

FCC Seeks Further Comment on “Net Neutrality” Rules

The Federal Communications Commission (FCC or Commission) has sought further comment in the rulemaking proceeding to codify and expand its net neutrality principles in order to preserve an open Internet.¹ In October 2009, the FCC 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.² In its recent further inquiry, the FCC seeks comment with respect to two issues: specialized services and application of net neutrality rules to mobile wireless platforms.³ Comments are due by October 12, 2010, and reply comments by November 4, 2010.

Key Elements of Framework. The FCC identifies five key aspects of the FCC’s proposed net neutrality rules on which the proceeding to date “appears to have narrowed disagreement.” This language seems to suggest indirectly that the FCC may believe there is growing consensus on these five key elements, which are:

- Broadband providers should not prevent users from accessing the lawful content, applications, and services of their choice, or connecting nonharmful devices of their choice to fixed or wireline broadband platforms.
- Broadband providers should be transparent with respect to their network management practices.
- Some form of anti-discrimination protection is appropriate for fixed or wireline broadband platforms to handle lawful traffic.

1 See *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13,064 (2009) (Notice). See Advisory, *FCC Proposes Rules on “Net Neutrality,”* October 2009, available at http://www.arnoldporter.com/public_document.cfm?id=14812&key=16C0.

2 The proposed rules state that, subject to reasonable network, a provider of broadband Internet access: (i) will not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet; (ii) will not prevent any of its users from running lawful applications or using the lawful services of the user’s choice; (iii) will 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; (iv) will not deprive any of its users their entitlement to competition among network providers, application providers, service providers, and content providers; (v) must treat lawful content, applications, and services in a nondiscriminatory manner; and (vi) 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.

3 See *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, GN Dkt No. 09-191, Public Notice, DA 10-1667 (rel. Sept. 1, 2010) (Public Notice).

Contacts



Stephanie M. Phillipps
+1 202.942.5505



Maureen R. Jeffreys
+1 202.942.6608

ARNOLD & PORTER LLP

- Broadband providers must be able to reasonably manage their networks, including the use of tailored mechanisms to reduce congestion and harmful Internet traffic.
- Enforcing net neutrality rules through case-by-case adjudication is a better policy approach than promulgating detailed, prescriptive rules.

Specialized Services

In the Public Notice, the FCC acknowledges that broadband providers may provide specialized services over the same last-mile facilities used to provide broadband Internet access service and that such specialized services may generate additional private investment in networks and offer consumers new and valued services. The FCC seeks comment on three issues of potential concern with respect to specialized services:

- *Bypassing Open Internet Protections:* The net neutrality rules might be weakened if broadband providers offer specialized services that are similar to, but not technically classified as, broadband Internet access service. A similar concern may exist if a specialized service is integrated with broadband Internet access service.
- *Supplanting the Open Internet:* Broadband providers may fail to expand network capacity for broadband Internet access service in order to provide more capacity for specialized services. If this occurs, the structure of the open Internet may fail as a platform for competition, innovation, and free expression.
- *Anticompetitive Conduct:* Broadband providers may have the ability and incentive to engage in anticompetitive conduct with respect to specialized services, particularly if they are vertically integrated providers of content, applications or services, or if they enter into third-party business arrangements with third-party providers.

The FCC identifies six general policy approaches that, alone or in combination, could address these potential concerns:

- *Definitional Clarity:* Define broadband Internet access service clearly, and possibly broadly apply net neutrality

rules to all forms of broadband Internet access service. In this scenario, specialized services would be those services with a different scope or purpose than broadband Internet access service.

- *Truth in Advertising:* Prohibit broadband providers from marketing specialized services as broadband Internet access service and require broadband providers to offer a stand-alone broadband service, separate from specialized services, in addition to any bundled services offerings.
- *Disclosure:* Require broadband providers to divulge sufficient information to consumers, third parties, and the Commission for evaluation and reporting purposes.
- *Non-exclusivity in Specialized Services:* Require that commercial agreements with a vertically-integrated affiliate or a third-party that concern specialized services be provided on the same terms to other third parties.
- *Limit Specialized Service Offerings:* Allow broadband providers to offer only a limited set of specialized services with functionality that cannot be provided via broadband Internet access services (e.g., a telemedicine service that requires enhanced quality of service).
- *Guaranteed Capacity for Broadband Internet Access Service:* Require broadband providers to allocate sufficient network capacity to broadband Internet access service, and prohibit specialized services from hindering the performance of broadband Internet access service.

Application of Net Neutrality Rules to Mobile Wireless Platforms

The FCC seeks an updated record with respect to application of the proposed net neutrality rules to mobile wireless platforms in light of developments since October 2009. In particular, the FCC notes that several mobile broadband carriers have introduced new business models for handling broadband data usage that may mitigate their alleged incentives to engage in activities that might violate the proposed net neutrality rules. In addition, the FCC cites

to the recently announced net neutrality proposal of Verizon and Google that would exclude mobile broadband providers from net neutrality requirements except with respect to transparency.⁴ Thus, the FCC seeks comment on three issues with respect to mobile wireless platforms:

- **Transparency:** Disclosure requirements that are needed in order to allow consumers as well as application, content, and device providers to make informed choices regarding the use of mobile broadband networks.
- **Devices:** The ability of new technologies and business models to promote non-harmful attachment of third-party devices to mobile wireless networks.
- **Applications:** How to maximize consumer choice, innovation, and freedom in the creation of mobile applications, while also encouraging further private investment and competition in mobile wireless broadband services; how application distribution models affect consumer choice; and how differences between web-based and native applications should affect its analysis.

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

Stephanie M. Phillipps

+1 202.942.5505

Stephanie.Phillipps@aporter.com

Maureen R. Jeffreys

+1 202.942.6608

Maureen.Jeffreys@aporter.com

⁴ See Google, Public Policy Blog: Google's views on government, policy and politics, <http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html> (last visited September 13, 2010).

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