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I begin with a few propositions on which I am hoping we can agree.

- The question is no longer whether to deregulate telecommunications at least not whether to discontinue regulating it in the traditional manner and for the traditional reasons. The industry is obviously no longer a natural monopoly, and wherever there is effective competition typically and most powerfully, between competing platforms land-line telephony, cable and wireless regulation of the historical variety is both unnecessary and likely to be anticompetitive in particular, to discourage the heavy investment in both the development and competitive offerings of new platforms, and to increase the capacity of the Internet to handle the likely astronomical increase in demands on it for such uses as on-line medical diagnoses and gaming.

- As elsewhere, and generally, deregulation transfers responsibility for protecting consumers and competition to the antitrust laws applicable to both mergers and unfair methods of competition including, most prominently in this instance, prohibition of vertical squeezes foreclosures and discriminations between carrier-affiliated and unaffiliated -customers.

- Jurisdiction over mergers includes the possibility of conditioning approvals on structural and behavioral remedies, including, prominently, obligations to interconnect with competitors.

Prescription of such remedies, directly related to possibly anti-competitive effects of mergers must be distinguished from the deplorable tendency of the FCC to exact all sorts of non-structural, performance commitments, some of them only remotely related, if at all, to possibly undesirable effects of the mergers themselves, such as *prescribing* behavior that the FCC regards as pro-competitive and *results* that, in the extreme, have absolutely nothing to do with competition or the merger but that the Commission decides are in "the public interest" — such as offering lifeline plans at stipulated rates.[1]

- There is no consensus among economists about the likely sufficiency of competition under duopoly in the present instance, between landline telephone and cable companies in the offer of broadband access to the Internet although evidence of active competition between the two, such as is actually occurring, might provide sufficient basis for deregulation, particularly in light of the aforementioned rapidity of technological change. By the same token, the presence of an actively competing wireless provider or providers would, in the mind of most, justify indeed demand de- or non-regulation. Wireless voice service is one of the great success stories in telecommunications over the last few decades. I understand that the prospects for wireless data in the near future are excellent. Any analysis of future competition in Internet access must consider the possibility or likelihood that the cable and telephone duopoly will be joined by three or four wireless suppliers in the near future.

[1] Similarly, at the instance of two members whose assent was necessary, the FCC attached to its approval of the AT&T-BellSouth merger such conditions as that AT&T would repatriate three thousand out-sourced jobs to the United States by the end of 2007, charge new broadband customers $10 per month, and provide a "neutral network and neutral ground link of Internet traffic", for two years. Communication from Arnold & Porter, January 3, 2007.

"Network neutrality"

Calls for legislative interventions to require "network neutrality" ~~—~~however defined ~~—~~are undeniably efforts to regulate or re-regulate the offer of broadband access to the Internet, in specific ways.

- The aforementioned conditions and considerations ~~—~~the very large and competitively risky investments required, the existing and expanding competitive curbs on monopoly power ~~—~~ constitute a strong case for the government keeping its hands off ~~—~~at the least, shift the burden of proof of demonstrating the inadequacy of competition, present and prospective.

- Although there has been legitimate uncertainty for a long time about what precisely the advocates of network neutrality have been hoping to accomplish, its advocates have apparently settled on the specific goal of prohibiting the providers of Internet access "discriminating" among suppliers of content.

- To my knowledge, the only specific instance of such discrimination cited by the net neutrality advocates was the refusal of the small Madison River telephone company to carry the messages of its VoIP competitor, Vonage, the leading independent provider of telephone service over the Internet. Not one of them, to my knowledge, has mentioned the fact that the Federal Communications Commission promptly stepped in to prohibit that obvious violation of antitrust principles, as did the Canadian CRTC in the same situation. It is axiomatic that the abandonment of direct economic regulation shifts to the antitrust laws responsibility for preserving competition and it is unthinkable that the regulatory or antitrust agencies would

not strike down any other such discrimination against or squeezes of competing providers of services or content.

- The specific kind of asserted potential "discrimination" by Internet access suppliers that the proponents of network neutrality would prohibit is the creation of different tiers of online services, offering content suppliers access to an "express lane to deep-pocketed corporations, relegating everyone else to the digital equivalent of a winding dirt road."[2]

In these protests, the advocates seem to be guilty of using the term "discrimination," sloppily, to embrace mere *differences* in price for different *qualities* of service. Strictly speaking, discrimination describes differences in price for the *same* service unjustified by differences in cost. Conversely, differences in price reflecting differences in cost are not discriminatory at all, but instead the efficient product of effective competition such as was released by airline deregulation and beneficial to consumers offering them a variety of product or services at the respective differing costs of supplying them.

