

## Net Neutrality 101

*By Jorge L. Bauermeister*

### Overview

This article is intended to help individuals, unfamiliar with the Net Neutrality debate, to learn the basics on this important issue for the Hispanic community and for all Americans. A few disclosures – I am an attorney that has broadband providers as clients. At the same time, I spent a significant amount of time as a Commissioner in the Puerto Rico Telecommunications Regulatory Board, and I chaired the Consumer Affairs Committee of the National Association of Regulatory Utility Commissioners (NARUC). This gives me a different perspective that I can share with you. I do not favor net neutrality, and after reading through this article, I hope you will understand why.

In 2005 the Federal Communications Commission (FCC) issued its **Broadband Policy Statement** (also known as the Internet Policy Statement), which lists four principles of open Internet. In the Statement the FCC concluded that in order “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers,” the Commission should adopt the following principles:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run*

applications and use services of their choice, subject to the needs of law enforcement.

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.*

These principles have been embraced by all of the major broadband providers, with a major hiccup from cable television provider Comcast. Due to this one time, albeit significant event, the entire landscape of Internet regulation is poised to change.

### **The Comcast Factor**

In late 2007 and 2008 Comcast's Internet Service Provider Service began to block peer-to-peer traffic at certain times of the day (peak times). After news reports on this issue surfaced, Comcast initially denied they had anything to do with the slowdowns. Several groups complained before the FCC, among them an organization called Free Press, resulting in the Commission launching an investigation. Comcast defended its interference with peer-to-peer programs as necessary to manage scarce network capacity.<sup>[1]</sup> During the investigation, Comcast modified its systems and put in place a more neutral congestion management system. Furthermore, Comcast agreed to abide by the FCC's four principles for an Open Internet. (Comcast also settled a class action lawsuit for \$16 million.).

The byproduct of the FCC investigation was a Resolution and Order where the Commission exerted its jurisdiction over Comcast's network management practices. The FCC ordered Comcast to describe the details of their new network management system and their progress towards implementing it. Finally, the Commission stated that it would issue an automatic injunction should Comcast fail to make the required disclosures or renege on its commitment. Comcast complied with the FCC order, but it would not accept the FCC's decision to regulate its network management practices. It appealed the FCC's decision before the Court of Appeals for the District of Columbia, and won.

The Court of Appeals, ruled that the FCC did not have legal authority to exert its jurisdiction over Comcast's Internet. It held:

It is true that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies." Resp't's Br. 19. It is also true that "[t]he Internet is such a technology," *id.*, indeed, "arguably the most important innovation in communications in a generation," *id.* at 30. Yet notwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority." *NARUC II*, 533 F.2d at 618 (internal quotation marks and footnote omitted). Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility," *Am. Library*, 406 F.3d at 692, we grant the petition for review and vacate the *Order*.

(Comcast v. FCC, 600 F.3d 642, 661 (C.A.D.C. 2010).

The FCC took this decision as a challenge to prove their authority over Internet services and issued a Notice of Proposed Rulemaking asking for comments regarding its plan to extend telephone regulations to key sections of the Internet's infrastructure.

By doing so, the FCC could delineate its jurisdictional grounds to regulate, among other things, a provider's network management policies. So the issue is on the table. Here is the general position of both parties.

### **Broadband Service Providers**

Broadband Service Providers (Verizon, AT&T, Comcast, etc.) attain that they are complying with and embracing the Open Internet Principles set forth by the FCC in its Open Internet Statement. Providers agree that the FCC should be able to review alleged violations of these principles on a case-by-case basis. However, they also propose that the Government should not establish network management and/or other rules that will slow down or cripple their ability to change their products with the speed required in a highly volatile market.

In order to be fair, we need to expand on this position and discuss potential issues that could develop out of the broadband provider's position.

