

Network Neutrality Disclosures: More and Less Information

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In December 2010, the Federal Communications Commission (“FCC”) adopted a new Network Neutrality Order that requires broadband providers to publicly disclose practices that might violate Network Neutrality. This Article argues that the Commission must carefully design disclosure rules in order to achieve results that justify the investment of resources in creating, distributing, and consuming information about Network Neutrality practices. In Part I, I provide a brief sketch of the history of disclosure as a Network Neutrality regulation. Disclosure has been a part of the policy debate from its inception and figures prominently in the 2010 Open Internet Order. Though the Order’s future remains uncertain, disclosure regulation in some form is likely to survive a successful attempt at judicial or congressional repeal of the FCC action. In Part II, I outline the potential benefits of mandated disclosure: enhanced competition in the market for broadband services; increased democratic participation in Network Neutrality regulation; improved performance of both regulators and providers; and practical advantages that make disclosure easier to design and enact than other regulatory options. Part III assesses the many ways that mandated disclosure could fail. Finally, I suggest a targeted system that manages those risks by directing more information to regulators, broadband providers, and other repeat players at the FCC while reducing the informational burden on consumers. Instead of

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more information, I argue that the Commission should focus on giving consumers better advice.

I. INTRODUCTION

We are implementing optimization and transcoding technologies in our network to transmit data files in a more efficient manner to allow available network capacity to benefit the greatest number of users.

-- Verizon Wireless User Agreement¹

The next time you subscribe to broadband service, you'll be entering into a contract that contains terms like the one above. In December 2010, the Federal Communications Commission enacted new Network Neutrality regulations, including a requirement that broadband providers disclose the techniques they employ to manage their networks, many of which have direct and indirect effects on the content users will be able to access. Can a transparency requirement be fulfilled by terms so opaque?² This Article looks at the potential benefits of Network Neutrality disclosure regulations and the myriad ways they can (and, as Verizon's agreement demonstrates, do) fail. Those challenges can be overcome by creating a two-tiered disclosure regime: detailed, extensive disclosures for regulators, companies, and consumer watchdogs, and simple advisory disclosures that the Commission can use to provide advice to ordinary consumers.

Itself a reflection of the ongoing struggle over the subject, the term "Network Neutrality" has no fixed, neutral definition.³ Though they lack the teeth of enforceable regulations, the four Internet Policy Principles outlined in the FCC's 2005 Broadband Policy Statement offer a common touchstone:

¹ *Customer Agreement*, VERIZON WIRELESS, https://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (last visited Feb. 19, 2012).

² For a plain-English explanation of this term in Verizon's agreement, see Kevin C. Tofel, *Verizon Soft Caps Make Sense, But Carry a Harsh Penalty*, GIGAOM (Feb. 3, 2011), available at <http://gigaom.com/broadband/verizon-soft-caps-make-sense-but-carry-a-harsh-penalty>.

³ For a routinely updated list of the competing definitions, see *Network Neutrality*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Network_neutrality (last visited Feb. 19, 2012).

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to:

- access the lawful Internet content of their choice;
- run applications and use services of their choice, subject to the needs of law enforcement;
- connect their choice of legal devices that do not harm the network; and
- competition among network providers, application and service providers, and content providers.⁴

These principles, when enforced, protect consumers from a multitude of sins, including existing and anticipated measures that allow providers of Internet access services to discriminate against lawful content, applications, and devices by blocking, delaying, or charging more to transport certain types of information.⁵ Network Neutrality advocates argue that “guaranteeing a neutral network eliminates the risk of future discrimination, providing greater incentives to invest in broadband application development today” and “facilitates fair competition among applications, ensuring the survival of the fittest, rather than that favored by network bias.”⁶ In addition to allaying concerns about social control and freedom of expression, Network Neutrality promotes innovation by ensuring “predictability of the network and a certain security of investment.”⁷

⁴ In *The Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14986, 14987 (2005) (policy statement) [hereinafter *Internet Policy Statement*].

⁵ *See id.*

⁶ *Ex Parte Notice of Tim Wu and Lawrence Lessig, The Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, filed CS Docket No. 02-52 (Aug. 22, 2003) at 3, available at http://timwu.org/wu_lessig_fcc.pdf.

⁷ *Id.*

At the same time, powerful forces have aligned against any attempt to enforce the Principles. For many commentators, Network Neutrality regulations represent a solution in search of a problem. Reports of interruptions in Internet service were and are “isolated.”⁸ For broadband network operators, the kinds of conduct decried by Network Neutrality advocates as interference with the free flow of information are desirable—and perhaps necessary—to maintain high-quality service by managing the flood of increasing traffic.⁹ Internet access service providers also defend their traffic management techniques as protecting fairness; why should the entire network of customers suffer slower speeds in the name of protecting power users’ on-demand access to bandwidth-intense but often frivolous content?¹⁰

The best-documented violation of the Internet Policy Principles, later the subject of litigation between the FCC and Comcast,¹¹ was discovered by a Comcast subscriber in February 2007.¹² Robb Topolski, an engineer at Intel and a fan of (public domain) Civil War-era barbershop music, noticed that his attempts to share his collection online attracted no takers. Topolski’s tests, later recreated by the Associated Press, demonstrated that Comcast was blocking file-sharing programs such as BitTorrent, preventing its customers from using the service to share and receive the lawful content of their choice.¹³ Other invasive techniques allow broadband providers transporting information across the Internet to “read” the contents of those messages and handle them differently based on that

⁸ Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1857 (2006).

⁹ *Id.* at 1874.

¹⁰ See *Customer Agreement*, *supra* note 1.

¹¹ *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 644 (D.C. Cir. 2010).

¹² Daniel Roth, *The Dark Lord of Broadband Tries to Fix Comcast's Image*, WIRED, Feb. 2009, at 55–56.

¹³ Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS, Oct. 7, 2007, available at http://www.msnbc.msn.com/id/21376597/ns/technology_and_science-internet.

information.¹⁴ These tools could be used by private entities to amass unprecedented control over speech and knowledge.¹⁵

After years of failed legislation (some prescribing command-and-control techniques and some barring the FCC from regulating)¹⁶ and a ruling that the Commission lacks the legal authority to enforce the Internet Policy Principles,¹⁷ the FCC has adopted a new Open Internet Order. The Order creates regulations based on the Principles, including rules that mandate disclosure of “network management practices, performance characteristics, and terms and conditions of their broadband services” and some command-and-control provisions that prohibit unreasonable discrimination and blocking of “lawful content, applications, services or non-harmful devices.”¹⁸ A number of Internet access service providers already obey similar rules created as part of consent decrees required for merger approval,¹⁹ the requirements to participate in the 700 MHz wireless spectrum auction,²⁰ and the requirements for grantees under the broadband programs of the American Recovery and Reinvestment Act.²¹ The Order’s transparency provisions became effective in late 2011 after the

¹⁴ *Just Deliver the Packets*, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, <http://dpi.priv.gc.ca/index.php/essays/just-deliver-the-packets> (last visited Feb. 19, 2012).

¹⁵ See generally TIM WU, *THE MASTER SWITCH* 299 (2010).

¹⁶ For an idea of the variety of bills introduced in the first Congress to take up Net Neutrality, see Anne Broche, *Net Neutrality Field in Congress Gets Crowded*, CNET NEWS (May 19, 2006, 2:47pm), http://news.cnet.com/Net-neutrality-field-in-Congress-gets-crowded/2100-1028_3-6074564.html.

