



***Net Neutrality Phase II:
The Battle of 2009***

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Executive Summary

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With its Aug. 1, 2008 decision to find Comcast in violation of its 2005 Internet Policy, the Federal Communications Commission turned a historic corner in the ongoing debate of the issue known as "network neutrality," issuing for the first time a legal decision based on net neutrality ideals. Though the mild penalties (and potential legal overturn) may make the Comcast order a mere footnote, the decision nevertheless marks an important turning point for the network neutrality debate, moving it from a largely theoretical discussion in the past to one focused more upon technical definitions, distinct rule-making and adjudicating jurisdictions.

It is also just the starting point for what insiders expect will be an active year of net neutrality actions, following the elections this fall that will scramble the roster of top regulators and legislators close to the issue. While the most powerful players in the debate -- the nation's large telecom providers, AT&T and Verizon, and the biggest cable companies, like Comcast -- are still adamant in their beliefs that no new "net neutrality" laws or regulations are needed, political momentum and recent events may tip the scales and lead to passage of (at the very least) some baseline net neutrality laws or regulations in 2009.

- ***That insiders and followers of the issue put such legal changes at about even odds shows just how much the net neutrality playing field has changed since the issue reached its first public-perception zenith during 2006.***

During that year, the biggest service providers and their political allies in the GOP held nearly all the cards, with majorities in the House, Senate and at the FCC. While the telcos were able to politically defeat any and all net neutrality amendments during 2006, the turmoil of that year's elections also helped keep

the Republicans from ever bringing their net neutrality-free telecom reform bills to a full Senate vote.

In August of 2008, political power and public perception is now mostly on the side of net neutrality proponents, thanks to the 2006 switch to Democratic control of the House and the Senate, and to the PR missteps made by Comcast over the course of the BitTorrent drama. Net neutrality proponents can now also count on search giant Google as a firm ally, alongside Democrat Barack Obama, the first Presidential candidate to publicly state support for the creation of network neutrality rules.

In **"Net Neutrality Phase II: The Battle of 2009,"** Sidecut Reports examines the current state of the network neutrality debate, and the legislative, regulatory and public-relations battles that are expected to surface or continue throughout the next calendar year. At its heart, the network neutrality debate is nothing less than a battle for control of the Internet, and how to reach the greater public good. One choice is to trust that the large service providers, the telcos and cable companies, will not use their gatekeeper status for business advantages; the other choice is to pass laws or regulations to pre-emptively limit the providers' power over how Internet communications are conducted.

This "Battle of 2009" has immense consequences for all businesses that touch the Internet, from individual users and small software startups to device and infrastructure gear-makers to the biggest service providers, and to investors all along the Internet business chain. The question of whether or not lawmakers or regulators will intervene in either direction could have long-term effects on investments on both ends of the business, from the Silicon Valley startup level to the service providers' needs for funding of fiber, cell towers and infrastructure equipment.

At its heart, the net neutrality debate is nothing less than a battle for control of the Internet, and how to reach a greater good for Internet users.

For our report we interviewed top policy executives from all the companies with leading stakes in the debate, including AT&T, Google, Verizon, Comcast, Qwest and BitTorrent, as well as legislators like Rep. Ed Markey (D-Mass.), representatives from consumer-issue groups like Free Press and Public Knowledge, and net neutrality thought-leaders from leading public-policy law schools and industry analyst groups.

- ***By combining their views with our own long record of reporting and analysis, we provide business professionals, regulators, legislators and investors with a clear picture of the current state of the debate, where it is headed next, and how the potential outcomes could affect the greater Internet business ecosphere in 2009 and beyond.***

With the current FCC under chairman Kevin Martin officially heading into lame duck status, insiders and industry observers expect that the next significant steps in the network neutrality timeline will now wait until after the November elections, when a new President, a new FCC and perhaps some new players in Congress will decide whether new regulations or laws are needed, and if so what shape and form they will take and who might best enforce them.

AT&T and its brethren almost universally believe that no new laws are necessary, and will start the debate by pointing at the Comcast order as proof that the FCC has all the rules, incentive and power it needs to enforce any such infractions. Net neutrality proponents, however, are already pointing out that the Comcast order is limited in scope and doesn't even begin to address important questions like whether or not providers should be allowed to charge premiums for preferential deals that provide prioritized delivery of Internet traffic, a key net neutrality issue.

Yet while a wide gulf still exists between the two sides, there are already cooperative moves (like Comcast's attempts to reach business pacts with P2P players like BitTorrent) and compromise-seeking statements emerging from either edge, bringing hope for a discussion that could be more a search for solutions than the rhetorical bluster that marked the previous phase of the

debate. There are also moves from the Internet's professional engineering community, such as the recent P2P workshops overseen by the Internet Engineering Task Force (IETF), that may help alleviate theoretical, political and business net neutrality problems via technical, standards-based solutions.

If the first phase of the debate was about framing the network neutrality problem (or denying its existence), the second emerging phase seems to be more rooted in technical and business questions, including trying to define what "reasonable network management" really is, and determining how much transparency service providers need to provide into their net-management actions, as well as how they will price and define terms of service so users can simply understand what kind of broadband access they are getting, and for how much.

The new "balance of powers" on either side may have been exactly what was needed to move the debate from its initial, highly polarized and politicized phase into more rational discussions of what the future of the Internet should look like, and how participants on all sides could help guarantee user freedoms and rights -- while allowing service and application providers reasonable freedoms of their own to manage networks and businesses to ensure the profits that their investors and shareholders demand. That said, there are still strong opinions, marketing messages and political pressures ready to be applied from both sides, as each tries to win the upper hand in a game that is still in its early days. So ring the bell -- and let **"Net Neutrality Phase II -- The Battle of 2009"** begin.

The balance of power on either side of the net neutrality debate may be just what is needed to move the debate from its initial politicized phase to one more about how networks operate.

Comcast/BitTorrent Reset: Where We Are Now

Even as the daily news and blogging outlets fall all over themselves trying to affix significance and deep meaning to the FCC's Comcast/BitTorrent order, those at the center of the network neutrality debate know that while the action may be a significant turning point, it's at most just a start for the second phase of the net neutrality debate, which most expect to reach full force during 2009.

