Net Neutrality and Broadband: The New Rules

Owen D. Kurtin

In *Net Neutrality and Broadband: A New Way Forward?* we looked ahead to the U.S. Federal Communications Commission's then-pending Report and Order to enact rules to ensure unblocked, non-discriminatory access to the Internet, a regulatory scheme known as "Net Neutrality." Bloomberg Law Reports - Technology Law, Vol. 2, No. 25 (Dec. 13, 2010). We explained as well why the FCC had, on December 1, abandoned its announced "third way" approach of regulating Net Neutrality by reclassifying broadband service as "Telecommunications Service"[1] in place of the existing "Information Service"[2] classification pursuant to the Communications Act of 1934 ("Communications Act"),[3] as amended by the Telecommunications Act of 1996 ("Telecommunications Act").[4]

This writer had criticized the "third way" approach, announced in May, as inviting years of litigation owing to the FCC's own decades of administrative rulings in the *First Computer Inquiry*,[5] the *Second Computer Inquiry*[6] and the *Third Computer Inquiry*[7] and the Supreme Court's 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services.*[8] The *Computer Inquiries* collectively established a "bright line" distinction between what was then called "basic service" (the equivalent of Telecommunications Service), in which the transmission was apparently unaltered between sender and receiver, the paradigm of which was voice telephone service, which was subject to Communications Act Title II common carrier regulation; and "enhanced service" (the equivalent of Information Service), in which the transmission was subject to data processing, which was not subject to the common carrier regime.

The FCC issued the Net Neutrality Report and Order[9] on December 23, 2010, containing the new rules and maintaining the Information Service classification, and 2011 promises to *see* the rules hotly contested anyway. In this follow-up article, the new Net Neutrality rules will be reviewed and critiqued.

Why Regulate?

The Report and Order commences with a discussion of why Net Neutrality need be regulated. The FCC notes that the current openness of the Internet has promoted and is critical to continued innovation, investment, competition, free expression and the goals of the National Broadband Plan, which the Commission issued in March 2010.[10]. By openness, the FCC means the Internet's low barriers to entry, free transport, transparency and universal protocols.

The Report and Order asserts that broadband providers, the owners of the Internet backbone network (essentially AT&T, Verizon and the major cable operators) have the incentive and the ability to curtail the Internet's historical and current openness. First, the FCC states that broadband providers offer many of their own applications and content and

---

have incentives to benefit their own or affiliates' offerings (a potential example would be the pending Comcast-NBCU merger) at the expense of unaffiliated offerings. Second, broadband providers have incentives to charge content and application providers (who already pay for their Internet connections) for carriage of their traffic as a source of revenue. The Commission notes that although broadband providers have not historically imposed such fees, they continue to assert their right to do so. Such fees could, if imposed, block access to end users, effectively prioritize higher paying traffic, and potentially block some traffic whose carriage on the network was not adequately funded. Third, and perhaps most potentially insidious, the FCC asserts that if broadband providers are permitted to charge non-affiliated content and application providers for prioritized access to end users, they will have an incentive to degrade the speed and quality of transmission of non-prioritized traffic. After all, the prioritized traffic will expect better service for its higher fees; otherwise, why pay them?

The Commission then asserts that the dangers to the open Internet just discussed are not speculative; attempts by broadband providers to limit access to the Internet have occurred. A number of examples of blocking, slowing and degrading of various applications and content are cited, including that underlying the case that led to the now-abandoned "third way" approach, the U.S. Court of Appeals for the D.C. Circuit's April 6 decision in *Comcast Corp. v. FCC*.[11] The FCC finally states that the benefits of Net Neutrality regulation outweigh the costs, and refutes claims that regulation will discourage broadband providers from investing in the extension and enhancement of their networks.

The New Rules

The Report and Order then sets out the new Net Neutrality rules. The rules are asserted to be based on broadly accepted Internet norms of transparency, prohibition of blocking, and prohibition of discrimination.

Transparency. The rules provide that fixed and mobile broadband providers must, in the interests of transparency, publicly disclose accurate information regarding their network management practices, their network performance characteristics and their terms and conditions of commercial service. The disclosure must be sufficient for consumers to make informed choices about use of the broadband service and for content, application, service and device providers to develop, market and maintain their service and product offerings. The rules expressly do not require public disclosure of information that is competitively sensitive, that would compromise network security or undermine reasonable network management practices. An expressly non-exhaustive list of network practices, performance characteristics and commercial terms subject to disclosure is provided.