¹⁷ For a summary of the history leading up to the Open Internet Order, see Stacey Higginbotham, *A Net Neutrality Timeline: How We Got Here*, GIGAOM (Dec. 21, 2010), <http://gigaom.com/2010/12/21/a-net-neutrality-timeline-how-we-got-here>.

¹⁸ In the Matter of Preserving the Open Internet Broadband Industry Practices, 25 F.C.C.R. 17905, 17906 (2010) (report and order) [hereinafter *Open Internet Order*]. These rules apply somewhat differently to wireline and wireless providers of Internet access services. The transparency requirement that is the focus of this Article applies equally to both types of providers.

¹⁹ In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc., 26 F.C.C.R. 4238, 4249 (2011).

²⁰ In the Matter of Service Rules for the 698–46, 747–62 and 777–92 MHz Bands, 22 F.C.C.R. 15289 (2007).

²¹ Notice of Funds Availability (NOFA) and Solicitation of Applications, 74 Fed. Reg. 33104 (July 9, 2009).

Federal Register announced that the Office of Management and Budget had approved the information collection mandates.²²

This Article argues that the Commission must carefully design disclosure rules in order to achieve results that justify the investment of resources in creating, distributing, and consuming information about Network Neutrality practices.²³ Part I provides a brief sketch of the history of disclosure as a Network Neutrality regulation. Disclosure has been a part of the policy debate from its inception, and figures prominently in the 2010 Open Internet Order. Though the Order's future remains uncertain, disclosure regulation in some form is likely to survive a successful attempt at judicial or congressional repeal of the FCC action. Part II outlines the potential benefits of mandated disclosure: enhanced competition in the market for broadband services, increased democratic participation in Network Neutrality regulation, improved performance of both regulators and providers, and practical advantages that make disclosure easier to design and enact than other regulatory options. Part III assesses the many ways that mandated disclosure could fail. Finally, this Article suggests a two-tiered system that manages those risks by directing more information to regulators, broadband providers, and other repeat players at the FCC while reducing the informational burden on consumers. Instead of more information, the Commission should focus on giving consumers better advice.

II. DISCLOSURE AS A NETWORK NEUTRALITY REGULATION

Among many divergent proposals for Network Neutrality regulation that agree on little else, mandated disclosure is a common theme.²⁴ Early in the debate, disclosure was advanced as a "third way"

²² *Open Internet Order*, *supra* note 18, ¶ 161.

²³ In order to focus directly on the efficacy of disclosure as a method of regulating practices that violate Network Neutrality principles, this Article will leave unaddressed a number of interesting questions at the heart of the Network Neutrality debate. This paper assumes a normative conclusion, embodied in the FCC's current order, that a neutral network is worth pursuing. I also set aside the extensively debated question of whether the Federal Communications Commission has the authority to enact Network Neutrality regulations that affect providers of Internet access services.

²⁴ *Compare Comments of Verizon, In the Matter of Preserving the Open Internet*, filed GN Docket No. 09-191 (Jan. 14, 2010), at 51, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378523>, with *Comments of Public Internet Commenters, In the Matter of Preserving the Open Internet*, filed GN Docket No. 09-191 (Jan. 14, 2010), at 63, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378818>.

alternative between competing proposals that the FCC either (a) institute command-and-control regulations, including bans on broadband provider efforts to charge for priority transmission of some types of information or otherwise use their control of the “pipes” to shape customer’s access to content or (b) do nothing.²⁵ Today, the transparency prong of the Commission’s Open Internet Order embodies similar ideas, enacted alongside other forms of regulation. As opposing parties seek judicial and legislative relief from the new rules, the Order’s mandated disclosure requirements may, in the end, survive while other Network Neutrality regulations are repealed or overturned.

1. *Early “third way” proposals.* Following the early legislative debates about Network Neutrality, Rob Atkinson, a D.C. policy analyst, and Professor Phil Weiser responded to an “unfortunate turn on Capitol Hill” toward strident partisan rhetoric and hardening polarization with a “third way” proposal.²⁶ Their program sought to avoid the extremes of Republican efforts to strip the FCC of jurisdiction needed to enact Network Neutrality regulations and Democratic efforts to limit the ability of broadband providers to offer and charge for higher levels of quality of service. Instead, Atkinson and Weiser advocated “antitrust like” action by the FCC against abuses of market power, tax incentives for broadband investment including a “best efforts” pipe to consumers (today’s status quo), and mandated disclosure of “the level of bandwidth, amount of latency (delay), and any limitations on the ability of consumers to access the content or services of their choice.”²⁷ The FCC would then monitor compliance with the stated terms and require that, in order to call a service “broadband,” providers of Internet access services provide at least a basic level of unmanaged access.²⁸ In addition to taking advantage of some emerging points of political consensus, this proposal—unlike outright bans on non-neutral conduct—allowed for the flexibility needed to adapt to rapidly changing technologies. Later, Weiser and other commentators would argue for shifting the focus of

²⁵ See Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007).

²⁶ ROBERT D. ATKINSON & PHILIP J. WEISER, THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION, A “THIRD WAY” ON NETWORK NEUTRALITY 1-2 (2006), <http://www.itif.org/files/netneutrality.pdf>.

²⁷ *Id.* at 2.

²⁸ *Id.* at 11.

the Network Neutrality debate to the Federal Trade Commission, which could monitor the truthfulness of mandated disclosures about network management as part of its broader consumer protection responsibilities.²⁹

2. *The current Order.* The FCC's 2010 Order adopts a disclosure mandate as part of a three-part strategy for securing a "neutral communications medium" as "the basis of a fair, competitive market economy, of democracy, and of science."³⁰ Unlike the earlier "third way" proposals that relied on incentives and enforcement of broad competitive principles, the Commission's Order includes direct, broadband industry-specific prohibitions on unreasonable discrimination and on blocking lawful content, applications, services or non-harmful devices.³¹ The Order envisions a single disclosure, published on each provider's website, that provides information about network practices (congestion management, application-specific behavior, and device attachment rules), performance characteristics (service descriptions and the impact of specialized services), and commercial terms (pricing, privacy policies, and redress options).³² Notably, the transparency requirement, unlike the other regulatory tools adopted in the Order, applies equally to wired and wireless broadband providers.³³

3. *The only thing that remains after judicial or congressional repeal?* Though it represents a compromise born out of years of debate and negotiations, the Open Internet Order is really only the end of the beginning of the rulemaking process. The Order's opponents have announced their intention to seek repeal, either in Congress or the courts. At the beginning of the 112th Congress, shortly

²⁹ See generally Phillip J. Weiser, *The Next Frontier in Network Neutrality*, 60 ADMIN. L. REV. 273, 291–98 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080672.

³⁰ *Open Internet Order*, *supra* note 18, at 18039 (statement of Chairman Julius Genachowski).

³¹ *Id.* at 17906.

³² *Id.* at 17938–39.

