



August 2008

FCC Shakes Finger At Comcast For Internet Interference

Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440

The FCC has determined that Comcast deliberately interfered with its customers' Internet usage by selectively blocking peer-to-peer (P2P) applications, particularly BitTorrent. "In essence," said the FCC, "Comcast opens its customers' mail because it wants to deliver mail not based on the address on the envelope but on the type of letter contained therein." The FCC noted a possible anticompetitive motive – BitTorrent and other P2P applications can let users watch high-quality video they might otherwise have to pay for on cable TV systems, such as Comcast's.

The FCC rejected Comcast's argument that its actions were necessary to manage traffic on the network, because Comcast:

- interfered with even low-volume P2P users;
- blocked traffic at times of the day when congestion was not a problem;
- targeted neighborhoods not experiencing congestion; and
- tolerated very high bandwidth customers who did not use a disfavored application.

Moreover, Comcast repeatedly lied about its practices, according to the FCC. First, it denied any responsibility for its customers' connection problems, then admitted targeting P2P traffic – but only during peak congestion, it said – and finally admitted that it blocked P2P at all times of day and regardless of congestion levels.

And yet, in the end, the FCC did little more than issue a warning. Comcast is required to do three things:

(1) give the FCC details of its discriminatory practices; (2) explain how it will stop those practices; and (3) tell its customers and the FCC about any new practices it will use instead.

The FCC took the occasion to announce it would oversee “federal Internet policy” in resolving any other claims of discriminatory network practices. After seeing the penalties imposed on Comcast (*i.e.*, none), we doubt that other network operators are losing much sleep.

In fairness, though, the decision does plant a flag on the beach. Since the 1970s, in the pre-Internet days when people began sending large amounts of data over telephone lines, the FCC has consistently forborne from regulating any aspect of transmitted content. A series of decisions over the past few years explicitly extended that policy to cable, DSL, wireless, and broadband-over-power-line, exempting the providers of each from the traditional forms of regulation that would have blocked Comcast’s methods. Network operators might have thought themselves free to run their systems as they wished. With its decision in the Comcast matter, though, the FCC put an important limit on that freedom: operators may not discriminate against categories of content. The full text of the Order is not out yet; when released, it may shed more light on the Commission’s current thinking.

But another question, equally important, remains unanswered: can an operator discriminate *in favor of* certain users? That is the issue that launched the “network neutrality” debate – whether an Internet service provider can move some sites to customers faster than others, in exchange for money. Considering that the FCC’s decision went on a 3-2 vote, and that composition of the Commission may well change after the election, we are not making any predictions.