As the Federal Communications Commission sorts through the more than 1 million comments submitted in its open Internet proceeding, the calls for more prescriptive net neutrality rules have reached a fever pitch. Unsatisfied with proposed rules that would require broadband providers to be transparent about their network management practices, prohibit broadband providers from blocking access to Internet content, and prohibit fixed broadband providers from engaging in commercially unreasonable practices, some net neutrality advocates want more. Like Chicken Little, who insisted the sky was falling, they claim that the Internet providers under Title II, the FCC would have to find that broadband providers offer a separate telecommunications service to edge providers that properly falls within the scope of the FCC’s Title II authority, which is not the case when a broadband provider merely transmits an edge provider’s content requested by an end user. Although an edge provider could be a broadband provider’s “customer” under certain circumstances, such “customer” relationships do not currently exist because the FCC’s since vacated net neutrality rules effectively prohibited broadband providers from offering edge providers service arrangements over their last mile networks. Currently, a broadband provider enables its customers to access the Internet, and each customer decides with which edge providers to interact. And, to the extent a broadband provider makes available an offering to an edge provider, it presumably would do so by making an individualized decision whether and on what terms to serve, which is not subject to Title II regulation.

Third, even assuming the FCC could legally and factually regulate broadband service under Title II, Title II has always permitted carriers to treat customers differently, so long as any “discrimination” is not “unjust or unreasonable.” Thus, Title II would not prohibit a broadband provider from offering edge providers different service levels for access to their broadband customers, provided these service levels are made available to all similarly situated edge providers.

Beyond the legal shortcomings of Title II regulation, the
Don’t panic, the sky won’t fall without net neutrality rules

need for and desirability of an absolute ban on commercial arrangements between broadband providers and edge providers are difficult to fathom. Some net neutrality advocates assert that the Internet would be relegated to “fast lanes” and “slow lanes” if broadband providers are able to differentiate broadband services based on consumer preferences or quality of service. Likewise, or so the theory goes, absent a ban on commercial arrangements with edge providers, broadband providers would compel edge providers to pay “tolls” as the price for end users being permitted to access their content.

Predicting the future, particularly when the Internet is involved, is a dicey proposition. However, dire predictions about broadband providers taking steps to undermine the openness of the Internet in the absence of prescriptive net neutrality rules are misguided. There is a dearth of actual evidence of misconduct by broadband providers, and the FCC’s only decision finding that a broadband provider (Comcast) violated open Internet principles was reversed on appeal in Comcast v. FCC. Furthermore, there was no legal prohibition on network operators entering into voluntary agreements with edge providers from the inception of the commercial Internet in 1995 until 2010 when the FCC adopted its “nondiscrimination rule” (a rule that only applied to fixed broadband providers and that the U.S. Court of Appeals for the D.C. Circuit vacated earlier this year in Verizon v. FCC). And yet none of the fears about which net neutrality advocates are concerned were realized during this 15-year period. If network operators truly have the incentive and the ability to exact “tolls” from edge providers and to block access to content whose owners refuse to pay such tolls, why did network operators not engage in such conduct when they had the freedom to do so?

In truth, broadband providers have a financial incentive to attract and retain as many broadband customers as they can, which they can only do by ensuring that customers can go where they want on the Internet. The costs of deploying, operating and maintaining a vibrant broadband network are substantial, and broadband providers have invested approximately $1 trillion in their networks since 1996, according to some estimates. Because these network costs are largely fixed, broadband providers must maximize the traffic on their networks in order to spread those costs over a greater number of revenue-generating customers.

To the extent a broadband provider were to block or interfere with a customer’s ability to access a particular website or application, he or she would not be a customer for very long. End users regularly switch broadband providers. And, while not every U.S. resident has the choice of multiple broadband providers, the vast majority do. According to FCC estimates, more than 90 percent of households have a choice among three or more broadband providers (including wireless) that offer broadband with speeds of at least 10 Mbps downstream and 1.5 Mbps upstream. Broadband options will only continue to increase, as the availability of Wi-Fi and the deployment of Long-Term Evolution (LTE) technology expand.

It also is ironic that those who advocate for a complete ban on commercial arrangements between broadband providers and edge providers tout (correctly) the Internet as a petri dish for innovation. While relationships between broadband providers and edge providers are largely theoretical at this juncture, a host of innovative arrangements may ultimately benefit end users. For example, edge providers that offer services for which there is a need for especially low latency may be interested in prioritization arrangements (to the extent content delivery networks, localized content storage, or other approaches would not adequately address latency issues). Likewise, sponsored data, two-sided pricing, or other commercial arrangements would have positive effects on an end user’s Internet experience or reduce the cost of broadband service. There is no reason to smother such innovative arrangements in the crib before they have a chance to mature and before the FCC even has an opportunity to assess their real-world consumer and competitive benefits.

Consistent with the evolution of the Internet, broadband providers and edge providers should be able to experiment in how best to use their assets that underpin the Internet ecosystem in delivering value to their respective customers. Allowing broadband providers and edge providers to negotiate arrangements that have neither anti-competitive nor anti-consumer effects is the only practical means of ensuring that the terms of such use are mutually beneficial and economically efficient. Permitting such negotiations will not cause either the sky to fall or the Internet to end.

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