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The Case Against Net Neutrality Rules

*Network Neutrality*, or *Net Neutrality* for short, is a term used to describe various rules or proposed rules that would restrict Internet Service Providers (ISPs) and other owners of IP-based networks considered to be part of the public Internet from blocking, restricting, or otherwise degrading the traffic which travels over those networks. Net Neutrality rules start from the four principles published by the Federal Communications Commission’s (FCC) 2005 Internet Policy Statement[[1]](#footnote-1) and is codified in its October 2009 Notice of Proposed Rulemaking:[[2]](#footnote-2)

1. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from *sending or receiving the lawful content of the user’s choice over the Internet.*
2. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user’s choice.*
3. *Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network.*
4. *Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user’s entitlement to competition among network providers, application providers, service providers, and content providers.*

In addition the October 2009 Notice of Proposed Rulemaking (NPRM) adds two additional proposed rules:

1. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.
2. Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

Together these six rules and their associated explanations make up the Net Neutrality rules that the FCC proposed.

The 2009 Notice of Proposed Rulemaking brought the Net Neutrality debate to a focal point. No longer just an abstract debate, the FCC sought to make Net Neutrality the law of the land. Lobbyists and special interest groups soon lined up on both sides of the debate. The strongest groups in favor of Net Neutrality rules are the public advocacy groups Public Knowledge, and Free Press, along with website operator Google. The big Internet Service Providers (ISPs) AT&T, Verizon, Comcast, and free-market advocacy groups, FreedomWorks and The Heritage Foundation, are against the imposition of new net neutrality rules. This paper is about the arguments of the groups against Net Neutrality regulations.

In general, Net Neutrality opponents believe that new rules requiring Net Neutrality are not needed, and would harm the Internet. They believe that the free market is sufficient to make sure that the Internet remains opens. They are worried that rules against discrimination are too broad and would have unforeseen side effects. Finally, Net Neutrality rules would remove the incentive for new investments and would be a “taking” of their existing investments.

Net Neutrality proponents want all content to be treated equally on the Internet. They believe that the Internet currently provides an equal playing field, allowing people in garages and dorm rooms to compete against Google and other big companies on equal footing. Proponents see the Internet as a medium which carries every packet without regards to its contents. AT&T believes this is an over simplification. AT&T believes that “*the Internet*” is not a singular thing, but an “ever-shifting spaghetti tangle of thousands upon thousands of networks that interconnect in unpredictable ways.” [[3]](#footnote-3) AT&T alleges that the Internet is not equal. The technology that underlies it has inherent physical limitations. At some point there are capacity limitations, which limit the speed of the network. Big website operators know about this, and actively try to engineer around those limitations. For example, AT&T quotes Google CEO Eric Schmidt boosting about the private network that Google has created that “overlays” the public Internet, delivering Google’s content and advertising to the customer faster than its competitors are able to. Other companies who do not have the scale of Google, use third parties, called *Content Delivery Networks (CDNs)*, such as Akamai and Limelight, to engineer around the public Internet in order to have their content delivered faster. AT&T believes that large players already have an advantage on today’s Internet.

These interconnections between networks have always been regulated through private contracts. The government has never regulated these contracts. AT&T argues that the Internet has done as well as it has without regulation of these contracts. AT&T cites a paper on how *transit* prices have fallen from $1200/Mbps in 1998 to $12/Mbps in 2008.[[4]](#footnote-4) AT&T and others believe that the market is better than regulators to explore new technologies and business models.

One such new service is called “IP Multicast.” Currently when a user watches a video online, a stream of packets must be sent directly from the content provider to the user. If the user’s neighbor is watching the same video, an identical stream of packets must be sent from the content provider to the user. For a video which many people are watching at the same time, such as a live sporting event, this is a great deal of additional traffic, much of which is identical. It would be ideal for only one copy of the content to be sent from the content provider which would be received by all of the users interested in watching it. In fact, this is how broadcast and cable television works. However, the Internet is inherently point to point. Content providers try to mitigate this by placing a server which splits the traffic as close to the users as possible. They currently do this by purchasing service from CDNs which have servers all over the globe. Some CDNs even pay ISPs to rent space in their data center, in order to get closer to the customer. In the future, these “splitting” servers will be placed even closer to the customer, deep within the ISP’s network or even be run by the ISP. AT&T and others argue that it should not be illegal to engage in these voluntary business transactions, which improve the customer experience, while limiting the traffic over the Internet.