To quickly recap what happened: In October, the Associated Press reported that Comcast was interfering with users' ability to run file-sharing applications over its network; Comcast first denied the charges, but then admitted to "delaying" some traffic. More denials followed after public interest groups filed a formal complaint with the FCC; the FCC started an investigation, which included a hearing at Harvard where Comcast was found to have paid people to attend; despite attempts by Comcast to show it was correcting the problems, the FCC voted 3-2 on Aug. 1 that Comcast had "unduly interfered" with Internet users' rights and ordered the cable provider to disclose its previous practices to the FCC, to submit a plan describing how it was going to stop the practices, and disclose to customers and the FCC how it was going to change its practices for network management.

Whether or not the order survives any legal challenges Comcast may decide to bring, it is still significant as the first attempt by the FCC or Congress to enforce net neutrality principles, which still exist mainly in theory since there is no law or FCC order mandating their existence.

"The Comcast order is the first definite action to put the [2005] openness principles to the test," said Ben Scott, policy director at Free Press, the consumer

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-- Ben Scott, Free Press

advocacy group that along with compatriot group Public Knowledge filed the formal complaint to the FCC in the Comcast matter last November. "But I don't think it ends the debate. The question of whether the sale of quality of service through commercial arrangements [is allowed] has not been addressed here." Another large area of potential conflict the limited Comcast order avoided, according to Scott and other proponents, is whether advanced services will be available under exclusive contracts, "only to those with the resources to pay."

Comcast, which said it was "gratified" for not being fined, nevertheless still challenged the FCC's decision, saying in a statement that "we are disappointed in the Commission's divided conclusion because we believe that our network management choices were reasonable, wholly consistent with the industry practices and that we did not block access to Web sites or online applications, including peer-to-peer applications."

- ***While some observers think Comcast may challenge the ruling in court, other close followers of regulatory law have said that such a tactic might lose by winning; for example, should Comcast get the FCC order overturned in court, Congress might feel empowered to then enact stricter, clearer rules giving the FCC jurisdiction to fine and police cable providers without question.***

Currently, Comcast has not stated its plans.

The big question for many casual FCC observers is why would Martin, a Republican who is no historical friend of net neutrality rules, suddenly embrace the 2005 principles? The answer is, it may be a lesser-of-two-evils choice that his

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telco friends would wholeheartedly support, because it gives them a pain-free way to say that new net neutrality laws aren't needed. Indeed, just moments after the FCC's vote was made public, both Verizon and AT&T issued statements supporting Martin's actions.

Why would the telcos join Martin in this embrace of principles they have long said were unnecessary? Perhaps, to tamper net neutrality momentum while their friends still have some power.

- ***With the Democrats in control of both the House and the Senate, the odds of Congress drafting some kind of baseline net neutrality legislation in the near future are looking more likely, especially if Obama were to win the Presidency. The best way to head such legislation or regulation off at the pass, if you listen to the telcos, is to argue that the 2005 principles are all the rules the FCC needs to police and enforce any net neutrality infractions.***

"I think the FCC's broadband principles are helpful, I think they provide some clarity to companies like mine as we make decisions, and I think they provide some reassurance to consumers, that there are some rules and that the government can and will enforce them," said Jim Cicconi, senior executive vice president for external and legislative affairs at AT&T. "So that there is a constraint on those few who might engage in untoward conduct."

Walter McCormick, president and CEO of the U.S. Telecom Association, the chief lobbying group for large telecom service providers like AT&T and Verizon, seconded Cicconi's opinion of the Comcast order.

"The complaint was filed, and the FCC had both the authority and the will to enforce the [2005] principles," said McCormick. "It's clear that there's a process by which perceived problems can be addressed."

And even Comcast, which might not agree with the outcome this time, thinks that additional regulations aren't necessary. Joe Waz, Comcast senior vice president of external affairs and public policy, said the idea of "vigilant restraint" in the area

of network neutrality and consumer rights has worked historically and should continue to work going forward.

"The FCC clearly has the authority and jurisdiction over the Internet, on how it will work to protect consumers' rights," said Waz. But what the FCC has *not* done with its 2005 principles, Waz said, is seek to enforce them.

"The original comments by Martin and [commissioner Michael] Copps say the principles are not enforceable," Waz said.

"So you start from that premise, that [the FCC] did not want to regulate in this area, since they passed no rules."

In defending Comcast's actions in the BitTorrent matter, Waz said the cable operator felt it was within its rights as stated by the principles to try network management techniques it felt were reasonable.

"We wanted to minimally limit or delay [some] P2P traffic, and we chose a particular technique," said Waz. While there has been much debate -- both pro and con -- over whether Comcast's use of "TCP resets" was a typical engineering solution (it uses "forged" messages to disrupt large file transfers), Waz said what was more important was Comcast's later moves to find practices acceptable to content facilitators like BitTorrent, and to Comcast customers who wanted to use applications like BitTorrent. Waz also pointed to recent industry initiatives -- including a recent Internet Engineering Task Force workshop to find less-intrusive ways of accommodating BitTorrent traffic -- as positive steps toward progress all made without regulator intervention.

"If what we are doing is not viewed as acceptable, we need to figure out what the alternatives are that work," Waz said. Punishment from the FCC, he said, doesn't seem to make much sense. "If all of this [the FCC order] is for the good of the infrastructure, then the FCC's goal can have a good result," said Waz. "If the goal

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is to punish [Comcast] I think that is not good. Vigilant restraint has worked well, and we haven't had to adopt new rules. I don't think that makes new legislation any more effective now."

- ***So while some may jump to the conclusion that Martin and the FCC are now fully behind the net neutrality principles, the lightness and incompleteness of penalties (and lack of any fines) in the Comcast order, as well as its uncertain legal status, are signs to net neutrality proponents that the battle is far from over, and perhaps is just getting started.***

"They had been saying network neutrality was a solution in search of a problem, so here we are," said Gigi Sohn, president and co-founder of Public Knowledge, of her philosophical opponents and the Comcast case. "The Comcast case has concretized the issue, but it's not the end of the line," she said. What is needed, Sohn said, are some baseline rules that determine what is a net neutrality violation, and how it can be avoided or adjudicated.

"Otherwise, groups like ours will be busy with every single case," Sohn said. "And for every one we find, there will be a million that we don't."

