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MYTHS ABOUT THE FCC'S INTERNET OPENNESS RULES

The FCC's December decision to adopt Internet Openness rules has been the subject of an extraordinary amount of heated rhetoric. If one sets aside the politics, however, the reality of the agency's order does not come close to living up to the hype. Far from being radical, the FCC's rules are in fact quite moderate and leave ample flexibility. This document responds to some of the widely circulated myths about the Internet Openness rules.

Myth:
The FCC rules mean the Internet is now a regulated medium. Once the rules take effect, the government will be "regulating the Internet."

Reality:
The FCC rules apply only to companies that provide Internet *access* – that is, the providers of the Internet's physical "on ramps." The vast universe of speech, commerce, and civic and social activity that rides on top of the Internet remains just as unregulated as it was before. In fact, the entire point of the rules is to ensure that Internet access providers don't act as de facto private regulators, picking winners and losers among online businesses and services.

Myth:
The FCC rules will radically change how the Internet works. This is a big departure from the status quo.

Reality:
Just the opposite: The rules *protect against* radical changes in the way the Internet works, by ensuring that consumers will continue to have access the full Internet without tampering or favoritism. The rules don't interfere at all with the ability of Internet service providers (ISPs) to keep on providing Internet access service as we know it. They merely prevent ISPs from discarding traditional Internet access in favor of a more restricted, supervised offering – something that ISPs claim they have no intention of doing anyway and that has long been discouraged by federal policy under the FCC's 2005 Internet policy statement.

Since the rules reflect the way the Internet already works, key ISPs such as AT&T and Comcast have said they don't object to them. NCTA, the cable industry association, has said that the FCC's action "largely codifies the broadband Internet access providers' current conduct, which doesn't change the economic status quo, whether in terms of investment or job creation."

Myth:
This is a power grab by the FCC. In the absence of new legislation, the FCC has no jurisdiction over broadband.

Reality:
If the FCC were asserting jurisdiction over all the activity that flows over the Internet, that would indeed be a remarkable power grab. But the FCC is doing no such thing. Its Open Internet rules apply only to the "pipes" – the physical communications links that connect people to the Internet.

There is a long history of FCC jurisdiction regarding the provision of physical communications infrastructure. Ensuring that operators of such infrastructure do not abuse their position is a core function of the FCC. With respect to data communications in particular, in a long-running set of proceedings starting in 1971 known as the Computer Inquiries, the FCC focused specifically on the relationship between the operation of the physical communications network and the offering of "enhanced services" (the prior label for "information services"). The new Open Internet rules address the same fundamental issues.

Far from terminating this longstanding FCC role, the 1996 Telecommunication Act effectively carried forward the Computer Inquiries regime. Nothing in that Act remotely envisioned that the FCC would be stripped of all authority in this area at the very moment that data- and computer-related services were assuming an unprecedented role in the nation's commerce, civic discourse, education, and government.

The only real question regarding jurisdiction, then, should be the viability of the *specific legal theory* the FCC relied on in its recent order. That will be tested in court – but Congress should keep in mind that the FCC chose its legal theory in an effort to compromise with the major carriers. Far from trying to grab power, the FCC was trying to take a light-touch, compromise approach.

Myth:
The existing legal framework has proved perfectly adequate to address any incidents that arise, as the Comcast-BitTorrent and Madison River examples show. There's no need to add new rules.

Reality:
In the wake of the D.C. Circuit's ruling in the Comcast case, the prior legal framework is in shambles. That framework had centered on the 2005 Policy Statement and the threat that, if necessary, the FCC could take action. The court ruling has exposed that threat as toothless. So eliminating the FCC rules would not take us back to the regime that existed from 2005 to 2010; rather, it would lead to a new, almost total absence of safeguards.

Nor does antitrust law offer much protection for Internet openness. Absent a clear anticompetitive motive, network operators likely could curtail Internet openness in a variety of ways without running afoul of antitrust law. In short, antitrust's prohibition against anticompetitive conduct is a far cry from any kind of affirmative policy to preserve the Internet's uniquely open network structure. Nor can antitrust law take into account the major non-economic reasons for maintaining an open Internet, such as the impact on independent speech and civic empowerment. Finally, as a practical matter, antitrust cases tend to drag on for many years. Individual innovators and small startup companies – key beneficiaries of Internet openness – are unlikely to be in a position to bring antitrust cases against major network operators.