First, Providers have stated that they have want to retain the ability to modify their pricing structure as they see fit, as long as there is market support for such a structure. Basically, they don't want the government to intervene. However, if the Government is going to intervene in the marketplace, Broadband providers have argued that they should be allowed flexibility to establish business models that will in turn promote the deployment of new broadband Internet facilities. For example, carriers have argued that they should be allowed to charge higher rates to users that consume more bandwidth. According to them, the increase in expenses associated with the heavier users (which are a minority) should not be born by the majority. Basically, they argue for the right to have the cost-causer bear the costs.

Another position involves potentially charging companies, and not the end-users, to share the burden that their traffic takes on the network. For example, content providers that require high bandwidth, like video providers, would have to pay a fee to cover the expenses covered by the provider in building out the network. This position is similar to our current long distance regulatory scenario. Let's assume you have ABC long distance as your long distance service provider. When you make a long distance call, the payment for that call goes to ABC, even though that call uses your local telephone company's network. Next, your local company will charge ABC for the use of their network in handling that long distance call (these are known as access charges). This scheme designed and approved by the FCC, fairly compensates local companies for the use of their network by another service provider.

These last two positions have become fodder for "net neutrality" advocates and their positions reflect concerns for potential abuses by the broadband providers. Let's review them.

### **Net Neutrality Advocates**

Net Neutrality advocates, specifically Joe Torres from Free Press and Joe Rucker from Color of Change, agree that Broadband service providers are complying with the FCC's four principles for an Open Internet. There is also agreement that the Comcast case has been the only violation of the Principles. [2] They have raised one other alleged violation, but it was a technical issue related to SMS traffic and not Internet traffic.[3]

The main concern of net neutrality advocates is that without government intervention, Providers will be "free to censor websites, stifle competition, and continue to ignore underserved communities." [4]

They are prone to use slogans and other headline catching statements like “Save the Internet”, “Protect the First Amendment”, and even go as far as labeling this issue as a disaster and equating it to the Gulf spill and the Wall Street meltdown. Ultimately, their entire position is prophylactic, and asks the government to intrude upon the operations of the Providers today to prevent future misconduct.

Finally, they propose that the FCC should take whatever steps are available to establish rules that will protect consumers from future, and potentially uncertain, actions by broadband service providers. They specifically reject any attempts by the providers to charge content providers for the additional strain their content places on the networks. As we will see in the next section, this will have dire effects on our community.

### **Reaction to Arguments Made by Neutrality Advocates**

Now let me tell you why I am against the arguments made by Net Neutrality advocates.

First off, I am concerned about the need to expand the penetration of broadband Internet in our communities. Broadband penetration in English-speaking Hispanic households in 2005 was 28% and 20% if you take into account all Hispanic households (including Spanish-only households). Without any government regulation of the Providers, and allowing them to make the necessary investments in their network, this number grew dramatically. In 2009, 68% percent of English-speaking Hispanics and 48% of all Hispanic households had adopted broadband.[5]

<b>Race</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
White	31%	42%	48%	57%	65%
African American	14%	31%	40%	43%	46%
Hispanic – English Speaking	28%	41%	47%	56%	68%
Hispanic All	20%	29%	33%	40%	48%

In recent months the FCC issued its National Broadband Plan. The Plan sets up an ambitious goal of having broadband access available to all Americans over the next 20 years. The FCC estimated that to reach that goal, Broadband Providers would have to invest over \$350 Billion dollars. This number is separate from any other investment that the Providers need to invest to maintain and keep their networks running effectively, which brings us to how the Internet has evolved and how a small percentage of users are placing significant strain on the provider's network.

As Broadband speeds increase, users are also increasing their consumption of network resources. For example, the use of broadband Internet to watch movies, T.V. shows, and other video material is rising. Viewing this content uses significantly more bandwidth than exchanging email or viewing web pages in your browser. Now, in order to keep these customers happy and to continually expand the speed of their networks, carriers need to make significant investments. When you add these investments to the \$350 billion dollars required to achieve ubiquitous broadband you beg the question: Who is going to pay for it?

A recent study by Robert Shapiro, Kevin Hassett, and the Georgetown Center for Business and Public Policy in the McDonough School of Business of Georgetown

University addresses this very question. The results are telling.

