

FCC PLANS NET NEUTRALITY RULEMAKING

On September 21, 2009, Federal Communications Commission (FCC) Chairman Julius Genachowski announced plans to launch a rulemaking proceeding at an FCC meeting in October 2009 to codify “net neutrality” rules. The date of the October 2009 meeting has not been scheduled as of the date of this advisory.

In 2005, the FCC adopted an Internet Policy Statement announcing four principles related to Internet access. These principles provide:

- *“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.”¹*

To date, the FCC has refrained from adopting formal rules governing net neutrality and has yet to address whether the Internet Policy Statement applies to mobile broadband networks.

During a speech at the Brookings Institute on September 21, 2009,² in which he drew on the recurrent themes of his Chairmanship to date—such as investment and innovation and benefits to consumers and business—Chairman Genachowski said that he planned to propose adopting formal rules to codify the FCC’s Internet Policy Statement and to include additional principles that focus on non-discrimination and transparency.

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¹ See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14,986, 14,988, ¶ 4 (2005).

² Chairman Genachowski’s speech is available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf.

The first new principle would prevent Internet access providers from discriminating against particular Internet content or applications, subject to “reasonable network management.” Chairman Genachowski recognized the importance of curtailing illegal conduct on the Internet. He also stated that the FCC would take a careful look at how to address broadband providers’ delivery of managed services.

The second principle would require Internet access providers to be transparent about their network management practices. Chairman Genachowski said that this requirement would not require broadband providers to disclose subscriber data or information that could harm network security.

Finally, Chairman Genachowski stated that the net neutrality principles “apply to the Internet however accessed,” and that he “will ask [his] fellow Commissioners to join [him] in confirming this.” The Notice will examine how the rules should apply to differing platforms, including mobile Internet access services.

Chairman Genachowski plans to circulate proposed rules to his fellow Commissioners in the coming days and seek their support in issuing a notice of proposed rulemaking. He stated that the notice would provide for input on the proposed rules and their application and would ask a series of specific questions on how the Internet openness principles should apply to mobile broadband. He also announced that the Commission will host a number of public workshops on this topic, which will incorporate the use of the Internet and other new media tools in an effort to facilitate participation. The FCC has launched a new website, www.openinternet.gov, to further this discussion.

Commissioners Michael Copps and Mignon Clyburn issued statements in support of the Chairman’s proposal. Commissioners Robert McDowell and Meredith Baker issued a joint statement in which they expressed support for the goal of maintaining a free and open Internet and emphasized that any future Commission action should promote freedom, investment and innovation. However, they expressed concern that the Chairman’s proposal would “grow government’s involvement in Internet governance

and management” and said that they do not believe the Commission should adopt regulations if the facts do not demonstrate that a problem needs to be remedied.

Finally, several bills have been introduced on net neutrality issues in Congress and, if enacted, may address the FCC’s authority in this area.

We will be following this issue in future advisories. If you have any questions, please contact:

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