Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	**GN Docket No. 09-191**
	)	
Broadband Industry Practices	)	**WC Docket No. 07-52**
	)	
	)	

Comments of the Competitive Enterprise Institute
January 14, 2010

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Overview: Net Neutrality vs. "Bandwealth"

On Thursday, October 22, 2009, the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking[1] (NPRM) that asserts national government authority over the Internet's future with respect to broadband access and pricing. Unelected FCC Commissioners contemplate this action with questionable authority from Congress.[2] Meanwhile the U.S. Court of Appeals for the District of Columbia Circuit is hearing (with skepticism) a pivotal case concerning FCC's authority to enforce neutrality principles in the absence of specific statutory authority.[3] Net neutrality contends that the government should decree that Internet service providers treat all online traffic the same, rather than adapt in response to consumer demand, market and technological realities, and competitive pressures that already greatly mitigate against unreasonable blockage. No credible case exists for *universal* neutrality in contrast to an occasional rifle shot to deal with legacy—and clearly diminishing—market power owing to past exclusive franchises and other belligerent behavior. (Even in such cases, unfavorable press generally does the trick.) Worse, banning entire proprietary business models is hardly "openness." Legitimizing proprietary approaches to network access, strategies and pricing (and enjoying the infrastructure wealth creation that such property rights foster) is vital.

America's challenge is not for FCC to "do something" in the communications and Internet realm, but rather to dismantle and move beyond earlier regulatory impediments that have limited our creative freedoms in expanding infrastructure and content access. Current lapses are less representative of the market—which has labored under decades of sweeping communications regulation—than of the preemptive role of government, its derailment of institutional evolutionary market processes, and its blocking of freedom by inhibiting growth in what should be far more vibrant areas like infrastructure expansion.

At stake is less today's ground-level dispute, but rather the *principle* of proprietary control versus the *principle* of collective control in the *creation and management of infrastructure and communications wealth decades hence*. Competition in the creation (and creative destruction) of networks is as important as competition in the content and "stuff" deployed across those conduits. The "infrastructure socialism"[4] inherent in coercive neutrality's obsession with only the latter undermines consumer well-being, Internet robustness and (*not* paradoxically) means a less open, less neutral Internet for future generations.

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[1] Federal Communications Commission, Notice of Proposed Rulemaking, Preserving the Open Internet, FCC 09-93. http://www.wired.com/images_blogs/epicenter/2009/10/fcc-09-93a1.pdf.

[2] Arnold & Porter Advisory, "FCC Plans Net Neutrality Rulemaking," Sept. 2009. http://www.arnoldporter.com/resources/documents/Advisory_FCCPlansNetNeutralityRulemaking_092209.pdf.

[3] See Fawn Johnson, "Court Skeptical of FCC's Net-Neutrality Push," Wall Street Journal, January 9, 2010. http://online.wsj.com/article/SB10001424052748703481004574646361009488756.html, and John Eggerton, "FCC Gets Torrent Of Tough Questions In Oral Argument," Broadcasting & Cable, January 8, 2010. http://www.broadcastingcable.com/article/443254-FCC_Gets_Torrent_Of_Tough_Questions_In_Oral_Argument.php.

[4] Adam Thierer and Wayne Crews, *What's Yours Is Mine: Open Access and the Rise of Infrastructure* Socialism, Cato, Washington, D.C., 2003. http://www.catostore.org/pdfs/Whats%20Yours%20Intro.pdf.

Neutrality is the telecom industry's equivalent of the destructive, Enron-pushed "retail wheeling" scheme that has delegitimized electricity deregulation for the foreseeable future (where, for many reasons, transmission capacity remains gravely inadequate[5]). The principle of *compulsory access to technologies and networks* is not one to tolerate. Given the experience with rent seeking attracted by economic regulation, this filing contends that "well-meaning" is about as valid a characterization of net neutrality as "unintended" would be for the consequences. When liberalizing a heavily regulated segment of a mixed economy, the gauge of the impending reform's appropriateness is simple: *The body of private activity subject to regulation must decline rather than increase*. Instead, the FCC is on a growth path. The wealth, infrastructure, content, options, consumer benefits and security to be created in a competitive regime vastly exceed what "neutrality" can sustain on a regulated, more stagnant, Internet.

An Alternative Case for *Agency Neutrality*

Something remarkable has happened without net neutrality regulation. According to the FCC itself, "broadband Internet access service adoption has increased dramatically, with broadband in approximately thirty percent of American households in 2005 and sixty-three percent today"; fewer than 10 percent access the Internet via dialup today **(NPRM, p. 20, paragraph 48)**. We actually live in a world where the very providers being disparaged have facilitated high-speed access that didn't exist a short time ago. Virtually no one uses 28 kilobit-per-second modems anymore, and the Net is increasingly mobile and compact.

A curiosity in the agency's magnanimous claim to be "[m]aking sure that users can express themselves freely on the Internet and receive the content of their choice" **(NPRM, p. 39, paragraph 95)** is that, rather than private corporations blocking access apart from transitory instances that fall well short of justifying *universal* neutrality mandates, we find it to be governments most inclined toward blocking and filtering content (examples include the Communications Decency Act effort, library filtering, social networking regulation, privacy regulation). FCC itself sues broadcasters in prominent indecency cases.

Along with the censor posing as guardian of access to expression, the NPRM seeking input on "Preserving the Open Internet" arises in an another important context. Network neutrality activists claim that not regulating network owners will leave the Internet at the mercy of a few large companies; but many of these activists' backers are themselves large corporations.

For these and other reasons to be outlined, the only sense in which neutrality is appropriate is *Agency Neutrality*. The FCC should turn a deaf ear to politically driven business and pressure-group demands for special treatment for any sector of the communications industry. Our entire economy is arrayed against any carrier or dominant content provider that attempts to bully others, and firms that engage in bad behavior won't survive. The infrastructure and content sectors can fight it out—or even integrate. Net neutrality amounts to picking favorites, not just among companies and industries, *but among business models as such*. To the extent that the FCC

[5] "Though investment is increasing in some areas, lagging investment in transmission resources has been an ongoing concern for a number of years. More investment is required as each peak season puts more and more strain on the transmission system, especially in constrained areas such as the Northeast, California and southwestern U.S., as well as parts of Ontario, Canada." North American Electric Reliability Corporation, 2007 Long-Term Reliability Assessment. October 2007. http://www.nerc.com/files/LTRA2007.pdf

disparages proprietary approaches to network access and pricing, it is itself "discriminating" (one of FCC's new prohibitions) on a far higher level than any infrastructure company alone could ever do. Coercive neutrality represents a *true* reduction of competition on a vast, overarching scale of which only coercive governments are capable.

FCC's proper approach is to *not* interfere with the competitive mix of open and proprietary investment and management decisions in the marketplace and to *not* lock in or prejudice any particular industry structure for future generations. Where bottleneck problems arise owing to the residue of the exclusive monopoly franchises once enjoyed by dominant providers, numerous coping mechanisms are available that fall far short of imposing universal restraints on broadband practices.

FCC's Priestly View of Its Role

Public policy seems to forget we are not immortal, that not every network has been built yet, and that the networks used and business models deployed by our descendants need not necessarily resemble or be managed like those of today. The worst assumption is that today's politicians and administrative bodies know what's best for those not yet alive, companies not yet created, networks not deployed, and business plans not yet formulated.

But in FCC's vision, cyberspace need not occupy the realm of markets and trade; rather, Net users have *entitlements* while those who help make the Net possible in the first place have *obligations*. The agency sets itself above: "[W]e believe that high-level rules specifying impermissible practices will best promote and Internet environment of widespread innovation and light-handed regulation" **(p. 21, paragraph 49)**.

Via the four Principles contained in its 2005 Internet Policy Statement, the commission claims to be trying to protect the ability of consumers to[6]:

> Access the lawful Internet content of their choice[;] . . . run applications and use services of their choice, subject to the needs of law enforcement[;] . . . connect their choice of legal devices that do not harm the network[; and] . . . competition among network providers, application and service providers, and content providers **(p. 12, paragraph 30)**.

