

What Net Neutrality Order?

Verizon's challenge to the Open Internet Order was dismissed on the grounds that it had been filed too soon. However, even though the FCC won in court, its Order has gone nowhere fast.

By Jill Kasle ■ *The George Washington University*

On December 21, 2010, the Federal Communications Commission, after a long career of issuing decisions guaranteed to annoy somebody, issued a very large order that annoyed almost everyone: the Open Internet Order. In the FCC's words, the Order set down "basic rules of the road to preserve the open Internet as a platform for innovation, investment, competition, and free expression." The specific mandates of the Order included regulations that banned content blocking and required transparency from Internet service providers (ISPs). The rules also exempted wireless broadband companies from all but the transparency and blocking rules.

Many people reacted to the Order as if Christmas had been canceled. Advocates of net neutrality screamed. Consumer advocates shrieked. Companies howled. Congress huffed and puffed. And then, a scant month after the Order was issued and before the rules were even in effect, Verizon filed an appeal in the United States Court of Appeals for the D.C. Circuit, seeking to overturn the FCC's decree. A few days later, the wireless provider Metro PCS, which had already been accused of violating the new rules, also asked the same court to hear the challenge.

VERIZON'S APPEAL

Verizon's appeal was based on a claim that the FCC had overstepped its authority by promulgating sweeping new regulations that controlled not only broadband services but also the Internet.

The antecedents of Verizon's appeal – indeed, the antecedents of the Open Internet Order – lie in a decision made

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by Comcast in 2007 to block the peer-to-peer transfer of giant files on its network. When these behemoths (known, in Internet lingo, as bandwidth hogs) were moving on a network, other users on that network noticed a pronounced delay in their own ability to send and receive messages.

In response to Comcast's action, two public interest advocacy groups, Free Press and Public Knowledge, filed a complaint with the Federal Communications Commission asking for a ruling that Comcast's actions violated FCC policy. In 2008, the Commission issued a decision holding that it had jurisdiction over the matter and could resolve the situation by simply ordering Comcast not to discriminate against peer-to-peer traffic.

Although Comcast had by then ceased to enforce the policy, the company's response to the FCC's decision was a lawsuit filed in the United States Court of Appeals for the D.C. Circuit. The is-

sue in the case was who had the right to manage Comcast's network, Comcast or the FCC, and, by extension, whether the FCC could make and enforce network management rules for Internet service providers such as Comcast. In a unanimous decision in April 2010, the Court of Appeals found in favor of Comcast.

To answer the question "Who's in charge here?" the court looked to the Communications Act of 1934, the statute that gives the Commission authority to exist and regulate. The Commission had based its decision on the general language of Title I of the Communications Act, which affords authority to pass regulations that are "reasonably ancillary to the effective performance of the Commission's various responsibilities" outlined elsewhere in the Act.

The court found that the FCC had failed to show its action of barring Comcast from interfering with its customers' peer-to-peer use was reasonably ancillary to the effective performance of

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other statutorily mandated authority because, in fact, the Commission doesn't have much authority under the Act to regulate aspects of Internet service. The FCC had relied on a Congressional statement of policy and various provisions of the Communications Act, but none of these sources created the necessary "statutorily mandated responsibilities," according to the court.

The Commission's order against Comcast was its first attempt to impose rules requiring network neutrality on ISPs – and the Court of Appeals' rejection of that effort did not go unnoticed. So, when the Open Internet Order was issued nine months after the Comcast decision, Verizon pounced.

RIPENESS IS ALL

In January 2011, Verizon filed a claim against the Open Internet Order. The appeal was a little too cute for some. Verizon filed it in the very same court that had issued the Comcast decision, made the very same arguments that Comcast

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had made, asked for the case to be assigned to the same judges who had written the Comcast opinion and clearly hoped for the same result. The case was even brought for Verizon by the lawyer who had represented Comcast. But in April 2011, almost a year to the day after the Comcast decision, the court gave Verizon's appeal short shrift, finding that the appeal had been filed too early to be adjudicated.

And then ... nothing. Nothing. After all the yelling last December when the Open Internet Order was released, it has all but disappeared. It hasn't even gone into effect yet because it has not been published in the Federal Register.

The eight months or so that have passed since the Order was issued is an unusually long time for an FCC Order of this magnitude to go unpublished, and industry watchers are wondering what happened. Some legislators have asked the Commission to perform a cost-benefit analysis of the Order, a lengthy and time-consuming process that would slow things down considerably. However, slowing things down doesn't seem necessary at the moment, as the Order seems to have come to a screeching halt already.

What promised to be a noisy and divisive fight between the FCC and ISPs is currently on hold. Stay tuned. ❖

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