³³ *Id.* at 17906. An increasing number of Americans, including a large segment of low-income and minority Internet users, rely exclusively on mobile broadband, typically accessed by mobile phones rather than computers. See generally *The Spectrum Initiative: Mobile Broadband Spectrum and its Impacts for U.S. Consumers and the Economy, An Engineering Analysis*, MOBILEFUTURE.ORG (Mar. 16, 2011), <http://www.mobilefuture.org/page/-/rysavy-spectrum-effects-301611.pdf>.

after the Order was adopted, the incoming House Majority Leader and Whip promised congressional action to roll back the Network Neutrality rules and establish new limits on the FCC's authority.³⁴ In March, the House Committee on Energy and Commerce passed "a resolution disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices,"³⁵ beginning a little-used process that would allow Congress to reverse the Commission's action.³⁶ Verizon and MetroPCS have also launched lawsuits in an effort to vacate the Open Internet rules, attacking first the jurisdictional basis for the FCC's ability to enact the rules.³⁷ Many more such suits are expected to be filed, and it could be years before the courts reach the substantive review of the rules themselves. As Congress and the courts consider these challenges, disclosure as a Network Neutrality regulation will remain an important area for consideration. Even if a court finds that the Commission does not have the authority to ban non-neutral practices like paid prioritization,³⁸ the Order's transparency requirements could be enacted either under authority ancillary to the Commission's other data collection mandates or under

³⁴ Tony Romm, *GOP lawmakers threaten to repeal Net neutrality*, POLITICO (Dec. 21, 2010), www.politico.com/news/stories/1210/46685.html.

³⁵ H.R.J. Res. 37, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.J.Res.37>.

³⁶ CONG. RESEARCH SERV., R40163, THE CONGRESSIONAL REVIEW ACT AND POSSIBLE CONSOLIDATION INTO A SINGLE MEASURE OF RESOLUTIONS DISAPPROVING REGULATIONS (2009) ("The Congressional Review Act (CRA) establishes expedited procedures for Congress to disapprove regulations issued by Federal agencies. Disapproval under these procedures requires enactment of a joint resolution that has a specified text and is submitted within 60 days (excluding recesses) after Congress receives the regulation. For these disapproval resolutions, the act provides expedited procedures for Senate consideration and to clear the measure for Presidential action. If the resolution becomes law, the rule not only becomes of no force and effect, but is treated as if it had never taken effect, and the issuing agency may issue no substantially similar rule without subsequent authorization by law.").

³⁷ See Editorial, *Net Neutrality, Back in Court*, N.Y. TIMES, Mar. 7, 2011, at A20.

³⁸ See *Open Internet Order*, *supra* note 18, ¶ 115–38 (discussing the Commission's legal authority to enact the Open Internet Order).

the current authority of the Federal Trade Commission,³⁹ surviving even a dramatic rollback of the FCC's Order or statutory authority.

III. WHY DISCLOSURE?

For a broad spectrum of regulatory problems—both the substantive challenges that regulations respond to and the political problems inherent in enacting regulations—disclosure is seen by an influential group of scholars and regulators as a near-panacea. Assessing the growing ideological and practical backlash against the burgeoning administrative state, Cass Sunstein, who has written extensively about disclosure in both his academic and governmental work, posits that “perhaps the first goal [of regulation] ought to be to ensure genuinely informed choices, rather than to dictate outcomes from Washington.”⁴⁰ Disclosure's initial attractiveness as a regulatory tool is demonstrated by its implementation in areas as different as securities and dietary supplement safety. In this Part, this Article outlines the benefits of mandated disclosure frequently cited by transparency advocates: enhanced competition in the market for broadband services; increased citizen participation in Network Neutrality regulation; improved performance of both regulators and providers; and practical advantages that make disclosure easier to enact than other regulatory options.

A. COMPETITION

With increased information about Network Neutrality practices, consumers can make better choices among increasingly differentiated service providers. Regulators routinely cite increased competition as the rationale for disclosure regulations. Accurate pricing and economic efficiency that put resources to their most highly valued uses require that consumers understand what they are buying. Where sellers possess information that buyers do not, mandated disclosure can put consumers on a more level playing field, where they can make

³⁹ Catherine J. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Network Neutrality Debate*, 78 *FORDHAM L. REV.* 641, 650 (2009).

⁴⁰ Cass Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 *FLA. ST. U. L. REV.* 653, 654 (1993).

more efficient choices about how to spend their money.⁴¹ Increased consumer knowledge about a product's features also creates opportunities to market products that are more differentiated across a greater number of non-price factors, better satisfying consumer preferences.

For example, Congress explicitly cited competition as the rationale for the Truth-in-Lending Act of 1968, which created a framework for providing consumers with standardized, timely information about the costs of borrowing money.⁴² The Act includes the Congress's finding that "informed use of credit" by consumers promotes "competition among the various financial institutions and other firms engaged in the extension of consumer credit."⁴³ Similarly, the Order describes the standard for disclosure as information "sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain the Internet."⁴⁴

In the Internet access services market, information is distributed asymmetrically. While most users surveyed by the FCC found information about the price of their broadband service to be clearly conveyed in their bills, few consumers thought the information about speed, restrictions on service, or fees for terminating service were very clearly presented.⁴⁵ Providers do not make this information easy to find or understand, probably because they are not attempting to compete on these aspects of their service. Advertisements for broadband focus overwhelmingly on speed and price.⁴⁶

⁴¹ See William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1716 (1999) (discussing this dynamic in the health care market).

⁴² 15 U.S.C. §§ 1601–15, 1631–49, 1661–67f (2000 & Supp. II 2004) (implemented by the Federal Reserve Board via Regulation Z, 12 C.F.R. § 226 (2005)).

⁴³ 15 U.S.C. § 1601(a).

⁴⁴ *Open Internet Order*, *supra* note 18, ¶ 54.

⁴⁵ FEDERAL COMM'N COMM'N, BROADBAND SATISFACTION: WHAT CONSUMERS REPORT ABOUT THEIR BROADBAND INTERNET PROVIDER 6 (2010) (FCC WORKING PAPER), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1206/DOC-303263A1.pdf [hereinafter BROADBAND SATISFACTION REPORT].

⁴⁶ Comments of Free Press, *In the Matter of Framework for Broadband Internet Service*, filed GN Docket No. 10-127, 111–13 (July 15, 2010), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020543742>.

In announcing the new Open Internet Order, Chairman Genachowski expressed optimism that the transparency rule could help cure this information imbalance, arguing that

consumers and innovators have a right to know the basic performance characteristics of their Internet access and how their network is being managed. The transparency rule we adopt today will give consumers and innovators the clear and simple information they need to make informed choices in choosing networks or designing the next killer app.⁴⁷

Given the widely variable patterns of Internet use among broadband customers, it makes sense that consumers will have heterogeneous preferences among different kinds of network management. In addition to helping consumers best match their preferences to a product, disclosures can facilitate consumer education that, in turn, makes it worthwhile to create and market different kinds of broadband services.

B. PERFORMANCE

Network Neutrality disclosures have the potential to improve performance measures of knowledge, coordination, and productivity. Disclosure requirements designed with performance in mind seek to remedy not the information asymmetries between producers and consumers that are the focus of the competition rationale, but instead look to the sharing and coordination of knowledge across the industry, including among competitors, to improve productivity.⁴⁸ Individual information producers take on the cost of generating data, but the gains from that effort cannot be fully captured by those producers.⁴⁹ Information is, therefore, generally under-produced, even in well-functioning markets. Mandatory disclosure rules ensure that all market participants will generate and distribute information, reducing search and monitoring costs.⁵⁰

⁴⁷ *Open Internet Order*, *supra* note 18, at 18039–41.

