

The Post-Internet Order Broadband — Lessons from the Pre-Open Internet Order Experience. Net Neutrality Special Issue Blog # 4

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To support the 2015 Open Internet Order (OIO), the FCC cited four potential violations of net neutrality over the previous ten years, only two of which it explicitly challenged. Why, then, did the FCC say a rule was desperately needed and Broadband Internet Access Service (BIAS) providers say the rule would be devastating given that their past behavior meant that the rule would not affect them much? To mix common sense with econspeak, why did anyone care about the Order if it was not binding?[1]

Tim Brennan, professor in the School of Public Policy at the University of Maryland, Baltimore County and former FCC Chief Economist, addresses this question and explores the potential effects of the OIO 2015 rule in “[The Post-Internet Order Broadband Sector: Lessons from the Pre-Open Internet Order Experience](#).” In particular, he explores what lessons policymakers might learn from the handful of cases as they continue to grapple with net neutrality.

This post is the fourth in a series featuring the contents of a recent special issue of the *Review of Industrial Organization*, organized by the Technology Policy Institute and the University of Pennsylvania’s Center for Technology, Innovation, and Competition.

The short answer to why the Order matters if it doesn’t matter is that it is likely to affect future business models and network development. The longer answer is more nuanced.

Brennan begins by explaining why the order may have been non-binding. One possibility is that the rules were consistent with an outcome reached via existing competition. A second possibility is that even if one accepts the premise that BIAS providers have significant market power, they would not necessarily have an incentive to charge content providers or degrade quality. Brennan notes that even a monopolist faces limits on how high it would increase prices and might set quality at a higher or lower level than what it might be in a competitive market.

But non-binding rules today can have implications tomorrow.

The four examples the FCC cites as evidence that the Order is necessary each highlight problems that could develop as a result of strict enforcement.

The first case involved Madison River Communication, a telephone and DSL service provider, which blocked VoIP providers for fear that VoIP would compete with their own telephone service. The FCC intervened, and Madison River backed down. The incident is generally regarded as an example of how BIAS providers can use market power anticompetitively and how the FCC was able to intervene even without specific net neutrality rules. An oft-overlooked implication, though, is that BIAS providers may avoid certain investments if it “would force them to forgo profits from prior services.” That is, would Madison River have invested as quickly in DSL if it had known that it would lose voice revenues as a result? What future investments might a BIAS provider avoid if it believes it will not be able to earn a return from them?

The second case stemmed from Comcast delaying BitTorrent traffic because, Comcast claimed, it caused network congestion. The D.C. Circuit Court agreed with Comcast’s argument that the FCC did not then have the authority to regulate network management. It was at least in part because of this ruling that the FCC adopted the 2010 Open Internet Order, which Verizon then challenged. The key economic problem with that and subsequent Orders banning paid prioritization is the implication that the last mile networks are “uncongestible.” Brennan notes, “I am not an engineer, so I have to concede that anything is possible. But the idea that last mile capacity is effectively unlimited is contrary to economic intuition.”

The third and fourth cases the FCC cites, but did not explicitly condemn, highlight potential problems arising from strict enforcement.

The third involved AT&T and Apple's bandwidth-intensive FaceTime service. AT&T chose to forestall network congestion by allowing FaceTime's use on their network only for subscribers willing to pay explicitly for it. A host of other mechanisms are possible to manage such problems, such as peak-load pricing or basic usage pricing. If net neutrality rules had prevented AT&T from mitigating the congestion problem then network quality may have suffered. The point is not that net neutrality rules would have necessarily led to network congestion in this case. Instead, the point is that strict rules could have eliminated ways to handle congestion that impose the lowest costs on consumers.

Finally, Brennan discusses the implications of Comcast's conflict with Netflix over whether Netflix should pay Comcast to deliver its content. The concern was that Comcast targeted Netflix because Netflix competed with Comcast's own video service. But, Brennan, argues, the incident highlights other issues. First, how can an ISP manage the network when a small number (one, in this case) of content companies are responsible for a large share of traffic if regulations do not allow it to use price or quality changes. Second, edge providers requiring large amounts of bandwidth raises the question of who has stronger demand—willingness to pay—for last mile bandwidth. There is no reason to believe it is necessarily consumers.

Brennan acknowledges that non-economic reasons may also have influenced the FCC's decision to pass the Order and BIAS providers' decision to oppose it, even if it was nonbinding.

One reason is everyone's favorite bugaboo: the proverbial "camel's nose under the tent." Proponents of the rule might have hoped, while opponents might have feared, that it was a first step towards stricter rules that would be binding.

Another argument is based on the First Amendment. Proponents of net neutrality argue that individual access to technology and communication falls under the first amendment free speech umbrella. At the same time, BIAS providers maintain that *their* first amendment rights allow them to discriminate content transmission. The 2015 OIO, however, stayed away from this issue, focusing instead competition.

Additionally, different groups have different philosophical beliefs about the Internet itself. Is it, as early users maintained, a platform for sharing information research and learning? A tool for the small innovator? Merely another medium for commerce? A global village where users from around the world can interact? Each view, and each combination of views, might suggest different rules that yield some best outcome.

In summary, Brennan notes that the current net neutrality debate can be informed by past events, and should include additional issues in the present. He contends that things might not change all that much, under 2015 OIO or future net neutrality rules, but policymakers must consider how BIAS providers will be incentivized to innovate while stuck between edge providers and end users.

[1] Econspeak is our fault, not Brennan's.

Note: Our intent is to summarize Brennan's paper, but mistakes are ours alone, not his.