

Are We Ready to Act on Net Neutrality?: 10 Key Questions That Need Answers

BY ROBERT D. ATKINSON | OCTOBER 19, 2009

The FCC is poised to vote this week on whether to issue a Notice of Proposed Rulemaking (NPRM) for net neutrality which would initiate a public comment process to provide input to the Commission on this issue. In some ways this is not a surprise. In the last several years discussions of the issue of net neutrality have dominated telecommunications policy discourse in the United States, almost drowning out discussion of a host of other important issues such as inter-carrier compensation reform, broadband deployment policies, and universal service reform, to name just a few.

But after Congressional hearings, hundreds of forums and white papers, and thousands of blog postings and op-eds (some of which ITIF has participated in or written), it's not clear that the Washington telecommunications policy community is all that much further along in terms of really understanding the issue of net neutrality and being able to have a decision process grounded on a common and fully informed understanding of the problem and the potential solutions.

In part this is due to the highly charged nature of the debate. Both opponents and proponents of strong net neutrality rules see the implementation of the other side's position as a fundamental threat to the Internet and to the business models that support it. Opponents of strong rules fear

that rules will reduce or even eliminate innovative business models *in* the network, including incentives by carriers to invest in the network and to continually improve it. Proponents of strong rules fear that lack of rules will reduce or even eliminate innovative business *at the edge* of the network, including hampering new small firms trying out new and possibly transformative applications. Proponents also fear that absent strong rules, ISPs will stifle free speech and needed civic discourse that is the hallmark of our new Internet-enabled democracy. With the stakes this high, no wonder emotions run higher and tempers flare.

But emotions are not a substitute for analysis and making rules about an issue as important as this requires careful, comprehensive and objective analysis. Yet, as the FCC considers its NPRM on net neutrality, what is surprising is that this is an issue that is characterized more by diametrically opposed views of the problem and solution than by careful analysis. To be sure, some of these views reflect interests of businesses with a stake in either solution. And to be sure, some views represent strongly held ideological positions regarding the primacy of core values (freedom of contract and action vs. freedom of speech and access). But even taking into consideration the polarization of views that is par for the course in Washington on so many issues, the lack

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of even basic agreement on the nature of this issue (net neutrality), much less the solution, is troubling, to say the least. It is as if each side has been talking—or in some cases, yelling—past each other. When the state of debate and discourse for an issue is this polarized and frankly underdeveloped, this does not bode well for the likelihood that the government will get it right if they take action now without engaging in more sustained and careful analysis.

Let me suggest ten key questions that those of us involved in this debate, including the FCC and Congress, need to get a much better handle on before taking action:

1. Does any favoring of some packets over others by ISPs without individual consumer choice represent a per se violation, or is there some discrimination (blocking, degrading, charging for usage and network management) that is pro-competitive and pro-consumer. If it is all a per se violation, then the case for strict rules and/or legislation is quite strong. If, however, some kinds of discrimination benefit the lion's share of consumers and/or competitors then strict per se rules, while limiting potential harmful actions by ISP's, would also limit beneficial actions.
2. What is the record of ISPs with regard to engaging in anti-consumer and/or anti-competitive discrimination in the past? If the record is a moderate or extensive one it suggests that action is needed. If the record is quite limited it suggests that action may not be needed.
3. What is the likelihood that ISPs will engage in anti-consumer and/or anti-competitive discrimination in the future? Again, if the likelihood is strong, it suggests that action is needed. Conversely, if the likelihood is limited, it suggests that action may not be needed.
4. What is the risk to innovation and consumer welfare if ISPs engage in anti-consumer and/or anti-competitive discrimination in the future? Even if the likelihood of action is small, if the risk to innovation and consumer welfare is large, action is likely needed. Conversely, if the risk is minimal, action may not be needed.
5. How easy is it for the user community (including non-ISP business competitors) and government to accurately detect anti-consumer or anti-competitive actions by ISPs in a timely manner? If ISPs can engage in these practices for a long period of time without discovery, action is likely needed. But if companies' potential transgressions are quickly found out, the need for action may be less.
6. How easy is it for the players involved (advocacy groups, researchers, government, competitors, and ISPs) to distinguish between pro-consumer and/or pro-competitive blocking, degrading and network management and anti-consumer and/or anti-competitive blocking, degrading and network management? If it's difficult to determine with certainty if discrimination is pro-consumer and/or pro-competitive than the case for per se rules limiting discrimination is stronger. If it is more straightforward, albeit with some analysis and fact-finding, to determine pro-consumer from anti-consumer discrimination then the case for a rule of reason approach is stronger.
7. Is differential pricing by ISPs of different users and/or different content and applications inherently bad? Or can differential pricing be pro-consumer and pro-competition, and if so, what are the situations in which it is and is not? If it is inherently bad then a per-se rule would be in order. If it depends on the situation then a rule of reason approach would be in order.
8. Does quick discovery of potential ISP transgressions lead to correction in the marketplace due to public outcry and loss of customers or are ISPs likely be able to "get away with" transgressions absent direct government action? If it's the former, the case for strong rules is less. If it's the latter, then the case for strong rules is stronger.
9. Does the FCC have the legal authority it needs to effectively and expeditiously stop potential anti-competitive and/or anti-consumer ISP practices? If they lack this authority, the case for giving it to them is obviously stronger.
10. Does the FCC have the skill and inclination to effectively and expeditiously stop potential

anti-competitive and anti-consumer practices by ISPs, and if they don't can Congressional oversight substitute for this? If the FCC is likely to have the skill and inclination to stop anti-competitive and anti-consumer practices, regardless of the political composition of the Commission, then the case for passing legislation and binding rules is less. Even if they don't, but Congressional oversight is likely and effective, then the case for binding rules is less.

Getting net neutrality right is a central task of ensuring a framework for continued digital progress in the 21st

century that protects consumers, and drives productivity and innovation. But the challenge is that there is no consensus on what "right" means, nor have the basic questions that need to be answered before Congress and the FCC can make the right decision been answered. This suggests that the FCC should engage in a comprehensive, analytical and fact-based inquiry—exactly the same kind of inquiry the Commission is rightly taking in the development of the long overdue National Broadband Plan. For the stakes are too high to make decisions without engaging in this kind of rigorous and dispassionate process.

For additional ITIF work on net neutrality see:

Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate, by Richard Bennett (<http://www.itif.org/index.php?id=294>)

A Third Way on Network Neutrality, by Robert D. Atkinson and Philip J. Weiser (<http://www.itif.org/files/netneutrality.pdf>)