



Remarks by PPI Senior Fellow Hal Singer at the FCC Open Internet Roundtable

“Economics of Broadband: Market Successes and Market Failures”

Federal Communications Commission

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Remarks as Prepared for Delivery

I'd like to thank the Commission for including me on this esteemed panel. Given my experience in working for independent cable networks in several discrimination complaints before the FCC, I hope to bring a fresh perspective on how the FCC should address discrimination by ISPs against independent content providers.

I would like to make five simple points in favor of a case-by-case approach to adjudicating discrimination complaints on the Internet.

First: Economists and engineers who have studied the issue of priority service unanimously believe that a market for priority *could* be a good thing for all parties to the transaction, including broadband customers.

While priority arrangements could be used by an ISP for bad reasons—like favoring its own content or an exclusive app provider—priority could also be used for good reasons. The packets associated a *life-saving* telemedicine application demand better treatment than the packets associated with a cat video. Both the app provider and the customer benefit because the customer gets to experience the real-time app in all its glory. And the ISP finds a new source of revenue. It's a win-win-win. This is why we don't want to ban *all* priority deals—we just want to eliminate the harmful ones. And that argues for a case-by-case approach over a blanket prohibition.

Second: Not only do all parties to the priority transaction benefit, no third party is worse off with priority.

Net neutrality proponents counter that an upstart app provider that can't afford the upgrade is worse off, but that's only the case if the ISP *degrades* the connection of app providers that decline priority. If the ISP were to keep whole those apps that decline priority, then there is no impairment in any meaningful sense. This is why we need to distinguish between “No Slow Lanes” and “No Fast Lanes.” The former would ban ISPs from degrading service for those who decline priority, while the latter would prevent ISPs from offering any priority. Proponents of strong net neutrality claim without a shred of evidence that the mere *thought* of a priority deal occurring would cause fragile upstarts to shudder their business plans.

Third: The leading proponent of strong net neutrality acknowledged in last week's FCC Roundtable that priority could be a good thing so long as it is user-directed and users pick up the tab.

This was a *brave* admission and it opens up the door for a break-through compromise. Users served by two or more ISPs already have an implicit say on harmful priority deals by voting with their feet. But to make their say explicit, we can involve end users in crafting priority arrangements. As soon as one acknowledges that priority could benefit broadband customers, the claim that all priority should be banned evaporates. With respect to the suggestion that only end-users can pay for priority delivery, this is blatant protectionism for content providers. No economic model would ever require the *more* price-sensitive party pick up the tab for a service. While the model of Dr. Economides solved for the *conditions* under which a user-pays restriction generates benefits for content providers in excess of consumer harm, it turns out those conditions likely are not satisfied in the real world. In any event, a user-pays restriction harms users under any parameterization of his model.

Fourth: Even if the FCC wanted to ban priority outright, there is no guarantee that Title II is up for the task.

Trying to ban priority under section 706 is what got the FCC's 2010 order vacated by the D.C. Circuit, which said: "If the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of \$0, we see no room at all for 'individualized bargaining.'" Net neutrality proponents are advising Chairman Wheeler that, if he wants to ban all forms of priority, he would be better off using Title II. But even advocates of common carriage concede that Title II would *permit* priority arrangements. Their only hope of banning priority under Title II is to get the Commission to declare all priority to be "inherently unjust," as it did with certain conduct in *Carterfone* and *Computer II*. But the conduct in those cases is far removed from merely offering priority to third parties, and the competitive circumstances are entirely different. The FCC can evade this trap by permitting priority and policing it on a case-by-case basis.

Fifth: The critiques of case-by-case should not persuade the Commission to embrace a blanket prohibition on priority.

As the economic expert in several discrimination cases against cable operators, let me be the first to admit that the FCC's adjudication process could use some tweaks. It takes too long, can be expensive for upstarts, and fails to provide relief even after the plaintiff prevails on an Administrative Law Judge and a majority of Commissioners that discrimination has occurred. But the Commission is starting from a blank slate here, and can address these challenges when it designs the ground rules. The costs associated with using a case-by-case approach—even under an imperfect process—pale in comparison to the costs that would be inflicted on the Internet ecosystem from an investment slowdown if we embrace common carriage.

Thank you for your time.

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