The rules cannily imagine how inadequate transparency can be used in furtherance of unreasonable discrimination. If unaffiliated or un-prioritized content and application providers have inferior knowledge about network characteristics, they will be unable to optimize their services to match the offerings of affiliated providers or who are paying for superior knowledge, resulting in intrinsically uncompetitive offerings. Similarly, consumers must have sufficient knowledge of the terms and conditions of service to make informed choices among competing broadband providers. In terms of the no blocking, no discriminatory access goals of the FCC's rulemaking, the exception from disclosure of information that would "undermine reasonable network management practices" is where the rubber meets the road for future application and content provider claims of discriminatory treatment. The FCC has left plenty of wiggle room, stating that the level of disclosure necessary is flexible.

No Blocking. The rules provide that fixed broadband providers may not block lawful content, applications, services, or non-harmful devices. Mobile broadband providers may not block lawful websites or applications that compete with their voice or video telephony services. The FCC expressly notes that the rules permit blocking of unlawful content, such as child pornography; and that the no-blocking rule prohibits impairment or degrading of lawful content, applications, services or non-harmful devices so as to be effectively equivalent to blocking. For example, delaying traffic may have the same functional results as blocking traffic, since end users will lose patience and click away without viewing. Therefore, providers might delay traffic based on the same incentives that would cause them to block traffic completely, if the prohibition's extension were not made clear. The FCC finally states unequivocally that a circumstance in which a content, application, service or device provider was able to avoid blocking only by paying the broadband provider a fee would be prohibited.

Most of the attention since the Report and Order issued has focused on the failure to extend the same breadth of prohibition to mobile broadband providers, which the Commission justifies based on mobile broadband's earlier stage of development. Of course, since mobile broadband is where the current and foreseeable action is, it may be the less strict mobile blocking prohibition that sets the standard. The potential remaining for mobile broadband providers to block lawful content and applications other than those that compete with their voice or video services under the new rules is troubling.

No Unreasonable Discrimination. The rules provide that fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic. It is expressly stated that reasonable network management practices shall not constitute unreasonable discrimination. In terms of what network management practices would be "reasonable," the Commission offers some guidance, stating that the more transparent differential treatment of traffic is, the less likely it is to offend the rules; that "use-agnostic" or "application-agnostic" differential treatment is less likely to be prohibited; and that conformity to a standard-setting body's endorsed practices that entail differential treatment is less likely to be prohibited. The FCC enumerates some examples of prohibited unreasonable discrimination: impairment or degradation of a competitor's applications or services; practices that impair and effectively reduce end user choice of content, applications, services or devices; and conduct that impairs free expression. Any "pay for priority" traffic arrangement between a broadband provider and a third party would almost certainly be prohibited (the FCC notes that such arrangements are not current or historical Internet practice, and would raise entry barriers; and again makes the point that if some third party providers are paying for prioritized traffic, the broadband provider is automatically given economic incentive to de-prioritize non-paying traffic, lest the paying providers ask what they are getting for their money. The FCC expressly declines to impose a strict non-discrimination rule as proposed in earlier regulatory proceedings. There is no non-discrimination rule at all for mobile broadband providers).

The rule is reasonable as far as it goes (meaning the complete exclusion of mobile broadband), but leaves plenty of case-by-case wiggle room based on assertions of network management practices that attempt to circumvent obvious prohibited conduct. The acknowledgement that an overt "pay for priority" arrangement would be prohibited is welcome. The Commission's refusal to impose a strict non-discrimination rule akin to the common carrier regime is temporizing-and disappointing. Not only would strict non-discrimination have applied had Title II reclassification gone forward, but the likelihood of having to litigate a strict non-discrimination rule would probably be no higher than it is for the announced rule, nor would there be less likelihood of success in the litigation.