I have yet to see a discussion of this issue directly confronting the question of whether higher charges for guaranteed faster delivery than of non-prioritized content is truly "discriminatory": I should have thought that, on the contrary, the faster priority service entails higher incremental cost: (1) the short-run, opportunity costs of displacing non-premium services, moving them down in the order of priority to the "winding dirt road" (a metaphor that I understand grossly exaggerates the perhaps imperceptibly slower rate of delivery of non-prioritized services) and (2) the (long-run) cost of the large investments such as the telephone companies are making

[2] Lawrence Lessig & Robert W. McChesney, *No Tolls on The Internet*, WASH. POST, June 8, 2006, at A23; *but see* Kyle D. Dixon, *Rhetoric vs. Reality: Lessig and McChesney on Network Neutrality* 2006 Progress & Freedom Found. Progress Snapshot Release 2.14, http://www.pff.org/issues-pubs/ps/2006/ps_2.14_netneut_lessig.pdf.

in fiber to the premises, in order to be able to deliver video services, in competition with the cable and satellite service providers. It raises the corollary question also of why charging subscribers for such capabilities as taking motion pictures off the Net for the greater broadband capacity they require should be regarded as unacceptable when, I understand, it would in fact not even be "discriminatory."[3]

The only way to avoid that is to give network operators the ability to manage traffic on their networks, expediting some data (phone calls, streaming video, or remote medical diagnoses and treatment) over less time-sensitive data (such as ordinary e-mail).[4]

Entirely apart from the extent to which differential charges to content providers for different speeds of delivery are or are not discriminatory, proponents of mandatory network neutrality apparently ignore the reality that price discrimination can not be regarded as objectionable per se: the supply of communications services entails large fixed, common costs, the only economic way of recovering which is, typically, genuine price discrimination—disproportionately large contributions from purchasers whose demand is relatively inelastic and charges closer to marginal costs for uses the demand for which is more elastic.

Some advocates of network neutrality (prominently among them large providers of content, such as Google and e-Bay, but also, surprisingly, self-styled consumer advocates) explicitly oppose the access networks charging content suppliers *at all*, contending that they ought to be required to obtain their revenues solely from ultimate consumers—subscribers to

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[3] As Christopher Wolf and Mike McCurry, opposing mandated network neutrality, presumably on behalf of one or another broadband supplier, point out --irrefutably, it seems to me --that

> "A hospital or university sending a live feed should not have to contend with a slower connection because neighbors are illegally downloading the latest movie."

[4] *Illinois Business Journal*, January 2007, page 17.

broadband service: access of the content suppliers to the Internet, they aver, should be "free". That contention obviously self-interested on the part of content providers but misconceived in the case of consumer advocates ignores the fact that access to end customers is itself valuable to content suppliers, as a potential source of advertising revenue. They fail to comprehend or choose to ignore that the market here is "two-sided" providing Internet content and services to consumers *and* the attention of consumers to advertisers. It makes no more sense, therefore and is clearly misguided for consumer advocates to want to forbid the broadband access suppliers that carry those advertising messages charging the *advertisers* for access to the public than to require newspapers, television broadcasters or cable companies to obtain their revenues exclusively from readers, viewers or subscribers.[5]

The two-sided character of the market does, however, seem to me to cast doubt on the sufficiency of competition among the Internet access suppliers to protect providers of content — even ones so prized by Internet users as Google — from exploitation, as it might in ordinary markets. If one of the major providers of Internet access such as AT&T imposed unreasonably high charges on Google for transmitting its "messages", the ladder company could not escape such exploitation by threatening or actually transferring its business to, say, Comcast: in order to reap the rewards of its highly successful innovation, Google requires and in some real sense, deserves — access to the customers of *both* carriers. In other words, if AT&T is so constrained by the competition of Comcast for end-subscribers as to prevent it from extracting from Google the fruit of the ladder company's innovation, in its charges for *initiating* that company's "messages", Google

[5] As the aforementioned Wolf and McCurry observe:

> "Not surprisingly the large-content companies such as Google, Amazon, e-Bay and others are leading the lobbying fight.
>
> They want to use 'neutrality' regulations to avoid paying for the huge bandwidth costs they consume [*sic*]."

could still be exploited by a refusal of Comcast to carry its search engine capabilities to *its* – Comcast's--subscribers unless it received some share of the rents.

I confess that I do not see how vague prohibitions of "discrimination" or higher charges for "fast" and "slow" lane would resolve that particular conflict. Instead I suggest – with something less than full confidence – that this may be a situation requiring mandated interconnection on a reciprocal basis – the "peering" that, I understand, is the present practice.

Additionally, I suggest the advocates of legislating network neutrality ought to be concentrating their efforts on impressing on Congress and the agencies with antitrust authority the need to ensure that the antitrust laws will be promptly applied (1) whenever a provider of Internet access discriminates against a competitor (using "discriminate" in the economic sense of charging price differentials for both initiating and terminating messages unjustified by corresponding differences in short-term opportunity or long-term investment cost) in such a way as to impede efficient competition; and (2) whenever mergers threaten to reduce competition in the (two-sided) supply of Internet access to consumers and the eyes and ears of consumers to advertisers.

In contrast, and so far as I can see, enactment of a "network neutrality" requirement will be beneficial only to professional litigators.