Before the
Federal Communications Commission

In the Matter of

Open Internet Remand
GN Docket 14-28

Framework for Broadband Internet Service
GN Docket 10-127

Comments of Floor64, Inc. / Techdirt.com

July 14, 2014

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Executive Summary:

Floor64 is an online media, research and consulting company, most well known for the Techdirt blog and community, as well as for its research into key trends and issues related to technology, technology policy, law, economics, innovation and business models. The company was started by me, first as a hobby email newsletter in 1997, then later as a hobby website, eventually turning it into a full-fledged business in early 2001. Over the years, Techdirt has written about and reported on a number of key issues related to the internet and technology policy, as it relates to innovation. For example, a study from the Berkman Center at Harvard University on the reporting that occurred around the 2011/2012 debate on the proposed SOPA and PIPA copyright laws found that Techdirt was the "single most important professional media site over the entire period, overshadowing the more established media." As a company, we have also done research into technology trends and policy for a number of Fortune 500 companies, including Volkswagen, Dell, IBM, Oracle and SAP.

This entire business was built on the basis of a free and open internet. After starting out as a simple email newsletter, we put up our first website on a $30/month shared web serving company that I found late one night in 1998 after doing a web search (pre-Google). Today, we're still hosted by that same company, but with multiple dedicated servers, rather than a shared platform. We were able to build our business thanks to that ease of getting on the internet and having our work available to anyone at the same level as major media companies many thousands of times our size. To this day, I've never met in person the small team at our hosting company who manages our servers. Instead, we've built a successful business entirely over the internet, in which this team helps manage much of our infrastructure and allows us to compete on an equal playing field with every other site.

We fear that with the current proposed rules, this ease of building a business online, which was so crucial to us, would become next to impossible for the next generation of internet companies. The next person kicking off something as a hobby and hoping to turn it into a business might find that rather than being able to quickly jump on a cheap hosting plan to build her business, she'll have to worry about paying additional fees to guarantee that her site will actually load at a reasonable speed so the public does not just move on to a large, established player who paid up for the fast lane.

Furthermore, given our role in often writing about and criticizing existing dominant broadband access players and various front groups they have funded, we are quite concerned that any setup involving priority access to some parties will be denied to us for a variety of reasons really aimed at limiting our speech and participation in these debates. While we might be able to sue at the FCC for the harm created, as a small business with no full time lawyers or lobbyists our ability to protect ourselves would be significantly limited -- allowing broadband access providers an easy way to stifle criticism coming from sites like ours.

Under the proposed rules, relying on Section 706, the FCC would be powerless to stop such priority agreements, so long as broadband access providers can argue that they are "commercially reasonable." Instead, we urge the FCC to make use of Title II, in combination with strong forbearance rules, to truly prevent discrimination by broadband access providers, allowing the internet to remain open and free for innovation and competition.

In addition, we urge the FCC to recognize that the current debate over interconnection is not a different issue, but the other side of the same coin. It is how the large broadband access providers have tried to move the debate upstream, to use their market power to get internet companies to double-pay for the same traffic they already sold their end users, creating the equivalent fast and slow lanes, even if not at the last mile.

Finally, we urge the FCC to focus more on improving competition in the broadband space and removing barriers to entry. This starts with using its power to remove state and local laws that have created de facto monopolies or oligopolies on broadband internet access, blocking out competing access to the same rights of way as the large broadband players received (often by using Title II to their own advantage). Further, the FCC should do as much as possible to increase the opportunity for additional forms of non-discriminatory broadband access, such as by freeing up much more spectrum for use in open ways.

Floor64 and Techdirt

Without the open internet, Floor64 would not exist today. Started on a whim, initially as a hobby, it was only possible because, at first, I could send around emails, and then I could expand to the web for the low price (then) of a $50 domain name and $30/month web hosting -- which enabled me to put up a website that could easily compete with the NY Times or the Washington Post. Over the years, Techdirt has built a strong and loyal community, as we've reported on numerous issues related to technology, innovation, tech policy, broadband, intellectual property and more.

