Why the FCC can’t protect net neutrality

Mike Ingram
28 December 2010

The Federal Communications Commission (FCC) voted December 22 by a three to two majority to adopt new rules supposedly aimed at guaranteeing the future of the open Internet. The victory of the three Democratic commissioners over the two Republicans on the commission was tempered by the differences expressed by two of those voting for the proposals.

Michael J Copps, an outspoken critic of aspects of the proposals such as exempting wireless providers from new rules and an advocate of reclassification of broadband companies as “Title II communications companies” to give the Commission more powers, voted for the proposals. Copps said that “On numerous fronts in the *Open Internet Order* before us today, the Commission is taking strides forward. On others, I pray that our timidity will not undermine the spirit of the Order that we are adopting.”

Copps said he “would have preferred a general ban to discourage broadband providers from engaging in ‘pay for priority’—prioritizing the traffic of those with deep pockets while consigning the rest of us to a slower, second-class Internet.” He also believed the commission “should have done more to strip loopholes from the definition ‘broadband Internet access service’ to prevent companies falsely claiming they are not broadband companies from slipping through.” Copps also argued for parity between fixed and mobile technologies, stating, “After all, the Internet ***is*** the Internet, no matter how you access it.” [Emphasis in the original].

Many in the pro net neutrality camp had hoped that Copps and fellow Democratic commissioner Mignon Clyburn could either convince FCC chairman Julius Genachowski to strengthen the proposals, or vote against them. But Copps said in his statement, “So, in my book, today’s action could—and should—have gone further. Going as far as I would have liked was not, however, in the cards. The simpler and easier course for me at that point would have been dissent—and I considered that very, very seriously. But it became ever more clear to me that without some action today, the wheels of network neutrality would grind to a screeching halt for at least the next two years.”

Citing the same “anything is better than nothing” mantra, Clyburn said that despite the compromises, “it is my belief that we have made real progress in this proceeding, and through this Order, we are ensuring that the Internet will remain open for the benefit of many consumers...

“Left to my own devices, there are several issues I would have tackled differently. As such, I am approving in part and concurring in part to today’s Order.”

If one were to believe the rants of right wing news outlets such as the *Wall Street Journal*, the Obama administration, through its FCC has seized control of the Internet and mandated anti-capitalist legislation against big business interests.

An opinion column by *Journal* columnist John Fund, published December 1, is headlined “The Net Neutrality Coup.” It claims Obama is “seeking to impose his will on the Internet through the executive branch,” and goes on to claim that net neutrality is the invention of Marxists and socialists.

This attempt to link the Obama policy on net neutrality to Marxism is as ridiculous as earlier attempts to portray the administrations’ health care reform as a socialist measure. The association of people such as Robert McChesney, the University of Illinois professor who heads the lobbying group Free Press, and the assorted liberals and middle class radicals around *Monthly Review* with the Obama administration is merely an indication of how removed these tendencies are from genuine socialism and Marxism.

Far from representing a “serious effort to reform the media system” as advocated by McChesney, the FCC document does nothing to secure network neutrality or challenge the corporate control of the Internet and telecommunications infrastructure.

Net neutrality refers to a set of principles designed to prevent restrictions by Internet Service Providers (ISPs) and governments on content, sites, platforms or the kinds of equipment that may be used to access the Internet. The term first came to public prominence in 2005 when Madison River, a North Carolina telephone company, blocked Vonage Voice over IP (VoIP) services in one of the first cases of an ISP discriminating IP traffic. The FCC imposed a $15,000 fine on Madison River, which agreed to refrain from such practices. In August of that year the FCC issued the so-called “Open Internet Principles” which were simply a policy statement with no legislative regulations to back them up.