And even though Free Press and Public Knowledge were successful in their actions vis-à-vis Comcast, their small staffs and budgets are really no long-term match for their adversaries in the rule-making influence business, the largest telcos. Next, let's take a look at where AT&T and Verizon stand on net neutrality, and what the strengths and weaknesses of their arguments are.

The Telcos And Their Incentive to Invest -- Or Not!

Better than anyone else, the country's biggest telecom companies -- AT&T and Verizon -- realize that network neutrality, like many other communications issues, is at its essence a political game. There is simply no way to separate Americans' private, public and business communications from the machinery of the political process, since communication is at the root of every human interaction.

With huge staffs of lawyers and lobbyists and spending budgets that reflect businesses whose quarterly revenues run into the tens of billions of dollars, the telcos -- who have been regulated just about since Alexander Graham Bell asked Mr. Watson for help -- know and play the political game as well as any entity in the land.

If you need any more convincing that AT&T was in favor of Martin's decision to make an example of Comcast, listen to AT&T's Cicconi -- a longtime GOP insider who was deputy chief of staff to President George H.W. Bush, and a staffer in the Reagan administration -- on what he expects to happen in Congress for the rest of the year or early next:

"I don't think Congress is going to legislate. I think the Comcast complaint actually provides the FCC with an opportunity to demonstrate that it can and will enforce the broadband principles, and that they do work -- and they are sufficient to deal with any of the complaints that could arise, including fairly complex matters as this one is."

"In this case the laws are anything but inadequate... you've got a lot of cops on the beat."

-- Jim Cicconi, AT&T

Cicconi continued:

"Generally, Congress feels the need to legislate when there's a problem that can't be addressed in any other way, or where it's been demonstrated that the laws are inadequate. In this case the laws are anything but inadequate. You have the FCC vested with authority, you have the antitrust laws as a backup, the justice department... you've got a lot of cops on the beat. The [Comcast] complaint shows the ability to raise the issue, the ability to get a lot of attention focused on it, and the ability to get a resolution. If one is seeking legislation, I'm not sure of the basis on which you seek it. What isn't working?"

More regulation means increased costs for big service providers like AT&T and Verizon, who note that such costs are passed on to -- guess who? -- the customer.

In terms of the net neutrality argument, the telcos' biggest and best argument to date is that any "new laws and regulations" will decrease the incentive to invest in the building of new networks, either by the telcos themselves or by the capital funding machines of Wall Street. AT&T's Cicconi, who oversees a staff of 700, explains some of the reasons behind the telco's deregulatory stance.

"One of the reasons companies like ours talk a lot about deregulation is that regulation [can] require an outlay of resources and people that is pretty significant," Cicconi said. "A lot of [AT&T's] reporting requirements are pretty massive. And a lot of them are just relics of a bygone era, of a far less competitive environment. Some of them date back to the Bell system; others date back to the breakup of the Bell system."

Cicconi said that dramatic changes in the services landscape, especially in the last few years, have led to a communications marketplace that is far removed from a monopoly.

"There's no area of our business today that's not intensely competitive," he said. While the company isn't against regulation per se -- "it has its place in certain areas" -- Cicconi said net neutrality rules would be "rather intrusive," and would end up costing customers as well as AT&T.

"It [regulation] requires massive resources, costs a lot of money -- the cost of which are passed onto consumers, of course," Cicconi said. "And in a competitive market, regulations really don't regulate behavior as well as the market does."

Cicconi also said that strict net neutrality rules -- such as ones that expressly prohibit network management -- could hit consumers directly in the pocketbook.

"The major achievement for net neutrality advocates, unfortunately, is probably going to be that they brought about the end of all-you-can-eat services pricing," Cicconi said. "When they defend the inalienable right of one power user to totally hose everybody else's services in the neighborhood, and argue a network operator can't do anything about it, they are effectively mandating an end to all you can eat services. I don't think that's what they advertised when they started pushing net neutrality, but that is going to happen."

Tom Tauke, executive vice president for public affairs, policy and communications at Verizon, brought up the notion that regulations can cause "unintended consequences," a phrase favored by big companies in just about any regulated industry. In telecom, Tauke said, new regulations may harm those who aren't committing misdeeds, if the regulations are applied too broadly.

Legislators and regulators, Tauke said, seem to be "struggling to find the right balance" between making sure providers do what's right, but not getting them "handcuffed" with new rules that significantly add to the costs of doing business.

"The major achievement for net neutrality advocates is probably the end of all-you-can-eat pricing."

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"We consider ourselves a relatively good actor," said Tauke. "It's the bad actors who attract regulation, and that [new net neutrality laws] could delay the delivery of new services."

- ***Close watchers of the telecom financial market do agree that Wall Street can "discount" stocks of companies operating in heavily regulated areas. So even if that discount is as little as one or two percent, it makes mathematical sense for an AT&T -- which just had revenues of about \$30 billion for its most recent financial quarter -- to spend millions in political and lobbying efforts to defeat any proposed regulations or legislation that might add burdens to its businesses.***

Stanford law professor Lawrence Lessig notes that venture capitalists won't invest in startups now if they think the networks of the future will be controlled by big service providers.

But it can also be asked how valid the telco argument is about needing regulation-free "incentives to invest" when Verizon and AT&T just got done spending the lion's share of the \$19.6 billion collected in the recent auctions of 700 MHz spectrum -- some of which came with new regulations that will force operators to open their networks to outside devices and applications, burdens that seem as "heavy" as any that net neutrality laws might apply.

Greater telco control of networks can also affect similarly important investments in other areas of the Internet ecosphere, said Stanford law professor Lawrence Lessig. The current environment of perceived big-operator control, he said, could already be limiting venture-capital investment in the Internet startups that help fuel network economy growth.

"Here in the Valley venture capitalists now are investing money in the future," Lessig said during his presentation at the FCC's April 17 meeting, held in Silicon

Valley on Stanford's campus. "And when they invest that money in the future, they invest asking a single question -- 'what will the world look like then, when this technology needs to be deployed, and profit made from this technology?' And uncertainty about what the world will look like then raises the cost of these new technologies, and therefore lowers the investment in those new technologies now -- not five years from now, but right now. If they believe the platform will be controlled tomorrow, there will be less investment today."

"You can't layer on a lot of additional risk [via regulation] and expect companies are going to continue to invest at those levels."

