Institute For Policy Innovation
IPI

www.ipi.org

Tom Giovanetti
President
tomg@ipi.org

1660 South Stemmons,
Suite 245
Lewisville, TX 75067
(972) 874-5139 voice
(972) 874-5144 fax

email ipi@ipi.org

14 January 2010

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioners:

This letter is in response to the FCC's, "In the Matter of Preserving the Open Internet, Broadband Industry Practices, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07–52; FCC 09–93

In this letter the Institute for Policy Innovation (IPI)[1] addresses the proposed adoption of so-called "open Internet" "principles" via the Commission's *Notice* proposing rules to regulate the practices of broadband Internet service providers (ISPs), and whether in fact they will result in greater innovation or rather simply serve as limitations on network management via government regulation.

Summary

The intent of Congress to increase competition and innovation in communications through the Telecom Act of 1996 is being realized. Congress intended to deregulate and thus invigorate the communications industry through competition and market forces. The wisdom of this approach is obvious as the United States today has a vigorously competitive communications marketplace, and consumers have access to a tremendous array of products and services, all of which have been paid for through private risk capital, at little or no cost to the taxpayers.

But the Federal Communications Commission (FCC) did not see the wisdom of Congress' intention, and only after losing in federal court multiple times did the FCC yield and properly implement the 1996 Telecom Act. In particular, after the FCC properly decided that it would not regulate broadband networks, private investment in new broadband networks exploded, and today most U.S. households have access to high speed broadband networks. The pace of the broadband rollout adds hundreds of thousands of homes and business to high-speed networks every year.

Only after the FCC abandoned a regulatory approach to new broadband networks did the broadband rollout begin in earnest. It is thus troubling and puzzling today to see the FCC backsliding and moving in the direction of regulating the very same broadband networks that it freed from regulation only a short time ago.

[1] The Institute for Policy Innovation (IPI) is a 23 year old free market-oriented public policy think tank with headquarters in Lewisville, Texas. IPI is recognized by the IRS as a 501(c)(3) non-profit organization. IPI has been involved for several years with in-depth evaluation of the communications marketplace. Specifically, we have worked on policy development with regard to opening, expanding, and preserving markets for video, voice, and Internet access, including broadband.

There is no demonstrated reason for the FCC to begin applying new regulations to this vibrant and competitive broadband marketplace. There is no problem to solve, no consumer harm to address, and no market failure to correct. Nevertheless, the FCC is considering doing precisely that.

In fact, the FCC is considering regulating "everything from bits to business plans" in the broadband market. In our opinion, a return to such a flawed regulatory approach will almost certainly discourage investment and job creation, frustrate innovation and result in loss of consumer benefits.

Our conclusion is that the FCC is being urged to implement new regulations for ideological reasons alone. And we believe that regulations should only be implemented when there is clear evidence of consumer harm or market failure, not simply because newly empowered regulators have a different vision for what the communications marketplace should look like.

In a market economy, it is the participants in the market who determine what a particular market looks like and what results it delivers, not government regulators operating under the assumption of perfect knowledge.

Overview

The economy of the United States operates under a market framework, where providers and consumers transact business largely at will within a framework of property rights, consumer protection, and regulation. Government implements health and safety regulations to protect consumers from harm, but generally speaking, government applies economic regulation only when there is a market failure or bad behavior on the part of providers of goods and services.

The intention of the Telecom Act of 1996, however imperfect, was to move the communications market to a similar, deregulated and competitive framework. Congress recognized that technological innovation made competition in communications possible, and took steps to make that happen. And today, after years of fits and starts, our communications marketplace is realizing the goals of the 1996 Act, meaning broadband availability is being rolled out at a breathtaking pace, on a demand-driven basis, by providers using private risk capital. Until 2009, the broadband rollout has proceeded with almost no demand on the taxpayer purse. And broadband adoption is proceeding at a pace far exceeding the adoption rates of previous critical infrastructure rollouts.

As broadband rolls out, it gives consumers and businesses not only new products and services, but also introduces new competition in phone service, Internet access and video service.

