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Perspectives from FSF Scholars ***August 26, 2014*** ***Vol. 9, No. 29***

Net Neutrality v. Consumers

By

Randolph J. May *

Rep. Anna Eshoo says she wants to re-brand “net neutrality.” According to the [National Journal report](#), Rep. Eshoo thinks the terminology surrounding the debate has left the American people “with a muddled understanding of what to support.”

I don’t pretend to be a marketing expert. In any event, Rep. Eshoo has launched some type of [contest on Reddit](#) to pick a new “brand” for what I’m going to continue, in the meantime, to call “net neutrality.” So I’ll leave the re-branding to those who think that merely changing the name of a highly problematic endeavor somehow will resolve the endeavor’s problems.

Wasn’t it Abraham Lincoln who said: “You can fool some of the people some of the time, and some of the people all the time, but you cannot fool all the people all of the time.”

Re-branding of the net neutrality campaign is not what the American consumer needs. What consumers need is better informed continuing education concerning the real-world implications of the net neutrality regime the advocates seek to impose.

In the cause of furthering such consumer understanding, let’s begin by reviewing excerpts from recent *Wall Street Journal* stories about new wireless pricing plans offered by Sprint and T-Mobile.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

- “For about \$12, Sprint Corp. will soon let subscribers buy a wireless plan that only connects to Facebook. For that same price, they could choose instead to connect only with Twitter, Instagram or Pinterest—or for \$10 more, enjoy unlimited use of all four. Another \$5 gets them unlimited streaming of a music app of their choice.” [“Sprint Tries a Facebook-Only Plan,”](#) *Wall Street Journal*, July 30, 2014.
- “T-Mobile US Inc. will let customers listen to several popular music services without counting it toward their data use, giving up a potential revenue source to bolster its subscriber base. The country's fourth-largest wireless carrier said it is going to waive data charges when subscribers use services like Spotify, Pandora and Rhapsody.” [“T-Mobile Will Waive Data Fees For Music Services,”](#) *Wall Street Journal*, June 18, 2014.

Each of the plans announced by Sprint and T-Mobile would appear to be attractive to consumers. In one way or another, they all offer subscribers additional choices for accessing services the subscribers wish to enjoy at a price lower than otherwise would be available or, alternatively, without incurring data usage charges that otherwise would be incurred. In the latter instance, such as the T-Mobile’s “Music Freedom” plan, this feature has become known as “zero-rating” because data usage charges do not apply when subscribers access sites covered by the plans.

I do not know whether these new wireless plans ultimately will prove successful in the marketplace, which continues to evolve at a rapid pace. But I have not heard of any meaningful consumer discontent with the plans. To the contrary, I surmise that consumers welcome the additional options, especially low-income or budget-conscious consumers who either are unable or unwilling to pay for wireless plans that are not limited in some fashion.

America’s consumers may welcome these new plans – but not Washington’s self-designated consumer advocates who purport to speak in their name. In each instance, these consumer advocates have expressed opposition to the new plans on the basis that they violate the net neutrality non-discrimination principle. This is because, in their view, all applications and content must be treated exactly in the same way – that is to say, with perfect “neutrality.” In this view, it is a violation of net neutrality principles for Sprint to offer a low-budget plan that allows subscribers to connect only to Facebook and not to Myspace, or for T-Mobile to offer a plan that “zero-rates” data usage for certain popular music services but not for other music sites, or, say, popular poetry sites – or you name your favorite site.

Thus, in response to Sprint’s announcement, Free Press’ Matt Wood said: "That helps lock in the existing choices and not let the new ones grow more organically. That's just not the way the Internet has worked."

Shortly after T-Mobile’s plan was revealed, Public Knowledge’s Michael Weinberg said this: “T-Mobile’s announcement that they will exempt a handful of music streaming services from their data cap is but the latest example of ISPs using data caps to undermine net neutrality.... This type of gatekeeping interference by ISPs is exactly what net neutrality rules should be designed to prevent.”

