

Special Review Memorandum

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Ken Robinson

Re: "Network Neutrality" All Over Again?

Foreword

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"If You Write It, They Will Sign"

But just this past week, it seems, Senator Barack Obama signed a letter -- and, indeed, even spoke -- on the importance of keeping the Internet free and open. Earlier, Senator Hillary Clinton also indicated she liked "network neutrality," too. Evidently she'd signed-on in 2006, after all, when Senators Dorgan and Snowe raised the issue. Next will probably be Senator Edwards, perhaps even Congressman Dennis ("The Menace") Kucinich, right? Then, the Republicans will probably want to say something, wouldn't you think?¹

Now, ourselves, we're not sure any of these esteemed folks actually appreciate what they're urging. But in Fairness, the near-term politics here are pretty clear. MoveOn.org and Free Press have demonstrated that "network neutrality" is an enormously powerful "policy tool." Remember how, in 1994, polls were conducted which showed some 85% of the public had heard the term, "Information Superhighway"? They weren't sure what it was. But like "network neutrality" today, the term sounded appealing?

It ought to be noted, moreover, that there's no one in Washington who's actually said "network neutrality" is a bad thing -- they just differ, sometimes considerably, on how it ought to be achieved. The Federal Communications Commission (FCC) and Federal Trade Commission (FTC) leadership both have publicly committed to an open, nondiscriminating Internet -- and, they've both said that if problems arise, they'll be right on them, lickety-split. They've got their guidelines, their monitoring. That is, they're in -- just not fully engaged.

¹ In Yes, Minister, you'll recall, the Minister for Administrative Affairs, the Rt. Hon. James Hacker, tells his speech writers he wants to look more up-to-date, more au-courant. So they insert in all of his public remarks the line, "And, the silicon chip is changing all of our lives." We've seen this same phenomenon, of course. Remember when Senator Kerry declared he favored "broadband" -- this, from the only member of the U.S. Senate unable to operate a BlackBerry -- and, the President soon followed, saying he liked "broadband," too? Think someone like Senator Thompson, or Dr. Ron Paul has any idea what "network neutrality" might be? We expect that, like, the Democrats, they're all in favor of it, too.

Furthermore, nobody's really said this is something all these companies ought to be able to work out themselves -- without Federal Government intervention. Look at all the "network industries" where the Government deliberately takes a hands-off position. Trains and "trackage rights," automatic bank teller machines, online travel reservations.

Here, however, nobody's said they're confident Google can take care of itself. So aren't Senators Obama and Clinton really just calling for sort-of, sort-of roughly the same thing? That is, "active monitoring-plus"? What's so wrong about that?

Ourselves, We Agree With Dr. Farber

Well, ourselves, we agree with Carnegie-Mellon Professor Dave Farber, one of the Internet community's senior gurus. Farber's said you just don't want to get Federal or state regulators mixed up in all this -- because you don't know what else that might buy you.

First, remember, nobody's quite sure what "network neutrality" actually is. Does it mean Comcast can't control any of its customers's use of BitTorrent? Does it mean nobody's allowed to contract for Akamai's accelerator services? Does it mean Verizon has to charge everyone exactly the same -- or, offer Amazon "most-favored nation" rates? So that Borders, or Barnes & Noble, doesn't get a rate break?

Second, nobody's quite sure what you buy into -- if you invite the regulators to come in and "make nice." What's the FCC's Wireline Competition Bureau supposed to do? Sit around, like the Maytag repairman, waiting for complaints? Or, undertake a full-fledged rate case -- to make sure that the prices charged, here, are fully compensatory and fair?

Have you ever seen a situation where regulators have held back and not gotten mixed up in controversies -- especially when there are all these potential jobs? Remember how, back in the 1990s, it sometimes seemed as if half the FCC staff was going to work for "competitive local exchange carriers," CLECs, at one time or another? No wonder they were so interested in "unbundled network element" lore, right? Well, just imagine what these folks would do here!

