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Knotted in net neutrality

The FCC is struggling to assert its authority over ISPs.

The Federal Communications Commission's notice of proposed rule-making (NRPM) to promote and protect an open internet is mostly about untying some legal knots that constrain the FCC – and it probably will not work (Comms Wire, yesterday).

The FCC stands by its December 2010 *Open Internet Order* which set three basic rules for net neutrality:

- **Transparency**. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
- **No blocking**. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and
- **No unreasonable discrimination**. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

Verizon argued that the blocking and non-discrimination rules violated the Communications Act by imposing common carriage regulation on an information service (which is not a telecommunications service regulated under Title II of the Act). On January 14, 2014, the D.C. Circuit agreed.

But the court gave a nod and a wink to the FCC. It upheld the Commission's reading that sections 706(a) and (b) of the Telecommunications Act grant it authority to encourage and accelerate the deployment of broadband capability to all Americans through, among other things, measures that promote competition in the local telecommunications market or remove barriers to infrastructure investment. The court held that the Commission could utilize that section 706 authority to regulate broadband Internet access service.

So with that encouragement, what did last week's NPRM change?

Read this carefully: "we propose to adopt the text of the no-blocking rule that the Commission adopted in 2010, with a clarification that it does not preclude broadband providers from negotiating individualized, differentiated arrangements with similarly situated edge providers (subject to the separate commercial reasonableness rule or its equivalent). So long as broadband providers do not degrade lawful content or service to below a minimum level of access, they would not run afoul of the proposed rule"

As I said, read it carefully. ISPs would be free to negotiate “better than typical” delivery with edge providers, and would be prohibited (subject to reasonable network management) from delivering “worse than typical” service in the form of degradation or outright blocking.

This part of the NPRM is what has led to the angst about creating a “fast lane” for content and applications providers (called edge providers by the FCC) with deep pockets.

The chairman of the FCC, Tom Wheeler, makes a distinction between the connectivity provided by an Internet Service Provider (ISP), which is simply a pathway that should be “open and inviolate”, and interconnection (“peering”) between the consumer’s network provider and the various networks that deliver to that ISP.

So, this is about paid peering and two-sided markets. The first is common and currently unregulated. The second is a concept that is yet to be tested but looks like it may apply. It could lead to ISPs being allowed discretion in how they charge end users and edge providers if the outcomes can be shown to maximise participation and usage in the market.

The FCC is asserting that section 706 gives it the authority to set an enforceable legal standard of “commercially reasonable peering practices”, and is now asking how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether. There is still a long way to go!

In case that is not enough, the FCC is also looking at peering as a telecommunications service subject to Title II; which would allow it to prohibit “unjust or unreasonable discrimination”. It claims that in the Verizon case, the court stated that ISPs furnish a service to edge providers, thus functioning as edge providers’ telecommunications carriers.

But one of the two dissenting Commissioners on the FCC, Ajit Pai, says “I see no legal path for the FCC to prohibit paid prioritization or the development of a two-sided market”.

Tom Wheeler does not want to prohibit paid prioritisation. He would condone the agreements that Netflix (which now accounts for one third of peak time traffic on the US internet) is making with ISPs. And he probably supports AT&T’s sponsored data service, launched in January. But, his “fast lane” has speed checks in terms of (undefined) commercial reasonableness.

The speed checks only apply if the FCC can cut through the knots that bind it with either the authority of section 706 or bring ISP peering arrangements under Title II. The debate around the NPRM to 15 July may shed some light on where this finishes. But it is more likely that it will end up in court – again.

John de Ridder

John de Ridder is an independent telecommunications economist