-- Jim Cicconi, AT&T

Other past arguments by the telcos against net neutrality laws -- specifically that such laws would make it illegal for them to offer specialized services like prioritized video on demand, or medical-information networks -- look to be failing for a lack of any movement in such directions. Had there been a solid business model in offering preferential treatment for delivery of video services, the very powerful telcos might have been better off to simply launch the services while their political friends still held sway at the FCC, and take their legal chances. Complaining that new laws might limit their ability to launch such services is seen by many as weak tea from the telcos, who historically haven't been shy to take rule-breaking action if they felt their means were justified.

Should Martin, as expected, offer his resignation as chairman to the incoming President (most followers expect him to do so no matter which party wins the Presidency and its control of the FCC), AT&T and Verizon could lose a big friend at the top of the regulatory chain. Perhaps in that light, it should be no surprise that Cicconi's message about the chills of regulation on investment will be renewed and repeated as the net neutrality debate continues.

"This year we'll invest 19 billion dollars to upgrade and maintain our networks," Cicconi said. "Then add in billions [spent] on spectrum. You very quickly get to a

little short of \$30 billion in investment, in one year, that a company like AT&T is making. That in itself is risky, and you can't layer on a lot of additional risk and expect companies are still going to continue to invest at those levels, at least in broadband."

- ***Is that the veiled threat that net neutrality legislation or regulation will force AT&T to stop or slow its spending, which in turn fuels other parts of the U.S. economy?***

"We either care about broadband deployment in this country, or we don't," said Cicconi, responding to a question about whether AT&T was sensitive to the concerns of net neutrality proponents. "And if we're serious about it, we've got to have policies in place that ensure that the incentives are present for that investment to occur. And it's not a one-time investment, it's ongoing investment."

While the incentive-to-invest theme may be the telcos' traditional strong argument, recent interviews showed that the biggest carriers are also united in message about who their biggest opponents are in the net neutrality game: Google, Google, and... Google. AT&T's Cicconi at times seemed to let his distaste for Google cloud his historical perspective of the net neutrality debate, claiming that "the real impetus of the idea" came from the search giant, even though a look back at a net neutrality timeline shows Google to be somewhat of a later entrant.

"I don't think for a minute that their advocacy of net neutrality was altruistic," said Cicconi of Google. "I think it has absolutely been designed to further their business model versus others, and to advantage themselves commercially. Frankly at this point in the debate they appear to be a lot more strident and irreconcilable about it. Many of the true consumer groups are not."

Google, of course, begs to differ, as do the public policy groups who started the fight for network neutrality long before Google got heavily involved. Next, let's take a look back at network neutrality history, and how the "Google Factor" has influenced the current state of the debate.

Net Neutrality History, and the Google Factor

Being tagged as the telcos' bogeyman must seem like *Groundhog Day* to Rick Whitt, Google's Washington telecom and media counsel. Whitt, who battled the big telcos in a former life as a public-policy exec at MCI, isn't surprised by AT&T's attempts to paint the search giant with the "big bad" brush in the net neutrality tilt.

"The carriers will try to frame this as being between themselves and Google -- I'm a veteran of MCI so I saw this in the '90s," said Whitt. "They came after MCI as the poster child of the CLEC side [in previous battles about network sharing issues] and unfortunately, they did a pretty good job."

Creating the "bugaboo" of Google is just "a tactic well known in D.C.," said the Free Press's Scott. "The notion that Google is a puppeteer gives them way too much credit," Scott said. "But when you don't have the facts on your side, one tactic is to confuse."

Public Knowledge's Sohn also rejects the Google theory, but notes that the telcos' resources can help such misperceptions stick.

- ***"It's their favorite whipping boy -- but this is not about Google," Sohn said. "It doesn't mean a damn thing about Google. It has to do with, if I can have access to the network. They [the telcos] are always going to want to change the topic, saying it's all about Google. The problem is if enough people listen to them."***

"It's their favorite whipping boy, but this is not about Google. It has to do with if I can have access to the network."

-- Gigi Sohn, Public Knowledge

Strategically, raising fears about Google's powers isn't too tough a case for the telcos to make, given the company's unparalleled dominance in Internet searches, along with its ability to mint billions off search-related advertising sales. But while Google has certainly used its economic and cultural influence to its advantage in taking a lead role in the debate, to call Google the instigator or ringleader of the entire network neutrality debate is to ignore the roots of the arguments, which started well before Google decided which side to support.

In 2004, then-FCC chairman Michael Powell defined the "Four Freedoms," the principles behind the net neutrality idea.

While many parts of the net neutrality debate have antecedents relating to historical questions about telecom network control and the "common carrier" obligations of telecom providers, the current issue known as "net neutrality" started taking shape around 2002. According to Phil Weiser, professor of law and telecommunications at the University of Colorado, the earliest parts of the net neutrality debate started as an offshoot of the argument surrounding cable network open access, or whether third party ISPs should be given access to the cable networks. Weiser, who is also executive director of the Silicon Flatirons Center, has had a front-row seat for most of net neutrality's history, as many of the seminal moments occurred during the yearly Silicon Flatirons telecom conferences, usually held in early February on the Boulder, Colo. campus.

In 2003, law professor Tim Wu (then at the University of Virginia) presented a paper at the Silicon Flatirons event called "Network Neutrality, Broadband Discrimination," which asked questions about "the conflicts between the private interests of broadband providers and the public's interest in a competitive innovation environment centered on the Internet," and was believed to be the first public use of the term.

A year later at the Silicon Flatirons event, then-FCC chairman Michael Powell delivered a speech titled "Preserving Internet Freedom: Guiding Principles for the Industry," which formally outlined the "Four Freedoms" of net neutrality -- the freedom to access content, the freedom to use applications, the freedom to attach personal devices and the freedom to obtain service plan information -- that Powell felt were necessary to empower users and entrepreneurs, whose empowerment was "critical to unlocking the vast potential of the Internet."

In March of 2005, the FCC fined ISP Madison River \$15,000 for blocking Vonage, the first known net neutrality infraction.

The first real flash point in the debate, however, didn't come until a year later, again at the Silicon Flatirons event, when a presentation from Stanford's Lessig included a last-minute addition of some recent news he had heard, namely that voice over IP provider Vonage Holdings had formally complained to the FCC that a telecom service provider was "blocking" its DSL customers from using Vonage's service.

