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“Where’s the Beef?”

by

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Since I am actually one of only a few people in the room who have officially cast a vote on “Net Neutrality” during my tenure at the Federal Communications Commission, I wanted to share just a few of my reasons that the FCC should vote “NO” on regulating the Internet under a Title II regime. And, my resolve has not wavered since 2005 when net neutrality was first introduced to the FCC.

1. Where’s the Beef?

What is the specific problem, harm, or illegality alleged in a formal complaint before the agency? There should be a thorough review and analysis of the precise complaints being filed officially at the FCC; assess the type and issues involved in those complaints prior to undertaking any rulemaking which are confronting the Office of Consumer and Government Affairs. And if there is one – which I would suggest there is not – what is the specific problem/harm the FCC is attempting to cure by regulating the Internet as we would old-fashioned POTS telephone services under a Title II regime? “Where’s the beef”?

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Consumers have more choices, more “plans,” more providers across more devices than ever before in communications history. Wireless competition alone has increased 82% in four years. And, since most of us now access the Internet via mobile devices, before regulating, we should also consider what type of economic market – a fully competitive one as it relates to mobile – in which Title II could possibly even be applicable. I believe there have been a whopping total of three total formal complaints ever filed at the FCC: Madison River, Bit-torrent, and an alleged Verizon complaint about a text message from NARAL. The latter was immediately – within days – resolved by a phone call from the Chairman’s office. Shining a bright light on any real or imagined blocking, throttling, or unreasonable network management can do wonders! As you probably remember, the DC Circuit did not agree with the FCC’s rebuke and action against Comcast and, in reality, Bit-Torrent and Comcast remarkably became “business partners.” Twice the FCC has been criticized – and their actions reversed or at least returned for lack of legal authority underlying those Orders – by the DC Court of Appeals. In both cases, the FCC was attempting to regulate net neutrality without the necessary legal authority needed. Now the FCC will take another try and this time with another attempt to find jurisdiction under Title II Reclassification.

However, bottom line: There still has been no real harm, unreasonable network management activity, or even a formal complaint filed requesting FCC action. As many have noted previously, this is a “solution in search of a problem.”

Compared to the rest of the issues our nation is facing, it seems that the FCC should get to work on the spectrum auction, insuring we have a national emergency services network and a myriad of Congressional mandates that are tardy – some by several years.

2. Something is rotten in....Silicon Valley

And who is supportive of the return to industrial-era heavy handed economic regulation of the Internet anyway? Who is calling for returning to past policy of a bygone era?

Silicon Valley.

I remember when many of those companies did not even have an office in DC, nor think they should even have any discussions with the FCC. Today, they are our nation’s largest cap, fastest growing stocks. Several are larger than all the car manufacturers put together. Facebook’s “population” alone would rank it as the 3rd largest nation in the world. Rather than negotiate market priced contracts to use the phenomenal infrastructure which telephone, cable, and competitive providers have built across this entire country for decades, net neutrality advocates want consumers to underwrite Google, Twitter, Facebook, Netflix, and new streaming content providers’ costs.

Also, ISPs don’t want to have to pay for what they use – like the rest of us do. Their business model is simply to use our information, search habits, and personal information as the widget to sell advertisers. And, to have the government set a zero or very low price THEY pay for the heavy use of bandwidth infrastructure – 24/7.

Even an ardent net neutrality advocate, Tim Wu, understands that in the end, “the consumer always pays.” Always be careful to ask who is seeking the regulatory action. It often has a funny smell!

3. Cost/Benefit Analysis

Most fiscal conservatives want government to fully vet any potential government regulatory action by performing a simple cost/benefit analysis. Many sections of the Telecom Act require it, and the FCC should do one regarding imposing old-fashioned Title II requirements on technologies that look nothing like the telephone wires of yesterday.

So what are some of the regulatory burdens? Well, ask any old telephone company about the cost of government regulation – there is a cost. And, in this case, consider the legal bills alone spanning eight long years to date.