In a typical market today, consumers can choose to purchase video and broadband services from two different satellite providers, a cable provider, and often from one or more "phone companies" such as Verizon, AT&T and Qwest or hundreds of smaller, regional phone companies, as well as from national, regional and even local wireless providers

This competition is genuine, vigorous, facilities-based competition—not artificial "free-rider" competition created through government regulation. Adoption rates are high, and growing, across all demographic groups and even in spite of recession. The private investment companies have made in broadband networks in the last few years dwarfs the amounts that the federal government is now beginning to spend on broadband, and will continue to dwarf federal expenditures on an ongoing basis. So, among the benefits of deregulation is the enormous job-creating and network-building investment made by private companies, with no demand on the taxpayer.

Compared to most other countries, the broadband market in the United States is more competitive, and compared to most other countries, the broadband infrastructure has been built by private risk capital and not with taxpayer dollars.

In other words, broadband in the United States is a resounding success, and is not a collection of problems to be addressed, injustices to be righted, and failures to be corrected.

But at the very time that the benefits of deregulation are becoming apparent all around the country, some are urging that the clock be turned back on over a decade of progress, actually re-regulating the broadband industry, and fighting old ideological fights, instead of recognizing the tremendous progress that has been made in rolling out broadband, all of which was done with private risk capital.

The Internet Has Always Been About Bottom-Up, Not Top-Down

The Internet is a vast collection of interconnected, separate networks that have agreed to exchange traffic for the benefit of the users of the various networks. The majority, often cited as 80 percent, of these networks are private, thought the Internet also includes government and educational networks as well.

Networks connect to each other and agree to exchange traffic for the mutual benefit of their respective users. And the history of the Internet is a history of private actors self-organizing and their networks for mutual benefit, outside of the scope and control of government, and in some cases despite the attempts of governments to prevent them from doing so.

Within the United States, the Internet for the most part is comprised of private networks, paid for with private risk capital and entirely without making demands on taxpayer funds. The rollout of these networks has thus been demand-driven, with feedback from market mechanisms determining the "rules of the road."

The Internet thus is not and has never been a centrally-planned, top-down, government-directed mechanism. Rather, the Internet represents a triumph of capitalism and the free-market system that something as transforming and useful as the Internet could largely arise through private capital, the self-organization of free individuals and free institutions to create something greater than themselves, property rights, market forces and the right of contract.

The Internet should not now be subjected to restrictive regulations when current regulations and law have anticipated and resolved the mere handful of concerns that have arisen over many years and many many actors.

At What Cost Hampering Network Management?

There seems to be agreement that service providers should be free to "reasonably" manage their networks. But while some agree that network operators certainly need to manage their networks, they decline to define what exactly "reasonable" means.

These decisions are far too important for semantic disagreements. In fact, network operators and service providers should be allowed to manage their networks as they see fit to maximize the investment that they have made in those same networks.

As we have commented previously, the economics of network management make government regulation of networks a tricky business and most certainly an impediment to innovation.

A necessary part of the efficient and effective function of any network is management of that network, whether it is a network for electricity, water, airline and automobile traffic, or traditional telephone service. In fact, there have recently been efforts to build more intelligence (read: capacity for management) into such networks, especially air traffic control and the electrical grid, which has been the subject of much campaign rhetoric and current spending policy.

Today, broadband network companies manage their networks and are making enormous investments in order to give consumers the performance, products and services they want. And consumers want HDTV that does not pixellate on the night of the Super Bowl. They want their VoIP communications (and especially VoIP communications between first responders and hospital emergency rooms) to be clear and crisp without degradation because of resource drain to massive applications operations. They want spam and viruses contained to the degree possible by the network itself. These are all examples of network management needs that are today as fundamental and necessary as they were unforeseen just a decade ago.

As noted, broadband networks are not public infrastructure, but rather almost entirely a collection of private networks that have agreed to exchange traffic for the benefit of their customers. Seen in this light, the Internet is a demonstration of the success of markets in finding ways to provide useful goods and services to consumers.