That claim (first reported by yours truly on the Advanced IP Pipeline website on Feb. 13, 2005) was confirmed the next day at the event by Powell, who said the FCC would aggressively pursue the matter. On March 3, 2005, the FCC named rural ISP Madison River (which billed itself as "the 17th largest phone company in the U.S.") as the firm that was blocking Vonage's VoIP services. Madison River agreed to stop the practice, and agreed to a consent decree with the FCC under which it paid a \$15,000 fine for its actions.

While the fine and the provider in question may have been small potatoes on the grander scale, for net neutrality proponents it was clear proof that operators could and would use their market power to thwart Internet-based competition. For Vonage, it was a small victory that may have ended up doing more harm than

good, since it made the VoIP provider a huge target for the big telcos, who perhaps sensed a competitor to their profitable landline businesses.

(The business case of Vonage may be worth a research paper all its own, but it is probably not a coincidence that after its "victory" in the Madison River case, Vonage came under extreme scrutiny of the FCC and its new chairman Kevin Martin, who was nominated by President Bush to replace the retiring Powell on March 16, 2005. An order by the FCC in 2005 directing all VoIP providers to add enhanced 911 capabilities to their services, which was extended but eventually complied with by Vonage, caused the company no small cost in equipment outlays and customer-information programs, and perhaps showed what can happen to new market entrants who aren't prepared to battle the incumbents in regulatory as well as market-based arenas.)

If "Madison River" was the spark that started the fire of the net neutrality debates, the pending mergers of AT&T and SBC and Verizon and MCI only added to general concern about potential gate keeping power (worries which were increased by the summer of 2005 cable-favorable ruling in the "Brand X" case and the FCC's decision to deregulate DSL). But the fuel to turn that previous blaze into a rhetorical conflagration didn't arrive until late October of 2005 when then-SBC chairman Ed Whitacre, in an interview with BusinessWeek, voiced some opinions that went down in net neutrality infamy.

The money quote from the interview with BusinessWeek's Roger Crockett (which actually appeared online before the printed publish date of Nov. 7, 2005) deserves to be quoted in full, since it is still pointed to as one of the prime reasons why the big telcos can't be trusted:

BusinessWeek: How concerned are you about Internet upstarts like Google, MSN, Vonage, and others?

Ed Whitacre: How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!

The GOP struggles in the 2006 elections kept the telecom reform bill from ever reaching the floor of the Senate for a full vote.

Not to be outdone, Verizon chimed in similarly early in 2006, when CEO Ivan Seidenberg suggested that Google and Microsoft should "share the cost" of operating broadband networks in an interview at the CES trade show in Las Vegas. A month later, another Verizon exec called Google out for enjoying what he called "a free lunch" at the telcos' expense, perhaps the most egregious example of the telco rhetoric which claimed that Internet application providers like Google and Vonage weren't paying their fair share of connection costs, despite the readily provable infrastructure expenditures of both firms and their brethren.

Such incendiary language set the stage for an incredible summer of contentiousness, as net neutrality became a polarized, partisan issue thanks to the Republican efforts in 2006 to pass telecom reform bills with language specifically tailored to eliminate any future opportunity for net neutrality considerations. When Free Press and others started Internet-based sites like Savetheinternet.com to help promote their ideas, telco-backed organizations countered with faux "grassroots" (called "astroturf" by detractors) operations of their own like HandsofftheInternet.com, raising the clash of voices to new, web-wide heights. Videobloggers, actors and musicians joined the traveling circus on the proponent side, leading to memorable over-the-top moments like the "Ask a

Ninja" video about net neutrality that somehow brought Robin Williams' hairy cousin, bacon juice and hot dogs on a stick into the debate.

But while net neutrality backers may have had recognizable names like musician Moby and actor Alyssa Milano on their side, in Congress the telcos and the GOP had power on all the relevant committees, defeating all net neutrality amendments and eventually passing a reform bill in the House. In the Senate, commerce committee members passed their own version of a reform bill, but not until then-committee chairman Ted Stevens (R-Alaska) made net neutrality a nationwide sensation in the worst possible way, when his rambling attempts to explain the Internet as "a series of tubes" gained widespread fame in a "Daily Show" video clip that is probably now in YouTube's Hall of Fame.

In the end, Republicans' fall 2006 campaign struggles kept the telecom reform bills from ever reaching the Senate floor for a vote, effectively tabling the debate. By early 2007, however, Google had finally fully engaged itself in the process, hiring D.C. vet Whitt in January to lead a policy effort that in the past had earned little more than ridicule for its casual attitude toward the Beltway in general and the potential impact of political opinion on Google's businesses.

- ***In fact, comments by Google execs in that time frame had many wondering which side of the debate the search giant was on.***

Whitt said that internally, the company actually debated which side to take, "since there was an argument to be made that we'd come out just fine" if application providers like Google had to pay service providers for preferential treatment.

In the end, Whitt said, Google founders Larry Page and Sergey Brin, along with CEO Eric Schmidt, were adamant that the company would support Internet innovation, even if it cost Google a business advantage.

"We strongly believe in an open Internet, with no gatekeepers at the access points," Whitt said. "We believe that passionately." During 2007, Google put its economic power behind that passion, taking the public-perception lead in matters like the 700 MHz wireless spectrum auctions and the "open access" conditions,

which Scott said were actually first proposed by Free Press, written by Media Access Project lawyer Harold Feld.

"When we started Savetheinternet.com, we never spoke to anyone at Google," said Scott, who claims that his group also has taken no corporate or personal donations from Google or any of its founders, trying to dispel another popular myth. "When we went to Google, we didn't ask them for money, we asked them to help work, because we needed someone to help take the heat," Scott said. "It's great that they have come in because they have stature and they can get things done." But the record shows, Scott said, that Google isn't the net neutrality ringleader the telcos would like people to believe.

"We're not content to address the system as it is. Citizens should have more access."

-- Rick Whitt, Google

What Happens Next: Some Rules, the Obama Wild Card, and A Nicer Debate?

