

# **Moving Slowly in the Fast Lane: A Comment in Response to Profs. Wu and Yoo**

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The network neutrality discussion has been going on now for two years or more, and the arguments are well-rehearsed and rarely break new ground. It is beyond time to reframe this debate. If the policy problem we are trying to solve is “getting highspeed internet access to more Americans,” we are making very little progress. The network neutrality debate is a symptom of that problem, not a cause, in at least two ways. First, if we had more competition in internet access, someone would find it worthwhile to provide neutral (non-prioritized) access and we wouldn’t be having this debate. Second, if we had more competition in internet access, someone would find it worthwhile to cover previously unserved areas of the country. Bob Cringely suggests in an online column today that the game is already over:

[N]ow we’re in the middle of the pack [for broadband penetration] among developed countries and there are nine DEVELOPING countries that have more and better

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broadband service than does America according to the Organisation for Economic Co-operation and Development (OECD). To those who say this is BS and that we're actually ahead of the world if you control for rural populations, family size, the effect of Wi-Fi hotspots, etc., I say that is simply wrong: we are behind and losing ground. . . . There are many reasons for this change of circumstance, but *much of it comes down to government policy or lack of it* and some of it comes down to pure luck.<sup>1</sup>

In my view, the FCC is asking the wrong questions and heading in the wrong direction. We need new leadership in this country that has the political muscle to implement radical change. A key national priority, on a par with funding Head Start programs and adequate national healthcare, must be to ensure that access to an unfettered internet is universal, speedy, and cheap.

Thirty years ago, two-way communications in this country were controlled by Ma Bell. After eight years of litigation, AT&T agreed to divest itself of its local telephone companies, and those local telephone companies (the "Baby Bells") agreed not to leverage their local monopolies into the market for long distance service.<sup>2</sup>

Where are we today? The Baby Bells have re-consolidated. Telephone service in this country is essentially controlled by AT&T (in the West) and Verizon (in the East), with Qwest filling in gaps. And two-way

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<sup>1</sup> Robert X. Cringely, *Game Over: The U.S. Is Unlikely Ever To Regain Its Broadband Leadership*, WeeklyColumn, PBS.org, Aug. 3, 2007 (emphasis added), available at [http://www.pbs.org/cringely/pulpit/2007/pulpit\\_20070803\\_002641.html](http://www.pbs.org/cringely/pulpit/2007/pulpit_20070803_002641.html).

<sup>2</sup> As of January 1, 1984, AT&T's local operations were split into seven independent Regional Bell Operating Companies known as "Baby Bells." The resulting Baby Bells were originally Ameritech (now part of AT&T), Bell Atlantic (now part of Verizon), BellSouth (now part of AT&T), NYNEX (now part of Verizon), Pacific Telesis Group (now part of AT&T), Southwestern Bell Corporation (now part of AT&T) and US West (now part of Qwest). This separation of competitive long distance services from monopoly local exchange services was driven by "skepticism that regulatory authorities could otherwise stop an integrated monopoly from engaging in predatory conduct (such as discriminatory interconnection) in adjacent markets." Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 94 (2003).

communications in this country – which, these days, means highspeed internet access – are controlled by a duopoly of Big Phone and Big Cable.<sup>3</sup> Many Americans don't have a choice of highspeed providers, and, as Consumers Union, Consumer Federation of America, Free Press, Media Access Project, and U.S. Public Interest Group recently told the FCC, “Americans pay 10 to 20 times as much [as people do in other countries] for far less service.”<sup>4</sup> The duopoly is something like Shamu and Godzilla on hire for televised wrestling – giant beasts gently swatting at one another for the cameras. They aren't competing, these giants. There is a clear failure in the market for highspeed internet access in this country.

Even people who don't often think about interactive communications have heard that the U.S. is lagging far behind many other developed nations when it comes to highspeed internet access. As with other key infrastructure issues – like Head Start, healthcare, and highway bridges – we just don't seem to care about giving our people a firm foundation for life.