Reasonable Network Management. The FCC, having made so many exceptions to prohibitions when "reasonable network management practices" are the cause of differential treatment of traffic, undertakes to set out the limits of such practices, stating that a network management practice is reasonable if appropriate and tailored to achieving a legitimate management purpose, taking into account network architecture and technology. Perhaps recognizing the "eye of the beholder" quality of this formulation, the Commission states that it will develop specifics on a case-by-case basis, will know it when it sees it, but offers some guidance. First, the Commission expressly disavows a standard of reasonable network practice to be one "narrowly or carefully tailored," stating that to be restrictive might constrain legitimate network engineering decisions. The FCC further states that what is a reasonable practice may differ across broadband platforms: cable, telephony, satellite, terrestrial mobile, and so forth. Reasonable management may include considerations of network security, end user wishes and network congestion.

The timidity inherent in the FCC's rejection of its own previously employed "narrowly or carefully tailored" standard is disappointing, especially when the standard is by no means incompatible with exceptions for legitimate network security, congestion and similar concerns in cases where there is no evidence that the broadband provider was targeting a specific application, content, service or device provider or end user, or that economic incentives underlay the conduct.

Mobile Broadband. As noted in several of the preceding sections, the Report and Order makes some distinctions between fixed and mobile broadband, and the Commission sets out the distinctions in a separate section of the rules. The justification for different treatment for mobile broadband is stated to be its earlier stage of development, subject to rapid evolution and change, and with both more choice and lower penetration rates than is the case for fixed broadband. The FCC states that this situation puts greater pressure on providers and requires a more liberal view of what constitutes "reasonable network management practices." Mobile broadband providers will be subject to the same transparency rule as fixed broadband providers. Mobile providers should, in addition to the disclosure requirements imposed on fixed providers, follow FCC guidance to licensees of upper 700 MHz C Block spectrum. The FCC imposed a modified no-blocking rule on mobile providers, as noted above. The more relaxed rule is intended to guarantee end users' access to the Web (for any lawful website) and prevent blocking competitors' voice or video telephony applications. The Commission emphasizes that the rule does not apply to app stores, and that mobile broadband providers are free to "curate" their own app stores. Finally, the FCC expressly declines to extend the "no unreasonable discrimination" rule to mobile broadband, citing the desire to proceed incrementally.

Other than the potential for abuse in the transparency rule's flexible standard, the provision's application to mobile as well as fixed broadband is welcome. This writer is unconvinced by the claimed need for a watered-down no-blocking rule and exclusion of the non-discrimination rule from Mobile Broadband.

The FCC's Authority to Regulate Net Neutrality

The Report and Order then takes up the issue discussed in our prior article: the FCC's authority to regulate under the Title I Information Service classification. As stated, the FCC's decision to abandon its proposed "third way" approach of reclassification of broadband service as Telecommunications Service and to regulate Net Neutrality under the existing Title I "Information Service" classification was consistent with this writer's critique, and avoids the grim specter of the next years being spent attacking the very basis of the Information Service classification built up by the FCC itself in the U.S. Supreme Court *Brand X* decision and the nearly forty year history of the FCC's *Computer Inquiries*. Nevertheless, the FCC now must ground its regulatory authority on the "ancillary authority" under Title I that the Supreme Court appeared to accept (though in *dicta*) in *Brand X*, but which the D.C. Circuit Court of Appeals arguably rejected in the April *Comcast v. FCC* decision. An exercise in "ancillary authority" must be based on a grant of express authority, which means that the FCC must show at least a colorable express statutory basis for its right to regulate broadband service.

The FCC cites several provisions of the Communications Act and the Telecommunications Act to ground this authority, but the pickings are slim on the ground (for discussion of why the Telecommunications Act makes so little reference to the Internet, *see Net Neutrality and Broadband: A New Way Forward?, supra*). The principal basis asserted, as predicted in the prior article, is Telecommunications Act §. 706, which requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . ."[12]

The D.C. Circuit, in *Comcast v. FCC*, did not outright reject Section 706 as a ground of express authority support ancillary authority. In fact, the D.C. Circuit stated that Section 706 is a provision that "at least arguably . . . delegate[s] regulatory authority to the Commission" and "contain[s] a direct mandate (meaning Section 706's direction to the FCC to "encourage" advanced telecommunications deployment).[13] The FCC states that the *Comcast* court nevertheless incorrectly concluded that Section 706 could not serve as a basis for authority because the Commission had disavowed Section 706 as a grant of authority in another, prior regulatory proceeding. The Commission claims that its prior order, on which the *Comcast* court relied, was more limited in scope, and that it had continuously asserted Section 706 as a grant of more general authority. The FCC finally asserts that Section 706's grant of authority is wide, but co-terminous with other grants of authority in the Communications Act, which is why it did not seek to ground authority in Section 706 prior to *Comcast*.