First, if there is no change in the regulatory scheme and if the price of the service did not have to increase to finance additional investment of \$300 billion, Broadband uptake rates for all Americans will be at 99% in 2020.

RACE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Non-Hispanic										
White	72.5	78.4	82.5	87.1	91	94.7	99	99	99	99
African										
American	59.1	65.5	69.9	75	80.3	85.6	91.1	96.5	99	99
All Hispanic	62.7	69.3	74	78.9	84.3	89	92.5	96.1	98.7	99

The net result of the data represented in this table indicates that if an individual, other than the consumer, needs to assume the cost of the expected \$300 billion dollar network expansion – 99% of all Americans would have broadband access by 2020.

However, if the increase in monthly fees to cover additional investment is spread among all consumers (a by-product of the Net Neutrality argument), the results reflect a negative impact on the Hispanic community.

RACE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Non-Hispanic White	72.5	73.7	75.1	76.9	79	81.2	83.2	84.8	84.9	84.7
African American	59.1	61.3	63.6	66.2	69.2	72.1	75.5	79.5	81.8	82.0
All Hispanic	62.7	65	67.4	70	72.9	76	78.9	81.6	83.2	83.2

As you can see, there would be a 9% reduction by 2014, and it would continue to increase until it reached 16.7% difference by 2020.

A second scenario included in the study reflected Broadband Uptake rates if 20% of heavy bandwidth users carried the burden of 80% of the additional investment required to satisfy their needs. The scenarios are much more democratic.

RACE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Non-Hispanic White	72.5	78.4	82.4	87.1	91	94.7	99	99	99	99
African American	59.1	65.5	69.8	74.9	80.1	85.3	90.8	96.1	98.6	98.6
All Hispanic	62.7	69.3	73.9	78.8	84.1	88.7	92.2	95.7	98.3	98.6

Finally, the study analyzes Broadband uptake if the cost of \$300 billion in additional investment is divided 50-50 between heavy bandwidth users and all other subscribers.

RACE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Non-Hispanic White	72.5	77.5	80.6	84.3	87.4	90.4	92.7	93.5	93.1	92.9
African American	59.1	64.6	68.2	72.4	76.8	81.3	86.0	90.5	92.5	92.2
All Hispanic	62.7	68.4	72.2	76.2	80.7	84.6	87.4	90.3	92.3	92.3

Again, this will slow down our goal as a Nation to have all Americans gain access to Internet services.

## Conclusion

These numbers convinced me that, in this case, government intervention with network management practices of the broadband providers would hurt our community. I strongly believe that the burden of the significant investment that needs to be made to the network must be born by the cost-causers, in this case, heavy users and broadband hogging content providers.

This will truly bring an Open Internet, free and democratic, to our communities.

*Jorge Bauermeister is a former Commissioner for the Puerto Rico Telecommunications Regulatory Board. During his 15 year career as a telecommunications attorney he chaired NARUC's Consumer Affairs Committee and actively participated as part of the leadership of NARUC's Telecommunications Committee and its Board of Directors. His experience in politics, industry and government service provides him with a unique perspective on issues impacting both consumers and industry alike. His hope is that this blog will serve as a valuable resource for the Latino community in their efforts to gain greater accessibility to the Internet and expand Latino ownership of media outlets.*

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[1] Comments of Comcast Corp., at 14, WC Docket No. 07-52 (Feb 12, 2008).

[2] These statements were made in a panel organized by the Free Press during the National Association of Hispanic Journalists in Denver Colorado, June 2010.

[3] Verizon solved this issue in less than 24 hours.

[4] FreePress Press Release, <http://www.freepress.net/press-release/2010/7/15/free-press-urges-fcc-restore-broadband-oversight-authority>.

[5] These statistics, as well as the rest of the tables in this article were included in this study by: Shapiro and Hassett, Georgetown Center for Business in the McDonough School of Business of Georgetown University. A New Analysis of Broadband Adoption Rates by Minority Households, June 2010.