Note that these are normal market offerings in a competitive, non-monopoly franchise environment. They are precisely the features that have emerged since the days of 28kbps modems, and one would expect them to flourish on an Internet optimized for the future. It is disingenuous for the Commission to claim credit or pose as guardian. Monopoly regulation already arguably set such flexibility behind years. Yet, to these initial four principles the new NPRM adds new ones (obligations) on non-discrimination and transparency, to be discussed later.

The FCC proposes not technology neutrality and indifference to special interests, but "to codify the principles as obligations of broadband Internet access service providers" **(p. 37, paragraph**

[6] This particular language is drawn from the earlier FCC Internet Policy Statement on four "Internet freedoms. The emphasis in the NPRM is more directly on obligations than on entitlements of consumers **(page 37, paragraph 90)**.

90). But consumers and those who serve them are not at war (indeed, vibrant capital markets mean users are *shareholders* in the providers, as well). A truly neutral stance would not dictate what appropriate business models ought to be. As noted, the valid FCC public policy role at this stage is to step back and allow the emergence of a business and competitive environment in which open and proprietary network management approaches compete with one another. The NPRM's subject matter purports to "Preserv[e] the Open Internet," but that's not what rules do to the extent they drive markets in a constrained direction by ruling out certain business practices and setting content and infrastructure firms at loggerheads.

This is an inappropriate priestly attitude from the very agency responsible for overseeing a static, monopolized, non-innovative industry for decades.[7] Characteristic is the agency speaking of the Carterfone decisions **(p. 9, paragraph 25)** as "enabl[ing] numerous innovations in customer premises equipment, including the answering machine, fax machine, modem [etc.]" again with little acknowledgement of where the legacy monopoly power that had until then prevented so much innovation came from. Moreover, the Carterfone changes were not a replacement for ending the exclusive franchises at the root of monopoly. It's significant that "natural monopoly" is something not actually seen in nature.

Despite various requests for input on its authority, FCC's mind is made up and it seems intent upon "high-level rules" **(p. 21, paragraph 49)**. While it is doubtful that the agency even has authority to impose regulation apart from general policy statements,[8] there is little chance that any argument that any of the thousands of filers might make would cause the agency to relent. So this proceeding is a signpost along a path that could well end with Congressional action. There, we either will see passage enabling legislation on the one hand, or an (unlikely now, but needed) move to stop agency overreach before rulemaking through an intervention like the draft bill from Rep. Marsha Blackburn (R-TN) ("The Federal Communications Commission shall not propose, promulgate, or issue any regulations regarding the Internet or IP-enabled services"). A resolution of disapproval of a final FCC ruling would be an option, but court is more likely part of the future of neutrality deliberations.

Only corporate giants are a problem to the agency mindset. But consumer welfare would benefit from more corporate giants and a bit less of an agency leviathan more powerful than them all put together. Consumers deserve the benefits of "communications without commissions"[9] Indeed, the "rules specifying impermissible practices" should be directed straight at FCC: That is, *it is FCC's own intervention in today's competitive markets that should be specified as "impermissible."* If the goal is actually network proliferation, even if the agency had the authority but not the command from Congress to impose neutrality, it should reject the idea. But FCC suffers from what Thomas Sowell in *Intellectuals and Society* notes as a lack of consequences and a "vision of the anointed."[10] Unseen ventures never get established and

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[7] Adam Thierer, "Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly," *Cato Journal*, Vol. 14, No. 2, Fall 1994. http://www.cato.org/pubs/journal/cjv14n2-6.html.
[8] Barbara Esbin, "The Audacity to Hope Regulatory Restraint Will Prevail," *PFF Progress Snapshot*, Vol. 5, Issue 9, October 2009, http://www.pff.org/issues-pubs/ps/2009/pdf/ps5.9-regulatory-restraint-hope-audacity.pdf.
[9] Braden Cox and Wayne Crews, "Communications Without Commissions: A National Plan for Reforming Telecom Regulation," CEI Issue Analysis 2005 No. 9, October 18, 2005. http://www.answerstat.com/papers/6/01.pdf.
[10] See David Hogberg, "The Divine Right of Intellectuals" (Book Review), National Review Online, January 5, 2010. http://article.nationalreview.com/?q=MzczMzhmNjZhNzRiMWI3ZjMyOWZjMGViZDc4ODY2NjA=

consumers suffer, but no one at FCC can be held accountable for anything. A later section will discuss FCC self-assessment required to bring something to the table apart from an appetite for regulation. Afterward, alternatives to coercive neutrality will be briefly noted.

Proposed Rule Fosters Political Vulnerability for All Market Participants

Not every competitiveness issue is properly a public policy question. But they all become so when somebody who wants special treatment gets the ear of a regulator. Net neutrality advocates' premise is that infrastructure companies should not control content, but that it's perfectly acceptable for content companies, in conjunction with an even more powerful government, to control infrastructure. It's difficult to exaggerate the negative implications of entrenching this extraordinarily interventionist idea further in law and policy at this stage of communications history.

An irony is that net neutrality' advocates increase their own vulnerability to political predation as a result of this proceeding. The many CEOs that wrote the FCC in favor of this rulemaking[11] could regret it, and their Boards, managements and shareholders should take note of this folly while there's still time (to the point of advocating a Congressional ban on the rulemaking, or at least a resolution of disapproval on the rules). Alternatives to Net neutrality, steps to promote access that *reduce* agency power—unlike neutrality and the body of intervention following it that would *enlarge* agency power, require CEO level advocacy.

Firms that favor net neutrality are already finding that their own escalating market power renders them vulnerable to the same political predation now unleashed on the infrastructure industry. One could just as credibly—that is, perversely—make a case for "Search Neutrality"[12] (All search results shall appear first!). It is not only Internet access being improperly dubbed an essential facility; if network owners are to face regulation, search engines won't likely be immune from predatory activism against search ranking algorithms, proprietary content placement, advertisement and other service pricing, privacy standards and more. Neither infrastructure nor content companies nor their customers ultimately benefit from a self-destructive regime in which no one can change course and charge for (or pay for, or demand) premium quality services well beyond the capabilities of today's technologies.

Neutrality assumes that broadband service providers are not entitled to set the terms on their networks. Likewise, major content firms will increasingly find that they are not entitled to their business approaches either. (As it's been joked, business might win more battles if it ever fought any.) The NPRM should be taken as a warning:

> At least one commenter in this proceeding has suggested that we should read the Internet Policy Statement as embodying obligations binding on content, applications, and service providers in addition to broadband Internet access service providers. Although the question of Internet openness at the Commission has traditionally focused on providers of

[11] Letter to FCC Chairman Genachowski Supporting Open Internet Rules, October 19, 2009. http://www.openinternetcoalition.org/index.cfm?objectID=69276766-1D09-317F-BBF53036A246B403.

[12] Adam Raff, "Search, but You May Not Find," *New York Times*, December 28, 2009. http://www.nytimes.com/2009/12/28/opinion/28raff.html?_r=1&scp=1&sq=december%2028%20search%20neutrality&st=cse.

> broadband Internet access service, we seek comment on the pros and cons of phrasing one or more of the Internet openness principles as obligations of other entities, in addition to providers of broadband Internet access service. **(p. 40, paragraph 101)**

Market power and information-gatekeeper accusations will extend to content companies; they can now reject neutrality, or be regulated themselves later—it's as simple as that. It's in the interest of all sides of this debate—a clash of the titans in the good sense of the term, given the bounty consumers stand to gain—to come to terms on a mutually beneficial FCC rollback instead of the hyper-regulatory regime that neutrality will impose. This is the crucial point in business and market history to make a choice between regulation or "bandwealth." This proceeding is well on the way to enlarging the scope of future regulatory purview well beyond what many anticipate, thus this appeal for reconsideration. Net neutrality conflicts with the genuine needs of consumers and ultimately its advocates' goals—but comports well with agency turf building. A network in which government regulates infrastructure is one in which complementary content regulation is easier as well.

Letting lieutenants run show on the 2010 Washington battlefield is disastrous policy for American high tech business. The temporary gain from securing temporary regulatory advantage pales in comparison to the rewards of network, content and communications liberalization. Neutrality is in some ways like antitrust; it serves as a non-market tool of (phony) competition whose non-objectivity everyone exploits it to selfish advantage. Few actually oppose such slippery rules on general principles even when they know they should—they do so only when they are themselves the target. Even critics sometimes unfortunately want neutrality they can live with, as opposed to registering the fundamental opposition that's warranted. The "four principles" themselves needed undressing years ago; few seemed willing to do that, now the price is being paid. At stake is not merely the destruction of infrastructure wealth but of content flexibility, consumer welfare, and even infrastructure security. Embracing infrastructure socialism sets in place the machinery for endless future headaches.