Matt Wood told *Ars Technica* that, "even if all music apps are on equal footing, they are advantaged against other kinds of apps. That kind of favoritism skews innovation because it favors certain content, business models and technologies over others."

About all the wireless plans, Jason Abbruzzese said this in a post on Mashable: "Mobile carriers have begun to give the world a picture of what a net neutrality-free Internet could look like. Wireless companies have slowly but surely begun to roll out plans that favor certain content providers or entirely limit access to particular sites and apps."

Now, with the features of the new plans in mind, along with the opposition of the consumer advocates, let's be clear: These wireless plans, and variations of these plans with similar parameters, do, as Mr. Abbruzzese asserts, "favor certain content providers or entirely limit access to particular sites and apps." And, if a net neutrality non-discrimination prohibition were applicable to wireless providers – which presently it is not – then their lawfulness certainly would be called into question, at least under the stringent version of net neutrality advocated by Free Press and Public Knowledge. Recall, according to Mr. Weinberg, "this type of gatekeeping interference by ISPs is exactly what net neutrality rules should be designed to prevent."

To be fair, by far the most common rationale offered for the consumer advocates' opposition to plans like those described is this: If the service provider is allowed to "pick winners and losers," then the "next Google" or "next Facebook" may not be able to emerge from the garage because it will be disadvantaged. I do not question the good faith or motivations of the consumer advocates advancing this claim, including the ones quoted above.

I am willing to grant that, under certain market conditions, particular practices of Internet service providers, including wireless broadband providers, *possibly* might present competitive concerns that *could* harm consumers. But in the context of the current competitive marketplace, such concerns are much more hypothetical than real. In the present environment, if the next Google or next Facebook has an application or content site that is truly attractive to consumers, that entity most likely will be able to secure the financing and other backing that will allow it to compete. Indeed, the reality is that in order for the "next Google" or the "next Facebook" to compete against those well-entrenched giants, the putative new entrant might well be looking to negotiate some arrangement with a service provider that will give it a fighting chance of competing with the entrenched giants by differentiating itself.

But, here, for present purposes, I want to assume the legitimacy of the concern that some practices involving "discrimination," or what I prefer to consider differentiation of services, possibly might raise competitive concerns. The question then becomes: What is the preferred approach for addressing such concerns. In my view, taking into account the absence of any apparent present market failure and consumer harm, the preferred approach would be for the FCC to forbear from adopting any new net neutrality mandates at all, leaving it to the antitrust authorities to investigate and address any anticompetitive concerns that arise. Failing that, and assuming a majority of the FCC commissioners moves forward to adopt some form of new net neutrality regulation, the preferred approach then would be adoption of the "commercial reasonableness" approach articulated initially by FCC Chairman Tom Wheeler and incorporated into the Commission's [Open Internet rulemaking notice](#). For this approach to be acceptable,

there must be enough flexibility built into the “commercial reasonableness” regime so that Internet service providers are allowed to differentiate their offerings in ways that are responsive to consumers’ needs.

Consumers’ needs. This brings me back to the main point: It is unlikely that a version of net neutrality – or, I might say, a vision of net neutrality – that is sufficiently rigid that it leads its advocates inexorably to oppose the wireless plans described above is in consumers’ interest. Such an inflexible version of net neutrality, espoused most fervently by those who insist Internet providers must be classified as common carriers under “Title II” of the Communications Act, is, I maintain, at odds with consumers’ interests.

Indeed, I maintain that the vast majority of consumers, if asked the question in a fair way, would say they are pleased with the additional choices they now have available under the Sprint and T-Mobile plans. I suspect they would say they are not aware that self-designated consumer representatives have opposed these very plans in their name.

In sum, I don’t believe re-branding of net neutrality is what is needed. What is needed is more consumer education concerning why a strictly neutral Internet – neutral in the sense of prohibiting all product differentiation and innovation along the lines of the Sprint and T-Mobile wireless plans – would be detrimental to consumers’ own interests.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.