Furthermore AT&T and others believe that there are no actual market failures which justify the new rules.[[5]](#footnote-5) The NPRM cites two cases where ISPs discriminated against customers. In 2005, a small North Carolinian telcom called, “Madison River Communications,” blocked Vonage.[[6]](#footnote-6) When Vonage filed a complaint, the FCC fined Madison River $15,000 and Madison River reversed the block quickly. In 2008, Comcast *throttled* (or slowed down) all traffic over the peer-to-peer protocol *BitTorrent*. After initially claiming that they were not doing anything, Comcast admitted to slowing down all traffic using the BitTorrent protocol.[[7]](#footnote-7) The FCC believes that Comcast’s actions violated its Internet Policy Guidelines. However, in April 2010, the D.C. Circuit Court of Appeals found that the FCC did not have the authority to enforce net neutrality. The FCC proposed reclassifying the Internet from an “information service” to a “telecommunications service” in order to impose net neutrality regulations. ISPs strongly oppose the reclassification because they believe that it would bring along much of the baggage of old regulations centered around the telephone. [[8]](#footnote-8)

ISPs and other free-market groups strongly believe that that the Internet should remain deregulated in order to incentivize investment. AT&T, Comcast, Verizon and others spend billions of dollars each year investing in their networks.[[9]](#footnote-9) They are not guaranteed a profit. AT&T cites some analysts who believe that Net Neutrality regulations would lead to higher costs for network operators, which would delay those providers’ deployments of next generation networks, such as fiber-optic based wired networks and “4G” wireless networks.[[10]](#footnote-10) On net, this would lead to a worse outcome for consumers.

In addition, requiring broadband networks to be “dumb pipes” would be grossly inefficient. AT&T quotes the former FCC Chief Technologist and Chief Economist saying that adding capacity is an inefficient solution because Internet traffic is very bursty – simply adding capacity would not address this underlying fact.[[11]](#footnote-11) Instead, network management techniques provide much more bang for the buck, while still allowing most users’ traffic. Adding more capacity would simply be passed along to the consumer, making all consumers pay for the traffic of a few.[[12]](#footnote-12)

Furthermore, the ISPs believe that the proposed Net Neutrality rule would represent an uncompensated “taking” of private property, which is prohibited by the 5th Amendment to the US Constitution.[[13]](#footnote-13) The Supreme Court has long found that, “[t]he right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property.”[[14]](#footnote-14) In addition, the new rules would “gut the economic value of several lines of business and render them unprofitable,” which would amount to a regulatory taking, which is prohibited under *Penn Central Transportation Co. v. City of New York*.[[15]](#footnote-15) AT&T believes that the rules would not only be a bad idea, but illegal.

For the reasons listed above AT&T and other ISPs and free-market groups do not want the FCC to impose Net Neutrality rules. They believe that the free market is a better arbiter of the future of the Internet than regulators. Not only would the new regulations be an illegal “taking,” but they would make consumers worse off by preventing the new networks of the future. New regulations would prevent new services such as multicasting and other win-win voluntary commercial agreements. In addition, ISPs believe that network management techniques, such as throttling, are needed to manage the temporary bursts in internet traffic efficiently. Way overbuilding a network and then using it as a “dumb pipe” would be a very inefficient use of resources. This cost would be passed along to consumers. Furthermore, there is question as to if the rules are even needed or if the FCC has the authority to implement them. Therefore these Net Neutrality rules should not be issued by the FCC.

1. Federal Communications Commission. Policy Statement. FCC #05-151. In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (CC Docket 02-33), Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket 01-337), Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements (CC Docket 95-20, 98-10), Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities (GN Docket 00-185), Internet Over Cable Declaratory Ruling (GN Docket 00-185), Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities (CS Docket 02-52). Adopted 5 Aug 2005. [↑](#footnote-ref-1)
2. FCC. Notice of Proposed Rulemaking. FCC #09-03. In the Matter of Preserving the Open Internet (GN Docket 09-191) and Broadband Industry Practices (WC Docket 07-52). Adopted 22 Oct 2009. [↑](#footnote-ref-2)
3. AT&T. Comments of AT&T Inc. In the Matter of Preserving the Open Internet (GN Docket 09-191) and Broadband Industry Practices (WC Docket 07-52). 2010 January 14. Filed with the FCC http://fjallfoss.fcc.gov/ecfs/document/view?id=7020377217 p21 [↑](#footnote-ref-3)
4. From Comments of AT&T Inc. See id. at 20; DrPeering, Why care about Transit Pricing?, http://drpeering.net/a/

   Peering\_vs\_Transit\_\_\_The\_Business\_Case\_for\_Peering.html. [↑](#footnote-ref-4)
5. Comments of AT&T Inc. page 94 [↑](#footnote-ref-5)
6. McCullagh, Declan. Telco agrees to stop blocking VoIP calls. 2005 3 March. C|Net News. CBS Interactive. http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352\_3-5598633.html [↑](#footnote-ref-6)
7. Kang, Cecilia. Court rules for Comcast over FCC in ‘net neutrality’ case. 2010 April 7. The Washington Post. http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040600742.html [↑](#footnote-ref-7)
8. *Ibid.* [↑](#footnote-ref-8)
9. Comments of AT&T Inc. page 26 [↑](#footnote-ref-9)
10. Comments of AT&T Inc. page 26 [↑](#footnote-ref-10)
11. Comments of AT&T Inc. page 46 [↑](#footnote-ref-11)
12. Comments of AT&T Inc. page 63 [↑](#footnote-ref-12)
13. Comments of AT&T Inc. page 244 [↑](#footnote-ref-13)
14. Quoted in Comments of AT&T Inc. page 246 [↑](#footnote-ref-14)
15. Comments of AT&T Inc. page 247 [↑](#footnote-ref-15)