⁴⁸ *See Sage*, *supra* note 41, at 1800.

⁴⁹ *See Sage*, *supra* note 41, at 1771.

⁵⁰ John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984) (“A mandatory disclosure system can thus be seen

For regulators, the disclosure requirement reduces the cost of monitoring industry action in an environment of changing technological strategies. Disclosure laws address the structural inability of many regulators (the FCC included) to gather and process information at the speed required to keep up with the industry being regulated,⁵¹ both directly through the information included in the disclosures and indirectly through interest groups, who employ technological and other means to analyze the disclosures and make recommendation to the FCC.⁵² Improved knowledge at the Commission makes possible the kinds of “experimentalist” regulations that are particularly well-suited to regulatory challenges where uncertainty remains as to both the problem and potential solutions.⁵³

Mandated disclosure also has the potential to improve the performance of broadband providers. An upcoming disclosure is an effective and low-cost way to induce good management.⁵⁴ Disclosure could reveal, for example, that broadband providers are over-managing their networks, employing more invasive techniques than their usage statistics suggest are necessary. As illustrated by Comcast’s blocking of BitTorrent, companies that manage their networks secretly may choose blunt instruments to do so, instead of working to develop more sophisticated tools.⁵⁵ Knowing that the information will become public can motivate broadband providers to develop and deploy network management techniques that are the alternatives least restrictive of user choices. For example, after its blocking program was discovered, Comcast developed a more selective traffic management technique that responds to specific causes of congestion. Dispersing

as a desirable cost reduction strategy through which society, in effect, subsidizes search costs to secure both a greater quantity of information and a better testing of its accuracy.”).

⁵¹ See generally F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

⁵² See, e.g., MANY EYES (May 30, 2011), <http://www-958.ibm.com/software/data/cognos/manyeyes> (IBM’s free data analysis and visualization tools).

⁵³ See generally Charles Sabel & William Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

⁵⁴ Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1336 (1996).

⁵⁵ For a more detailed discussion of the technology Comcast employed to block Bit Torrent, see Edward B. Mulligan, *Derailed By the D.C. Circuit: Getting Network Management Regulations Back on Track*, 62 FED. COMM. L.J. 633, 639–42 (2010).

Network Neutrality information among broadband providers may also lead to better overall management of the broadband network because many providers share infrastructure resources, such as the backbone, which are affected by individual providers' management decisions.

C. DEMOCRACY

Vibrant democracies require information. John Stuart Mill believed that democracy required public intellect, which requires widespread knowledge of the facts at hand.⁵⁶ Civic Republicans see information as vital to reflective deliberation, a process required to produce favorable outcomes.⁵⁷ Skeptics who see the burgeoning administrative state as prone to abuse and failure believe information "helps the public monitor the apparatus of government."⁵⁸

In the case of Network Neutrality, although providers will disclose non-governmental conduct, the democratic rationale for disclosure remains important because the private behavior of broadband providers has such significant public implications.⁵⁹ The central question of the Network Neutrality debate is to what extent the owners of those pathways should be able to control, directly or indirectly, the content of the speech that flows over them. Broadband providers control the means by which the vast majority of our communications reach others, thereby implicating speech and deliberation on every topic of public concern.⁶⁰

The democratic participation made possible by mandatory Network Neutrality disclosures facilitates popular consent, allows consumers to monitor the FCC's work, and facilitates the public deliberation needed to overcome the collective action problem inherent in regulating this shared resource. First, mandated disclosure facilitates the public knowledge needed to legitimize the Commission's decision to allow broadband providers to ration service. Broadband providers argue that some non-neutral network management

⁵⁶ See Sage, *supra* note 41, at 1803.

⁵⁷ See CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 17–35 (1970).

⁵⁸ See Sage, *supra* note 41, at 1803.

⁵⁹ WU, *supra* note 15, at 300 ("We like to believe that our safeguards against concentrated political power will ultimately protect us from the consequences of accumulated economic power. But this hasn't always been so.").

⁶⁰ WU, *supra* note 15, at 303–08.

techniques are required because “data hogs” can overwhelm scarce bandwidth resources.⁶¹ The Open Internet Order allows rationing to allocate bandwidth in two ways: the Order allows companies to create “quality of service” tiers where providers of specific functions, such as bandwidth intensive transfers of medical results between hospitals, pay more for preferential delivery. The need for popular consent to rationing is even clearer in the case of wireless broadband service, which relies on the finite and publicly held resource of wireless spectrum.⁶² The Order allows wireless broadband providers much greater latitude to use non-blocking network management techniques.

Second, the Order’s transparency requirement will facilitate popular participation in a process that is still working toward consensus rules.⁶³ As noted in Part I, the Order is only the end of the beginning of the Commission’s work toward creating a complete framework for Network Neutrality regulation. Even if the rules withstand efforts at congressional or judicial repeal, the important work of adjudicating whether specific practices violate the new rules has not yet begun. Evaluating new technological advances in network management will be an ongoing responsibility of the FCC. Mandated disclosure prepares the public to contribute to this continuing debate.

Finally, disclosure makes possible the public deliberation needed to overcome the collective action problem inherent in the regulatory structure the Order creates. The individual purchasing decisions at the heart of the competition rationale⁶⁴ may exclude from their scope the most important economic and social consequences of Network Neutrality regulation. Imagine that you are shopping for a new cell

⁶¹ Yoo, *supra* note 8.

⁶² Cf. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 390 (1969) (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”). Note that the scarcity argument is much less compelling on the wired side, where congestion is a function of use and investment by broadband providers, which has not been sufficient.

⁶³ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 444 (1998) (“By setting and continuously improving the standards for directly deliberative participation by which all instrumentalities of government are judged, as a condition of their own activities, the agencies safeguard democracy while advancing it.”).

⁶⁴ See Lauren E. Willis, *Decision-making and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 743 (2006) (“The informational fix assumes that consumers will make self-interested, well-informed, rational probabilistic financial choices using the disclosures.”).

phone data plan. You do not watch much video on your phone, but when you do, you use your Netflix subscription. It would make sense, then, to purchase a plan from a wireless provider that provides priority to Netflix, allowing you to stream videos at a higher quality from Netflix than from other services. That decision may be optimal for your current needs, but an entire nation of subscribers making the same calculus could induce providers to consistently favor established content companies. New competitors in the streaming video market would be relegated to slower service, making it harder to compete with Netflix and easier for Netflix to raise its prices. Mandated disclosure ensures that broadband companies are providing information about their network management practices to the public at large, and not just for potential or current consumers, so that societal deliberation about the larger consequences of the purchase decision can take place.

D. PRACTICALITIES

Of all the rationales for mandated disclosure, Realpolitik is perhaps the most persuasive. Simply put, disclosure is easy to accomplish because it shifts costs away from regulators, requires less precise tailoring than other regulatory measures, and squares with widely held values.

In a time of limited and overextended resources, mandated disclosure typically shifts regulatory costs away from government to the regulated industry.⁶⁵ Companies pay for data design, collection, dissemination, and maintenance.⁶⁶ Once informed, consumers and interest groups share the costs of monitoring whether the company's actual behavior complies with their disclosed policies.