Still, when it comes to net neutrality proponents there is no more recognizable name than Google, given its economic prominence and its star-turn as Silicon Valley's current brightest light. But instead of just relying on its name and its bankroll, Google is trying tactics different than those of past lobbyists and opinion influencers, using Internet technologies and applications to help it battle the traditional, entrenched telcos.

According to Whitt, Google is looking to expand its current small D.C. staff ("there are only three of us on the Hill, and I'm the only one focused on the FCC," Whitt said) but said it will never match the sheer numbers of an AT&T.

"Carriers are always regulated, and they have deep political roots," Whitt said. "We're not going to replicate that model. But we're not content to address the

system as it is. Citizens should have more access. [Government] transparency is a problem." Regular citizens, Whitt said, "can't just show up and get a meeting at the FCC. That's just the way it is. It's not wrong, it's just not optimal."

One of the ways Google tries to provide more access to the process is through its public policy blog, where the company often makes official announcements. Google also recently announced its support for an online entity called "Internet for Everyone," which basically couches the net neutrality ideals into a softer-sell message of making broadband services available to all Americans. And in June, Google said it was working on a software program that would help users monitor whether or not their ISP was meddling with their broadband connection.

"We're trying to put a spotlight on things, to get people to read and understand, and get involved in the process," Whitt said. "We want to make information [about telecom regulation] much more transparent." That's different from some players, Whitt said, "who see benefits to keeping all this an inside baseball game."

What could change that faster than any amount of lobbying actions is if Democrat Barack Obama should win the November election and become President. In addition to being the first Presidential candidate to solidly and emphatically back network neutrality (Sen. Obama has said "I'm going to make sure that is the principle that my FCC commissioners are applying as we move forward"), Obama has been amassing a well-connected string of telecom policy wonks as advisors and supporters, including former FCC chairmen William Kennard and Reed Hundt.

- ***Should the predicted Democratic gains in the House and Senate also materialize, net neutrality proponents might have the voting power they need to overcome even the telco lobbying strength.***

While Rep. Markey has conceded that his current net neutrality legislation is mainly effective as a dialogue-starting placeholder, Markey still wants the certainty of written rules rather than softer principles that rely too much on the

judgment of the rotating office of FCC chairman, and said that he will pursue new legislation in 2009.

One close observer of telecom dealings in Washington said "there is a very good chance that in an Obama administration, something recognized as net neutrality becomes law." But unlike the preachy tenets of Powell's freedoms, the new rules or laws would likely incorporate the realities of the current net neutrality debates, including:

- **A provision declaring there shall be no blocking or degrading of traffic by owners of last-mile pipes ("Ed Whitacre lost that battle," our source said)**
- **A provision that recognizes the need for providers to engage in reasonable network management**
- **A clear way to manage the inevitable disputes that arise about what is and what isn't reasonable network management**
- **A directive that addresses whether or not providers can charge extra or selectively for quality of service and prioritization of traffic**

Perhaps the most heartening thing for veterans of the net neutrality debate is the emergence of a new spirit of acceptance from both sides, toward working together to find solutions that either end can live with. The University of Colorado's Weiser is one who hopes that "a new President and Congress can develop something more of a sustainable framework, one that gives guidance and some process for compliance." Weiser, like others close to the debate, noted that it may be some combination of rules, laws, enforcers and enablers that brings more certainty to the broadband services marketplace.

"There are lots of different ways to solve the problems -- it can be through the FCC, or the Federal Trade Commission (FTC), as well as whatever the IETF comes up with," Weiser said. "And there is self-regulating by the industry." The only thing for certain, Weiser said, is that "uncertainty is not good for anyone."

Comcast's Waz said the company participated in the recent IETF workshop in Dublin, Ireland (where technical solutions for P2P traffic congestion were debated) and found it "refreshing, since it wasn't a place where people came to litigate. Everyone was in that room to solve a problem."

Comcast also became a business partner of Google in one of the year's more interesting developments, the May 7 announcement of a \$3.2 billion combined investment by Comcast, Intel, Time Warner Cable, Google and others to back a new nationwide WiMax wireless network formed out of the combination of infrastructure and spectrum assets from Clearwire and Sprint. The network, which will abide by the kind of "open" requirements Google sought for the 700 MHz spectrum auctions, is set to launch in trials later this year.

"The important thing is that the [Clearwire] deal was arrived at in a business to business decision, without government intervention," said Waz, whose company put \$1.05 billion into the deal. "It made business sense, and wasn't done out of regulation."

What also makes sense to almost everyone involved in the debate is that the Comcast-BitTorrent case has changed the topics that are being talked about, from largely theoretical questions about potential harm to users or investments, to more realistic questions about how providers might manage networks, how they might tell users about such techniques, and what costs such techniques and

Both net neutrality proponents and opponents seem to be moving toward calmer debate, focused more on technical ideas.

disclosures might do to the average Internet user's broadband services monthly bill.

"The Comcast-BitTorrent debate has matured the [net neutrality] debate," said Verizon's Tauke. "It got people thinking about network management and the delivery of new services. That has resulted in a new level of scrutiny about how networks work, and that is having an effect on policymakers."

Like others, Tauke said that the passage of time may have helped lessen the conflict that seemed to previously make any interaction between sides impossible. "I think [the industry] went through a period, of fear of the unknown," Tauke said. "As we become more familiar with the services, there's less fear. It seems like we're reaching the point where a lot of this tension in the industry that was preventing normal cooperation is dissipating. You see more attempts by industry to solve problems, and that process seems to be working."

AT&T's Cicconi said he is doing his best to listen to opposing viewpoints, and thinks (Google aside) that there are ways to resolve net neutrality issues:

- ***"If nothing else has occurred in the net neutrality debate, it has heightened awareness on the part of companies like mine that we've got to remember, as we make decisions, not to simply make them based on traditional network routing and engineering principles, because we also have to keep in mind the impact on the broader internet ecosystem. I do think there's a path here on network neutrality. I think we're finding that everybody is growing a little weary of this debate."***

Proponents like Free Press's Scott see a somewhat similar landscape, albeit arrived at by a different path. Though he said "there isn't one way to do it," Scott does think now that some kind of legislation or regulation of baseline net neutrality ideals is imminent.

"To my mind, the outcome of Comcast case and the prevailing winds of change of the electorate are about what kind of legislation we ask for next year," Scott

said. "The big shift is that two years ago, we were asking will we have [net neutrality] in the law. Today, we're talking about when we will have it, and what will it look like."