Network operators, the Shamus and Godzillas of interactive communication in this country, want to control and monetize highspeed access to the internet.<sup>5</sup> They believe that they can and should control this

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<sup>3</sup> See S. Derek Turner, *'Shooting the Messenger': Myth vs. Reality: U.S. Broadband Policy and International Broadband Rankings*, FREE PRESS, Jul. 2007, available at [http://www.freepress.net/docs/shooting\\_the\\_messenger.pdf](http://www.freepress.net/docs/shooting_the_messenger.pdf).

<sup>4</sup> See *In the Matter of Broadband Industry Practices*, WC Dkt. No. 07-52, Comments of the Consumer Federation of America, Consumers Union, and Free Press, June 15, 2007, at 1, available at [http://www.freepress.net/docs/fp\\_net\\_neutrality\\_noi\\_fcc\\_filing.pdf](http://www.freepress.net/docs/fp_net_neutrality_noi_fcc_filing.pdf).

<sup>5</sup> See, e.g., Apr. 3, 2006; BellSouth statement on network neutrality: “Broadband network providers should be able to offer different plans that feature enhanced levels of service or that promote their own brand names and products or the services of selected vendors. For example, BellSouth should be able to enter into arrangements with content providers by which the content provider pays for special treatment, such as preferential listing or faster downloads from that provider's website or receiving higher quality of service.” Dionne Searcy and Amy Schatz, *Phone Companies Set Off a Battle Over Internet Fees*, WALL ST. J., Jan. 6, 2006 (quoting Verizon's Ivan Seidenberg: “We have to make sure they [content providers] don't sit on our network and chew up our capacity. We need to pay for the pipe.”), available at <http://www.freepress.net/news/13218>; Vince Vittore, *Cable flying under net neutrality radar*, TELEPHONY ONLINE, Mar. 6, 2006, available at [http://telephonyonline.com/mag/telecom\\_cable\\_flying\\_net/](http://telephonyonline.com/mag/telecom_cable_flying_net/) (noting introduction of products that will allow cable network managers to prioritize their own content while relegating other material to “best efforts” status); Joseph Waz, *Keynote Remarks*, Broadband Policy Summit, Washington, D.C., May 10, 2006 (calling for freedom for “network builders”); Dan Brenner, NCTA, Apr. 25, 2006

complex system by, among other things, deliberately degrading upload speeds<sup>6</sup> (so that we users can't produce and host our own materials) and keeping highspeed access for their own content.

Many other countries have taken a hard look at their communications policy and have understood that communications and economic growth are tightly intertwined. Economic growth is driven by new ideas creating ever-newer goods and services and new ways of making a living. We have never had an interactive communications platform like the internet before – it's capable of producing enormously diverse ideas (in the form of new niches, new roles, and new understandings of information) and allowing them to be disseminated on a large scale. Universal highspeed access to the internet could trigger crucial economic growth that would benefit U.S. society as a whole.<sup>7</sup>

And this access has to be fast. We are beginning to see the video future of the internet, and that future requires that information flow far more quickly over the now-monopoly-controlled local bottlenecks in this country than it does now.

We should care about the economic health of our country. Access to the internet at high speeds should be something that we make available to everyone in the U.S. as a public infrastructure. We don't even know what we'll be capable of using this access for – yet – because our expectations

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NPR remarks, *available at* <http://www.npr.org/templates/story/story.php?storyId=5362403>: "Companies that have spent money and have not been rewarded by Wall Street...[like cable] allow[] companies like Google to thrive . . . . Let's say someone wanted to get a broadband delivery of a wedding. Companies should be able to charge for this."

<sup>6</sup> All highspeed internet access providers in the U.S. provide slow upload speeds. These networks were designed on the assumption that people would be downloading, not uploading. In particular, cablecos and telcos want to have enough bandwidth to sell their own movies. The last was cited by Cisco's chief cable architect as the reason DOCSIS 3.0 is designed for 1 gig down, 100 meg up, where the technical constraints are irrelevant - the cablecos make money on various downloaded services (e.g., Video On Demand) but not on anything consumers upload. Because the backhaul (the internet backbones) are symmetric and more traffic goes downstream, the additional cost of giving every customer greater upload speeds is negligible. So every customer could get symmetric service at no cost except the opportunity cost of the customer not upgrading to the more expensive service. Verizon currently charges \$19.95 for 768K/128K and AT&T charges a similar amount. For the same operational cost, they could provide 768K symmetric. *See* email David Burstein to Susan Crawford, Jan. 15, 2007 (on file with author).

