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A New Direction For Net Neutrality

Less broad regulations, more competition and innovation

by

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"If you come to a fork in the road, take it."

That's one of my favorite Yogi Berra aphorisms.

I am reminded of Yogi's injunction because the Federal Communications Commission, now that it has released its broadband plan, is approaching a big fork in the road as it contemplates the net neutrality proceeding it initiated in October 2009. Although Yogi is too smart to have ever offered advice regarding net neutrality, I am less reticent. Indeed, I want to propose a new way forward.

In a sharp departure from the FCC's traditionally broad and vague regulations, including its proposed net neutrality mandates, this new direction would tie the FCC's regulatory oversight over broadband Internet service providers (ISPs) to marketplace-based decisions regarding alleged competitive abuses that cause demonstrable consumer harm.

First, a brief explanation concerning the FCC's proposed net neutrality rules. They would prohibit all Internet providers, such as AT&T and Time Warner Cable, from

blocking or degrading a subscriber's access to any Web site. Most significantly, they would prohibit ISPs from "discriminating" in any way against unaffiliated applications and content providers. The discrimination prohibition would require Internet providers to charge every customer the same price regardless of the customer's usage, and it prevents an ISP from prioritizing Internet traffic in any way, regardless of the time-sensitive nature of the traffic.

As a practical matter the proposed net neutrality rules would largely turn today's broadband providers, whether their services are delivered over wireline, fiber, cable, satellite or wireless platforms, into traditional common carriers. Indeed, the most strident net neutrality proponents are not content to rely on mere practicalities; they advocate the even more radical approach of actually classifying the ISPs as common carriers for all purposes.

If the FCC adopts regulations embodying this approach there will be several consequences. Common carrier-type regulation, with its strict anti-discrimination mandates and price controls, dampens investment and innovation, especially in technologically dynamic, constantly evolving markets. Even the FCC admits that in such markets "discrimination" among applications and content can benefit consumers as Internet providers seek to differentiate their network offerings in novel ways responding to consumer demand.

Even though the rules are drawn broadly to anticipate all potential harms, inevitably they will contain ambiguities that lead to drawn-out administrative and judicial litigation. For example, the FCC's proposed rules allow ISPs to engage in "reasonable network management" activities and to offer "specialized" or "managed" services outside of the neutrality strictures. The inherent vagueness of such exceptions will discourage ISPs from experimenting with new business models or adopting new practices that may enhance their subscribers' online experience.

Finally, another disadvantage of the FCC's proposed approach is that it likely infringes on the First Amendment rights of the Internet providers. Any regime that dictates in an anticipatory fashion--without any showing of competitive or consumer harm--that ISPs must carry all content, or that prevents ISPs from preferring any content, raises serious free speech issues.

Instead, the FCC should take a less intrusive, less rigid approach that will still allow it to deal with any real anticompetitive abuses that cause consumer harm. While it is highly unlikely that such abuses will occur in a marketplace in which consumers generally have a choice of Internet providers, there nevertheless is a properly delimited role for the FCC to play in policing and remedying any anticompetitive acts.

Rather than adopting broad-brush regulations that place ISP practices that may benefit consumers off limits, the FCC could adopt a simple rule prohibiting ISPs from engaging in practices that constitute an abuse of significant and non-transitory market power that harm consumers. A market-oriented rule like this would provide the FCC with a principled basis for adjudicating allegations that ISPs are acting anti-competitively and causing consumer harm. Using traditional antitrust-like jurisprudence that incorporates

rigorous economic analysis, the Commission would focus on specific allegations of consumer harm in the context of the particular marketplace situation.

A competition-based rule linked to the presence of market power, while providing a means for remedying specific abuses, is much less likely to deter investment on a broad scale, and less likely to constrain the development of innovative business models responsive to evolving consumer demands. And it has the advantage of being more First Amendment-friendly by eschewing *a priori* blanket mandates tied explicitly to the treatment of Internet content.

It may well be that any rule regulating Internet provider practices will be found by the courts to exceed the FCC's jurisdiction. If so--and if Congress determines some form of Internet regulation is needed--the FCC should amend the Communications Act to adopt the competition-based approach recommended here.

For many years net neutrality advocates have pushed for Internet service providers to be regulated in a common carrier-like fashion the way Ma Bell was regulated when it had a monopoly. The FCC's proposed rules embody such regulatory overkill.

But while there may be a need for remedial FCC action--in the relatively rare case when there may be a proven market failure--any such action should be targeted narrowly to redress demonstrable consumer harms.

In other words, the FCC must choose the right fork in the road.

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