

Senator Grassley's Written Questions for Senate Judiciary Committee Hearing, "Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules" – September 17, 2014

Questions for Dr. Eisenach

1. Proponents of net neutrality claim that if we want broadband Internet access to operate in a manner that preserves the Internet's open character, then the best approach is to establish that expectation in advance through regulation.
 - a. Do you agree with this approach? Will regulation-before-the-fact preserve and promote the Internet's openness better than, let's say, targeting an actual market failure or anti-competitive behavior that has occurred?

Answer: I do not agree that regulation is needed to protect the open nature of the Internet. Indeed, broadband networks have operated without the sort of regulation now being considered from the very beginning – for nearly two decades – and the number of alleged (not necessarily actual) Net Neutrality violations advanced by Net Neutrality advocates can still be counted on one hand.

- b. In a dynamic, ever-changing environment such as the Internet, is there a greater justification for ex ante regulation as compared to ex post enforcement?

Answer: No. Ex ante regulation is especially costly in dynamic markets, where it inhibits the innovation and technological progress which are responsible for improving consumer welfare creating economic growth. Regulations take years – in the case of Net Neutrality, a decade and counting – to put in place, while markets may be transformed in a matter of months. Ex post enforcement of competition principles, on the other hand, has the capacity to adjust as markets change.

2. I asked this question at the hearing, but would like you to give a more detailed response in writing. It has been argued that antitrust analysis is purely a numbers game that doesn't take into account important non-economic values.
 - a. Do you agree? Does an antitrust analysis only consider financial and economic values, or can it, in fact, constitute a broader consumer welfare-based analysis that looks at other consumer values?

Answer: Antitrust answer is focused on protecting the competition and, by so doing, enhancing consumer welfare. The underlying values behind antitrust are grounded in the

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principles of individual liberty and empowerment: By precluding anticompetitive actions that may create or preserve monopoly power, they ensure that all Americans have an opportunity to enter markets and compete on an equal footing. At the same time, they promote and protect the ability of all citizens to create and market products and services that are valued by their fellow citizens and consumers – without political interference or excessive government control. In the realm of speech, antitrust prevents large and powerful entities from using unfair practices to prevent others from speaking out, while at the same time protecting the rights of all parties (the powerful as well as the weak) to engage in speech-related commerce so long as they do so without engaging in exclusionary or other harmful conduct. To be sure, the antitrust laws are not social policy, and they do not provide a basis for “industrial policy” or legitimize policies that consciously seek to favor one group or business over another. But whatever maybe said in favor of such policies, they cannot in general be promoted as favoring “consumer welfare.”

3. It has been claimed that we have had a *de facto* net neutrality policy regime for the past 20 years. Do you agree with this observation? Why or why not?

Answer: The answer to this question depends someone on how one defines “net neutrality policy.” It is simply not accurate to suggest that the FCC has had in place regulations that resemble in any meaningful way the regulations now being considered. It is, however, true that the “un-regulatory” policies put in place beginning under the Clinton Administration in the late 1990s have resulted in the most open and empowering communications technology in history, and in that sense have advanced the causes espoused by many Net Neutrality advocates.

4. It has been claimed that the Internet needs “basic rules of the road to ensure that it remains open.” Do you agree with this sentiment? Would adopting clear rules provide marketplace certainty and promote investment? If so, what rules specifically should we adopt?

Answer: The basic rules of the road required for the Internet to continue to prosper are contained in the extensive laws and regulations already in place, including the antitrust laws, Section 5 of the Federal Trade Commission Act, and a wide variety of privacy and consumer protection laws and regulations in place at both the Federal and state levels. The “basic rules” being proposed by the FCC, on the other hand, would create the impetus for further regulation, litigation and lobbying activity that lead to tremendous regulatory uncertainty and thereby impede investment and innovation.

5. Some net neutrality proponents argue that without government regulation, certain content providers may be prohibited from getting their content online. Do you agree or disagree with this statement and why?

Answer: There is no basis for concluding that ISPs would discriminate against content providers. Rather, the net neutrality rules would themselves prove to be discriminatory, as the FCC set out to decide which classes of Internet users should be given favorable treatment and which should be discriminated against. The current proposals, for example, prohibit ISPs from charging content providers to use their networks, but place no restrictions on their ability to charge consumers, who as a result would bear the full costs of supporting the network.

6. You testified that free market principles should guide the interactions of a dynamic internet ecosystem. However, another witness testified that there should be an internet market “open to all.” Are these two principles compatible under economic theory?

Answer: The “open to all” thesis is a canard. The question is who will pay for what. As described in my response to question 5, under the net neutrality rules as proposed, consumers pay for 100 percent of the network while content and other edge providers are given free access. So, “open to all” means “open to all corporations but only open to consumers for a fee.” In a market-driven system, costs are allocated based on the value created and the benefits received by all parties.

7. It has been said that there is a “strong argument that Internet access is a “telecommunications service”” within the definitions of the Communications Act.
 - a. Do you agree with this assertion? Why or why not?

Answer: I am an economist and not an attorney, but it is my opinion that the FCC’s decisions finding that the “information service” aspect of Internet access is inseparable from the telecommunications aspect, and therefore that Internet access is not appropriately classified as a telecommunications service, are sound from an economic perspective.

- b. How would classifying Internet access as a Title II “telecommunications service” result in the regulation of the larger Internet ecosystem? Are you concerned that it could possibly ensnare other things like content, applications or edge providers? How could that impact the Internet?

Answer: Yes. Classifying Internet access as a Title II service would risk setting off a free-for-all in which all firms in and around the Internet ecosystem would seek favorable treatment under the resulting rules. Because computing and communications are inextricably interwoven in the modern Internet architecture, and becoming more so, there are no clear boundaries by which to distinguish between “exempt” and “non-exempt” services. The result would be the

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politicization of decisions regarding relationships between players in the Internet ecosystem which heretofore have been made through pragmatic, flexible, market-based processes.

8. I've heard concerns that vertical contracts between ISPs and content providers – such as “paid prioritization” agreements and differentiated pricing structures – will only harm consumers and the Internet marketplace overall. It has been claimed that the proposed FCC regulations are necessary to “preserve” the freedom and openness that has until now been a central characteristic of the Internet.
 - a. Are these concerns warranted?

Answer: To the extent vertical contracts and pricing structures evolve from market-based negotiations, subject to oversight under the antitrust and consumer protection statutes, they are highly likely to increase consumer choice and improve consumer welfare. Concerns to the contrary are not warranted.

- b. Are there any benefits or efficiencies that consumers will gain from such arrangements?

Answer: Yes. “Zero-rating” or “sponsored data” plans are a specific example. Under such plans, content providers subsidize the ability of “marginal” consumers (those who cannot afford to pay the full costs of mobile data plans) to access online content, such as Facebook or Twitter. Under such plans, content providers pay more and consumers pay less, thus benefiting consumers. From a broader economic perspective, such “competitive price discrimination” increases overall economic efficiency by allowing content providers and ISPs to recoup the fixed costs of providing their services while still offering the most price-sensitive consumers the ability to participate, and offering all consumers the positive “network effects” generated by extending the Internet ecosystem.