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The FCC's Open Internet Rules – Stronger than You Think

2 Comments

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Since the FCC adopted rules to protect an open Internet on Tuesday, many have asked whether the rules could have gone further to better protect users and innovators or whether the FCC's political strategy was flawed. These are all valid questions, and I'm sure they will continue to be debated for a long time. However, in this post, I want to focus on the protections for users and innovators that the FCC did adopt.

Since Julius Genachowski, the chairman of the FCC, circulated his proposal for network neutrality rules to the other commissioners on December 1, Commissioner Copps and Commissioner Clyburn, the two other Democratic commissioners, had been negotiating with the chairman over improvements to the order. Since the two Republican commissioners had made clear that they would not back any network neutrality proposal, a rejection by Copps (or Clyburn) would have killed the proposal.

When the FCC published the text of the order on Thursday afternoon, it became clear how important these negotiations have been. While Commissioners Copps and Clyburn did not get the exact protections for users and innovators they had asked for, they managed to improve the chairman's original proposal quite a bit. In particular, the text of the order

- sets out important principles that will guide the commission's interpretation of the non-discrimination rule and the reasonable network management exception;
- explicitly bans network providers from charging application and content providers for access to the network providers' Internet service customers;
- stops just short of an explicit ban on charging application and content providers for prioritized or otherwise enhanced access to these customers (this second practice is often called "paid prioritization"); and
- keeps alive the threat of regulation with respect to the mobile Internet.

1. Non-discrimination rule and reasonable network management exception

The chairman proposed, and the FCC adopted, a non-discrimination rule that bans discrimination that is "unreasonable." Whether a certain discriminatory conduct meets these criteria, will be determined by the FCC in case-by-case adjudication. The non-discrimination rule has an exception for reasonable network management.

While the order did not adopt the bright-line non-discrimination rule that many had argued for, the text of the order sets out important principles that the FCC will use to determine whether a certain discriminatory conduct constitutes unreasonable discrimination: transparency, end-user control, and use-agnosticism. [Use-agnostic discrimination (or "application-agnostic" discrimination), the FCC explains, is discrimination that does not discriminate among specific uses of the network or among

classes of uses.]

Why is this relevant? Instead of completely leaving the interpretation of the non-discrimination rule to future case-by-case adjudications, the FCC provides principles that observers can use to assess the likelihood that certain discriminatory conduct will be considered reasonable in the future.

Substantively, the principles reinforce key values that were at the core of the Internet's success. In the words of Commissioner Copps:

> "In discussing the "no unreasonable discrimination" standard, we put particular emphasis on keeping control in the hands of users and preserving an application-blind network—a key part of making the Internet the innovative platform it is today."

The details will have to wait for the next blog post, but, as I have argued in the past, using these principles ("application-blindness" and "user choice") as guidelines has direct consequences for which types of discriminatory behavior should and should not be allowed.

Thus, the principles provide additional clarity to market participants and guidance to the bureaus within the FCC which may end up enforcing the order. Substantively, the principles may have an immediate effect on network providers' behavior: Network providers' desire to minimize the risk of having to defend themselves in costly and highly public adjudications at the FCC may motivate them to invest in network technologies and choose practices that keep control in the hands of the users and preserve the application-blindness of the network over technologies and practices that do not. In other words, the rules motivate network providers to invest in network technologies and choose practices that preserve the factors that have made the Internet valuable to society in the past and to refrain from technologies and practices that violate these values.

Two additional aspects are worth highlighting. First, the order makes clear that the same principles that guide the Commission's interpretation of the non-discrimination rule will guide the Commission's evaluation of network management practices. This is an important clarification. Some had argued that discriminatory practices should automatically qualify as "reasonable network management," as long as they were designed to solve network management problems. However, the harm to users and innovators from exclusionary conduct is the same regardless of the network provider's motivation, making it necessary to impose stronger constraints on reasonable network management. In line with these considerations, the order makes clear that network management will be evaluated by the same principles that guide the interpretation of the non-discrimination rule.

Second, the order clearly rejects the view that the rules should only prohibit discrimination that is "anticompetitive." Such a rule (or an interpretation of the FCC's rule that restricted unreasonable discrimination to discrimination that is anticompetitive) would have made it impossible to bring complaints against many types of discriminatory conduct that network neutrality proponents are concerned about.

2. Pay-to-play access fees

Commissioner Copps and Commissioner Clyburn wanted a clear ban on access fees. Access fees come in two variants: In the first variant, a network provider charges application or content providers for the right to access the network provider's Internet service customers. In the second variant, which is sometimes called "paid prioritization" or "third-party-paid prioritization," a network provider charges application or content providers for prioritized or otherwise enhanced access to these customers.

The rules themselves do not address access fees. The text of the order discusses the two types of access fees separately.

Fees for access to end users

The text of the order **clearly prohibits** network providers from charging application and content providers for access to the network providers' Internet service customers (i.e. from just charging for access, without offering anything in return).

> 67. Some concerns have been expressed that broadband providers may seek to charge edge providers simply for delivering traffic to or carrying traffic from the broadband provider's end-user customers. To the extent that a content, application, or service provider could avoid being blocked only by paying a fee, charging such a fee would not be permissible under these rules. Footnote: We do not intend our rules to affect existing arrangements for network interconnection, including existing paid peering arrangements.

The order discusses this question in the context of the rule against blocking on the fixed Internet. To the extent that the rules prohibit blocking of a specific application on the mobile Internet, the no-blocking rule also prevents network providers from charging this application an access fee.[1]

Fees for prioritized or otherwise enhanced access to end users ("third-party-paid prioritization")

While the text of the order stops short of an outright ban of "third-party-paid prioritization" arrangements, it seems to **get as close to explicitly banning these arrangements as one can get without explicitly banning them**. The order explicitly endorses the concerns against these arrangements, unequivocally rejects the main arguments in favor of them, and concludes that "as a general matter," arrangements of this kind are "unlikely" to be considered reasonable.

