



## **FCC should leave net neutrality to anti-trust courts**

A squelchy net neutrality ruling by the FCC  
September 30, 2008

**By Thomas W. Hazlett**

US regulators have dropped the net neutrality bomb on Comcast, the country's largest cable operator that supplies broadband service to 14.4m households. The Federal Communications Commission ruled in August that the firm had secretly throttled certain "peer-to-peer" applications, such as Bit Torrent, that gobble bandwidth.

The motive for the scheme, said the FCC, was not to optimise spectrum sharing but to "unduly squelch" an "open and accessible internet," excluding products competing with Comcast's own video-on-demand (VOD). Finding the cable operator a bad actor, it ordered the company to abandon its existing practices and to better disclose its network management methods to customers.

It has already begun to do so - and the outrage in some quarters has only increased. Comcast, soon to be followed by other broadband providers, has announced it will levy explicit bandwidth limits on its subscribers. The days of "all you can eat" internet access are falling behind us. Not exactly what the plea for network neutrality regulation was said to be aiming for.

The case for disclosure is secure, but the wild punch tossed by the term "unduly squelch" conveys the flailing spirit of this regulatory improv. In cable broadband networks a tiny minority of bandwidth hogs can clog links. This congestion destroys value for all users, even the hogs. Pricing or other rationing devices avert this tragedy. Networks, including those of non-profits with no commercial motive to squelch, widely take such measures.

Regulators assert that Comcast's methods were clumsy and inappropriate. This is exactly why we want well-informed customers to make choices. Accurate disclosure was already the law.

But rather than enforce such rules, the FCC launched regulatory attack by asserting that Comcast's network management choices evinced anti-competitive intent. The operator disrupted access to video streams to protect Comcast's own cable products. The assertion was supported by nary a wisp of evidence or analysis in the 34-page FCC Order. Were the regulators the least bit serious, they would have seen their rationale for intervention as worthy of support. Surely, it needs some.

Comcast, like other cable operators, has invested billions of dollars to extend capacious broadband conduits to millions over the past decade. This internet access service is offered to just that 40 per cent of US households that can buy Comcast video - serving up a fast gateway for "cannibalisation" via linkstopping out at 15 MBPS down/5 MBPS up. At first blush, perhaps one blush more than what the FCC has given the matter, this appears a curious strategy for squelching video rivals.

The FCC writes that video-on-demand is the "particular competitive threat" which Comcast fears. But the company counts high-speed data revenue of over \$7bn per year, a quarter of the company's total. VOD brings in an estimated \$350m. Is the government's theory that Comcast materially degrades the broadband subscriber's experience to protect revenues only 1/20th as large? Not arithmetically impossible. But the story is of interest.

Perhaps after a federal court orders it (Comcast has already filed a suit that even staunch net neutrality proponents believe will overturn the order on jurisdictional grounds), the FCC will produce one. They should explain how, with cable operators free to set prices, they gain by thwarting their customers. Why not free them up and simply charge to capture lost VOD demand? Some potential reasons lurk, but not likely compelling. One clue: were the FCC holding such evidence or arguments, we would presumably have seen them.

While many net neutrality advocates praised the FCC's ruling (Stanford law professor Lawrence Lessig told the Commission that it had made it "clear that those who wish to profit from the internet do so without harming the internet"), others are howling over the quick market migration to data caps. While Comcast's 250 GB per month limit is loose - the average Comcast customer uses only 2-3 GBs per month - "a line has been crossed," writes industry analyst Craig Moffett. Other cable operators are reported to be following.

When one rationing scheme is excluded, others emerge. Download limits, upload limits and tiered service pricing are the most obvious. Lost upgrades or build-outs, where investors simply fail to commit more assets, are potentially unseen carnage. To craft better rules for the market, policymakers must understand that options have prices and rules have consequences.

The FCC ignored these realities. The venerable Alfred Kahn, professor emeritus at Cornell and the dean of US regulatory economists, anticipated this result in arguing that net neutrality rules are best left to antitrust courts. Such proceedings, imperfect though they are, require evidence, economic analysis, and a verdict on consumer welfare. Noted telecommunications attorney Jon Nuechterlein's recent article nicely explains why such standards are preferable to ad hoc agency rulings. As we stumble forth in the mist of duly and unduly squelches, this argument will become more and more compelling.

*The writer is professor of law economics at George Mason University, where he is director of the information economy project at the National Center for Technology and Law*