<sup>7</sup> *See* Susan P. Crawford, *The Internet and the Project of Communications Law*, \_\_\_ U.C.L.A. LAW REV. \_\_\_ (forthcoming 2007).

have been so dimmed by the craven practices of our local Shamus and Godzillas.

In an ongoing regulatory fact-finding mission (undertaken because the Commission didn't have the political will or sensitivity to actually act), the FCC is asking whether anyone using a U.S. network operator has been blocked from accessing particular sites.<sup>8</sup> That's the wrong question, as Consumers Union and its colleague advocates have told the Commission. The FCC should instead be asking why we haven't mandated competition for highspeed access by requiring that all providers sell unfettered transport services at wholesale rates into a competitive market for retail transport. Even better, Congress should take the reins and demand that the duopolies divest themselves of their transport services so that they aren't tempted to try to monetize internet access in favor of their own movies and phone services.

But for the FCC and Congress to change direction and start asking the right questions will take leadership. We don't have that kind of leadership now. All acts are incremental; all steps are taken with the advice and approval of the incumbents. We don't have a national economic policy that is tied to internet access because no one is willing to step up and lead. Sen. Kerry made a good speech at a recent hearing about auctioning off key airwaves,<sup>9</sup> but even if that auction is run as he suggests (and it won't be) it won't solve the larger infrastructural problem.

Meanwhile, Moscow has two-thirds (600,000) of the fiber connections (about a million) we now have in the entire U.S. (those U.S. connections thanks to Verizon's FiOS program).<sup>10</sup> David Weinberger has explained that structural separation (separation of transport from content) is essential.<sup>11</sup> Steve Levy recently had a fine piece pointing out that "Americans are paying more to putter around the Net at golf-cart speeds than citizens elsewhere spend to race around the Web in Porsches—often seven to 10

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<sup>8</sup> See *In the Matter of Broadband Industry Practices*, WC Dkt. No. 07-52, 22 F.C.C.R. 7894, 7897 (2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-31A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-31A1.doc).

<sup>9</sup> See Statement of John F. Kerry, Senate Commerce Cmte. Hearing: The 700 MHz Auction: Public Safety and Competition, Jun. 14, 2007, available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement\\_ID=266](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=266).

<sup>10</sup> *FTTx and DSL in tussle for Moscow market share*, POINTTOPIC, Jul. 3, 2007, available at <http://point-topic.com/home/press/dslanalysis.asp>.

<sup>11</sup> David Weinberger, *Delamination Now!: How To Keep the Internet From Going the Way of the Princess Phone*, Jul. 4, 2007, available at <http://www.hyperorg.com/misc/delamination.html>.

times as much.”<sup>12</sup> At the same time, the FTC has issued a report saying that, basically, all things considered, when you look at the situation in a certain way, everything is just fine.<sup>13</sup>

At this point in our country’s history, the strongest metaphor, the most convincing argument, has a hard time getting through and having an effect on policy.<sup>14</sup> This is a strange, blank-walled time; it will be difficult for Weinberger or Levy to get even a response, much less feel that they’re having an impact.

We need much more from our national leaders. Who will be the candidate who will understand this central issue? We’re waiting, but in the meantime we’re moving excruciatingly slowly in the supposed American fast lane.

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<sup>12</sup> Steven Levy, *True or False: U.S.’s Broadband Penetration is Lower Than Estonia’s*, NEWSWEEK, Jul. 2, 2007, available at <http://www.msnbc.msn.com/id/19389299/site/newsweek/>.

<sup>13</sup> *Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report*, June 27, 2007, available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>. FTC Commr. Jon Leibowitz took a different approach in his Concurring Statement, saying “[t]here is a real reason to fear that, without additional protections, some broadband companies may have strong financial incentives to restrict access to content and applications.” Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: “Broadband Connectivity Competition Policy,” June 27, 2007, available at <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>.

<sup>14</sup> In the past ten years, telecommunications, broadcasting and cable companies have spent more than half a billion dollars on lobbying efforts. See Common Cause report, Mar. 2006, available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/TELECOM-LOBBYING-DATA.PDF>.