And how does Scott see the new willingness of both sides to be more civil? "My opponents used to have blood on their teeth, and now they are softening," Scott said. "They know they are beat, and they're making the proper adjustments."

One of the adjustments seems to be a call for continued case-by-case approach to net neutrality regulations, something both Verizon's Tauke and FCC commissioner Robert McDowell see as a preferable path. McDowell, one of the two commissioners who dissented in the Comcast order, issued a 12-page statement explaining his reasons for dissent, wondering if the FCC wouldn't be better served to act as a type of dispute mediator:

"Perhaps the FCC could have created a new role for itself by spotlighting complaints of potentially nefarious network practices and conveying them to the IETF for collaborative review and action," McDowell said in his statement.

And perhaps the collaborative work is already starting to happen, either as an offshoot of the Comcast case or of the changing nature of the debate. In a recent post on Google's public policy blog, company "evangelist" and Internet co-founder Vint Cerf wrote not only of his concerns over the potential emergence of pay-per-bit broadband plans [which he did not find useful] but also about some recent meetings between Google and Comcast engineers.

"I've been pleased so far with the tone and substance of these conversations, which have helped me to better understand the underlying motivation and rationale for the network management decisions facing Comcast, and the unique characteristics of cable broadband architecture," Cerf wrote. "the real question for today's broadband networks is not whether they need to be managed, but rather how."

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APPENDIX A -- THE NET NEUTRALITY TIMELINE

Feb. 3, 2003 -- Law professor Tim Wu presents a paper on "Network Neutrality, Broadband Discrimination," at the Silicon Flatirons conference in Boulder, Colo. Wu's paper is believed to be the first use of the term.

Feb. 8, 2004 -- FCC Chairman Michael Powell introduces the "Four Freedoms," the base of the net neutrality arguments, in a speech at the Silicon Flatirons conference in Boulder, Colo.

Feb. 13, 2005 -- Larry Lessig reveals that Vonage has complained to FCC about a service provider "blocking" its Voice over IP services at Silicon Flatirons event; FCC Chairman Michael Powell confirms issue the next day, says FCC will aggressively pursue the matter.

March 3, 2005 -- FCC names rural ISP Madison River (which billed itself as "the 17th largest phone company in the U.S.") as the firm that was blocking Vonage's VoIP services. Madison River, in the process of filing for an IPO, quickly agrees to a consent decree with the FCC and pays \$15,000 to the U.S. Treasury.

March 16, 2005 -- Kevin Martin nominated by President Bush as Chairman of the FCC.

June 27, 2005 -- The Supreme Court rules in favor of cable companies in the so-called "Brand X" case, overturning a federal court decision that would have forced cable companies to open their networks to third-party ISPs. The decision is seen as to specifically suggest that the agency has jurisdiction over competition issues in the broadband environment, a move that will also allow the FCC to deregulate DSL services, a process it starts about a week later.

Aug. 5, 2005 -- The Kevin Martin-led FCC adopts the so-called "Internet Principles" order, which largely embraces Powell's "Four Freedoms" but adds an important footnote that tempers the commitment to the principles by allowing for "reasonable network management" by operators. In published comments, Martin says that such policy statements "do not establish rules nor are they enforceable documents." The order is issued the same day that the FCC declares its intentions to deregulate DSL services.

Sept. 13, 2005 -- eBay buys Skype for a reported \$2.6 billion, a deal that turns Internet telephony (especially Skype, which promotes free calls between Skype users) into a big, front-page business that directly challenges the telcos.

Sep. 19, 2005 -- Vonage's Jeffrey Citron calls for a "Broadband Bill of Rights," which mirrors net neutrality principles, in a speech at the Fall VON tradeshow in Boston.

Oct. 31, 2005 -- The FCC approves the SBC-AT&T and Verizon-MCI mergers, with "enforceable conditions" that include two-year pledges to "conduct business in a way that comports with the Commission's Internet policy statement."

Nov. 7, 2005 -- Then-SBC CEO Ed Whitacre interview with Roger Crockett appears in BusinessWeek (the article actually appeared online about a week before the publish date), which provides net neutrality proponents with an endless amount of ammunition. To quote:

BusinessWeek: How concerned are you about Internet upstarts like Google, MSN, Vonage, and others?

Ed Whitacre: How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!

Jan. 5, 2006 -- Verizon CEO Ivan Siedenberg says after a speech at the CES trade show in Las Vegas that Google and Microsoft should "share the cost" of operating broadband networks, and claims Google is in talks with Verizon about fees. Google denies having such talks. A month later, another Verizon executive calls Google out for enjoying what he called "a free lunch" at the telcos' expense.

April 24, 2006 -- Free Press launches "savetheinternet.com," a national campaign to "stop Congress from gutting Network Neutrality -- the First Amendment of the Internet."

April 25, 2006 -- Telecom lobbyists launch "Hands Off the Internet," an organization that presumptively represents grassroots support for opposition to network neutrality. Critics call HOTI one of the most egregious forms of "astroturfing," claiming that AT&T and other telcos provide the monetary backing for HOTI's extensive lobbying and advertising campaigns.

May 11, 2006 -- Online video show "Ask a Ninja" weighs in on the Net Neutrality debate, forever linking the girl at Hot Dogs on a Stick, Robin Williams' hairy cousin and bacon juice in its plea for its watchers to support net neutrality. Online video show Rocketboom weighs in a bit more seriously on June 23, also in support of net neutrality. (Both of these follow online video-show host Ze Frank's April 20 take on the subject where his description of AT&T as an "asshole" is among the more polite things he says.)

May 18, 2006 -- Net neutrality officially goes mainstream when musician Moby appears with Rep. Ed Markey at a Capitol Hill press conference. Moby joins fellow celebrity actress Alyssa Milano, who had earlier supported net neutrality in a blog post.

June 9, 2006 -- The U.S. House votes 269-152 to reject Rep. Ed Markey's net neutrality amendment to the COPE telecom reform bill, HB 5252.

June 28, 2006 -- Sen. Ted Stevens makes his "Tubes" speech during a Senate markup hearing, trying to decry net neutrality but instead delivering a performance that later wins him infamy on the Daily Show and in YouTube's hall of fame. Stevens and other Republicans on the subcommittee approve the Senate's version of the telecom reform bill, but the bill never makes it to the floor for a full Senate vote.