Compared to other regulatory tools, it is also easy to build a coalition around disclosure. Groups left, right, and center recommended disclosure to the FCC in its most recent Network Neutrality docket.⁶⁷ That consensus may be the result of the broad range of rationales discussed in this Part and their relationships to varying ideological and political commitments. Less charitably,

⁶⁵ See Sage, *supra* note 41, at 1772.

⁶⁶ James E. Dunstan, *Lieberman's Cyberspace Protection Bill: Enhancing Cybersecurity, or Establishing a New Uber-Authority?*, n.3 (June 2010), http://www.pff.org/issues-pubs/ps/2010/ps6.11-cyberspace_protection_bill.html.

⁶⁷ See *Open Internet Order*, *supra* note 18, ¶ 56.

agreement on disclosure may be the result of disclosure's amorphous nature. In this Rorschach test, mandated transparency looks like action to constituents who want action and looks minimally invasive to groups that don't want regulation.

Furthermore, disclosure requirements require less precision to design than other types of regulations. In contrast, Network Neutrality regulations must be sufficiently flexible to accommodate changing technologies through which broadband providers might manage their networks.⁶⁸ They must also accommodate changing consumer preferences and beliefs about what is reasonable. At present, the de facto neutrality spurred by the FCC's BitTorrent decision and the regulatory uncertainty that followed means that few users have experienced non-neutral practices by the providers. Even if they had, few would know what had occurred. Robb Topolski, as you will recall from Part I, was an electrical engineer with lots of free time on his hands when he discovered Comcast's blocking actions. Given that many network management policies mimic other connection problems, such as slowed speeds, most consumers will not recognize when these tactics affect their online experience. Disclosure regulation may be uniquely suited to this moment when many consumers, through the increased awareness created by disclosure and new consumer tools,⁶⁹ will be aware of their provider's network management practices for the first time.⁷⁰

Finally, regulation by disclosure fits squarely into an American value system that places priority on individual choice and responsibility. In addition to being a precondition for economic efficiency, Sunstein notes that informational remedies have their roots deeply embedded in our system of government:

⁶⁸ For example, at the time of the proceedings on Comcast's blocking of BitTorrent, Comcast had not yet developed its protocol-agnostic traffic management system. John Timmer, *Comcast Testing Protocol-Agnostic Traffic Management*, ARS TECHNICA (June 3, 2008), <http://arstechnica.com/old/content/2008/06/comcast-testing-protocol-agnostic-traffic-management.ars>.

⁶⁹ FCC Open Internet Apps Challenge, CHALLENGE.GOV, <http://challenge.gov/FCC/114-fcc-open-internet-apps-challenge> (last visited Feb. 19, 2012).

⁷⁰ See Sage, *supra* note 41, at 1724 n.60 (“[H]eterogeneity of preferences reinforces the importance of allowing consumer choice, and therefore makes disclosure laws preferable to substantive regulation that limits the range of available options.”). The current FCC Order only adopts part of this rationale, as it provides information but also eliminates certain choices, such as carriers that block specific legal applications.

The most general way to put the point is to note that in the framers' view, America was supposed to be a deliberative democracy in which representatives, accountable to the people, would make decisions through a process of deliberation uncontrolled by private factions. Without better information, neither deliberation nor democracy is possible. Legal reforms designed to remedy the situation are a precondition for democratic politics.⁷¹

In the search for political common ground on an issue that does not split neatly along party lines, increased information production satisfies both sides. For both supporters and opponents of further, more intensive regulation, disclosure legitimizes the decision (to do nothing or to do a lot more) by creating an informed public discernment process.⁷²

IV. HOW NETWORK NEUTRALITY DISCLOSURE COULD FAIL

Despite these benefits, many commentators are skeptical of disclosure. Successful regulation through mandated disclosure requires that policymakers, disclosers, and disclosees “play [their] demanding parts properly.”⁷³ This need for analysis, coordination, and compliance by numerous participants creates many opportunities for disclosure to fail, both immediately and long after the policy's initial implementation, and for disclosure regulation to consume more resources than its benefits can justify. This Part addresses in turn each of the actors in the Open Internet Order's transparency regime—regulators at the FCC, broadband providers, and consumers—and the problems inherent in their participation.

A. THE FEDERAL COMMUNICATIONS COMMISSION

Having determined that regulation is necessary and that mandated disclosure is an appropriate regulatory response to the

⁷¹ See Sunstein, *supra* note 40, at 658.

⁷² See Pateman, *supra* note 57.

⁷³ Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 679 (2011).

problem,⁷⁴ the FCC must now decide (and perhaps decide again in the future, depending on the Order's fate) on the proper scope of disclosure and against what standards each disclosure's adequacy will be measured. The Order is vague on each of these points, and the Commission's decisions on scope and standards will likely be developed as a product of its initial enforcement.

Improperly aligned incentives, lack of expertise, and normative uncertainty can cause initially modest disclosures to balloon to cover vast swaths of information. The relatively light governmental burden that makes disclosure so attractive to policymakers⁷⁵ creates a kind of moral hazard. In this case, an incremental expansion to the scope of disclosure adds little to the Commission's costs, while increasing the burden on Internet access providers (who pay to produce and distribute the information) and consumers (who must sort, prioritize, and analyze the information). Even when regulators are mindful of disclosure's cost, they may lack the expertise to properly define the optimal scope and err on the side of excess information.

Given the broad range of network management activities that Network Neutrality regulation seeks to cover and the relative newness of those techniques and technologies, it's possible that no one knows what information disclosees need.⁷⁶ Under this kind of uncertainty, Ben-Shahar and Schneider explain, disclosure mandates multiply in an attempt to cover all available bases.⁷⁷ Finally, normative uncertainty may compound the expansive effect of factual uncertainty. Deep political divisions between the Commissioners have led to a compromise Order full of equivocation on the value of a neutral network. Differing views on the principles undergirding the Open Internet proceeding and an under-theorized view of the ideal conduct by carriers that should result from the Order may lead to an over-

⁷⁴ For the reasons described in Part II, I believe that disclosure has secured its place in whatever regulatory scheme for Network Neutrality is implemented. Were regulation beginning with a completely blank slate, whether disclosure should be included could be a highly contestable point. See Ben-Shahar & Schneider, *supra* note 73, at 679–81, for a discussion of potential errors by lawmakers in the early stages of disclosure regulation.

⁷⁵ See *supra* Part III.D.

⁷⁶ Many disclosures that seem intuitively beneficial turn out to have little, if any, effect. See, e.g., *Calorie Labeling Has No Effect on Teenagers' or Parents' Food Purchases*, NYU LANGONE MEDICAL CENTER (Feb. 15, 2011), available at <http://communications.med.nyu.edu/media-relations/news/calorie-labeling-has-no-effect-teenagers%E2%80%99-or-parents%E2%80%99-food-purchases>.

⁷⁷ See Ben-Shahar & Schneider, *supra* note 73, at 688–89.

inclusive whole, comprising many different views on what types of information are needed.

