

Federal Telecom Legislation and Net Neutrality

The federal telecommunications legislative process for revision of the Telecom Act of 1996 is likely to be similar to the process that led to its enactment nearly 10 years ago. What is different now is that the first commercial web browser (introduced in 1995) had no influence on that legislation and the Internet was scarcely on anyone's legislative radar screen. In the 10 years since we began interacting via the World Wide Web and using web browsers and web-enabled applications, the world has become "flat" (to borrow a term from Thomas Friedman's recent book). Much of the global economic growth and economic productivity gains of the past decade can be attributed to the Internet.

What is likely to be the same in the current legislative process is that the corporations making the most campaign contributions and hiring the best lobbyists are likely to prevail unless legislators hear that very large numbers of their constituents are paying attention, have a different idea, and may vote to unseat them if they don't take a different view. The telecommunications industry continues to be the industry with higher expenditures on campaign financing and lobbying than any other industry. Within that industry, the Regional Bell Operating Companies (RBOCs) spend more than anyone else. The battles leading to the 1996 act can be described as battles of the oligarchs, with the regional bell operating companies as the most powerful oligarch and the long distance companies, led by the then still powerful AT&T, as the main opponent. The bill was perceived at the time to be a compromise between the local and long distance segments of the industry. In retrospect, it is clear that the RBOCs won, hands down. Almost everything the two industry segments agreed on was included in the "compromise" legislation. Everything the RBOCs didn't like was left out or was fought out and often changed at the Federal Communications Commission (FCC). If the RBOCs didn't win at the FCC they took it to the courts and used the legal system to overturn or delay anything they didn't like. The measure of their success last time is that SBC is buying AT&T, Verizon is buying MCI, and Sprint has transformed itself into a wireless company. The long distance segment of the industry has been absorbed back into the traditional local phone companies, which used their monopoly power over local phone lines to win the political power battle over the rest of the industry. It is ironic that SBC, which earlier purchased two other RBOCs created by the split up of AT&T in 1984, will now assume the AT&T name after putting most of the pieces of the former AT&T back together.

This time the two oligarchs in the battle in Congress are the much strengthened RBOCs and the cable companies. As these two oligarchs jockey for power, the issues they agree on are likely to be seen as less controversial and easily included in "compromise" legislation. It will be difficult to pass legislative items that both oppose. Both oligarchs want less regulation, no requirement to build out their broadband networks to poorer or more rural neighborhoods or communities, no local franchising requirements and no restrictions on their rights to control content. They may be willing to

have a small “universal service fund” surcharge if that is necessary to make the rest of politics work, but they are likely to oppose it to the end and make it as small and meaningless as possible.

The more important legislative battle is a real David and Goliath affair: The entrepreneurs versus the oligarchs. The economic growth of the past ten years has been the result of the entrepreneurs, who have taken advantage of the fact that the Internet has been open to all without any party censoring the content or restricting the development of new applications. In the economic competition of the past ten years the entrepreneurs have been handicapped by the failure of the oligarchs to build adequate broadband infrastructure, so that the US has dropped from first to 16th in the ranking of countries with broadband deployment. Nevertheless, the entrepreneurs have brought about the flattening of the world in just ten years. Innovative Internet applications such as Voice over Internet Protocol (VoIP) have killed the analog telephone network as we knew it. (Because of widespread adoption by large corporations, VoIP already accounts for about 50% of long distance telephone traffic.) The success of the entrepreneurs and the success of the US economy are now threatened by the oligarchs. By preventing legislative restrictions on their right to control the content and applications that run on their broadband networks the oligarchs can stop any entrepreneurial activity from threatening their core businesses and allow them to extract oligopoly profits from the applications they do permit. If the oligarchs succeed, expect their shareholders to benefit, but also expect US economic growth to stall back to the level of other countries that defend oligarchy capitalism and inhibit entrepreneurship. (Think of the US as a “banana republic” in the 21st century with very modest economic growth—less than the current two to three percent—while China and India continue to grow their economies at a compound growth rate of closer to eight percent.)

The FCC has adopted a “policy” of net neutrality. The following FCC press release summarizes the FCC position.

“FOR IMMEDIATE RELEASE:
August 5, 2005

NEWS MEDIA CONTACT:
Mark Wigfield, 202-418-0253
Email: mark.wigfield@fcc.gov

FCC Adopts Policy Statement

New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet

Washington, D.C. – The Federal Communications Commission today adopted a policy statement that outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4)

consumers are entitled to competition among network providers, application and service providers, and content providers. Although the Commission did not adopt rules in this regard, it will incorporate these principles into its ongoing policymaking activities. All of these principles are subject to reasonable network management.”

However, the oligarchs have taken the position that the FCC has no basis in law to support these policies or to implement rules to enforce them. They oppose the inclusion of net neutrality principles in federal legislation. The CEO of SBC (soon to be renamed AT&T) has been quoted in the press as saying that people are “nuts” if they think SBC will let others (presumably VoIP and video service providers or providers of other new applications) access SBC’s lines “for free.” He appears to be arguing that even though consumers pay SBC for their broadband Internet access lines, SBC should be able to censor or restrict their customers’ right of access to applications that might compete with services SBC offers or might offer in the future.

The two major RBOCs, SBC and Verizon, accepted, as a condition of getting FCC approval for their mergers with AT&T and MCI, that they will abide by the FCC open access to the Internet principles for a period of two years. After that, they would be free to block their customers from using Internet applications other than those offered by the oligopoly broadband providers. Both the cable companies and the RBOCs have consistently said that they have no incentive to invest in broadband infrastructure unless they have the right to control the content that is transported over “their” infrastructure.

Without legislation supporting net neutrality, the nice-sounding FCC policy statement is an unenforceable toothless tiger, even during the temporary two-year period SBC and Verizon have agreed to. Even if the FCC, without explicit legislative authority, could enforce and defend in court the policy as adopted, the loopholes in the current policy are sufficient to serve the purposes of the oligarchs. The “subject to reasonable network management” clause could be used to block any application that uses a large amount of bandwidth in order to “prevent network congestion or blockage.” In other words, anyone wishing to sell video on demand services over broadband Internet links in competition with RBOC or cable video services would be out of luck. The “subject to the needs of law enforcement” loophole could be used to block VoIP providers that don’t meet “wiretapping” standards drafted jointly by the monopoly broadband providers and law enforcement officials. If new Internet applications required prior approval from law enforcement officials, it would be folly to expect new applications to be developed and deployed.

If broadband access to Internet content, applications and services in the US becomes subject to censorship by the oligarchs, then the US economy is at risk. Even through the Chinese government attempts to block access to political content, they at least keep their network open to entrepreneurial economic activity. Censorship by powerful private economic interests in the US would have a more serious negative impact on our economy than political censorship has on the growth of the Chinese economy.

The stakes are huge in this battle. Let's support the entrepreneurs against the oligarchs in the battle to determine the future of the US economy.