



## Ten Things That Finally Killed Net Neutrality

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If you haven't heard much about Net neutrality this year, you're not alone. It went from being the political equivalent of a first-run Broadway show, with accompanying street protests and high profile votes in Congress, to a third-rate performance with no budget and slumping attendance.

So what killed Net neutrality? Here's a list, in no particular order:

1. The Bush administration. Democrats may control Congress, but the White House and federal agencies matter. And the administration made it perfectly clear on Thursday that no new Net neutrality regulations are necessary. That gives the Republicans in Congress their marching orders, and a unified GOP front means the Democrats are more likely to expend ammunition elsewhere.
2. House Speaker Nancy Pelosi. The California Democrat claimed to adore Net neutrality last year, saying: "Without Net neutrality the current experience that Internet users enjoy today is in jeopardy. Without the Markey Amendment, telecommunications and cable companies will be able to create toll lanes on the information superhighway. This strikes at the heart of the free and equal nature of the Internet." The Markey Amendment was defeated in a Republican Congress last year.

But even though Pelosi's now in charge, she's done precisely nothing (at least nothing that's been publicly visible) to live up to last year's rhetoric.

3. The AT&T merger. Net neutrality rules were part of the Federal Communications Commission's approval of the AT&T and BellSouth merger in December 2006. The company pledged not to privilege, degrade, or prioritize "any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination" for two years. That defused concerns for a while, which had grown after AT&T CEO Edward Whitacre was quoted as talking about giving Google and other Internet companies a "free ride" on his network, whatever that means.
4. A fragmenting coalition. The major pro-Net neutrality coalition last year was called "It's Our Net" and boasted 148 members. Now, says coalition spokesman Eric London, it's been "reconstituted in a different form" with a broader focus and is called the Open Internet Coalition. (The old domain name redirects to the new one.)

But the list of members today is far smaller, at just 74 members. Missing are previous members including Adobe, Amazon.com, the Business Software Alliance, Expedia, Intel, Microsoft, Sony, and Yahoo. Companies that stayed in the coalition include eBay, Earthlink, Google, NetCoalition (which includes CNET Networks), and TiVo.

5. Mixed messages. Most proposals for extensive Net neutrality regulations have given the FCC broad authority, not least because the chairman of the Federal Trade Commission said in August 2006 that she was skeptical of aggressive regulation.

Then Google's head of public policy said a few months later that "cutting the FCC out of the picture would be a smart move" in favor of Justice Department or FTC enforcement. Now, maybe he was misquoted, and Google subsequently said there's "no change" in the company's position. And it's true that the company has continued to be a part of pro-Net neutrality coalitions. Still, the legislation that Google officially supported in mid-2006 would have put the FCC--not the FTC--in charge.

There's also Google CEO Eric Schmidt's speech last month in Aspen, Colorado that I covered. By Google's standards, it was remarkably conciliatory: it mentioned Net neutrality only once and did not call for new federal laws. Schmidt even acknowledged "the billions of dollars that have been spent to do both wireless and wireline data deployment networks"--by the broadband providers that have been his political enemies for the last two years.

6. The Bush administration. Yes, it's on the list twice. It's on here again because of how much President Bush's and the Justice Department's arguably illegal wiretapping program and related policies have consumed Congress. The four most recent headlines on the House Judiciary Committee's Web site are about FISA or the Justice Department. In the Senate, the Judiciary Committee has held no fewer than seven hearings on the dismissal of U.S. Attorneys. It's true that the two Commerce committees haven't been tied up with those topics, but the Iraq War and global warming have been higher priorities than less pressing concerns about broadband regulation.

7. The Federal Trade Commission. The lifelong bureaucrats at the FTC are hardly a bunch of Hayek-quoting, Ron Paul-voting libertarians. Which is why, as I wrote in June, it's notable that they came out with a report saying no new laws are necessary. In part it's something of a turf battle, of course, and a way to warn the FCC that it doesn't have a monopoly on this issue. But it could have been far more enthusiastic about new laws, and is sure to make otherwise pro-regulation Democrats think twice about supporting them again.

8. No smoking gun. The problem with the Net neutrality debate has been two-fold. First, the term is vague and means different things to different people. Does it mean broadband providers shouldn't block content (a perfectly reasonable principle, that) or does it mean the FCC gets to prevent AT&T from entering into deals to make its partners' TV shows stream without hiccups? Second, it's possible to support the goals of Net neutrality while

being deeply skeptical of the FCC getting things right when it comes to Internet regulation.

Which brings me to Point No. 8: With one or two exceptions like the Madison River blocking, there's no evidence of wrongdoing by broadband providers. Sure, maybe broadband providers have been on their best behavior now that their arch-nemesis Rep. Ed Markey can haul them before his subcommittee, but without horrific examples of abuses (or, even any examples of abuses) it's hard for advocacy groups to raise the alarm.

9. 700 MHz wireless spectrum. Perhaps as a result of being trounced repeatedly in Congress last year, the proponents of Net neutrality have spent 2007 lobbying federal agencies instead (this is also known as the "FCC is a softer touch theory"). One catalyst was probably Columbia University law prof Tim Wu's paper, and Google's lobbying to persuade the FCC to impose open access requirements on a chunk of the valuable 700 MHz spectrum. They won in part in July, and Google said last month it will "probably" place a bid.

10. Partisan gridlock. Most technology debates in Congress aren't especially partisan: Both Democrats and Republicans fall over each other to enact unconstitutional restrictions on free speech when it comes to laws like the Communications Decency Act. The R&D tax credit is another. But somehow along the way, perhaps because Internet companies allied themselves so closely with MoveOn.org (hardly a non-partisan group), it became a partisan issue. And that led to the usual partisan gridlock.

James Gattuso, a senior research fellow at the conservative Heritage Foundation, has a related explanation he told me on Thursday: "When this became a hard left issue, I think some of the for-profit members of the coalition got cold feet. Some of the rhetoric got a bit out of control on the left. They started talking about the evils of pricing and the evils of price discrimination in markets. Anyone in the corporate side had to have second thoughts about that."

I should point out, to be fair, that Art Brodsky, a spokesman for pro-Net neutrality group Public Knowledge, thinks I'm wrong about the death of Net neutrality (and also thinks that Gattuso is wrong on the hard-left impact). "It's not dead," Brodsky said. "It's dormant, pending metamorphosis. It will re-emerge at some point." His group still wants Net neutrality rules enshrined into law as "part of a bigger broadband policy rather than a centerpiece of a discrete issue."

He may be right. Maybe some Net neutrality bill will come back from the dead under a Democratic administration in 2009. But I'd say the most likely scenario is that Net neutrality, at least in its current form, fades away like Show Boat and other onetime Broadway hits that are now just faint memories.