Standards against which regulatory disclosures are evaluated vary dramatically. At one end of the spectrum, food-labeling mandates require a high degree of formal compliance, both in form and content. On the other hand, “informed consent” discussions between doctors and patients are held to such loose standards that practices vary dramatically across institutions. Likely because of the factual and normative uncertainty discussed above, the current Order leaves decisions about the form and content of disclosures required by the transparency provisions largely in the hands of the companies providing the information.⁷⁸

Finally, disclosure requirements may ultimately harm the overall regulatory project by supplanting more effective regulatory schemes. As this section explains, disclosure benefits are highly contingent and dependent on the coordination of a large and diverse group of actors. While transparency may advance the competition, performance, and democracy goals outlined in Part II, it is hardly sufficient for any of them. Given the political and policy appeal of this kind of regulation, governmental actors may overlook or ignore other requirements for achieving those aims when disclosure is seen, without adequate justification, as having done the job. The risk of such incomplete action is compounded by the fact that regulated providers of broadband services may acquiesce to a relatively modest disclosure burden in an attempt to avoid more invasive regulation.

B. INTERNET ACCESS PROVIDERS

The lack of detail in the Order makes many interpretations possible. Even well-meaning providers of Internet access services may make errors in interpreting the mandate, collecting information, and distributing the disclosures that threaten the effectiveness of the Order’s transparency program.

With a vague standard and a history of lax enforcement by the Commission,⁷⁹ regulated companies are likely to interpret the transparency mandate in ways that favor themselves, at least initially. For some companies, that may mean minimizing compliance costs by

⁷⁸ *Open Internet Order*, *supra* note 18, ¶ 56.

⁷⁹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-79, FCC MANAGEMENT: IMPROVEMENTS NEEDED IN COMMUNICATION, DECISION-MAKING PROCESSES, AND WORKFORCE PLANNING (2009), available at <http://www.gao.gov/new.items/d1079.pdf>.

staying as close as possible to the information they already provide. In this way, companies could easily, if only temporarily, thwart the purpose of the mandate. Many of the current disclosures, such as Comcast's interminable end user agreement,⁸⁰ vacillate between vague and incomprehensibly complex contract terms. Had these disclosures been sufficient, there might have been no need for the Commission to act. For other companies, the self-serving strategy may be to wait and see. Uncertainty about what qualifies as "reasonable" will lead some companies to initially offer insufficient disclosures and wait for litigation to force them to provide more and better information. Political divisions around Network Neutrality make this delay tactic even more likely, because stalling now might allow companies to wait for a more favorable environment after judicial or legislative repeal or significant changes to the regulatory scheme.

Data collection may turn out to be more costly and difficult than initially predicted. Independent telephone and telecommunications providers already complain about the relatively modest burden of "Form 477" data reporting requirements, which are used to determine the deployment of broadband and telecommunications services, the preparation of which consumes (by one estimate) roughly forty two business days per submission.⁸¹ In establishing the 477 rule, the Commission estimated those disclosures would take twenty hours.⁸² Industry associations have already filed complaints that the estimates of how long Network Neutrality disclosures will take to complete are too low.

Under the current Order, providers decide how and when to distribute the disclosed information. Consumers' purchasing patterns make it difficult for companies to provide this information in a way that has a reasonable chance of impacting the decision to subscribe. Consumers rarely switch providers.⁸³ Even if companies wanted to

⁸⁰ *Comcast Acceptable Use Policy for High-Speed Internet*, COMCAST, <http://www.comcast.com/Corporate/Customers/Policies/HighSpeedInternetAUP.html> (last visited Feb. 19, 2012).

⁸¹ Letter from Independent Telephone and Telecommunications Alliance Regarding Local Telephone Competition and Broadband Reporting, 73 Fed. Reg. 73931 (Jan. 22, 2009), available at <http://www.itta.us/advocacy/2009/4772.pdf>.

⁸² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OIRA CONCLUSION, ICR Ref. No. 199802-3060-013 (1998), available at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=199802-3060-013.

⁸³ *Broadband Satisfaction Report*, *supra* note 45.

provide this information at the point of sale, as many commenters suggested the FCC require,⁸⁴ it would be difficult to do so in a way that covers all the information the Commission suggests they provide. Imagine the already interminable phone conversation it takes to get U-Verse (AT&T's fiber-optic broadband network) working at your house now extending to cover AT&T's congestion management, application-specific behavior, device attachment, and security policies—to name less than half of the things about which you would be required to hear.⁸⁵ Research shows that the lucky consumers who subscribe via providers' websites will mercifully spare themselves that drudgery by simply clicking through the agreement without reading.⁸⁶ If broadband providers do the minimum the FCC suggests in the Order ("prominently display or provide links to disclosure on a publicly available, easily accessible website that is available to current and prospective end users and edge users as well as to the Commission"⁸⁷), they'll likely ensure that only people who really, really want to find the information will ever see it—which might be what they are going for.

C. CONSUMERS

Even if government and industry actors do everything right, the success of regulation by mandated disclosure remains imperiled in the hands of its intended beneficiaries: consumers, the party that is not (and should not be) required by Network Neutrality disclosure laws to do anything. For transparency requirements to be effective, consumers must successfully acquire the information, understand it well enough to use it to make a decision, and continue making decisions in a climate of information overload. Behavioral studies show that lay people often fail at each of these steps.

Before they ever begin searching for information, consumers must first realize that they need it. Current studies offer an unclear picture of what consumers know about network management and their

⁸⁴ *Open Internet Order*, *supra* note 18, at 17939 n.184.

⁸⁵ See Ben-Shahar & Schneider, *supra* note 73, at 714 (arguing that oral disclosures are even less understandable than printed versions).

⁸⁶ See generally Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (Law & Economics Research Papers Series, Working Paper No. 09-40, 2009).

⁸⁷ *Open Internet Order*, *supra* note 18, ¶ 57.

broadband service; the FCC's surveys, like those conducted about engagement with the Network Neutrality debate, ask respondents to assess their own knowledge—but the questioners don't check to see if the respondent was correct.⁸⁸ Perhaps the best indication of what consumers currently consider when choosing a broadband provider is the kinds of information broadband companies have decided is worthwhile to advertise. Those solicitations pertain almost exclusively to speed and price, suggesting that consumers currently perceive Internet access services as a commodity with little variation in quality across providers.⁸⁹ Even consumers who realize they should consider their provider's stance on Network Neutrality still have to find that information, the flip side of the distribution question discussed in Part III.B. As explained there, the current Order gives broadband providers little incentive to draw customers' attention to the disclosures.

For customers who do eventually acquire the needed information, the hard work is only just beginning.⁹⁰ Beyond the usual comprehension challenges of widespread illiteracy⁹¹ and innumeracy,⁹² understanding and analyzing the implications of Network Neutrality disclosures requires specialized knowledge. Ask yourself: do you know the difference between a bit and byte? If you do, what does your experience tell you to expect about your provider's advertised speed of 12 megabits per second? If you (correctly) expect to get in reality about half the speed that was promised, how long does that mean it will take you to download *Avatar* from iTunes? What if you want the Blu-ray edition?

Knowing what the disclosure means, you will still have to decide what it means to you. Studies have shown that we tend to be overly

⁸⁸ *Broadband Satisfaction Report*, *supra* note 45, at 5.

⁸⁹ See Ben-Shahar & Schneider, *supra* note 73, at 709–10.

⁹⁰ See STEPHEN BREYER, REGULATION AND ITS REFORM 27–28 (1982) (arguing that one cause of market failure is the inability of buyers, even in the presence of competition, “to evaluate the characteristics of the products or services” on offer); Susan Rose-Ackerman, *Progressive Law and Economics and the New Administrative Law*, 98 YALE L.J. 341, 356 (1988) (“[M]ere information provision may not be sufficient” because it depends on “the limited information-processing capacities of people”).