Fallacies Motivating Net Neutrality

Neutrality is not a new notion, but one rooted in discredited ideas of natural monopoly and a longing for common carriage. It glosses over the historical role of regulatory agencies in officially establishing those monopolies in the first place through such vehicles as exclusive franchises and regulatory "certificates of convenience and necessity." This current campaign rests upon numerous misperceptions about competitive markets and capitalism. *Among these fallacies*:

- Infrastructure companies and content companies are naturally and inherently at odds.
- Network competition requires political or regulatory force to exist.
- Discrimination is bad, and that such a thing as "non-discrimination" exists.
- Net neutrality is itself not a form of picking sides (or discrimination, as it were)
- Infrastructure companies should not control content; however, content companies, in conjunction with bureaucracies backed by legislation and regulation, should control infrastructure companies.
- Government enforced net neutrality spawns "openness"; market impulses do not.

- Communications flows (video, information, voice, future innovations like holograms, etc.) are maximized by neglecting, even blocking, the liberalization of and enforcement of property rights in grids.
- Networks themselves cannot be regarded as a competitive unit in any sense: only the movement of bits from point A to point B on an existing network counts as competition. Networks best exist as passive husks, not dynamic forms of infrastructure wealth created, managed and duplicated in response to price signals.
- "Market failures" matter, government failures do not exist (indeed, they are of little concern in the NPRM).
- Infrastructure companies' interest lies in withholding services, in not exploiting gains from trade with content companies, whatever petty transitory jealousies may exist.
- Wall Street, rivals, advertisers, shareholders, consumers and the media are inherently passive and cannot react to discipline inefficient network management (or engage the capital markets to generate new bandwidth infrastructure themselves).
- FCC is better equipped than capital markets and a global economy to discipline ill-managed networks.
- Alternative, profit-driven modes of infrastructure organization matter less than FCC regulating the mode that exists: User ownership of grids; liberalization of non-telecom network industries to enable wide-scale, cross-industry infrastructure consortia; "splintering" into and out of the public net by private carriers—all have little role to play and may safely be ignored in favor of net neutrality.
- FCC interference will not undermine alternative modes of competitive discipline, or alter technological trajectories in any harmful way.

Does "Market Failure" Demand Neutrality Regulation?

In defiance of such fallacies, the FCC asks for "fact-based" answers and data about network practices **(p. 5, paragraph 6),** but itself hasn't provided fact-based evidence of market failure, only instances of residual effects of distant government granted monopoly power. There can be no fact-based answers about general abuses that have not even occurred of course. Meanwhile, the Department of Justice has weighed in on the apparent absence of market failure, as well as noted in gentle terms the absurdity of expecting marginal-cost pricing.[13]

Facts do, however, demonstrate great advances in Internet and mobile communications services in terms of emails and text messages sent, declining costs of storage, rise in mobile phone usage and more.[14] But if this were an issue of merely demonstrating an absence of market failure, this proceeding would have ended long ago. That's not how the regulatory process works; enough "public choice" and Chicago-school economic analysis is available to assure the skeptic that merely holding out the prospect of regulation attracts rent seeking, often against vibrant and thriving industries precisely because of their successes.[15] Rather than an inquiring into market

[13] Ex Parte Submission of the United States Department of Justice, Before the Federal Communications Commission, In the Matter of Economic Issues in Broadband Competition, A National Broadband Plan for Our Future, GN Docket No. 09-51. http://www.justice.gov/atr/public/comments/253393.htm.

[14] Oliver J. Chiang, "The Decade In Data: Our way of life has increasingly moved into bits and bytes," *Forbes*, December 28, 2009. http://www.forbes.com/2009/12/27/broadband-text-messages-technology-cio-network-data.html.

[15] See, for example, Robert D. Tollison, "Rent Seeking: A Survey," *Kyklos*, Vol. 35, 1982, pp. 575-602.

abuses, this NPRM should have inquired into political failure (which escapes scrutiny in the NPRM) and separately inquire into "fact-based" questions of who specifically gains from net neutrality wealth transfers. Not to do that is irresponsible in this context. (Such concerns are addressed in the upcoming section on questions that FCC should be asking instead of imposing neutrality.

Particularly given the advances in consumer online services, there's no cause to suggest market failure in an industry so young. Great wealth is at stake, and brutal competitive responses to every move indicate a high degree of competitive discipline (not "self-regulation" as it's often improperly described—there is no such luxury as self-regulation) in the industry directed at anything like bottleneck behavior.

Unlike a market failure response, the proceeding is fundamentally about *pre*-intervening in a market process on the part of some bureaucrats and pressure groups who want to control the choices others make, rather than allowing competitive communications to unfold naturally. That state of affairs is inherently a governmental and political failure.

A curious agency claim is that "Making these rules apply to particular entities will also provide certainty to all Internet participants as to what to expect and who bears responsibility for what types of actions." **(p. 38, paragraph 90)** There's no question that whimsical rulemaking hurts innovation; but another interpretation is that regulatory "certainty" of this variety is also a policy that tells where *not* to invest—and that too is a grave political failure when it comes to expanding broadband infrastructure and large-scale deals. Note, incidentally, that conditions being imposed for accepting government NTIA and other federal funding for investment are also a foot in the door for regulation **(p. 18, pargraph 45)**; providers beware.

While there need not be numerous rivals in competitive capital markets to maximize consumer welfare,[16] the possibility of profits would attract new competitors. But given FCC's regulatory inclination to specify terms for network technologies management, such future competition is less likely to emerge. So the end result of neutrality is a regulated grid and massive political failure; good for regulators, bad for the consumers regulators claim to speak for.

Mandatory Dumb Pipes? But What of the Possibility of Genius?

It's worthwhile to reflect on the prerequisites for greater infrastructure and bandwidth. Net neutrality mandates imply that private control by dominant vendors is against the public interest. But a better starting point is to appreciate that today's offerings are not broadband at all compared to future multimedia needs and specialized requirements. Neutrality imposed at 28 kilobits per second would hardly have been a benefit to anyone and would have left us much poorer.

Neutrality advocates often invoke the sanctity of so-called "dumb pipes," but we would more properly advocate a competitive dimension that acknowledges the possibility of the "genius" of pipes. To hold in 2010 that pipes should henceforth be "dumb" further indicates grave political

[16] A notion hinted at in the Dept. of Justice ex parte filing referenced above: "In markets such as this, with differentiated products subject to large economies of scale (relative to the size of the market), the Department does not expect to see a large number of suppliers."

failure approaching. It's unfortunate enough that the agency allegedly responsible for communications would shut off the possibility of advanced network access and charging, of differentiation of price and service; but beyond that why regard smart pipes as incompatible with retaining dumb ones, as consumers desire? Ironically, today's network policy of enshrining openness finds an FCC eager to impose dumb pipes at a time when sister electricity networks mired in regulation tout "smart grids" as one element of overcoming congestion and stagnation.

The NPRM notes that "[T]he Internet's creators…chose an architecture that did not favor particular applications," attributing this to its non-proprietary standards. Architecture matters, but so does the creation of networks on which future architecture experimentation can unfold. What could matter for the long term as society becomes wealthier is Internet *technology*, not so much only the Net as it happens to exist today with "dumb" pipes.

In what appears to be a concession, the NPRM notes that, "We also acknowledge that broadband Internet access service providers have flexibility to develop and deploy new technologies and business models, including by offering managed or specialized services that are distinct from traditional broadband Internet access service" **(p. 4, paragraph 11)**. But these specialized or managed services are not actually exempted, any more than are content providers who think future rulings will not apply to them. The division between the two was already somewhat arbitrary; a mere two pages later in the NPRM, the reader learns that the commission "seek[s] comment on a category of "managed" or "specialized" services, how to define such services, and what principles or rules, if any, should apply to them" **(p. 6, paragraph 16)**.