The question, then, is to what degree should government interfere in the functioning of private broadband companies? And the right answer, given the economic experience of the 20th Century, is that government should only interfere when and if significant problems are demonstrated. Otherwise, the owners of the many networks have the right to manage their networks in the way they think best serves their customers. But maybe even more to the point, broadband companies have an obligation to manage their networks.

In almost all cases, network management today is unnoticed by consumers. However, a total lack of management would be immediately apparent. If network operators were

precluded from managing their networks, consumers would clearly be negatively affected. Imagine a day where, as some would have it, all “management” was abandoned. The result could be a complete or partial breakdown of our communications infrastructure.

At the very least, the burden of proof should rest upon those who charge a particular ISP with a particular network management practice that is “unfair” or discriminatory. ISPs should not be considered guilty until proven innocent. Otherwise, ISPs are in the unreasonable position of having to guess which network management practices might be frowned upon by a particular regime at the FCC.

At What Cost Addressing Phantom Harm?

Virtually the entire “justification” for the FCC to add regulation, both by adding new “principles” and “upgrading” the principles to rules, has rested on the concern that service providers could discriminate in such a way as to favor their content or services to the detriment of potential competitors.

However, in the two instances cited in the *Notice* where some action taken by the service provider has been considered to be illegitimate, the current legal and regulatory schemes have addressed the issue and righted the “wrong.” To argue that some new heavier handed regulatory scheme is necessary is simply without basis.

Most recently, some are making the case for greater regulation based on whether any "open" provisions internationally or in domestic mergers here have caused lack of investment--seemingly arguing via assertion that if investment was not diminished then the additional regulations cannot be viewed as harmful. This “no harm, no foul” argument in favor of regulation turns the burden of proof for need for regulation on its head, assuming that everything should be regulated unless there is a clear case for not regulating. This utterly runs opposed to our market based economic system.

If existing trends continue, which seems a likely assumption, major competitive network providers will continue to invest in rolling out new services to new areas on a demand-driven, market-oriented approach. There will continue to be a vigorous competition between cable, traditional telecom and wireless providers to provide service to unserved areas, and underserved areas will see the additional of new competitors.

Indeed, the private sector is investing in broadband at a breathtaking pace. Private U.S. broadband providers invested approximately $120 billion in communications infrastructure throughout the nation over the past two years alone.

The result of all this private investment is new and more competitive broadband availability every day in cities, towns and rural areas across America. People are coming home from work to find sales flyers in their front doors and in their mailboxes announcing that new broadband service from Company X is now available in their area. Television, radio and newsprint are filled with advertisements from competitive broadband companies urging consumers to switch to their company, and people are choosing and switching from among offerings from cable, satellite, traditional telecom, and wireless providers. Price and service competition between broadband providers is today a reality in the majority of cities and towns across America.

As an example, just now in the Dallas market a new WiMax service from Clear is being aggressively marketed on radio, TV and newspaper advertisements. This is a new competitor in the marketplace, in some places a third, fourth or even fifth competitor for the delivery of broadband service. The only federal action necessary to facilitate this new competitor was to facilitate its access to the necessary spectrum. This function, ensuring property rights and facilitating markets, is the proper role of government, not redesigning an industry from the top-down.

So why risk ruining what has been one of the brightest spots during the recession and presumed recovery? Why burden success with regulation that courts failure? If it is not broke, why fix it?

In addition, the argument that so called "open" provisions will not hamper investment is not logical. It assumes that we can know how much investment there would have been absent merger conditions or regulatory policies. Whether or not a company invested as much as it would have absent any regulatory burden placed on them during a merger cannot be known. All that can be observed is what actually happened, that is, how much investment they actually made. To suppose that any particular level of investment observed is the same as the investment that would have been made absent the encumbrance is absurd. We simply do not have the ability to determine what levels of investment would have occurred absent a particular policy or set of polices.