⁹¹ *National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS http://nces.ed.gov/naal/kf_demographics.asp (last visited Feb. 19, 2012).

⁹² Ben-Shahar & Schneider, *supra* note 73, at 712 (citing Isaac M. Lipkus et al., *General Performance on a Numeracy Scale Among Highly Educated Samples*, 21 MEDICAL DECISION MAKING 37, 40 (2001)).

sanguine in our predictions of our own behavior.⁹³ Unfounded optimism about ourselves can lead to unwarranted risk-taking.⁹⁴ For example, consumers routinely downplay the likelihood that they will carry a balance on their credit cards, leading them to assume, wrongly, that a higher interest rate won't affect them.⁹⁵ Consumers make similar errors in assessing their cell phone usage, leading them to generally overpay for those contracts.⁹⁶ These prediction errors play an even more important role in the Network Neutrality context because, unlike credit card rates and cell phone contracts, consumers must also make predictions about how other consumers will behave and how their individual conduct fits into the larger collective action picture described in Part III.D.

All of this may seem daunting, but doable—if assessing the Network Neutrality policies of a particular broadband provider were all you had to do today. In reality, our days are filled with the need to make these kinds of assessments, from the FDA warning on our morning vitamins (not proven to treat any condition!) to the nutrition facts on our midnight snacks. To cope (and get through the day having accomplished something other than reading fine print), consumers adopt simplifying strategies that exacerbate the challenges we already face in information gathering and decision-making.⁹⁷ Faced with too much information, people actually make worse decisions than they would have without any disclosure at all.⁹⁸

After hearing this litany of problems, many readers may ask, “What’s the harm?” Disclosure may be sub-optimal, but surely it benefits some consumer, somewhere. When asked, consumers routinely tell pollsters they would like to have more information. Regulators can easily imagine a situation where one more fact could have made the difference. In reality, mandated disclosure consumes government, corporate, and individual resources. If disclosure is not

⁹³ Oren Bar-Gill & Franco Ferrari, *Informing Consumers About Themselves*, 3 ERASMUS L. REV. 93, 117–18 (2010).

⁹⁴ RICHARD C. THALER & CASS. R. SUNSTEIN, NUDGE 31–33 (2008).

⁹⁵ Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76 (2004).

⁹⁶ Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 51 (2006).

⁹⁷ See generally Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003).

⁹⁸ *Id.* at 419.

achieving regulatory goals, those resources could be better spent elsewhere. The next Part suggests a program that makes the effort invested in mandated disclosure worthwhile.

V. TARGETED DISCLOSURES: MORE AND LESS INFORMATION

The transparency requirements laid out in the Open Internet Order will be developed over the course of the Commission's development and enforcement of rules interpreting the Order.⁹⁹ Careful design of those rules (or others created by future Network Neutrality regimes) can help overcome the challenges laid out in Part III in order to achieve the benefits of disclosure. In this Part, I suggest that the Commission can best generate those benefits by creating two different, concurrent disclosure mechanisms: thorough "full disclosures" that provide sufficient information to create realizable performance benefits, and simple yet specific "advisory disclosures" for ordinary consumers that promote competition and participation.

Cass Sunstein, in his role as the Administrator of the White House Office of Information and Regulatory Affairs, has outlined principles for heads of executive departments and agencies to help them decide between and execute summary and full disclosures as they work to implement President Obama's commitments to fostering transparency, participation, and collaboration throughout the executive branch.¹⁰⁰ Implicit in his guidance are two distinct audiences: interested lay people who may have limited time, rationality, and interest in the subject at hand, and individuals and organizations willing to devote more of their efforts to consuming, analyzing, and distributing a large quantity of information.

At present, the Open Internet Order's transparency rules stand to aggravate the difficulties the Commission faces in achieving mandatory disclosure's benefits because the Commission designed its transparency regime for a unitary audience—providing too much information to regular people and not enough information for expert users. The goals outlined in Part II are best achieved by designing

⁹⁹ See *Open Internet Order*, *supra* note 18, at 17940–41 (reserving the right to change disclosure rules in the future).

¹⁰⁰ Memorandum for the Heads of Executive Department and Agencies: Disclosure and Simplification as Regulatory Tools (June 18, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf.

disclosures that respond separately to those two groups' unique needs and capacities.

This Article, therefore, proposes two models for disclosure of Network Neutrality information that meet the needs of each of those audiences—one to improve performance and one to bolster the democracy and competition rationales—while retaining disclosure regulation's practical advantages. Though each type of disclosure may target a different group of participants, both sets of information would, of course, be made available to all comers, making the system more adaptable to heterogeneous preferences. While creating two different disclosures may create additional costs, those expenditures are likely to be minimal, particularly as compared to more invasive regulation.¹⁰¹

A. FULLER FULL DISCLOSURE

Realizing the full performance benefits mandated Network Neutrality disclosure could yield will require a lot of information—more than ordinary consumers can be expected to process. Experts, on the other hand, deal with large quantities of information differently than non-experts, who lack the experience and context needed to develop useful shortcuts.¹⁰² More extensive disclosures can overcome the problems faced by governments and companies and improve their productivity.

Full disclosures should be created to take advantage of those expert abilities, better enabling government, industry, and consumer advocates to develop the full picture of network management needed to monitor and optimize Network Neutrality regulation. While companies would expend fewer resources organizing and distributing information about their Network Neutrality practices, they would be asked to provide a lot more of it.

The Order has outlined categories of information that companies should supply: network management practices, performance characteristics, and terms and conditions of their broadband services. These are mostly issues of corporate policy. Under those instructions, the resulting disclosure will likely focus on what a company can do,

¹⁰¹ This paper takes no position as to who should be responsible for those costs, as between public and private parties.

¹⁰² Ben-Shahar & Schneider, *supra* note 73, at 725.

and not what it has actually done.¹⁰³ Providing the listed information does not create a safe harbor, and the Commission could decide that full disclosures must also address why, how, and when network management practices have been used.

Full disclosure, produced in tandem with advisory disclosures targeted at consumers, shifts the balance of responsibilities between broadband providers and the Federal Communications Commission in order to minimize the risks explored in Part III. Full disclosure requirements blunt the potential anti-consumer effects of allowing broadband providers to interpret a vague mandate for themselves. Instead of making Internet access service providers responsible for deciding (within certain parameters) what and how to disclose, a point in the disclosure process where the interests of broadband companies and their consumers diverge, the Commission would receive and cull the available information and decide how best to transmit it to consumers, as discussed in the next Part.

Mandating comprehensive disclosures will also alleviate problems created by uncertainty at the Commission. While technological, regulatory, and normative uncertainty can cause disclosure mandates to expand beyond a scope individual consumers can process, the Commission is equipped to use that large volume of information to study what information is actually useful in the decision making process. Instead of possibly erring on the side of overwhelming consumers with too much information, mandating an extremely thorough disclosure will allow the Commission to gather information first, and allow the data to inform what it passes on to consumers, as discussed in the next section.