"What Makes You Think the Politicians Will Leave It Alone?"

It seems to us, as Professor Farber has often said, sort of foolish to invite the Federal regulators into your business without some very clear understanding of what you want them to do -- and, not do. For heaven's sake!

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Amazon.com, too? Who makes the decision to list what company when someone is looking for an appliance or book? Why should Company Y always be last? Is that fair? And, while we're at it, how come Amazon.com gets breaks on packing box, UPS, and other key service ingredients? Shouldn't Amazon.com be compelled to share these efficiencies with its competitors, in the name of fair competition?

The longtime head of the BellSouth office in Washington once asked, "What makes you think the politicians will leave it alone?" "If the Internet is so damned important to everything," he asked, "do you expect politicians to ignore it?"

Scaring Away the Investors

Maybe all the Internet activists working on "network neutrality" are confident the Washington regulators will only hassle the really big guys -- Verizon, AT&T, Comcast, and Time Warner. Maybe Google, eBay, Amazon.com, etc., think the regulators will leave them alone -- "Hey! We're competitive!" Right?

One of the problems with inviting the regulatory community to come in and help-out, however, is you're probably going to frighten away some of the investors, regardless.

Writing in the New York Law School's Media Law & Policy journal, Drs. Larry Darby and Joseph Fuhr recently went through all the high-policy economics, pointing out how "network neutrality" is plainly anti-investment. See Darby & Fuhr, Consumer Welfare, Capital Formation, and Network Neutrality: Paying for the Next Generation Broadband Networks, 16 Media Law & Policy 122 (2007).

The Essence of Regulation Is Income Redistribution

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In the past few years, remember, the fastest growing, most competitive, and most "option rich" of the communications businesses have been those which are regulated the very least: Cable TV and cellular (we'd add "satellite" to the cable TV operation, incidentally).

Nobody's wanted to invest in the conventional telephone business, you see, because until quite recently the regulators were bent on taking your assets, revenues, and profits, and giving them to your competitors, weren't they? The FCC and the old AT&T devised these fantastic regulatory schemes -- rebundled "unbundled network elements," and all that. But in the final analysis, all the FCC was trying to do was to make SBC, Verizon, Qwest, and other phone companies give AT&T money, right?

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How fast do you think Fidelity, Vanguard, Barclays, and other major AT&T and Verizon shareowners will redeploy their capital, in the face of FCC or FTC commitments to police U-verse or FiOS rates, to make sure they're fair? Would you want to place your personal retirement account in the hands of the FCC to manage, to make sure you're fair? Run, don't walk, to the nearest desert island, right?

The only people likely to appreciate FCC involvement in the details and mechanics of "network neutrality" are the folks who are not in the network building business. But all the people who build networks -- or, finance them -- simply don't want the FCC involved, do they? So, if you want to put the kibosh on high-capacity communications network investment, just keep doing what MoveOn.org and Free Press and Amazon.com and Google want you to do, right?

Conclusion

Dr. John Malone, when he headed Tele-Communications Inc. (TCI), would speak of the people who planted the potatoes -- versus the ones who liked to eat them. Senator Phil Gramm, when he headed the Senate Finance Committee, would also talk about the people who pulled the wagon -- and, the ones who liked to ride.

Well, throughout the 1990s, smart economists say, U.S. policy -- and, regulatory policy -- favored consumption. Not necessarily saving, investing, building, deploying -- useful things like that. Nevertheless, we kept the regulators away from two important sectors -- cellular and cable TV. And, the results were quite positive. And, quite spectacular from the public (and, investors's) standpoint.

So why in the world, given that positive experience -- and, the risks Professor Farber has identified -- would we now want to change policies, and really get into the "network neutrality" business? Does that make sense? It seems to us that it just doesn't -- and that, despite what Senators Obama, Clinton, Snowe, Dorgan, or Boxer might unwittingly sign. So.

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