This is one reason why the best policy has been to limit regulation to demonstrable examples of consumer harm or market failure. Otherwise, regulators are in the "pre-crime" business, holding parties under threat because the government feels that they may commit some crime in the future.

At What Cost Government Sponsored Discrimination in Regulation?

In addition to the fact that the *Notice* proposes solving a problem that does not exist, or rather, finding harm and asserting government involvement before any proof of need, the nature of the proposed rules simply ignores the nature of technology and innovation, and as a result treating similar services differently.

Convergence makes old legal and regulatory distinctions irrelevant. In the digital world, the distinction between how a voice service is delivered or executed has no meaning. Also meaningless are different regulatory regimes for cable, telephone, or satellite companies as they are all deliver the same product. Companies that once carried one-way video now compete with companies that once carried only two-way voice traffic. This is convergence. Companies that never carried voice now do, and some companies that didn't exist in 1996 much less 1984 now do. Regulations based on invalid distinctions will fail in their purpose and do real economic harm. More damaging then are regulations which would apply to only one business model out of the myriad of those competing in the same space.

So whether services such as voice are delivered simply as a software application, as a software application that is in part delivered by the traditional telecommunications system to transmit calls between end users, or is entirely delivered by the traditional facilities based system, a regulatory scheme should treat like services alike.

In other words, if competition among providers of networks, applications, services and content is truly to be "non-discriminatory," then regulations must be applied, or preferably freedom, equally. Or more simply said, network providers should not be singled out for discriminatory treatment while those in direct competition are provided a distinct advantage by government, particularly when those same applications can similarly exercise power to control a consumer's experience, via call blocking, directing an Internet search, or in various other ways.

Given that the proposed "non-discrimination" rule could grant the FCC the power to control everything online from bits to business plans it is urgent to note that in no way should these arguments be construed as a call for greater regulation or expanded regulation over other industries, to the contrary it should demonstrate the folly of trying to continue a regime that parses competing services into different regulatory buckets based on the means of which a service is accessed, or the business model underlying the delivery of the same or similar service.

At What Cost Transparency?

Transparency is one of those ideals that is sometimes hard to oppose. In fact, IPI has been part of a broad coalition for some time now supporting a great deal more transparency in government, particularly in the legislative process.

That said, there is a distinct difference in arguing for transparency in most government operations and demanding or regulating transparency in private industry where trade secrets, business arrangements otherwise protected by law, business practices and the like being disclosed would destroy the value of the enterprise.

Every citizen of this country is endowed with a portion of the sovereignty and power of this nation, of the government. We, the people, individually and collectively, choose when and how to lend this authority to those we regularly select to govern us. Similarly, that power does not have to stay on loan to any group, party or individual. And because we are the power of the government, then government actions and operations are ours solely to judge.

Private enterprise is fundamentally different. These operations are in no way open to the judgment of the people, or at least not all the citizens of the country. Rather, those operations are subject to the review and judgment of the enterprise owners.

Hence, calls for greater transparency in private industry must at least be met with considerable skepticism and burdened with a high degree of need to demonstrate an urgent compelling need. The necessary results of "transparency" in private actions, contracts, and operations can hardly be overstated.

Even in the event of the demonstration of market power should the government be requiring that search algorithms be made public so that people can determine if the search function includes any embedded bias? Should basic technologies that provide differentiated service to customers via packet prioritization be revealed? Trade secrets laid bare?

These are not decisions to made lightly or based on some oversimplified desire that "information wants to be free." This decision, perhaps more than other proposed principles, holds the very real potential of destroying the value of enterprises, whole markets, and the economic engine of this country.

At What Cost Regulatory Overreach?

Broadly speaking, the current proposal stretches the FCC's arm of regulation quite a bit further than it has reached before.

Frankly, the current proposal goes well beyond an analysis of whether consumers are being harmed. If that analysis were brought to bear the clear answer is that, in fact, consumers are likely better off now in terms of type of service, variety of service, number of service providers, availability of applications, availability of service packages, and availability of devices, than they ever have been before--all trends that show no sign of slowing down.

