

A Regulator's Read of the FCC's Open Internet Order, and Related Regulatory Proceedings

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Common Carriage (a little history)

- **Conduit/Content separation, no discrimination**
- **Common law** – bridges, ferries, other bottlenecks - “affected with the public interest”
- **Railroads** – end of 19th century, birth of CPUC



- basis of 20th century telephone **system**
- Until 2002: separation between conduit (wire) and the content (information, voice, etc)
 - FCC’s “Computer Inquiries”

The FCC's 'Original Sin'

- 2002 “Cable Modem” decision - conduit and content no longer separable
 - Together formed an inseparable “information” service
 - DNS issue
- 2005 - Supreme Court *Brand X* decision “defers” to rather than “approves” FCC ruling –
 - Justice Scalia dissent: “too clever by half”
- Years of litigation, regulatory confusion, and wandering in the desert follow



The Fixes that Weren't

- FCC's "Four Principles" in 2005 - rejected by the D.C. Circuit
- FCC's 2010 Order - again based on based on "information service" designation - rejected by the DC Circuit
 - DC Circuit's 2014 Decision in *Verizon v. FCC*: approves FCC's logic and authority to do something about content discrimination on the network, but rejects FCC's broken model: can't do this if you call broadband classified an "information service."
 - Provides roadmap to re-classification as a common carrier, telecommunications service
- 2014 First FCC Proposals - still trying to make net neutrality work under "information service" model

The Fix that Works: the Open Internet Order

- After 4 million comments (99% in favor of non-discrimination rules), including that of President Obama
- FCC reworks rules
- Broadband reclassified as telecom service, i.e., common carriage
- Rules apply to Broadband Internet Access Service (a new acronym - BIAS)
 - i.e., the telecom substrate, transport
 - Not “Regulation of the Internet”
- All rules apply to wireless as well as wired broadband

What are the Rules Going Forward?

- 3 “Bright Line” Rules
 - No blocking
 - No throttling
 - subject to “reasonable network management”
 - No Paid Prioritization
- General Conduct Rule (“No Unreasonable Interference or Unreasonable Disadvantage”)
- Enhanced Transparency Rule



No Blocking?

- No blocking of “content, applications, or services”
 - Exception: “reasonable network management”
 - Exception: unlawful content (e.g., child porn or “copyright-infringing materials”)

No Throttling

- Not addressed to outright blocking, but “conduct that *inhibits* the delivery of particular content, apps, or services, or particular classes of content, apps, or services”
 - Exception: “reasonable network management”
 - Exception: customer-chosen speed tiers
- Prime example: throttling over-the-top content that competes with carrier’s (e.g., cable) content

No Paid Prioritization (“no fast lanes”)

- “paid prioritization’ – can’t directly or indirectly favor some traffic over other traffic”



- Can’t receive \$\$ or other consideration for prioritization; can’t favor affiliated content
 - Paid prioritization is a business decision, therefore not “reasonable network management” by definition

“No Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct”

- “general conduct rule” - conduct may not violate 3 bright line rules, but still interfere with a consumer’s access to lawful content
 - “case by case” basis
- Whenever “reasonableness” involved, a plethora of standards that guarantee work for lawyers:
 - Preserves end-user control
 - Promotes competition, consumer protection, innovation, free expression
 - Application agnostic
 - Best practices & tech standards

“Enhancements” to the Transparency Rule

- Not a new rule, but “enhancement” to old rule
- Operators must disclose:
 - **Price** – the full monthly service charge
 - Other **Fees** – all additional one time and/or recurring fees & surcharges
 - Data **Caps** & Allowances
 - Performance Characteristics
 - **Speed**
 - **Latency**
 - **Packet loss**

What is Reasonable Network Management?

- To be developed on a “case by case basis”
- ”network management reasonable if appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.” (¶ 61)
 - Technical rather than business reasons
- Take into account the specific nature of the network
 - copper, fiber, DSL, cable, wireless

Not Your Father's Telecom Regulation -- Forbearance

- FCC has discretion *not* to enforce Telecom Act where not necessary – aka “forbearance”
- Forbearance: FCC not going to apply rate regulation, tariffing, *or unbundling* rules to broadband
- No forbearance: FCC going to enforce rules privacy, pole attachments, universal service (but no mandatory USF contribution from broadband providers), and disability access rules

Preemption of States

- BIAS “jurisdictionally interstate”
- States are bound by FCC forbearance decisions
 - So what can states do? Nothing “inconsistent” with what feds are doing
 - Section 706 delegation to states to promote competition?
- No *new* state USF assessments on broadband
- Order not a basis for requiring cable systems to get new “telecommunications” franchises
 - Still unclear: interconnection agreements; bills

What Does This Mean For You?

- No FCC 'Takeover' of Internet
 - About Fairness, Separation of Conduit and Content
- Light Hand Regulation (e.g. wireless model)
- Consensual Decisionmaking at ICANN, ARIN, etc to Continue
- No Direct Change in Interconnection Rules
 - Reasonableness - "case by case basis"
 - FCC to continue to monitor. Stay tuned.

The Larger Picture

- Say goodbye to the telephone network –
 - dialtone replaced by broadband connectivity
 - Voice – just an app (“specialized data service”)
- Essential Service
 - What is regulator’s role going forward?
What makes sense? We need your help.