This argument, even though self-justificatory, might persuade the D.C. Circuit to take another look at Section 706 if the Report and Order is litigated (and it will be, by at least some players). More importantly, as stated, the *Brand X* majority appeared to accept, in *dicta*, the FCC's ancillary authority to regulate broadband service, stating:

> [W]e think it improbable that the Communications Act unambiguously freezes in time the *Computer II* treatment of facilities-based information-service providers. The Act's definition of "telecommunications service" says nothing about imposing more stringent regulatory regulatory duties on facilities-based information service providers . . . .The Act's definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based, and the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.[14]

As we noted in the prior article, the *Brand X* majority also recognized that changing conditions and developments in an industry that an agency is tasked with regulating could legitimately lead to different regulatory results at different times, without arbitrariness or capriciousness:

> [A]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice . . . . For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.[15]

Conclusion

The new rules are mainly on-target and are intended to bring about an authentic Net Neutrality regime. They are in places wishy-washy, reflecting perhaps an irrational fear of litigation on the part of the FCC (irrational, because enacting stricter rules would not have increased the chances of litigation and adverse rulings and might conceivably have diminished those chances).

As we noted in the prior article, broadband backbone providers may hesitate to categorically oppose the new rules, lest the Supreme Court, once revisited, decide that they are overreaching and that the *Brand X* decision can be reasonably extended by affirming to that limited extent the FCC's Title I ancillary authority. The new rules are not guaranteed to succeed, but have better odds than did the reclassification third way proposal. There has been cautious industry support so far. However, the new Republican majority in the U.S. House of Representatives has expressed categorical hostility to Net Neutrality, which may encourage backbone providers to oppose the rules energetically.

Finally, it is worth repeating: what is really needed is Congressional action to amend the 1934 Communications Act, as amended by the 1996 Telecommunications Act, to impose the platform and technology-agnostic parity that our patchwork and obsolete legislative and regulatory framework so badly needs and which this writer has long urged.

Owen D. Kurtin is the principal of New York law firm Owen D. Kurtin PLLC. His practice focuses on corporate, commercial and regulatory representation of both mature and early stage companies, investors, and lenders in the Communications & Media, Satellites & Space and Information Technologies sectors. He is also co-founder of private investment firm The Vinland Group LLC. He may be reached by e-mail at okurtin@kurtinlaw.com. For background information on the legislative, regulatory and judicial history of broadband regulation, including the disparate treatment of telecommunications and information service, see the "U.S. Communications Law and Transactions" (Winter 2010) white paper at www.kurtinlaw.com/articles-whitepapers.

[1] 47 U.S.C. § 153(46).

[2] 47 U.S.C. § 153(20).

[3] Pub. L. No. 73-416, 48 Stat. 1064 (1934), codified as amended at 47 U.S.C. § 151 et seq.

[4] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[5] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom*. *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 F.C.C.2d 293 (1973).

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980), reconsideration, 84 F.C.C.2d 50 (1981), further reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom*. *Computer & Communications Indus. Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *aff'd on second further reconsideration*, 56 Rad. Reg. 2d (P&F) 301 (1984).

[7] In the Third Computer Inquiry, Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 F.C.C.2d 958 (1986), the FCC attempted to relax its Second Computer Inquiry structural separation requirements, which mandated "separate" subsidiaries for non-regulated activities, and replace them with non-structural safeguards. The U.S. Court of Appeals for the Ninth Circuit overturned the FCC, ruling that no justification for the relaxation of the structural separation requirement had been shown (*California v. FCC*, 905 F.2d 1217 (9th Cir. 1990)). However, separate subsidiaries were never restored.

[8] 545 U.S. 967 (2005).

[9] FCC 10-201 (Dec. 23, 2010).

[10] http://www.broadband.gov (last visited Jan. 11, 2011).

[11] 600 F.3d 642 (D.C. Cir. 2010).

[12] 47 U.S.C. 1302(a).

[13] 600 F.3d at 658.

[14] 545 U.S. 967, 996(2005).

[15] *Id.* at 981.