality.") The "tollbooths" Dorgan refers to in the opening quote represent the nascent, perhaps sometimes bumbling, efforts by an industry that is a fraction of the size it needs to become. Such tollbooths are the gateways to communications infrastructure wealth, including vastly expanded free content. We must experiment with them.

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