As we've grown as a business, we've been able to expand our infrastructure as well, making it more robust, moving from a shared server to a dedicated server, then two and eventually many dedicated servers. We've been able to make use of a variety of internet tools and services to make sure that visitors to our site can get it to load quickly, keeping it resistant to downtime and providing an enjoyable experience across the board.

Throughout this process, we knew that we only needed to focus on our own infrastructure. If we also had to worry about making sure we had priority access to various internet service providers just in order to "keep up" with the competition, not only would it have created an administrative nightmare, but it likely would have priced us out of business entirely.

The media business is a low margin business, often heavily reliant on the highly variable and cyclical advertising market. If we also had to pay each and every broadband access provider to make sure that we could stay competitive, we would not be able to do so.

As a small media business, we are not afraid of competition. Rather, we thrive on it. We learn from other media websites, both large and small, and expect them to learn from us. This allows us all to innovate and learn, figuring out ways to better serve our community with news, information and analysis they need and want. The explosion over the last decade and a half of alternative media forms has been a tremendous boon to knowledge and innovation. The rise of blogs, new media sites and all sorts of other outlets for speech and communication has created a wonderful marketplace of ideas and an opportunity for many new voices to be heard.

This is only possible thanks to a free and open internet, in which the barriers to entry are low, and the ability to get online in a manner equal to the NY Times is as easy as clicking a few buttons. A system that involves picking winners and losers would lead to the erosion of such a marketplace of ideas, again cordoning off voices and ideas, by making it impossibly hard for the marginalized to speak out.

Furthermore, as a frequent critic of legacy broadband access providers, it does not seem unreasonable to fear that these players would make use of pretextual reasons to seek to block any attempt we made to make use of a “commercially reasonable” fast lane, in an effort to stifle our criticism. There are existing stories of cable companies rejecting advertisements that criticize those companies[1] showing that this is not an unreasonable or unprecedented concern.

In the NPRM, you specifically ask about the impact of such rules on speech and civic engagement, and we directly fear that paid prioritization rules could be used to stifle sites like ours that are frequent critics of practices by large broadband access providers and various parties they have supported. As unlikely as it may be for the broadband providers to directly target sites like ours or others, too often we have seen how opportunities to limit critics can and will be abused to just that effect. While we could potentially challenge such actions at the FCC, doing so would almost certainly involves costs well beyond what we, as a small business, could handle.

As a small business, with no legal staff or lobbyists, having to challenge whether or not a broadband access provider’s decisions on priority access are “commercially reasonable” would be a regulatory nightmare, cost prohibitive in the extreme and a massive operating distraction.

Title II v. Section 706

In our writings, we are often quite skeptical and wary of over-regulation where it can cause unintended consequences or harm. In the past, we have often been concerned about how the FCC might insert itself too far into the process of regulating the internet. However, it is clear that this is not a debate about “regulate the internet” vs. “don’t regulate the internet.” The internet itself is *already regulated* -- large parts of internet infrastructure are in place due to regulations

[1] http://firedoglake.com/2008/06/10/comcast-rejects-fisa-ads-critical-of-comcast-take-action/

involving local rights of way, franchise rules, spectrum allocation and the like. It is just a matter of how it will be regulated to ensure the principles of an open and free internet that allows end-to-end communications without interference.

Following the appeals court ruling in February, the court expanded the generally believed powers of Section 706, leading to the current proposal to use Section 706 as the basis for new “open internet” rules. This is dangerous in two different ways. First, Section 706 does not allow for rules that truly protect an open and free internet that abides by the end-to-end principles. It does not truly allow for blocking discrimination, leaving a crucial “out” in the form of the phrase “commercially reasonable.” Second, and perhaps even more concerning, is that the broadened view of Section 706 will make it all too tempting for the FCC to wade into other areas of internet regulation in the future, potentially leading to damaging results.

Instead, taking a narrow view of Title II reclassification is the proper way forward. Title II is by no means an ideal solution on its own, but it is clearly the best current option when combined with strong forbearance rules. There is no doubt that Title II was written in a different era, but the core concept behind it still applies. The core infrastructure of the internet is clearly a form of a telecommunications service, not an information service. Telcos themselves recognize this, which is why companies like Verizon quite frequently make it clear they wish to classify their fiber optic lines under Title II regulations, so as to qualify for subsidies, tax breaks and rights of way.

