Abstract

The Federal Communications Commission's Network Neutrality Order regulates how broadband networks explain their services to customers, mandates that subscribers be permitted to deploy whatever computers, mobile devices, or applications they like for use with the network access service they purchase, imposes a prohibition upon unreasonable discrimination in network management such that Internet Service Provider efforts to maintain service quality (e.g. mitigation congestion) or to price and package their services do not burden rival applications.

This paper offers legal and economic critique of the new Network Neutrality policy and particularly the no blocking and no discrimination rules. While we argue the FCC's rules are likely to be declared beyond the scope of the agency's charter, we focus upon the economic impact of net neutrality regulations. It is beyond paradoxical that the FCC argues that it is imposing new regulations so as to preserve the Internet's current economic structure; that structure has developed in an unregulated environment where firms are free to experiment with business models – and vertical integration – at will. We demonstrate that Network Neutrality goes far further than existing law, categorically prohibiting various forms of economic integration in a manner equivalent to antitrust's per se rule, properly reserved for conduct that is so likely to cause competitive harm that the marginal benefit of a fact-intensive analysis cannot be justified. Economic analysis demonstrates that Network Neutrality cannot be justified upon consumer welfare grounds. Further, the Commission's attempt to justify its new policy simply ignores compelling evidence that "open access" regulations have distorted broadband build-out in the United States, visibly reducing subscriber growth when imposed and visibly increasing subscriber growth when repealed. On the other, the FCC manages to cite just one study – not of the broadband market – to support its claims of widespread foreclosure threats. This empirical study, upon closer scrutiny than the Commission appears to have given it, actually shows no evidence of anti-competitive foreclosure. This fatal analytical flaw constitutes a smoking gun in the FCC's economic analysis of net neutrality.