Since that time there have been numerous attempts to give legislative power to the FCC to impose net neutrality principles, most of which have been defeated in the courts. Most recently, in April of this year, a US appeals court vacated an order issued by the FCC in August 2008 which required that Comcast disclose details of its network management practices and not interfere with certain types of traffic. The US Court of Appeals for the District of Columbia ruled that the FCC could not order Comcast to stop blocking subscribers from using online file-sharing services such as BitTorrent to swap movies and other large files.

Opponents of the FCC argue there is no need to fix what isn’t broken—that the Internet is currently open and there is no evidence to show that if left to its own devices it won’t remain that way. On the contrary, there is ample evidence to show that commercial interests are threatening the openness of the Internet. The 200 page

report from the FCC itself demonstrates this. Section B of the report is headed “Broadband Providers Have the Incentive and Ability to Limit Internet Openness”. It states that “broadband providers may have economic incentives to block or otherwise disadvantage specific edge providers [i.e. deliverers of content over the Internet through various technological means] or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users.”

The report adds, “broadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet.”

This is not pure speculation on the part of the FCC as can be seen in the ongoing dispute between Comcast and Level 3 Communications (See “FCC chairman bows to corporations on ‘net neutrality’”)

There are questions as to whether the proposals will withstand legal scrutiny but even if they do, the measures proposed by the FCC are so vague as to do nothing to prevent such behavior by broadband providers going forward. The report refers to “protecting openness through high-level rules, while maintaining broadband providers; and the Commission’s flexibility to adapt to changes in the market and technology as the Internet continues to evolve. The document lays out three principles at the very beginning which are continuously called into question by clauses allowing providers “the flexibility to reasonably manage their networks.” What is considered “reasonable” is never clearly defined.

The first point is transparency. The document states, “Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services.” There was surprise among commentators that this clause included a reference to mobile broadband as it was widely thought that the FCC would accept the demands of Verizon and Google to remove mobile broadband entirely from legislation.

The next principle, “No blocking” does contain significant exceptions for mobile carriers. It states, “Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices” but for mobile providers it states only that they “may not block lawful websites, or block applications that compete with their voice or video telephony services.” This clause is carefully constructed so as not to conflict with Apple’s exclusive iPhone deal with AT&T, or Apple and Google’s control over what applications run on their devices.

The final principle is headed “No unreasonable discrimination” and states, “Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.” Again the term “unreasonable” is not defined and mobile operators are completely exempt from this.

As has been acknowledged by the two Republican members, the vast majority of the decisions of the FCC have been bipartisan in character and unanimously agreed. The bitter division over the issue of net neutrality reflects the ideological offensive of the Republicans against any perceived governmental control over corporations, no matter how false those perceptions may be.

As an integral part of a political system geared towards the defense of big business and the financial elite, the FCC is no more capable of defending Internet freedom than Congress itself. There are moreover very real dangers to increased government control of the Internet. While the commercial maneuvers of competing technological sectors most certainly can have a detrimental effect on the end user, a more pernicious threat is represented in the form of government monitoring and censorship.

The FCC document states “Openness also is essential to the Internet’s role as a platform for speech and civic engagement. An informed electorate is critical to the health of a functioning democracy and Congress has recognized that the Internet ‘offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’”

The report continues, “Many Americans now turn to the Internet to obtain news, and its openness makes it an unrivaled forum for free expression.”

In recognition of these facts there is a drive to vastly increase government control of the Internet, including proposals for President Obama to have a “kill switch” to allow the shut down of web sites as required. (See “Senate bill would authorize US president to seize control of Internet”)

The FCC document is peppered throughout with references to “lawful network traffic” but who determines what traffic is “lawful” at any given time? Are the documents made available by WikiLeaks considered lawful traffic? If so why does the FCC stand by while US companies such as Amazon and PayPal close down the accounts related to WikiLeaks?

The FCC is incapable of securing the openness of the Internet because such openness is incompatible with a system based on private ownership and the attack on democratic rights necessitated by a massive increase in social inequality. The real defense of net neutrality can only be conducted as part of a struggle for socialism.