B. FROM DISCLOSURE TO ADVICE

The level of detail needed to attain the performance benefits mandated disclosure can create would overwhelm the vast majority of consumers. Though there may be an argument that consumers “need” all that information, a better question might be to ask what they want.¹⁰⁴ Consumers make good decisions with limited information every day. To find a new dentist, you could consult regional studies on

¹⁰³ Furthermore, the Commission has policies in place that protect confidential information, such as trade secrets, from public disclosure even as the information is being disclosed to the Commission. *See, e.g.*, FED. COMM’N COMM’N, *Fact Sheet: FCC’s Ex Parte Rules*, <http://www.fcc.gov/encyclopedia/ex-parte-rules-2011> (last visited Feb. 19, 2012).

¹⁰⁴ Ben-Shahar & Schneider, *supra* note 73, at 746.

error rates and the need for repeat procedures, but you are more likely to ask around for a recommendation.¹⁰⁵ The democracy and competition rationales require disclosures that reach consumers in a meaningful way; they must be obviously useful, easy to locate and understand, and aligned with a consumer's reasonable assessment of her own needs and the broader implications for society. In order for government to provide or facilitate such a clear statement, it will need to carefully select a limited information set, establish clear standards for acceptable disclosures, and take a stance on uncertain political and (at least temporarily) technological questions.

The Commission can meet these challenges by serving as an information intermediary for consumers, adding to summary disclosure the next step of analysis: advice. Recognizing the heterogeneous preferences among its broad audience, such a system should help consumers assess their own use and interests quickly and without technical knowledge. This could be accomplished via a short series of questions (for example, "how many videos do you watch online most days?" but not "how much data do you transfer most days?") that could build a profile of use. These profile questions could also help consumers estimate what their needs are likely to be in the future—an important feature because "switching" costs are high and consumers rarely change providers outside the context of a change in residence.¹⁰⁶ Whatever system is used to build this profile, it should include a default based on the most common broadband use patterns so that consumers who wish to further simplify the process can skip this step.

Next, a system of advice must address the normative judgments about Network Neutrality inherent in the broadband subscription decision. Fairly predicting the implications of different practices admittedly presents a challenge for this divided Commission, which has had difficulty articulating a clear set of beliefs. The Order adopted by the Commission has begun this work by identifying the competing interests at stake. An advice system could address collective action concerns by giving consumers the Commission's assessment of the Internet-wide outcomes of everyone choosing a particular feature,

¹⁰⁵ *See id.*

¹⁰⁶ FEDERAL COMM'N COMM'N, BROADBAND DECISIONS: WHAT DRIVES CONSUMERS TO SWITCH—OR STICK WITH—THEIR BROADBAND INTERNET PROVIDER (2010) (FCC WORKING PAPER), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1206/DOC-303264A1.pdf.

while still acknowledging that those predictions are based on the kinds of normative conclusions agencies are asked to make every day and are necessarily speculative.¹⁰⁷ For example, consumers who indicate that they believe that the most important feature of the Internet is the ability to deliver consistently high speeds at all times might be fairly directed to information about the most aggressive congestion management programs.

Finally, having gathered information about the consumers' usage and preferences, this summary disclosure system can offer advice about what kinds of service fit the consumer best (perhaps with links to providers matching those characteristics).¹⁰⁸ That advice should make clear what a particular set of network management actions means to the average user. For example, if you choose a provider that throttles traffic during peak periods to the top five percent of data users, you might not be able to use certain features of your phone at busy parts of the day.

This aggregation of simple information and advice would not pick winners and losers (and should be careful to not give the impression that it does). The Commission will have, in the course of the full disclosure outlined above, collected detailed information on congestion management, application-specific behavior, device attachment rules, and security practices from all broadband providers. Broadband companies would not provide a particular mix of those characteristics without believing it to be ideal for some consumer profile, and the system should be designed to assess a large variety of preferences, without over-burdening all consumers with information unlikely to be relevant to their circumstances. If, however, evidence from this evaluation system leads some broadband providers to shape

¹⁰⁷ These kinds of normative conclusions are already built into the disclosures companies are using—they are just worded in ways that favor the company's current practices. For example, "Verizon Wireless strives to provide customers the best experience when using our network, a shared resource among tens of millions of customers. To help achieve this, if you use an extraordinary amount of data and fall within the top 5% of Verizon Wireless data users we may reduce your data throughput speeds periodically for the remainder of your then current and immediately following billing cycle to ensure high quality network performance for other users at locations and times of peak demand. Our proactive management of the Verizon Wireless network is designed to ensure that the remaining 95% of data customers aren't negatively affected by the inordinate data consumption of just a few users." *Customer Agreement, supra* note 1.

¹⁰⁸ All information collections by government agencies raise privacy concerns. While how the FCC might handle that issue in implementing an advice model is outside the scope of this article, it is worth noting that none of the aims discussed in this Part require the Commission to personally identify or keep the data that consumers provide.

their offerings to match the preferences of a large cohort of consumers, that feedback loop is likely to benefit consumers.

Full disclosure provides other checks against potential overreach or market interference by the FCC. The comprehensive disclosures provided to the Commission, while not directed at consumers, would be made available to the public (subject to trade secret limitations) so that companies, academics, and public interest organizations can publish their own recommendations. Competing sources of advice can give consumers options, making explicit areas where the Commission has made a normative choice and offer another opinion. They may also serve as a laboratory for different methodologies and modes of presentation that ultimately influences the advice the FCC provides.

But these third-party opinions are not, by themselves, a sufficient solution. The collective action problem described in Part II.C faces interest groups as well as individual consumers. The FCC can advocate for the national public interest inside the realm of democratic legitimacy in ways not available to private actors. That democratic undergirding is especially important because of the close link between access to the Internet and civic engagement, as well as to freedoms of speech and association.

Even with a well-designed system for providing advice, challenges remain. The Commission may need to take steps to ensure consumers are aware that Network Neutrality issues are a part of the broadband purchase decision—and that the other prongs of the Open Internet Order, such as the ban on blocking, do not obviate the need for consumers to decide among alternatives. But the system does not have to be perfect to be an effective use of agency resources and consumers' time.¹⁰⁹ Sophisticated Internet users may find more direct and precise ways (including technologies that can detect network management) of monitoring their provider's behavior. But for most users, advisory disclosures can be a low-cost aid to deciding between competing services.

¹⁰⁹ Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1150 (2009) ("It is worth reminding ourselves that even an optimally designed APR will not be perfect. It is impossible to fully capture the multidimensionality of a mortgage loan in a one-dimensional metric. This inevitable limitation, however, does not detract from the social value of the APR disclosure. Sophisticated borrowers who can deal with the complexity and multidimensionality will not rely solely on the APR. Those who rely solely, or mainly, on the APR will be the less sophisticated borrowers who, absent the APR disclosure, would rely on an even less accurate proxy.").

VI. CONCLUSION

Mandated disclosure is an attractive regulatory option. Done right, it enhances competition, increases participation, and improves performance—all while being comparatively easy to implement. But things can easily go wrong. For mandated disclosure to succeed, regulators, regulated companies, and consumers must all act carefully and conscientiously even when they cannot or do not want to. Information alone is not enough. This Article has laid out some of the challenges that need to be addressed in order to achieve the full benefits of disclosure as a Network Neutrality regulation and has suggested a transparency program to meet those goals. There are, no doubt, other systems that could overcome the many ways mandated disclosure could fail. But without addressing the challenges described in this Article, disclosure is at best a waste of time and at worst harmful to the overall project. The success of Network Neutrality regulation depends on a carefully designed and implemented mandate that simultaneously provides both more and less information.