Dec. 29, 2006 -- FCC approves AT&T merger with BellSouth, with stipulations that the firm adhere to the FCC's 2005 net neutrality principles for 30 months.

January, 2007 -- Google hires former MCI lobbyist Rick Whitt, showing that the search giant is finally getting serious about D.C. operations.

Jan. 9, 2007 -- Sens. Olympia Snowe, R-Me., and Byron Dorgan, D-N.D., introduce the "Internet Freedom Preservation Act of 2007," which includes net neutrality language that closely models Powell's Four Freedoms.

Feb. 15, 2007 -- Tim Wu publishes a paper calling for more open wireless networks, via a "Cellular Carterfone" provision that would allow users to use devices of their choice on cellular networks. A week later, Skype files a petition with the FCC to apply the Carterfone principles to wireless networks.

July 9, 2007 -- Google asks the FCC to consider making "open platforms" part of the rules for the upcoming 700 MHz spectrum auctions. A day later, the FCC does in fact issue a draft of the proposed rules saying that 22MHz of the spectrum would be subject to open-access regulations, meaning providers could not control what devices could be used or what the bandwidth could be used for.

July 20, 2007 -- Google announces its intentions to bid on the 700 MHz spectrum if the open access rules are adopted. Eleven days later the official rules are released, with only some of the "open" conditions Google asked for included.

August, 2007 -- During a live webcast of a Pearl Jam concert, AT&T mutes singer Eddie Vedder as he sings lyrics criticizing President Bush. AT&T later admits it has edited other such webcasts, but says it is "taking steps" to ensure such censorship doesn't happen again.

Sept. 13, 2007 -- Verizon sues the FCC over the openness rules for the 700 MHz auction, saying they aren't needed and could devalue the spectrum. After courts deny the company's request for an expedited review, Verizon drops the case in late October.

Sept. 27, 2007 -- Verizon rejects a request from abortion rights group Naral to allow people to sign up for text messages from Naral on their cell phones, claiming it has the right to block "controversial or unsavory" text messages. After public outcry, Verizon switches its position and allows Naral to send the text messages.

Oct. 19, 2007 -- The Associated Press publishes a report claiming "Comcast Corp. actively interferes with attempts by some of its high-speed Internet subscribers to share files online, a move that runs counter to the tradition of treating all types of Net traffic equally." The AP says it confirmed the interference through nationwide tests, and that it appeared to target peer-to-peer file-sharing applications like BitTorrent. Comcast says it "does not block access to any applications," but doesn't initially offer any more explanation.

Nov. 1, 2007 -- Public Knowledge and Free Press file a formal complaint with the FCC, charging Comcast with violating the 2005 Internet policy statement.

Nov. 27, 2007 -- Verizon says any device from any provider can connect to its networks in 2008, provided it can "properly connect to the network." The company announces plans for testing and application development and certification as well.

Jan. 8, 2008 -- FCC Chairman Kevin Martin says the agency will investigate the Comcast-BitTorrent blocking incident.

Feb. 25, 2008 -- At an FCC hearing at Harvard, Comcast is warned against its blocking tactics by FCC chairman Kevin Martin, who says the commission is "ready, willing and able" to punish the cable company. Comcast is later revealed to have hired people off the street to pack the audience at the event, in part to keep opponents out of the public hearing.

March 27, 2008 -- Comcast and BitTorrent say they will work together to resolve peer-to-peer management issues; Comcast also pledges to move to a "protocol agnostic" method of management on its networks by the end of 2008.

April 17, 2008 -- The FCC holds another hearing at Stanford, where Comcast, AT&T and Verizon are invited but decline to attend. Some panelists claim that Comcast still isn't telling the truth about its actions, and has been selectively blocking traffic at all times, not just at times of congestion as Comcast claims.

July 11, 2008 -- FCC Chairman Kevin Martin says that Comcast did violate the commission's Internet policies, and said an order regarding the matter would be voted on at the commission's Aug. 1 meeting. Martin added that he didn't think Comcast should be fined for its actions.

Aug. 1, 2008 -- The FCC, by a 3-2 vote, finds Comcast guilty of violating the Internet principles and orders the carrier to change its network management policies, and report back to the commission with new plans within 30 days.

APPENDIX B -- SIDECUT REPORTS PRESENTS

THE NET NEUTRALITY TOP 10 INFLUENCERS

The movers and shakers in the net neutrality debate, as of August 2008:

1. **Jim Cicconi, AT&T** -- Still the man with the most pawns and the best grasp of the board.
2. **Kevin Martin, FCC Chairman** -- A lame duck, but with a few big quacks left.
3. **Rick Whitt, Google** -- Looks like Phil Mickelson, and his company plays policy like Phil -- sometimes a champion, sometimes hitting from behind the concession stand and off a tree. Capable of major victories, but still not Tiger-solid.
4. **Rep. Ed Markey, D-Mass.** -- Driving the House Bus. A big bus but not a tank.
5. **Joe Waz, Comcast** -- I get knocked down, then I get up again... just like another famous fighter from Philadelphia?
6. **Ben Scott, Free Press** -- Riding the big wave of momentum. How long can the Silver Surfer stay afloat?
7. **Lawrence Lessig, Stanford** -- Always effective as the lone voice storming the castle; can he compromise if he is on the other side of the ruling walls?
8. **Tom Tauke, Verizon** -- Maybe not even the real source of power at Verizon but a former congressman who knows which strings to pull. Can pull hard with Ivan Seidenberg behind him.
9. **Blair Levin, Stifel, Nicolaus** -- If not the next FCC commissioner, he will know who it is before anyone else (and will explain why to Wall Street).
10. **Sen. Barack Obama, D-III.** -- First he has to win. Then Reed Hundt's troops can take over.

Honorable Mention: Tim Wu, Columbia Law School; Kyle McSillarow, NCTA; Eric Schmidt, Google; Walter McCormick, USTA; Chris Libertelli, eBay/Skype; Gigi Sohn, Public Knowledge; Jessica Rosenworcel, Senate Commerce Committee; Jonathan Adelstein, FCC; Phil Weiser, University of Colorado; Preston Padden, Disney.

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