And, by adding regulations, we ought to consider the potential disruption to the fastest-growing, explosive, moment-by-moment unveiling of new technologies and products which would possibly be slowed as implementation occurs. Entrepreneurs and businesses, whether a small business or a multi-national corporation, would suddenly find themselves dealing with compliance, potential filings, data capture for FCC related reports, and who knows what else from antiquated telephony rules in Title II. The trillion dollar investment we are experiencing would be impacted as corporations and leaders wrestle with varying regulations and how to comply. Some of the possible old rules might include:

- Deep packet inspection and the creation of a new bureau of “Internet inspectors” like truck weighing stations to perform those functions on the information superhighway
- USF contribution – at 16% contribution rate today would mean a hefty new “tax” on all those new Title II net companies (i.e. consumers)
- Data requests, quarter or annual reports to insure companies are indeed meeting all the Title II legal requirements
- Wireline data, wireless data for FCC annual reports already required by law
- 706 reporting requirements for annual 706 report required by law
- Information when Congress sends requests to FCC (companies must comply as well)
– Hearings before U.S. Commerce Committee
- ROI – Request for Information
- Information in order to investigate consumer complaints by FCC’s CGB (Consumer and Government Bureau)

- Reciprocal compensation – will old regimes regarding imbalance in traffic apply?
- All emergency, disabilities and other applicable provisions as required under Title II authority

All of these regulatory requirements come at a cost: A cost to investment and innovation, a cost to companies and consumer, a cost to our global dominance. Dozens of minority and diverse advocacy organizations agree and are deeply concerned about the impact that a Title II reclassification could have upon investment and access for our youth as well as those who are both un-served and under-served.

Our ICT sector would suffer, negatively impacting our economic growth, and thus the overall global economy would suffer.

Finally, the FCC is spending enormous amounts of agency man-hours – at tax payer expense – to litigate in various courts, reviewing comments (60% were found to be form letters), to hold public hearings, issue press releases, give speeches around the country, and issue NPRMs (thousands of pages in length) and then to repeat all of this after each court decision. No wonder the FCC – even in the midst of other de-regulation – requested an increase in its budget.

Frankly, what are the benefits?

Zero*

*Other than for the people in this room as well as consultants, attorneys, and lobbyists!

In addition, the FTC would no longer have any jurisdiction or ability to investigate the marketing practices of these companies. If the FCC does invoke Title II, then all the excellent progress regarding transparency being done regarding “deceptive marketing practices” by companies subject to Title II would no longer be within the purview of the FTC. (According to a quirk in the FTC’s legal authority, Title II carriers are exempt.) The FTC is indeed the most capable expert federal agency, with investigative and legal expertise across all industry sectors regarding consumer protection through its deceptive marketing practices jurisdiction. It is this jurisdiction and prosecutions that can also most benefit consumers and allow them to vote with their pocketbook. And, even more insulting would be the final outcome of an FCC prosecution. If successful, the FTC often executes a dollar fine – which returns to the very consumers who were harmed. Under the FCC’s consumer division, the fines merely go to the U. S. Treasury.

We all lose.

4. Actions Speak Louder Than Words

Finally, what message regarding regulation of the Internet ecosystem will we be sending to our global colleagues? I agree with my friend Ambassador Phillip Verveer who mentioned his concerns with net neutrality regulation “that could be employed by regimes that don't agree with

our perspectives about essentially avoiding regulation of the Internet and trying to be sure not to do anything to damage its dynamism and its organic development.” Most important was this observation: “It could be employed as a pretext or as an excuse for undertaking public policy activities that we would disagree with pretty profoundly.”

At the very moment in history when our government is critical of other national moves to “regulate” the Internet – often for their own purposes including censoring democratic speech or to discriminate or even intimidate their citizens – we would be taking a huge step toward regulation.

The FCC is seen as the “gold standard” for balanced, competition-driven, regulatory policy across the world. We have assisted and encouraged the creation of an “independent regulator” to oversee communications policy globally. We have negotiated treaties which underscore the access, affordability, openness, and freedom of the Internet. This underscores independent decision-making separate from the Ministries – historically closely tied to a Head of State (think autocrat). And, we have vociferously opposed any regulation by any country of the Internet. So, what will an Order regulating the Internet say to our friends?

Or much more importantly – what will our actions speak to our foes?

Conclusion: Just Do the Right Thing

Sometimes as a policymaker or government leader, you just have to do the right thing. I believe that telecom policy could be or should be non-partisan. It is about physics and technology, protons and electrons, markets and competition – not about a presidential platform checklist.

However, net neutrality has indeed become a partisan issue at the Commission – not just this Commission, but the past several. This Commission needs to correct that. My colleagues need to just do the right thing and vote not to regulate the Internet as POTS. Perhaps the Chairman is actually hoping for a 3rd “NO” vote so that he can say he tried valiantly to push this through and the majority said no. I did that on several occasions; you can too. I am still stumped regarding how this debate has lasted for a decade, fueled by political fervor, over such a non-issue.

After November 11th's election, it should certainly become one.

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