It is important to appreciate the significance of the fact that the FCC is unwilling to even affirm that it will leave managed and specialized services alone. While for the time being these are exempt from the ruling, that is only temporary; "we are sensitive to any risk that the growth of managed or specialized services might supplant or otherwise negatively affect the open Internet" **(page 53, paragraph 149)**. And still further, the agency asks—as if it were even conceivable in this rent-seeking environment for no one to take the bait and say "yes"—"Should any of the rules proposed here for broadband Internet access service apply to managed or specialized services?" **(p. 54, paragraph 152)**.

So there are no potential broadband offerings not vulnerable to regulation, and FCC is teeing itself up for future rulemaking. This, along with the earlier-noted query by the agency about the "pro and cons" of extending these rules to content providers and others, should be enough for the communications industry to take notice. Again, FCC is not asking for input to dissuade itself, it intends to regulate; this is not a "should we?" proceeding, it is a "we are going to" proceeding.

Of course, nothing about fostering "smart pipes" precludes the maintenance and expansion of "dumb" ones with unfettered access. Dumb pipes can flourish alongside the new. That "background hum" of the Net will escalate (just as fewer use dial-up anymore) with private investment in smart networks. For that reason FCC would best contribute by being out front articulating that case for smart pipes, not treating the Internet's infrastructure as some passive husk that fell out of the sky. Indeed, the agency seems to adhere to a "big bang" theory of infrastructure origins: It just showed up somehow, and we needn't worry about where future generations of infrastructure come from.

Critical new developments in economics stress the private property rights foundation undergirding the creation of wealth in developing nations.[17] What the NPRM fails to realize is that foundation's importance for wealth creation in frontier areas—broadband infrastructure deployment and pricing—in which property rights have yet to be adequately extended. While we're fairly competent at legitimizing property rights for "short and fat" property like a house or a car, human beings remain in the Stone Age when it comes to legitimizing proprietary approaches to "long and thin" property (or intangible property). We lack a "John Locke for the digital age," one might say; perhaps capitalism is still too new historically for one to have emerged. Nonetheless, the proper policy is to allow both open and proprietary network approaches to flourish, not impede the latter. Liberalization and embracing proprietary regimes affords room for neutrality, properly construed; but a compulsory neutrality regime would hinder proprietary decisions over pricing and access policies and effectively "ban" new infrastructure. This collapse in leadership is worsened by the effort to extend neutrality regulation to wireless services that, compared to what is to be if regulators can only restrain themselves, barely exist.

Stubbornly refusing to allow dumb pipes to have a consciousness locks in an inferior Internet to the gain of no one except its overseers. The "capital-I" Internet of today may not be the same as not-yet-created multimedia networks that may exist in the future; those will have numerous dedicated purposes and it would be suicidal for them to blindly adopt an overly open architecture that is an artifact of the Internet's public origins. Future networks may use Internet technology, but perhaps not all use the same physical network in decades to come. This is especially feasible as societies generations from now become wealthier and unforeseen network industry ventures spawn an assortment of dedicated networks. Online security and safety might be one driver: Metcalfe's Law is true, but so is a corollary; that if miscreants on your network are deliberately devoted to destroying it or otherwise creating pandemonium or preventing you from making security and privacy guarantees to anyone, then the value of your network rises as you eject them. Note that, in contrast to the net neutrality vision, this is a future of vastly greater and diverse network-and-infrastructure (and content) wealth than imaginable today. Relatedly, even as we strive to protect political anonymity online, we may need/desire less commercial anonymity in some contexts, which could drive the creation of such networks.[18]

Thus the proper stance from which to think about net neutrality is that we're 10 years away from a communications revolution, and 20 years away from the one after that, and so on; or stated differently, that we don't have *any* Internet or broadband today compared to the capabilities of unfettered future networks that will arise after we're long gone. Today we have an Internet, tomorrow we may have "Splinternets" or "Cyberspaces": nobody really knows. But what we can say that imposing neutrality on sub par network, and particularly extending the concept to new private networks, locks in the sub-par and "dumb." Elevating the principle of mandatory net neutrality above the principle of shareholder ownership and wealth creation in pipes and spectrum deflects competitive forces away from the infrastructure development—and content-handling capability—that our descendants will need.

[17] See the work of Hernando De Soto and Daron Acemoglu, for example.

[18] Wayne Crews, *Cybersecurity and Authentication: The Marketplace Role in Rethinking Anonymity – Before Regulators Intervene, CEI Issue Analysis*, November 8, 2004.

Price signals matter in advancing the great infrastructures of our day, and those of tomorrow. Price signals are in fact the fountain of growth. Price signals point to profit opportunity; they help direct where content provider and infrastructure owner investments go, creating wealth. Indeed a different, lesser kind of network evolves if customizability is forbidden. The lesson is to not sacrifice the consumer benefits of tomorrow out of fear of a few bottlenecks. In the electric power debate, there was something called a "stranded cost" that fearful utilities invoked when they were bypassed by a rival. The ultimate stranded cost occurs when consumers, Wall Street and investors, takeover artists and rivals abandon one's network for an alternative. Such competitive incentives help foster the right mix of openness and neutrality on tomorrow's networks. Freezing today's Internet into a regulated public utility via net neutrality's FCC-serving price-and-entry regulation would plainly slow investment and innovation—meaning fewer new companies, networking deals, products and technologies. Neutrality turns the entire industry "dumb"—not just the pipes—ultimately hurting content companies too. Compulsory neutrality undermines wealth maximization, including content maximization both indirectly and, eventually, directly.

Elements of a Constructive NPRM at Today's Advanced Stage of Communications History

The above sections attempted to demonstrate that regulation cannot substitute for competitive discipline. But one will scour the proposed rule in vain for recognition that government failure is both endemic and harder to extricate from than mere bad business decisions. Consumers and competitors can rapidly and devastatingly react against bad business practices; but reversing course under an inferior net neutrality regime is another story altogether.

As noted, capitalism itself is historically a relatively new phenomenon, and communications networks, as massive-scale private assets, lack the legitimization they deserve. FCC's true challenge now is not to look for ways to undermine property by favoring either side in this battle, but to extend the realm of property rights into an extraordinarily difficult field; to achieve in its realm of network property and spectrum the same thing previous generations accomplished in fostering the establishment of institutions of private property and liberty. Such institutions have to be discovered and defended; they're not obvious. To simply retreat to "openness" on legacy networks represents a colossal shirking and disservice. Rather than strive to legitimize markets, the NPRM puts network owners on the defensive without a corresponding recognition that the behaviors at issue—special agreements, contracts—contribute to consumer welfare.

Often, the problem consumers face is not that no competition exists, but that it remains illegal or cumbersome thanks to franchise, zoning, and environmental barriers, or compartmentalization of network industries (electricity, water, rail, sewer, communications) into regulatory silos—*all of which are the products of prior regulatory decisions* and of regulators thinking within their own squares, precisely as they are doing today with the concept of neutrality. To the extent smart pipes could develop, liberalization of these other networks would be a massive stimulus. The NPRM suffers similar shortcomings by seeking justification for business behavior but ignoring the multitude of government barriers to liberalization and the unshackling of infrastructure wealth.

Rather than repeating and expanding the platitudes of the Policy Statement, the NPRM should have been an entirely different document tackling impediments created by political institutions

such as FCC itself. It should have authoritatively presented a statement of principles articulating conditions for the creation of private communications wealth. Inquiry should have centered upon FCC's capability to foster actual liberalization rather than securing for itself a regulatory agenda for the next 100 years. Numerous elements of the NPRM represent a stance suspicious of private sector behavior; but similar suspicion could be directed at FCC. Indeed, answers to the questions in the NPRM are useless without the context provided by what FCC regards itself capable of improving upon rather than damaging.

The following questions require answers before FCC can properly act upon NPRM input.