There is little doubt that to some greater or lesser extent this debate has cleaved something of a split between service providers and application providers. However, government should not be in the business of favoring one industry over another or otherwise biasing a robust competitive landscape. Both industries have compelling and attractive property. Both want to serve as many consumers as possible as a means of increasing the value of their wares. The upper hand should be gained by value and serve to consumers, not by regulators. The competition amongst direct competitors and amongst industries will deliver the best products for the best prices to the greatest number of consumers in the most efficient manner.

The current proposal seeks to substitute regulators for the wisdom of consumers via a set of rules that will control service, equipment, prices and access. This overreach is a sure recipe for upsetting the current success of the marketplace. The only rationale can be that some believe that government can somehow divine economic efficiency better than the market

At What Cost Ignoring Rights?

Property rights are fundamental to functioning markets. Without property rights, investors don't invest and innovators don't take risks. Without property rights, contracts aren't executed because they are neither dependable nor enforceable.

Within the broadband marketplace, two aspects of property rights are critical. First, the property rights of those who have already built networks must be respected. Policy changes which devalue existing infrastructure are clear violations of property rights, and would likely qualify as a "taking" upon judicial review.

Network owners must also be free to execute contracts as an extension of their property rights. And almost all contracts are, by their nature, exclusive in some way. It is entirely appropriate and not at all novel for network owners to be able to sign contracts for exclusive access to specific types of content. It is entirely appropriate and within a traditional legal understanding of property rights and contract law for Direct TV to

enter into an exclusive contract with the National Football League in order to offer an exclusive product or service to Direct TV customers. Similarly, ESPN offers a "ESPN 360" product on a contract basis with certain network providers. These types of contracts facilitate creativity and competition within the marketplace, and should not be discouraged by new policies or new regulations, however well-intentioned.

It is also entirely within a traditional view of property rights and contract law for network owners to contract agreements with hardware providers for exclusive access to new and compelling hardware that access their networks. AT&T's contact for exclusive access to Apple's iPhone, for example, and Sprint's contract to be the first network to offer Palm's new Pre phone, are examples of entirely traditional and appropriate uses of contract law and property rights between free parties operating within a market framework. The right of network owners to contract with content or hardware providers in order to compete in the marketplace should not be discouraged by new policies or regulations, however well-intentioned.

The second critical aspect is protection of intellectual property. Unless intellectual property rights are protected, content owners will withhold, rather than make available, their content. In order for our broadband networks to meet consumer expectations, they need to be rich with content. The U.S. economy produces more rich content than any other nation, and this creative content is an important component of U.S. global competitiveness. Rich content made available over broadband networks can become an even more important component of U.S. economic growth so long as property owners are assured of the ability to protect their content.

The fusion of the property rights of network owners and content owners is the ability of the content and network industries to work together on solutions that lead to content availability and protection over broadband networks. It is in the interest not only of consumers but also of network and content owners that means for protecting intellectual property over networks, including digital technologies for watermarking authorized content and detecting unauthorized content, be permitted to develop and to be deployed. Most important, the existing legal regime for protecting copyright should not be weakened or abandoned under some confused understanding of the meaning of "openness" or "convergence." Innovation and economic activity will always depend on and demand protection of property rights.

Conclusion

In conclusion, the Institute for Policy Innovation (IPI) urges policymakers to have an honest and appropriate appreciation of the tremendous progress that we have made in rolling out broadband services to a significant portion of the American population under the current regulatory, legislative and law enforcement scheme—all done using private risk capital and deployed in a demand-driven, market-oriented manner.

We urge policy makers to likewise consider the costs of tampering with a system that currently works and demonstrates no harm. Costs should be considered broadly, including real costs, opportunity costs, and the costs to freedom.

We thank the FCC for this opportunity to provide input, and we would be happy to participate in further hearings and discussions related to these issues.

Sincerely,

Tom Giovanetti
President
Institute for Policy Innovation (IPI)

Bartlett D. Cleland
Director
IPI Center for Technology Freedom