As critics of Title II reclassification note, there are many additional aspects to Title II reclassification, but those can be dealt with via forbearance. By reclassifying broadband access under Title II as a telecommunications service, combined with clear forbearance against using other aspects of Title II, the FCC can create a system that narrowly, but clearly, protects the free and open internet against discriminatory and anti-competitive practices, and encourages innovation and competition, but without burdening anyone with too much regulatory red tape.

As for the concern that Title II reclassification will lead to a lengthy legal battle, it seems likely that the same would be true of the current plan under Section 706. Given that a legal battle is likely to occur under either result, it would be preferable to fight that battle for the right solution.

Interconnection

We also urge the FCC not to view the interconnection fights that have been in the news regularly as a separate and unrelated issue. We are encouraged by the recent moves by the FCC to investigate the nature of new interconnection agreements with Netflix and various broadband access providers, but are still concerned that if viewed as a separate issue, it merely leaves the door wide open for broadband access providers to “agree” to protect net neutrality at the last mile, while merely moving upstream to create the same dangerous result: getting successful internet service providers to pay double for internet traffic delivery, giving them a form of a “fast lane” that others have no reasonable ability to access.

In the past, such interconnection battles seemed unlikely to occur, but as the various broadband access providers have grown and consolidated market power, that is no longer the case. The interconnection fight is merely the other side of the same coin, and pretending that it is unrelated will likely only lead to a solution that is ineffective in both the short and long terms in protecting the free and open internet.

When broadband access providers are allowed to sell consumers a promise of being able to access content on the internet, but then allow their interconnection nodes to clog, rather than doing basic maintenance to make sure they can deliver the traffic requested by their own paying customers, the broadband access providers are playing a dangerous game. They are underserving both sides of the market, in an effort to get both to pay more. It is a move the broadband access providers can only make thanks to their market dominance in the space, and it is a practice that the FCC should be focused on preventing, as it clearly goes against the stated principles of a free and open internet.

Competition

As noted earlier in our comment, as a media company, we thrive on competition. The same is true for many innovative entrepreneurs and startup companies. Unfortunately, that does not appear to be the case for broadband access providers, who have worked quite hard to block competition at nearly every turn. We are encouraged by recent statements from Commissioner Wheeler that the FCC is ready to use its power to block questionable state and municipal laws that have blocked competition, whether from municipalities themselves or from independent third parties. Lowering barriers to entry is a must.

Beyond that, though, the FCC has opportunities to encourage greater competition in other areas as well, including by getting more open spectrum onto the market that can be used to create additional wireless internet access options. Furthermore, as a part of Title II reclassification, there is an opportunity to bring us back to a world where infrastructure providers wholesale their network to many different service providers. Encouraging greater competition at the broadband access service provider level, rather than all the way at the infrastructure level, will also lead to greater choice and opportunity.

Competition alone does not protect a free and open internet. However, Title II reclassification, with strong and clear forbearance, combined with preventing interconnection gaming and a policy of truly encouraging competition at a variety of levels, would help to move the United States towards a more vibrant, competitive and innovative internet. It would help keep the internet open, protect the end-to-end nature, and keep barriers low for everyone to participate in the wonderful world that the internet has enabled.

Conclusion

We are a small, six-person startup. We don't have lobbyists. We have relied on the internet and its open, end-to-end nature to remain in business for the past decade and a half. If that's to continue, we need the FCC to make the move that is most obvious if it honestly believes its statements about protecting a free and open internet: reclassify broadband under Title II where it clearly belongs, with clear forbearance, and make sure that broadband access providers cannot game the system at the interconnection level. On top of that, take steps to really encourage competition in and around the broadband space by ending restrictive, monopoly-guaranteeing local laws, freeing up much more spectrum and looking for additional ways to create true competition among broadband access providers.

By doing that, the FCC can protect the vibrant internet that the public and many small businesses like ours have come to rely on.

Sincerely,

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Publisher of Techdirt