- In what sense does FCC recognize the relevant competitive unit is not merely the transfer of information across today's existing networks, but the creation of networks as such?
- What case is the FCC preparing to combat infrastructure socialism and to avoid lending credence to a federally managed communications industry highly susceptible to rent-seeking behavior?
- Does FCC recognize that proprietary networks are consistent with consumer access? If not, why?
- What is FCC doing to fairly define "discrimination" and to reject the negative connotation? In what ways does FCC acknowledge "discrimination's" essential function in infrastructure and bandwidth creation, consumer welfare, child safety, network security and other desirable features of content and service?
- In what ways does FCC recognize "neutrality" or "openness" as one feature of one of many types of networks that potentially can co-exist, rather that the defining characteristic of a system (the "capital-I" public Internet) it presumes to regulate?
- What conditions does FCC regard as pre-requisites for firms to undertake major infrastructure investments? How are neutrality policies consistent with them?
- What is FCC's assessment of imposed openness on homeland security, information security, privacy and the vulnerability of intellectual property to piracy?
- What is the FCC perspective on the relevance of and myriad competitive pressures created by operations that remove traffic from the public Internet altogether, shunt it along and re-join near the end user? In what way does FCC believe it would improve upon those pressures as they increase?
- What is the FCC's assessment of who gains and what they gain from neutrality regulation?
- How has the history of government "silo" regulation contributed to the scarcity of "pipes" to the home?
- What is FCC doing to assure that regulatory silos are torn down and cross industry partnerships are fostered (power, water, rail, sewer) to secure more advanced communications and avoid short-circuiting this process with calls for neutrality?
- Given FCC's emphasis on regulation—rather than markets for redundancy, duplication and cross-industry rights-of-way and franchise reform—how would FCC impose net neutrality mandates without also embracing price and entry controls?
- Will net neutrality further entrench FCC authority and increase its budget?

- What does the FCC regard as the impact of net neutrality mandates on First Amendment protections, and would such mandates survive a challenge?[19]
- What would induce FCC to say it is causing harm and that it should step aside? Provide examples of policies FCC regards as destructive and is prepared to remove.
- Short of future versions of the past decades' wrenching telecommunications reform attempts, what more streamlined exit strategy does FCC envision when net neutrality mandates need similar rollback? (Upon emergence of broadband over power lines, for example)
- What has FCC determined to be the function and potential of user ownership (real estate developers, content companies, etc.) of portions of communications infrastructures in offsetting market power of providers, and in what way do these relax calls for neutrality?
- Does FCC realize that broadly applied neutrality policies could rule out or dis-incentivize solutions like user ownership of networks?
- What is the agency doing to help halt antitrust investigations into the alternative networks and content ventures (like the long-delayed XM-Sirius merger) in order to foster the kind of massive-scale infrastructure competition that would achieve the alleged ends of neutrality through purely market means?
- What is FCC's strategy to relinquish powers to other general regulatory agencies and avoid damaging duplicative and industry-specific regulation?

These simple considerations demonstrate that the questions in the proposed rule are actually the wrong ones to ask at this stage if one's concern is flowering of infrastructure and content. *The deliberate conflation of competition with government-defined openness and a penchant for compulsory access (and the attendant government role in price and entry regulation) colors the entire proceeding*. Only corporate motives are questioned, when we should be asking instead what does FCC truly regard as the source of new infrastructure wealth, and what *definable and limited political institutions* foster the necessarily hand-in-hand growth of content and network infrastructure

In the context of addressing FCC's queries, it's important to reflect on what institutions are the true sources of "openness" in civil society. Choices are government or private sector; proprietary networks on which choices and contracts can be exercised and altered (including the option of openness), or allegedly neutral ones controlled politically. Ensuring neutrality on a network that none of our descendants would want to use is an easy thing to do but hardly worthwhile. The choice today is one between *competitive* discipline and *political* discipline. The federal agency claiming to protect networks can too easily herald their stagnation, creating a communications marketplace in which the players no longer resemble what would have emerged in a truly competitive market.

Again, an elemental misconception in this entire FCC proceeding is that the interests of infrastructure owners on the one hand, and content owners on the other (as well as consumers) *legitimately conflict in a world where the option of turning to regulators for favorable political treatment is unavailable*; Rather, content and infrastructure are natural partners in a non-

[19] Randolph May argues against the survival of such a challenge. "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age," *I/S: A Journal of Law and Policy*, Vol. 3:1, May 2007. http://www.freestatefoundation.org/images/IS_Journal_Net_Neutrality.pdf

politicized environment characterized by free enterprise. In the most rudimentary sense, consumers of content are shareholders of infrastructure companies too.

The NPRM On Consumer Choice and Access to Content

The initial Statement of Principles now being promulgated as a rule emphasized the *open and interconnected* public Internet and upholds individuals' ability to *access the lawful content of their choice* …and*…connect their choice of legal devices.* Statements like this have the effect (perhaps unintended, but likely not) of improperly conflating political freedoms and contractual/economic freedoms, while potentially undermining both. Rights, of course, describe the relation of an individual to the *state*, not to a commercial vendor. Be that as it may, commerce is not a threat to democracy or the free flow of ideas; it is the enabler.

Consumer choice is created by, not threatened by, the existence of the producer. That consumer choice is made available by the complex interplay between content providers and network owners. It's often governments that impede consumers' access to content (note the use of the words "*lawful* content" and "*legal* devices" in the Statement) via censorship, filtering, prohibition of access to porn, gambling, etc. Or, governments—as in the cable a la carte debate—interfere with structuring of content packages that firms would otherwise offer. As far as the attachment of devices, prior inability to attach them is rooted in a regime where monopoly was entrenched by the governmental entities now calling for the right to connect a device. Disallowing enhancing networks via the addition of peripherals is not a feature of the marketplace. Naturally, somebody needs enough control to protect a network from damage, and it's normally a mere contractual matter; what the NPRM does is smuggle in the idea that government was the entity inherently responsible for the newfound freedom of using peripherals.

At least the FCC realizes that "…consumers are entitled to competition among network providers…." If only regulators had believed this a century ago when competition did exist and federal and state regulators stamped it out. Interesting in this regard is the urge to regulate and include wireless networks in proposed rules **(p. 54, paragraph 154)**. Note that wireless entities' incentive is to automatically allow access to content—otherwise why would anybody buy these services? If they don't offer basic access, then these "services" really have no appeal.

In any event, it's a misleading use of language for regulators to say consumers are "entitled" to competition when regulators actually intend to stamp out competition via neutrality. It's also an improper use of language in that what consumers are actually entitled to is for government policies to not forbid their access to information. "Entitlements" are not the language of competition. In a sense, this statement almost unselfconsciously embodies the essence of all that's wrong with infrastructure socialism, and the regime destructive of consumer welfare it heralds. Again, with respect to networks, we're at the infancy of development of property rights. It's crucial that agencies (not just FCC) focus on tearing down the regulatory walls erected between our network industries—already more than full time job—and not build new barriers in frontier applications like wireless while they ignore the real reasons consumers lack access and choice.

A serious consideration in this campaign is what contenders regard as the impact of net neutrality mandates on First Amendment protections for infrastructure companies and content companies

alike. Users have free speech rights in a political setting—but so do providers—a neglected point. The interface between providers and users is properly governed by contracts. But the order seemingly prevents future entrepreneurs from developing a network that only allows a certain type of content. *Political* freedom isn't the relevant concept when it comes to a consumers' relationship to any company with which it does business; those are contractual matters with which governments that intervene or more likely to undermine than enhance. Properly, if one develops a network as an exercise of free speech, one also has a right to *limit* one's speech or contractually limit that of those with whom one deals to mutual advantage. Competitive pressures will harshly punish improper limitations. In any event it's doubtful that content companies will ultimately regard energized federal involvement in content regulation as positive for their interests.

Who's Discriminating Online?

The original four Policy Statement principles miscast the pre-requisites of broadband infrastructure wealth creation (property rights, exclusive deals and contracts and so forth) as antithetical to consumer welfare and fluid access to content. In that sense, they are philosophically flawed and harmful; the industry as a whole deserves more credit, having been instrumental in bringing about not only the early promise of the Internet but the present reality.

However, the FCC NPRM goes beyond the initial four principles to incorporate a fifth anti-discrimination mandate. The NPRM states that "Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications and services in a nondiscriminatory manner" **(Section 8.13, page 66)**. The agency takes the term "nondiscriminatory" to mean that "a broadband access 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" **(p. 42, paragraph 106)**. Indeed, the FCC intends and endorses "a bright-line rule against discrimination" **(p. 43, paragraph 109)**.

