Analysis - Preserving the Open Internet in the U.S. and U.K.

By Keith Mallinson Sunday, January 16, 2011

The most significant accomplishment with the FCC order is that its enactment can be claimed to fulfi ll one of Obama's presidential campaign pledges. However, the order is ineffective and needless.

With dissimilar conditions for local loop network competition between the United States and United Kingdom, very different decisions have been made by the respective national authorities on the contentious issue of net neutrality. The rulings are affecting mobile in different ways despite very competitive carrier markets in both nations.

COMPETITION IN LOCAL LOOPS

Whereas the U.S. has nationwide duopoly competition in local loops to virtually all households, this is only the case for half the U.K.'s households. America prides itself on local loop competition with cable connections as well as copper or fiber local exchange lines reaching 95 percent of households. In contrast, cable passes only 50 percent of U.K. homes. Fixed broadband competition in the U.K. therefore can only be at the services level for the other 50 percent of homes and provisioning is dependent on phone company local loops that reach virtually all homes, as is the case in most developed nations.

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The U.K.'s communications regulator recognized the local loop monopoly by insisting upon local loop unbundling and accounting separation for these operations with BT's Openreach wholesale operation. Whereas BT's loops are the only connection possibility in most places, at the services level, there are many competing ISPs, including TalkTalk, PlusNet, Sky, AOL and Orange, as well as BT and Virgin Media in the places where it has no cable connections. In the U.S., the aforementioned duopoly and a focus on facilitiesbased competition quashed the impetus for local loop unbundling. ISPs are overwhelmingly vertically integrated with self-provided cableco and telco local loop facilities.

DISSIMILAR NET NEUTRALITY DECISIONS

In the U.K.'s net neutrality decisionmaking, the government concluded there was sufficient competition among ISPs that it was not necessary to impose any net neutrality conditions beyond a demand for transparency on matters such as network management practices like throttling. With many ISPs, if one blocks or impairs delivery of a popular content source, then another will step in to provide an alternative that satisfies such demand. With local loop unbundling, there's nothing much the loop provider can do to block or otherwise affect the services carried.

The FCC is more fearful of potential competitive abuse in U.S., where consumers have only limited choice with fixed broadband ISPs that have other vested interests such as protecting cable TV subscription and plain old telephony revenues. According to FCC data, only 4 percent of households have a choice of three fixed ISPs, with 78 percent having the choice of two, 13 percent with one available to them and 5 percent with no ISP access possible.

In response, the FCC produced a 193-page order on Dec. 23, 2010, entitled *Preserving the Free and Open Internet*, including prohibitions on blocking and unreasonable discrimination. It allows only reasonable network management practices without defining these and other terms. In one of its daftest restrictions, only users and not content providers can pay for priority – even if the latter would like to do so. Such two-sided pricing, as typically favored by economists, could help support the large capacity expansions required for video and yet the rules insist

only end-users can pay. In fact, on the basis of non-discrimination rules, it would need to be all users – rather than just those who actually use the most bandwidth-hungry services such as video – who must pay for the additional costs.

The order's lack of clarity makes it impotent and will provoke litigation. It is unclear whether the order will survive challenges on these issues and even the fundamental question of whether or not the FCC has the authority to issue and enforce such an order in the first place.

MOBILE CAUGHT IN THE SLIPSTREAM

Whereas there is abundant cellular competition in both nations, with a choice of five or more operators for the vast majority in each nation, the U.S. order is also snagging the wireless carriers with unclear conditions for "measured steps at this time to protect the openness of the Internet when accessed through mobile broadband." At least one U.S. wireless carrier's proposed practices will be challenged under these new rules. MetroPCS Communications announced service tiering that will require a premium payment for use of Skype's voice services and certain other content. Media advocacy group Free Press has asked the FCC to investigate this new pricing on the basis that MetroPCS plans exist inside a "walled garden" that appears to exclude Skype, Netflix and other popular consumer Internet services, although it seems that such services can be accessed for a premium price. It is quite incongruous and nonsensical that MetroPCS, a veritable minnow in comparison to market leaders AT&T and Verizon, might be first ensnared in regulatory restrictions on pricing and service tiering. Competition rules are usually only applied against those with greatest commercial power through dominant positions rather than on those with small shares of relevant markets, such as MetroPCS.

NET NEUTRALITY IS NOT NECESSARY OR HELPFUL

The most significant accomplishment with the FCC order is that its enactment can be claimed to fulfill one of Obama's presidential campaign pledges. However, the order is ineffective and needless. Anticompetitive or content deliveryrestricting maneuvers have been prevented without such rules. For example, the tussle between BitTorrent and Comcast on the matter of peer-to-peer traffic throttling was resolved long before this order was published. Skype and Netflix remain available and are blossoming with significant growth, including cord-cutting in voice and video as the mobile Internet substitutes for fixed access.

Whereas many seek to preserve various characteristics of the Internet, expectations for what it should deliver also are escalating enormously and over-the-top services are cannibalizing the core revenues in voice services and cable TV distribution that underpin carrier economics. With Internet convergence to include the voice and video services that are currently delivered over separate networks with stringent quality-of-service levels, the old Internet's variable "best efforts" are insufficient.

You can't have your cake and eat it too. Transforming the fixed and mobile Internet to provide reliable 24x7 substitutes for voice and video delivery, including voice and content such as live sports, demands major investment and changes that must include discriminate pricing and traffic management. Add anything approaching universal service obligations to the un-served and under-served in places such as rural communities makes the need for flexibility on speeds, service levels and pricing by ISPs even more important.

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