

## FCC Adopts Net Neutrality Rules

On December 21, 2010, the Federal Communications Commission (FCC or Commission) approved by a 3-2 vote a Report and Order (Order) adopting regulations prohibiting providers of broadband Internet access service from blocking certain types of content, applications, services, or devices; prohibiting unreasonable discrimination among certain types of traffic, but allowing reasonable network management; and imposing transparency requirements on Internet access service providers.<sup>1</sup> The Order comes after a successful court challenge to a prior Commission effort to regulate network management practices of Comcast that the Commission found interfered impermissibly with customer access to Internet content. Net neutrality has been the subject of extensive agency deliberation and public debate among industry leaders, consumer groups, Congressional leaders, and others as to whether government regulation of network neutrality and network management is necessary or appropriate. FCC Chairman Julius Genachowski characterized the Order as a compromise between industry and consumer interests that provides regulatory certainty while requiring little in the way of compliance costs. Several members of Congress have promised to undo the Commission's action.

The vote on the Order split along party lines. The three Democratic members of the Commission—Chairman Genachowski and Commissioners Mignon L. Clyburn and Michael J. Copps—voted in favor of adopting the new rules, although Commissioner Copps and Commissioner Clyburn both indicated a preference for stronger and more comprehensive rules.<sup>2</sup> Republican Commissioners Robert M. McDowell and Meredith Attwell Baker strongly dissented, arguing that the Order was beyond the authority of the FCC and harmful to broadband innovation and investment.

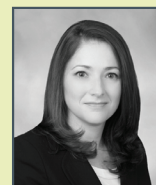
<sup>1</sup> *In re Preserving the Open Internet*, GN Dkt No. 09-191, Report and Order, FCC 10-201 (rel. Dec. 23, 2010) ("Order").

<sup>2</sup> Commissioner Copps concurred with the Order, and Commissioner Clyburn approved in part and concurred in part.

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## Rules

In the Order, the FCC found that broadband providers have the incentive and ability to limit the current openness of the Internet and based these rules on this finding. The FCC also adopted different rules for fixed and mobile “broadband Internet access service,”<sup>3</sup> with less stringent regulations applied to mobile broadband because it is a new and evolving platform that “presents operational constraints that fixed broadband networks do not typically encounter,”<sup>4</sup> and because consumers have more choices for wireless broadband than fixed wireline.<sup>5</sup> The FCC noted, however, that it “will closely monitor the development of the mobile broadband market and will adjust the framework...as appropriate.”<sup>6</sup>

**Transparency:** Both fixed and mobile broadband Internet access services are subject to the same rule regarding transparency:

“A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service,

and device providers to develop, market, and maintain Internet offerings.”<sup>7</sup>

The FCC elaborated that this rule “does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices.”<sup>8</sup> The FCC stated that effective disclosure would include information concerning network practices (e.g., congestion management, application-specific behavior, device attachment rules, and security); performance characteristics (e.g., service description and impact of specialized services); and commercial terms (e.g., pricing, privacy, and redress options). Further, “broadband providers must, at a minimum, prominently display or provide links to these disclosures on a publicly available, easily accessible website...and must disclose relevant information at the point of sale.”<sup>9</sup>

**No Blocking:** The FCC adopted different rules relating to blocking for fixed and mobile broadband Internet access service. Fixed providers are broadly prohibited from blocking lawful content:

“A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”<sup>10</sup>

The Order clarified that this rule “bars broadband providers from impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable” but does not “impose a blanket prohibition on degradation of traffic more generally, for example to address congestion problems.”<sup>11</sup>

Mobile providers, however, are only barred from blocking lawful websites and applications that compete with the provider’s voice and video services:

“A person engaged in the provision of mobile broadband Internet access service, insofar as such

3 “Broadband Internet access service” is defined by the Order as “[a] mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.” The term also includes “any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.” *Id.* ¶ 28. The Order specifies that “broadband Internet access services” likely do not include “connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device,” nor does it include “virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services.” *Id.* ¶ 47.

4 *Id.* ¶ 95. “Fixed broadband Internet access service” is defined as “a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user’s home router, computer, or other Internet access device to the network.” *Id.* ¶ 49. It includes fixed wireless broadband services and fixed satellite services. “Mobile broadband Internet access service” is defined as “a broadband Internet access service that serves end users primarily using mobile stations.” *Id.*

5 *Id.*

6 *Id.* ¶ 8. Commissioners Copps and Clyburn both argued in separate statements that more of the rules should have been extended to cover wireless.

7 *Id.* ¶ 54.

8 *Id.* ¶ 55.

9 *Id.* ¶ 57.

10 *Id.* ¶ 63.