The crippling effect of such decrees—locked in as if something were inherently special about the year 2010, and as if the Internet's present incarnation represented the culmination of all humanity's network technology—is rather hard to overstate. Pricing is one of the most important yet misunderstood, complex and critical variables for many innovative industries. [20] Moreover in terms of consumer welfare itself, there is no more socially important mechanism for allocating scare resources and fostering wealth expansion. That importance is not diminished however poorly understood someone else's pricing policies may be to a regulator, or self-servingly denigrated by a rent-seeker. Industries' very experimentation with pricing mechanisms expands consumer welfare, taking for the sake of argument that consumer well being is really the goal of a so-called "anti-discrimination" mandate.

Network owners *and content providers* must "discriminate," or "exclude" in ways that ease business expansion, network management or operations control and competitive content creation. Discrimination is also an implementation of *choice*: prioritization of critical medical information, filtering, protecting kids online and so forth. If you were suddenly to transport all today's traffic back 10 years, there'd be discrimination because it couldn't all fit. Today's Internet stands in a

[20] See for example Ronald H. Coase, "The Marginal Cost Controversy," in *The Firm, The Market, and the Law*, pp. 75-94.

similar position with respect to that of the future. Content, technology, and network infrastructure grow hand in hand, and at various times one sector may have sway over the other. Competing rivalries reveal profit opportunities, and in a never-ending stir create competitive pressures for consumer services. Those pressures dampen or work against unreasonable discrimination, and they bring service tomorrow to those lacking it today.

Neutrality renders these services and healthy competitive turmoil vulnerable to political predation and exploitation. Vulnerability also stems from the blurring of lines between access providers and content providers—between message and delivery of the message. In well functioning capital markets, content companies can become infrastructure companies and vice versa. Balances of power will shift (much like cable firms paying for broadcast content rather than broadcasters having to beg).[21] Liberty in the institutions developed for the creation and dissemination of information (rather than governmental guidance of such modes of expression) is one of our most cherished freedoms, and the true source of non-discrimination and openness. Occasionally "favoring" certain content is consistent with voluntarism, the buildup of new social and communications institutions within society, and can be a pre-requisite for the network and content wealth creation beneficial to consumers.

Compulsory neutrality is itself inherently discriminatory: it artificially favors one side in a battle of industry equals, damaging flexibility for everyone and undermining consumer welfare. It sets the content industry on a higher moral plane than the infrastructure industry, and creates enemies out of what are in fact natural allies, partners that could be working closely together and even integrating far more than they do to expand the Internet's capabilities. The recent economics Nobel prize captured the importance of such vertical relationships, which will be increasingly relevant to Internet health in coming decades. Just as consumers may desire lower electric power rates in exchange for interruptible services while industrial concerns may pay extra for premium power, one can readily envision future communications networks so prosperous and customized that content providers *want* to secure the very preferential treatment the NPRM would forbid them (or conversely pay less for non-vital transmissions). All such "discrimination" is consistent with (and indeed would improve) the openness enjoyed online now. Natural network evolution entails not only complex access and pricing policies, but making underlying networks longer, fatter, and redundant. Companies don't get to decide or "discriminate" in isolation of course, but must heed investors, advertisers, consumers, and the constant competitive pressure of rivals and hungry network alternatives. All these array against unreasonable blockage of any content or information flow, with the upshot that any "socially harmful discrimination" **(page 44, paragraph 114**) is more likely to be *privately* harmful—*to the perpetrator*.

Pricing and access freedom would result in *a constant escalation in the basic capabilities of the network*, an intensification of the "background hum" of the Internet as a whole, much as we've already witnessed without neutrality mandates interrupting the process over the past decade. If one envisions a continuum with "neutrality" or "perfect competition" at 1, and monopoly or proprietary control at 100, economists have beaten to death the endpoints, but have little appreciation for the abundance of activity taking place at 2 through 99. But that's where real creativity and competitive enterprise happens. Our descendants will be grateful for restraint here,

[21] Peter Grant and Brooks Barnes, "Television's Power Shift: Cable Pays for 'Free' Shows," *Wall Street Journal*, February 5, 2007, p. A1.

because an anti-discrimination rule, as Lawrence Spiwak of Washington's Phoenix Center notes, "will likely result in higher prices for consumers, increased transaction costs among suppliers, fewer content providers, less broadband deployment (which is a stated major national goal) and, perhaps most self-defeating, increased industry consolidation."[22]

The trap of these proceedings is that there's no way to prove "non-discrimination," since price and service differentiation critical to well functioning network services will become more so over time. *Non-discrimination, properly understood, is not a positive state of affairs*. Because it must "discriminate," business cannot defend itself within the parameters of the NPRM that regards discrimination as negative, and "openness" as the cardinal virtue. Note also that no exit strategy is apparent in the NPRM when the "need" for regulation subsides. The *agency neutrality* proposed here would mean regulators must not be allowed to "discriminate" and choose sides (content over infrastructure) in any market confrontation, period. The contractual resolution that ultimately prevails informs future entrepreneurship and is essential to the broader knowledge/wealth-creating process.

The agency entertains briefly the notion of preventing only "unjust or unreasonable" discrimination rather than the bright-line prohibition of all but that related to "reasonable network management" **(p. 43, paragraph 109)**. Of course, what's "reasonable" when you want something for free is different from what's reasonable when you own infrastructure or made the investment. Nonetheless, the FCC here inserts a wedge for itself to establish a permanent regulatory presence: "To be sure, the contours of our proposed exceptions [to reasonable network management] would be subject to development in future adjudications" **(p. 43, paragraph 110)**.

To its credit, the agency does ask for consequences of prohibiting charges for priority pricing **(p. 43, paragraph 112)**. The agency also seeks to clarify that managed or specialized services would not be subject to the principles, only "broadband Internet access service" itself, although all these "may be offered over the same facilities" **(p. 43, paragraph 108)**. This is really just an arbitrary distinction here, in the vein of past pro-regulation-and-litigation bureaucratic distinctions like that between "information services" and "telecommunications services"; Unimpeded by neutrality constraints, broadband access itself could become increasingly more "specialized" and "managed" in a bandwidth-flush future world, a worthwhile evolution that warns against the application of discrimination for "reasonable network management" only. The closest indication that FCC appreciates this is when it asks, "Should these [advanced and quality-dependent] services be more properly understood as managed or specialized services rather than broadband Internet access services?" **(p. 44, paragraph 113)**. But the NPRM doesn't make the next logical step to advocate that broadband access itself enjoy exemption from regulation also.

The Inappropriateness of Compulsory Transparency

The NPRM proposes a sixth principle on "transparency" with respect to network management practices, **(Sec 8.15)** holding that "sunlight is the best disinfectant" **(p. 45, paragraph 118)**. Such a sentiment is certainly appropriate in a political or governance setting; compulsory transparency should apply to unelected regulators, but not regulated private parties in a highly

[22] Lawrence J. Spiwak. "Bight Lines, Big Problems," Forbes.com, January 12, 2010. http://www.forbes.com/2010/01/12/networl-neutrality-european-union-fcc-opinions-contributors-lawrence-j-spiwak.html.

competitive setting that itself creates pressures for transparency and service guarantees. A political setting in which transparency might be appropriate would be a Freedom of Information Request directed at FCC regarding its internal discussions on market failure or lack thereof with respect to conversations about the wisdom of net neutrality or of FCC's relevance to a truly competitive market process.

But compulsory transparency rules are not appropriate in a private, competitive market setting, beyond what the market itself generates. This provision unnecessarily and harmfully interferes with confidential trade or business practices, and is a make-work provision for the FCC and for troublemakers. As long as consumers are getting the speed and services contracted for, there's no public policy issue at hand, and no legitimate entitlement to endless amounts of information about "traffic management practices of networks" **(p. 45, paragraph 118)**. Properly, how a firm manages its own private networks is a contractual matter driven by an impatient competitive process intolerant of the withholding of useful traffic and management information.

Forced disclosure is an inferior alternative to that driven by rivalry. Markets produce desired products and services, but they also produce *relevant information*. There exists a disclosure continuum from absolute non-transparency and secrecy, to full-disclosure of network practices. Where we "belong" on that continuum shifts continually with every new fiber deployment, merger, content deal, undigested meal—the list is endless. Users should and can pay for varying amounts of disclosure if they find themselves insatiable; but meanwhile competitive pressures between broadband providers, and demands by investors and shareholders, advertisers and Wall Street impel disclosure. By these means the competitive process is a highly energized and capable driver of transparency, and punisher of shady practices. The regulatory push for transparency is no substitute for this, and would undermine the kind of transparency genuinely useful to future interested parties.

