

## FCC PROPOSES RULES ON “NET NEUTRALITY”

The Federal Communications Commission (FCC or Commission) has adopted a highly anticipated Notice of Proposed Rulemaking (Notice) looking towards the codification and expansion of “net neutrality” principles intended to preserve the open Internet.<sup>1</sup> Comments on the Notice are due January 14, 2010. Reply comments are due March 5, 2010.

**Six Net Neutrality Principles.** The FCC has proposed to codify, as formal obligations of broadband Internet access service providers, the four principles set forth in the Commission’s 2005 Internet Policy Statement, as well as two additional principles. The proposed rules state that, subject to reasonable network management, a provider of broadband Internet access:

- may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet;
- may not prevent any of its users from running the lawful applications or using the lawful services of the user’s choice;
- may not prevent any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network;
- may not deprive any of its users of the user’s entitlement to competition among network providers, application providers, service providers, and content providers;
- must treat lawful content, applications, and services in a nondiscriminatory manner;<sup>2</sup> and
- must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.<sup>3</sup>

<sup>1</sup> At the Commission’s Open Meeting on October 22, 2009, Chairman Julius Genachowski along with Commissioners Michael Copps and Mignon Clyburn voted to approve the Notice. Commissioners Robert McDowell and Meredith Baker concurred in part and dissented in part.

<sup>2</sup> “Nondiscriminatory” is proposed to mean the access provider may not charge a content, application, or service provider for enhanced or prioritized access.

<sup>3</sup> Among other things, the Commission seeks comment on what customers need to know about network management; how the information should be disclosed to customers, content, application, and service providers and to the government; whether a disclosure requirement should not exist; and the legal limitations of what may be disclosed.

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**Scope of Rules.** The FCC has proposed to apply the rules to “broadband Internet access providers only to the extent they are providing broadband Internet access services.” According to the Notice:

- “Internet” means the system of interconnected networks that use the Internet Protocol for communication with resources or endpoints reachable, directly or through a proxy, via a globally unique Internet address assigned by the Internet Assigned Numbers Authority.
- “Broadband Internet access” means Internet Protocol data transmission between an end user and the Internet. For purposes of this definition, dial-up access requiring an end user to initiate a call across the public switched telephone network to establish a connection shall not constitute broadband Internet access.
- “Broadband Internet access service” means any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public.

The FCC seeks to apply the rules to all platforms for broadband Internet access, including mobile wireless broadband. This is the first time the FCC expressly has proposed extending net neutrality principles to include wireless networks. In the Notice, the FCC addresses the fact that the mobile Internet is not the same as the wired Internet. Thus, the Commission seeks comment on how and in what time frames or phases and to what extent the rules should apply to non-wireline technologies. The Commission asks how the nature of the mobile Internet should affect the rules, and if so, how the rules should differ. The Commission also seeks comment on whether to require mobile broadband access providers to allow users to attach any device to their network and how to implement such requirement.

***Reasonable Network Management, Law Enforcement, Public Safety, and Homeland and National Security.***

As stated above, the FCC proposes that the net neutrality rules be subject to reasonable network management.

According to the Notice, reasonable network management consists of:

- reasonable practices employed by a provider of broadband Internet access service to:
  - reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;
  - address traffic that is unwanted by users or harmful;
  - prevent the transfer of unlawful content; or
  - prevent the unlawful transfer of content; and
- other reasonable network management practices.

According to the Notice, the Commission intends the concept of “reasonable network management” to remain general and flexible and leaves the details to future adjudicatory cases. In addition to reasonable network management, the rules also will be subject to “the needs of law enforcement, public safety, and homeland and national security.”

The Commission also seeks comment and evidence supporting or refuting a variety of issues that have surfaced in the net neutrality debate, such as the technologies used for network management; how best to promote innovation and investment; the “current and future adequacy of competition and the market forces;” “how best to promote speech and civic participation;” the significance of “network congestion” to the above considerations; and any other argument the Commission should consider. The Commission also seeks comment on the ability of the proposed rules to close the “digital divide.”

***Managed Services.*** The FCC seeks comment on “managed” or “specialized” services. These are services such as voice, subscription video, and certain business services that are provided over the same networks used for broadband Internet access. The Commission seeks comment on how to foster growth of these services and maintain an open Internet; what other managed or specialized services will be offered in the future; how

to define such category of services; how the services will affect investment; and will access providers provide enough capacity for these services. It is anticipated that this area will generate extensive comment and likely will be one of the most contentious issues in the Notice.

**Jurisdiction.** The Commission believes that it has ancillary jurisdiction to adopt the proposed rules because exercising ancillary jurisdiction over facilities-based Internet access will advance the federal Internet policy set forth in Section 230(b) of the Communications Act as well as the broadband goals set forth in Section 706(a) of the Telecommunications Act. The Commission also states that it has additional authority under Title III of the Communications Act with respect to Internet access via spectrum-based facilities. The Commission seeks comment on its position that the Commission has jurisdiction to adopt the proposed rules.

**Enforcement.** The FCC proposes that the six net neutrality principles will be enforced on a case-by-case basis through adjudication. Specifically, the Commission seeks comment on whether to adopt procedural rules for complaints and if so, what the procedure ought to be; whether any other current procedures can be used as a model; whether different procedures should apply to different types of access providers; and what types of relief should or may be granted.

**Partial Dissents.** Republican Commissioners McDowell and Baker concurred in part and dissented in part to the Notice. These Commissioners questioned whether there is evidence of a problem for which the Commission should adopt rules as well as the Commission's legal authority to regulate broadband Internet access services.

**Rulemaking Process.** The Commission will host public workshops to discuss and address the proposed rules and any concerns. Moreover, the Office of Engineering and Technology will create a process to obtain technical advice from engineers in order to best determine what constitutes reasonable network management and what is the best way to create transparency.

**Response from Capitol Hill.** Since the Chairman's announcement in September that the Commission would launch a rulemaking proceeding, there has been significant activity by proponents and opponents of net neutrality. Both Republican members of Congress as well as a significant number of Democratic members of Congress have expressed concerns about the consequences of new net neutrality rules. Several bills have been introduced on net neutrality issues in Congress. Among others, following the Commission's action on October 22, 2009, Senator John McCain introduced a bill (S. 1836) that would prohibit the FCC from further regulating the Internet.

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

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