Myth:
There is no reason for the FCC to act now. Rather, it can wait and see what happens. If ISP practices develop in ways that prove to be harmful, the FCC can always intervene at that time.

Reality:
Once the damage is apparent, it may well be too late to go back. Imagine the FCC trying to unravel a web of discriminatory deals *after* significant investments have been made and new business plans have been built, all based on companies' reasonable assumptions about what the legal framework permits. It would be a hugely difficult undertaking both politically and logistically. Moreover, the very parties that today say that no "rules of the road" are needed would surely argue that, since companies had no warning that certain kinds of arrangements might be illegal, it would be unfair for the FCC to seek to nullify those arrangements at a later date. Setting some ground rules in advance would be far more efficient and effective than trying to reverse established "facts on the ground."

Myth:
Competition provides a sufficient safeguard against any possible "bad behavior" by ISPs. Consumers can always "vote with their feet."

Reality:
First, consumers have very limited options for broadband – often just two providers. Second, switching ISPs is too big a hassle for consumers to do frequently or lightly. Third, consumers don't have sufficient information; if a particular website or application performs poorly, a consumer can't tell if the cause is ISP-level discrimination or some other factor. Fourth, and most important, the bottom line is that once a consumer has selected an ISP, other online companies and Internet users can reach that consumer *only* via the facilities of that ISP. This is the "terminating monopoly" problem: subscribers may occasionally switch ISPs, but at any point in time each ISP has an effective monopoly over the ability to reach its subscriber base. You can't reach AT&T subscribers without handing off traffic to AT&T.

Myth:
The FCC rules help some companies at the expense of others. The rules effectively force ISPs to subsidize companies that deliver content and services over the Internet.

Reality:
Nobody is subsidizing anyone. On the Internet, everybody pays their way by contracting with some ISP to "get connected." Big users pay more: A major corporate provider of online content or services, for example, buys far more capacity than an individual subscriber. Each ISP then turns around and negotiates with other carriers, including "backbone" providers, to route traffic to and from the rest of the Internet. Under this system, each and every bit that ISPs carry is traffic they have previously agreed to carry in the contracts they have negotiated with their

subscribers and with other carriers. No ISP is somehow forced to carry traffic in excess of what it has already committed to do by contract, and no online content provider gets a free ride.

If anything, the new FCC rules *prevent* subsidization, by ensuring that ISPs cannot demand to "take a cut" whenever some other company wants to do business with the ISPs' subscribers. Allowing ISPs to run the equivalent of a protection racket, in which online businesses have to pay the ISP to avoid discriminatory traffic handling, amounts to forced subsidization of ISPs by the rest of the Internet economy.

Myth:
The FCC rules will prevent ISPs from adopting technically sound practices to deal with the serious challenges of running a network – in particular, the exploding bandwidth demands caused by the growing use of online video.

Reality:
The FCC rules are plenty flexible to permit reasonable ISP responses to technical challenges. The rules only bar "unreasonable" discrimination, and they contain an open-ended exception for reasonable network management. In addition, the FCC's order specifically notes that ISP actions to address congestion and bandwidth challenges directly, by charging for or reining in high-volume usage and users, does not violate the rules. When the concern is really about *volume*, there should rarely be a reason to discriminate based on the specific *content or application* a user chooses to access. The FCC's rules do not affect the ability of ISPs to adopt volume-based policies or limits on bandwidth usage.

Myth:
The FCC rules will undermine investment in broadband networks, because they will force ISPs to continue to rely exclusively on Internet subscribers to recoup costs. Allowing ISPs to seek deals with content providers could help generate additional revenues that could spur more deployment.

Reality:
First, jeopardizing the core characteristics that make the Internet such a valuable platform would be a terrible and ultimately counterproductive way to try to spur investment in broadband. The Internet is a big hit with subscribers, and demand for it continues to grow, precisely because it offers an open platform for a constantly changing array of innovative new services.

Second, the FCC's rules do not preclude ISPs from operating multiple services, with multiple revenue streams, over broadband networks. The rules allow the development of "specialized services," for example.

Third, pay-for-priority arrangements actually *discourage* broadband investment, by giving ISPs a strong financial incentive to maintain bandwidth scarcity. Put simply, it's hard to sell express lane service when the regular lane is zipping right along. The more ISPs generate profits from pay-for-priority service, the less incentive they have to stay ahead of bandwidth demand. Allowing ISPs to extract additional revenues from online content and applications providers is not a sound strategy for promoting broadband investment.