A transparency rule creates a make-work regime for an increasingly irrelevant agency. The NPRM's questions about appropriate "standard labeling formats" **(p. 47, paragraph 126)** to supposedly allow consumer comparison of network management practices illustrate this. Apart from the reality that competition can and will increasingly generate that type of information and in useful formats besides, this is a recipe for information overload, banking-privacy-notice style. There is no way to satisfy the political harassment of private firms this clause will generate.

Transparency regarding particular mundane network management practices becomes increasingly irrelevant in a world of torrential bandwidth and competitive pressures to disclose useful information. The issue now exists only because bandwidth is, naturally, not unlimited or unconstrained. The proper FCC approach is to foster a world in which speeds are so instantaneous and services so supremely tailored that *disclosure doesn't matter*. Beyond that, the only need is that the provider adheres to any contract or promise offered the user about speed and transparency. The key to achieving these benefits is, again, agency neutrality.

Network Security vs. Network Neutrality

The NPRM references to homeland security **(p. 66, Sec 8.21)** state that nothing supersedes or limits the ability of a provider "to deliver emergency communications or to address the needs of public safety or national or homeland security authorities." In reality, everything about net

neutrality influences the broader evolution of networks; indeed, few conceivable policies would supersede such concerns more. In the extreme, if only authenticated networks that discriminated against every packet were the way to have infrastructure security, the NPRM would obstruct such solutions; it can likewise obstruct interim measures.

There's little appreciation in the NPRM for the *fundamental* importance of proprietary control over networks to combat security threats and assure reliability. For that we need, not neutrality, but a plethora of overlapping wired and wireless communications networks and redundancy schemes and cyber-insurance projects that don't even exist yet.[23] Apart from the result being a better, cheaper and more robust version of the openness that today's advocates of net neutrality seek, security would be more ingrained. Network neutrality would undermine these lessons. But, in this age of potential "cyberterror," if imposed neutrality leads to vulnerability or even victimization, what recourse would anyone have? To protect a network sometimes not merely discrimination but outright exclusion could play a role.

FCC's pondering whether network discrimination benefits anybody or not is irrelevant if a network is destroyed. Again, when it comes to security, as with consumer welfare, the choices are the same: neutrality or bandwealth. Which approach adds flexibility and protects networks' future, which damages them? The lessons learned will allow us to better deal with spam, cyber-security, privacy, and piracy—much of which stems from inadequate ability to authenticate users and price online network usage.[24]

Alternatives to Compulsory Neutrality: Positive Communications Liberalization

While hiccups rooted in the difficulties of emerging from a heavily regulated telecommunications past are inevitable, market failure as such is stalking the communications industry. FCC does not need to act to implement neutrality rules; it could advance industry liberalization instead.

Even if there existed numerous instances of blockage by access providers, the issue should center less over the merits of infrastructure socialism and more over the relevance and capabilities of an entity like FCC in liberalizing infrastructure for tomorrow's users. Extending the institutions of property is a mark of civilization; there needs to be a way to make regulators answer for failing at that task and undermining the industries they oversee. FCC need not persist in setting itself up as the enemy of infrastructure and content wealth; but the reality is that neutrality amounts to the compulsory abolition of certain proprietary business models and is hostile to the concept of property in long, thin assets. Networks do not belong to the hive or collective; at the very least we need to establish that government rules are limited in scope, and do not apply to whatever alternative networks or online services might emerge in the future. Policy must allow for political rules to be dislodged and replaced by private arrangements; but there is no leeway for that in the NPRM.

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[23] Wayne Crews, *Cybersecurity Finger-pointing: Regulation vs. Markets for Software Liability, Information Security, and Insurance. CEI Issue Analysis*, May 31, 2005, http://cei.org/pdf/4569.pdf.

[24] Wayne Crews *Cybersecurity and Authentication: The Marketplace Role in Rethinking Anonymity – Before Regulators Intervene, CEI Issue Analysis*, November 8, 2004. http://www.springerlink.com/content/dq8522k3361757r4/fulltext.pdf?page=1

Indeed, if it didn't already exist in today's era of communications abundance and potential, we wouldn't create the FCC to meddle in the manner tolerated today. The FCC's willingness to erect neutrality barriers to the *creation of infrastructure wealth* indicates disdain for future consumer welfare online and for the very concept of liberalized communications and further separation of state from speech and communications. FCC should be first in line articulating the case for preserving and expanding the scope for competing network business models—open *and* proprietary. Instead, its philosophy is hostile not merely to legacy wireline, but to wireless and the yet-to-be.

The neutrality impulse is not unique, having been implemented or advocated in power grids, operating systems, various interoperability mandates, instant messaging, search results and more. The rationale is dubious even pertaining to "monopoly" communications networks, since, as photographs from the early telecommunications and electricity era illustrate, massive redundancy and duplication of wires prevailed. Rather than natural monopoly, congestion and aesthetic outrages plagued the era. The capital and incentives available to build infrastructure are even greater today.

The regulated open access paradigm assumes away the problem of ignorance and relies on government force to solve problems about which there can be no permanent agreement (which is appropriate in market settings; that discontent is a source of profit opportunity). In reality, policymakers haven't the vaguest idea how communications grids should develop, and certainly have no right to presume that any given paradigm is sacrosanct and worthy of being locked in by regulation. A regulated access regime would inflict the technological "lock-in" that FCC and the Federal Trade Commission otherwise claim to abhor **(page 34, paragraph 81)**. Meanwhile, we face a quandary with respect to the legacy bureaucracy. Industry itself sought regulation in exchange for the outlawing of competition, and future heavy regulation will entrench powerful (or merely lazy) interest groups whose self-interest will depend upon impeding future network and content liberalization. Indeed, an irony of neutrality, anti-discrimination and disclosure rules is that, the more meddlesome rules there are, the more likely that entrenched incumbents get to run tomorrow's show.

Public policy decisions need not lock in or prejudice the emergent competitive mix of open and proprietary approaches for future generations. Governments often presume to pick winning technologies, the "racehorses," so to speak, when governmental focus should be on improving the "track" (the regulatory, tax, policy, legal and competitive environment) on which *all* the horses run. That stance would counsel keeping out of private decisions about whether networks remain stupid and dumb. Smart networks do not mean a subservient future of "seeking permission from the owner of the broadband pipe" **(p. 26, paragraph 63)**. Providers and customers are simply not inherently at war, as this proceeding implies.

To move forward the Agency would need to grapple with limitations noted earlier and liberalize telecommunications in a way that promotes actual (not forced) competition and consumer welfare. But the NPRM lacks any exploration of the deregulatory means of achieving these same ends. The NPRM claims that a "Commission Goal" **(p. 21, paragraph 51)** is to "promote investment and innovation with respect to the Internet" as if neutrality is the unquestioned means of doing that, and as if we have these things because of government rather than sometimes in

spite of it. Footnote 1 in the NPRM refers to the commission's "statutory responsibility" under the broadband plan "to preserve and promote advanced communications networks"; it's worthwhile to note that this directive refers to infrastructure and "broadband capability," rather than broadband content itself. In that reading, the real charge if this mandate were taken seriously would be to ban neutrality mandates and central management of telecommunications as such, so that broadband capability could genuinely flourish.

