

Broadband Marketing Practices Proceeding, Docket 07-52. Crossfiled in Docket 08-7 per multiple docket instructions as they pertain to the two proceedings (Both are being addressed in a public hearing to be held after these comments are filed, so various parts of them may be pertinent to either, and certain pertinent to both.)

Abstract: Practices which restrict traffic, whether it be usage caps or throttling, must be banned and otherwise not permitted, given that the Internet may well be on its way to becoming the primary medium for receiving protected free speech content, such as video, audio, and print programming, including news, discussions of issues, or other First Amendment-protected speech.

## 1. Usage Caps.

'Usage Caps' are defined as any setting of an arbitrary maximum amount of traffic one may do on the Internet, including accessing websites, downloading or uploading content such as video or audio material, including streaming media, or publishing printed or graphical material such as text, photography, or files containing any material that would be considered protected speech under the First Amendment.

This may also include material posted on commercial services such as YouTube, audio and video podcasts posted and downloaded from any number of sources, and streaming audio/video feeds both from Commission licensed broadcasters and freelancers setting up stations online, whether they be standalone or via services like Live365.com.

A blog entry was posted today, which refers to usage caps. This is the relevant text from that.

Tuesday, February 12, 2008

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There's a reason your computer is sloooooowwing downnnn...

"Okay, let's check the traffic on the Internet: Traffic is heavy westbound and eastbound. Arteries are clogging up the expressway headed both north and south with tie-ups and breakdowns reported heading both in and out of town with delays of an hour or more in both directions. Internet service providers like Comcast and Time Warner have reached a point where they are now controlling traffic due to heavy Internet traffic. Time Warner is now testing monthly bandwidth caps and even the phone companies (AT&T and Verizon) aren't immune to congestion although they can go deeper in the system with service by using routers and fiberoptic links..."

Source: <http://melphillips.blogspot.com/2008/02/tuesday-february-12-2008.html>

The Commission is obliged to declare and deem this practice to be discriminatory, and that audio and video streaming and downloading is protected speech under Title II of the Act, and where necessary, under Title I as well.

## 2. Throttling.

'Throttling' is a different method of restricting the use of the Internet by any provider, whether it be mobile, broadband, or dialup access. Restricting the flow of a file to a user, whether it be a download file or a streamed file, also leaves the user feeling like he/she is unable to fully use his or her connection to the Internet to its potential.

Here is an example of throttling, from the digis.net website. Digis is a provider of wireless Internet access in Utah, particularly the Utah County area although they may now be elsewhere.

From their AUP:

"3.5 You agree that Digis may submit charges or throttle speeds for your use of connect time or bandwidth usage in excess of that provided as part of the DIA subscription plan you select without further authorization from you until you provide prior notice that you are terminating this authorization or wish to change your DIA subscription plan. Such notice will not affect charges submitted before Digis reasonably could act on your notice."

"3.7 YOU WILL INCUR ADDITIONAL CHARGES OR HAVE THROTTLED SPEEDS IF YOUR USAGE OF DIA EXCEEDS THE NUMBER OF HOURS OR AMOUNT OF BANDWIDTH (TOTAL DATA TRANSMITTED AND RECEIVED) COVERED BY YOUR APPLICABLE SUBSCRIPTION. YOU MAY ALSO INCUR CHARGES LEVIED BY YOUR LOCAL OR LONG DISTANCE TELEPHONE COMPANY TO CONNECT TO DIA FOR WHICH YOU ARE RESPONSIBLE. DIGIS WILL NOT REIMBURSE YOU FOR TELEPHONE CHARGES YOU MAY INCUR FROM YOUR TELEPHONE COMPANY FOR CALLS YOUR COMPUTER MAKES TO DIA. DIGIS MAY CAUSE UPGRADED SOFTWARE TO BE DOWNLOADED AUTOMATICALLY TO YOUR COMPUTER, IN WHICH EVENT YOU WILL BE RESPONSIBLE FOR ALL RESULTING CHARGES INCLUDING, WITHOUT LIMITATION, CONNECT TIME CHARGES AND LOCAL OR LONG DISTANCE TELEPHONE CHARGES. (all-caps in original).

Source:

<http://www.digis.net/services/agreements/agreement.shtml>

Plan descriptions that include throttling thresholds.

## Ultra High-Speed Internet

- \* Up to 7 Mbps (up to 5 Mbps download /2 Mbps upload).
- \* Always-on connection.
- \* 10 email addresses.
- \* Virus and spam filtering.
- \* FREE server-side content filtering.
- \* Unlimited transfer with Speed Protection Throttling.\*

Description of throttling, which claims to be something other than what it may really be:

"Speed Protection Throttling of connections is performed to prevent abuse and preserve access speeds. Throttling is done on a daily basis and varies by plan. Contact your sales or customer care agent for more information."

The company only offers two plans for home users, plus several more for business users.

Source for the above throttling description and sample of their residential plan:

<http://www.digis.net/services/hsinternet.shtml>

The above description of throttling appears in many ways to be very similar to the alleged throttling done by Comcast.net on their networks, which is being addressed by LOI and other means by the FCC at the present time.

Throttling, other than to stop specific abuse incidents such as spamming, spamming via botnet, downloading illegal content such as certain pornographic images, or content from or access to site known to be engaged in criminal activities, must be disallowed. Throttling content also violates the First Amendment, in that the user does not feel he or she can use the service as advertised, therefore, throttling must be deemed discriminatory under Title II of the Communications Act or Title I and must be disallowed except in the matter of network abuse as I have described above.