In different parts of the order, the order clearly endorses the concerns that commenters have raised against third-party-paid prioritization (see paras 76 and 24-34). At the same time, the order unequivocally rejects the two main arguments that have been used to justify paid prioritization –that paid prioritization would increase investment in broadband networks or lower the price of Internet service for end users, which in turn may increase broadband penetration:

> 40. Some commenters contend that open Internet rules are likely to reduce investment in broadband deployment. We disagree. (See also para 28.)

The clear rejection of these arguments makes it highly unlikely that a network provider who desires to enter into third-party paid prioritization arrangements could use these arguments to justify a deviation from the general determination that these practices are unlikely to be considered "reasonable."

Finally, after eloquently discussing the various harms associated with these arrangements in the non-discrimination section of the order, the order concludes:

> 76. [...] In light of each of these concerns, as a general matter, it is unlikely that pay for priority would satisfy the "no unreasonable discrimination" standard.

All this, taken together, not only provides clear guidance to the FCC bureaus which may end up adjudicating case-by-case complaints (see para 159). It also considerably changes the risk calculus for network providers. In the absence of an explicit ban on third-party-paid prioritization, network providers remain, of course, free to enter into these arrangements. They can, however, be almost certain that these arrangements will be challenged at the FCC and are very likely to be declared unreasonable. This may very well motivate providers to stay away from these arrangements altogether.

3. Wireless

Commissioner Copps and Commissioner Clyburn wanted to extend the same protections to the mobile Internet that the order extends to the fixed Internet. This did not happen. The rules only prohibit the blocking of some applications – of websites and of applications that compete with video telephony or voice applications in which the network provider has a financial interest. The rules do not prohibit discrimination on the mobile Internet.

The order makes clear, however, that the Commission's **decision not to adopt further rules for the mobile Internet at this time should not be interpreted as blessing discriminatory behavior** that would violate the open Internet rules for fixed broadband, but not for mobile broadband:

> 104. [...] We emphasize that our decision to proceed incrementally with respect to mobile broadband at this time should not suggest that we implicitly approve of any provider behavior that runs counter to general open Internet principles. Beyond those practices expressly prohibited by our rules, other conduct by mobile broadband providers, particularly conduct that would violate our rules for fixed broadband, may not necessarily be consistent with Internet openness and the public interest.

This text seems to have been motivated by the concern (fueled by the experience in Europe) that network providers may interpret the decision not to impose stronger protections as a "free pass to discriminate" in the mobile sector, and may start discriminating away. The order clearly rejects this interpretation. Instead, the relevant text, combined with the stated intent to continue to monitor the mobile sector, **signals the commission's desire to keep the threat of regulation alive**.

Thus, those interpreting the decision as the beginning of a bright future for the vendors of deep packet inspection devices for the mobile Internet may have celebrated too early. The threat of regulation can act as a powerful deterrent from discrimination. As the order makes clear, a mobile Internet provider who engages in discriminatory conduct that would violate the rules for fixed networks, but not for mobile networks, will refuel the debate over stronger protections for wireless and may provide the FCC with the motivation to move forward on stronger rules. Only time will tell how effective this approach will be. But the order clearly complicates a network provider's calculus on this issue.

In sum, instead of the clear, bright-line decisions that many had hoped for, the order has often opted for more muted signals. But the signals are there nonetheless. Network providers' desire to avoid costly and not necessarily reputation-enhancing complaints may get us a long way towards an Internet that preserves the aspects that have made the Internet important and valuable for society in the past. If it doesn't, the power of the rules will depend on the Commission's willingness to live not just by the text of the rules, but by the text and spirit of the full order. As Commissioner Copps put it at the FCC's open meeting,

> "If vigilantly and vigorously implemented by the Commission—and if upheld by the courts—today's Order could represent an important milestone in the ongoing struggle to safeguard the awesome opportunity-creating power of the open Internet."

Today, I share his careful optimism.

Thank you's

This is not the end of the debate, but rather the beginning of a long process. Still, it is an important milestone, so I would like to say some thanks.

I would like to thank Commissioner Copps, Commissioner Clyburn, and their staff for their tireless efforts to improve the order. They care deeply about preserving an open Internet for everyone, to the benefit of society. Their efforts would have been moot, though, without Chairman Genachowski's willingness to actually propose an order, and to accommodate them at least to some degree, and for this, I would like to thank him, too.

Since the Open Internet proceeding started, I have had many conversations and discussions with staff in the chairman's office and in the many bureaus of the FCC. More often than not, I have been deeply impressed with people's desire to really understand the issues, think long and hard about them, and try to look beyond the interests of particular constituencies to identify what is in the public interest. They may not always be able to do what they think is best, but I'm grateful for their efforts nonetheless.

Over the past years, I have benefited a lot from conversations with many people on all sides of the issues. These discussions have greatly improved my understanding of the technical, economic and practical questions relevant to this debate, and I greatly appreciate their willingness to share their thoughts with me.

And, of course, we wouldn't be where we are today without all the users, innovators, investors, public interest organizations and academics whose joint efforts have driven this process forward. Thanks a lot for all your hard work, and for your willingness to become involved in this debate in the first place.

Footnote 1:
See the explicit reference to para 67, which contains the access fee discussion, in the discussion of the rule against blocking on mobile networks on p. 56, note 306 of the order.

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