Numerous ways of dealing with holdout and legacy-monopoly power well short of imposing universal open access exist that would instead *reduce* agency power. The principle of neutrality should be replaced by a new principle, that of fostering competition in the creation of networks. Today's task is one of lowering transactions costs of building infrastructure. The best way to do that is to repudiate the NPRM. Other options, in no particular order, exist:

- Short of repudiating the NPRM, ban compulsory net neutrality on wireless and all future wireline networks.
- Ban the regulation of unregulated or managed and special services. As they dominate and perhaps incorporate traditional broadband access, regulation of that capacity could also be banned.
- Emphasize spectrum auctions with no strings attached.
- Where invoked, incorporate mandated access only on a rifle-shot basis rather than impose as a principle. Be sure rules apply only to the existing public Internet, and leave any future privately owned online services that may emerge in the marketplace free of these requirements.
- Work to reduce environmental and zoning restrictions that impede infrastructure build-out.
- Antitrust regulations should be relaxed so that content firms could foster infrastructure options. Note that this proceeding occurs seemingly disconnected from the FCC's opposite approach, a series of hearings around the country challenging "big media" and free choice in media ownership—these are the very kind of alliances that, if not themselves restrained, could help offset market power in infrastructure that spur calls for neutrality.[25]
- Work with other federal agencies and state regulatory bodies to reassess and reduce exclusive franchises in industries like electric power. Aggressively liberalize and tear down regulatory silos between infrastructure industries to cross industry investment in mutual infrastructure (communications, power, water, rail, etc); In this manner, the competitive infrastructure process flourishes not only at the communications sector level but but across industry sectors.
- Explore the state of and remove barriers to user ownership of grids and infrastructure as alternative to "neutrality" and as a means of alleviating market power where it may remain a concern. Office parks, real estate developers, corporate campuses, all have a role to play in the wealth-creating innovations in networks.
- Conventional antitrust could of course address any residual monopoly power without invoking net neutrality. The NPRM already notes the neutrality-style conditions imposed on mergers during the past decad**e (p. 13, paragraph 33)**. However, this approach has grave dangers that can be worse than the alleged monopolization because its abuse creates entities that do not resemble what they would in a free, competitive market. Antitrust, like neutrality,

[25] Wayne Crews, "A Defense of Media Monopoly," *Communications Lawyer*, No. 3, Vol. 21, Fall 2003. http://www.cato.org/research/articles/crews-fall2003.pdf.

hampers infrastructure wealth creation and is a poor substitute for competitive market discipline.[26] But it's mentioned here because other filings will advocate it as a substitute for net neutrality.

What Should Congress Do?

FCC asks for comments regarding its authority, its "jurisdiction over broadband Internet access service sufficient to adopt and enforce the proposed rules" **(Page 37, Paragraph 87)**. Such authority seems absent as noted earlier and the matter will end up in Congress, but most important to stress here is that it would be a grave mistake and historical misfortune for Congress to permit the rulemaking or to otherwise enact neutrality legislatively. Net neutrality, like many Internet and technology policy regulatory issues, does not necessarily track party lines[27] and it would benefit all to reconsider its wisdom. Congress should rule out coercive net neutrality entirely.

One cannot locate in the NPRM any procedures to discipline agency heads who propose to choose a business model for an industry without legislative authority; or who impose a system that harms long term growth of infrastructure wealth. The impulse for genuine liberalization seemingly must come from outside the FCC; that task is to de-legitimize the regulatory approach to infrastructure creation and content access.

As the above sections contend, emphasis belongs on communications liberalization and fostering the emergence of competitive institutions that replace uninspired and damaging bureaucratic oversight of "long and thin" property. A handful of things Congress might contribute to such reforms include:

- Legislatively affirm that the Agency not authorized by Congress to regulate the Net as proposed in the rulemaking (i.e., Blackburn bill).
- Ban the extension of neutrality mandates to wireless.
- Short of a radical liberalization, legislatively affirm exemption from regulation of future construction and competitive options. Guarantee that compulsory neutrality shall not apply to future network extensions or those that are not part of the "public" Internet
- Legislatively reject the final rule that emerges from the neutrality rulemaking.
- Pass a resolution of disapproval (as specified under the Congressional Responsibility Act) of the final rulemaking.
- Discourage the use of antitrust against large scale content and infrastructure ventures
- Have FCC present a report to Congress not critiquing "discrimination," but articulating the pro-market role of pricing and network management freedom, and on the Commission's understanding of the role of private enterprise in creating networks.
- Hold detailed hearings not on private business practices, but on FCC practices: its scope of authority and whether it's growing or declining, its interventionism, its expansion in staff and budget, its reason-for-being in modern times compared to that invoked at its origin.

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[26] See for example Wayne Crews, Comments of the Competitive Enterprise Institute to the Federal Communications Commission in the Matter of Consolidated Application for Authority To Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57, July 9, 2007. http://cei.org/pdf/6025.pdf.

[27] On October 15, 2009, several dozen Democrats wrote to FCC chairman Julius Genachowski with concerns about the negative consequences of net neutrality rules. http://thehill.com/images/hillicon_valley/october_09/72demltr.pdf.

Conclusion

The likely elevation of net neutrality to Congress given the FCC's rulemaking, and contemporary and subsequent court attention, presents a unique opportunity in business and political history to build an intellectual and consumer case against infrastructure socialism. Nothing important can be known today about how pricing access and content on the networks of tomorrow should be implemented, and nothing to be gained and a lot to lose by prescribing conditions on how producers make their decisions as network infrastructure is deployed. Future balances of power and optimal pricing structures are unknowable to us today; but regulation could easily lock in inferior business models, the rollback of which will be next to impossible. Yet, FCC seeks through this ruling to "generate over time a body of law" **(p. 37, paragraph 89)** rather than refrain.

If no FCC existed, one would be hard pressed to seriously propose creating the kind of entity that exists now. As it stands, the agency clings to past relevance (perhaps glory, in some eyes), operating in a priestly world where the agency wonders "will our policies create incentives?" But in a world in which firms discover their own incentives to invest, such as Google's $1.65 billion purchase of YouTube and Verizon's commitment to spend tens of billions on fiber to the home, the imperative would seem to be to remove regulatory uncertainty, to eliminate the possibility of regulatory whim. In this context, the task of reformers—which likely must come from outside FCC—should be to de-legitimize the crippling regulatory approach to infrastructure.

Most of the allegedly problematic behaviors indicated in the NPRM actually signify healthy economic activity, whether carried out by access providers or content providers, because they attract waves of competitive responses. Commissioner Adelstein indicated a mistaken desire to act while "decisions are being made today about the architecture of the Internet." Decisions *are* being made today about the Internet's architecture; but there should *never be a time when decisions aren't being made* about Internet technology and its deployment. Architectural decisions about proprietary networks, open ones, partially shared ones, overlapping and redundant ones—there is no time when architecture should *not* be in flux. It is not a positive development for an agency to freeze or rubber-stamp a particular architecture via neutrality.

A proper competitive infrastructure marketplace grants no entitlements, and does not entertain corporate welfare on anyone's behalf. Commissioners need not pick sides in a battle of giants. And any advantage so gained would be illusory: the interventionism of net neutrality hurts all sides. Proponents of openness, freedom of speech, low prices, and all the other "good stuff" the Internet promises will benefit from letting the parties duke it out, the end result of which will be a "background hum" that dwarfs the capabilities of today's Internet. Network liberalization should common goal of combatants. Otherwise, the paradoxical result will be that regulators and activists achieve "neutrality" on what, in reality, is sub-par infrastructure relative to tomorrow's needs. For that reason, the response to the threat of net neutrality is a matter of CEO-level corporate guidance. As corporate net neutrality advocates may learn too late, there's nothing special about the owners of broadband pipes that inoculates the proponents of net neutrality in tomorrow's communications fights. Everyone in the communications industry becomes more vulnerable to political predation in a world of government-enforced neutrality.

Empire building is common, even inevitable at government agencies under siege by reality and the disappearance of a mission, and can only be stopped if people point it out. But we want tomorrow's Internet at the speed of light, not at the speed of government. Alfred Kahn at the Civil Aeronautics Board came to realize the world was much better off with his agency much weakened, and proclaimed in *Time* magazine, "I will consider myself a success in this job if there is no job when I leave it."

New proceedings are needed in which FCC takes the opportunity to define a similarly more limited role for itself, one that replaces agency discipline with greatly unleashing competitive discipline, and that adheres to government's basic function of respecting property rights and contract and by extension, wealth creation. Net neutrality enshrines the opposite principle, empowering one side of the debate (temporarily) with disposal over the others' property, entrenching political control and decades of rent seeking. In other words, FCC needs to bring something to the table besides an appetite for yet more priestly regulation. It (and Congress) needs to question its own culpability in any residual monopoly excesses, then chart out a course for liberalization, not expand its own jurisdiction in a world no longer characterized by the "scarcity" and "public airwaves" of FCC's origin. Stepping back is far from doing nothing.

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