11 *Id.* ¶¶ 66, n.204.

person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management."<sup>12</sup>

This prohibition on blocking competing applications "does not apply to a broadband provider's operation of application stores or their functional equivalent."<sup>13</sup>

**No Unreasonable Discrimination:** The rule related to unreasonable discrimination only applies to fixed broadband Internet access service:

"A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination."<sup>14</sup>

This rule does not, however, "prevent broadband providers from asking subscribers who use the network less to pay less and subscribers who use the network more to pay more."<sup>15</sup> The FCC clarified that use-agnostic discrimination, i.e., differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses, is likely reasonable. Conversely, with respect to paid priority arrangements (where a broadband provider agrees with a third party to favor some traffic over other traffic for a fee), the FCC specified that "it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard."<sup>16</sup>

**Reasonable Network Management Allowed:** As set forth above, both the blocking and unreasonable discrimination rules provide exceptions for "reasonable network management." The Order defined "reasonable

network management" as a practice that:

"is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."<sup>17</sup>

"Legitimate network management purposes" include:

- Ensuring network security and integrity, including addressing traffic that is harmful to the network;
- Addressing traffic that is unwanted by users (including by premise operators),<sup>18</sup> such as providing services or capabilities consistent with a user's choices regarding parental controls, spam, or security capabilities; and
- Reducing or mitigating the effects of congestion on the network.

Before deploying a network management practice, broadband providers may seek a declaratory ruling from the Commission about that practice.<sup>19</sup> The FCC acknowledged that reasonable network management practices may differ across platforms.

**Other Laws:** The FCC made clear that the rules are not intended to affect the rights or obligations of broadband providers with respect to other laws or safety considerations, including the needs of emergency communications and law enforcement, public safety, and national security. Further, the FCC stated that the rules protect only lawful content and are not intended to prevent broadband providers from addressing copyright infringement or other unlawful transfers of content.

**Specialized Services:** The FCC also addressed "specialized services," which are "services that share capacity with broadband Internet access service over providers' last-mile facilities," including some current Voice over Internet Protocol (VoIP) and Internet Protocol video offerings.<sup>20</sup> The FCC noted that these services could be a

<sup>12</sup> *Id.* ¶ 99.

<sup>13</sup> *Id.* ¶ 102.

<sup>14</sup> *Id.* ¶ 68.

<sup>15</sup> *Id.* ¶ 72.

<sup>16</sup> *Id.* ¶ 76.

<sup>17</sup> *Id.* ¶ 82.

<sup>18</sup> The term "premise operators" refers to entities such as coffee shops, bookstores, airlines, and other entities that acquire Internet service from a broadband provider to enable their patrons to access the Internet from their establishments. The net neutrality rules do not apply to premise operators. However, the rules apply to broadband Internet access services provided to premise operators for purposes of making such services available to their patrons.

<sup>19</sup> *Id.* ¶ 84.

<sup>20</sup> *Id.* ¶ 112.

way for sidestepping open Internet regulations and stated that the Commission “will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service.”<sup>21</sup>

## Authority

The FCC’s authority to enact and enforce these rules was called into question by the US Court of Appeals for the District of Columbia Circuit, which found that the Commission lacked the jurisdiction to regulate an Internet service provider’s network management practices under the agency’s 2005 Internet Policy Statement.<sup>22</sup> Following the Comcast decision, Chairman Genachowski had proposed reclassifying broadband Internet access service as a “telecommunications service” subject to the provisions of Title II of the Communications Act but forbearing from applying most Title II requirements on broadband Internet access services. In the Order, the FCC appears to have abandoned this proposal. Rather, the FCC claimed that its charge under the Communications Act to regulate interstate communications, when considered against the specific grants of authority over advanced telecommunications services, telecommunications carriers, cable operators, and broadcast stations, gave it the legislative authority to adopt open Internet rules.<sup>23</sup>

- **Section 706 of the Telecommunications Act of 1996:** This statute instructs the Commission to take actions to help the deployment of “advanced telecommunications capability” and to perform annual inquiries regarding the availability of advanced telecommunications capability.<sup>24</sup> If the FCC finds that such capability is not deployed in a reasonable and timely fashion, the FCC shall “take immediate action to accelerate deployment of such

capability by removing barriers to infrastructure investment and by promoting Competition in the telecommunications market” under Section 706(b).<sup>25</sup> In 2010, the Commission found that broadband deployment to all Americans is not reasonable and timely. Accordingly, in the Order, the FCC claimed express authority under Section 706(b).

- **Title II of the Communications Act:** Among other things, Title II grants the Commission the authority to protect competition among telecommunications services and consumers of those services. In the Order, the FCC claimed authority under Sections 201 and 251(a)(1) because VoIP services increasingly compete with traditional phone services.
- **Titles III and VI of the Communications Act:** The Commission has authority under Titles III and VI to oversee multichannel video programming distributor services. In the Order, the FCC claimed these titles provide authority for the new rules because Internet video is increasingly important to video competition and the new rules help protect over-the-top services from discrimination.
- **Spectrum Licensing:** The Commission has broad authority to license spectrum and place terms on those licenses in order to serve the public interest. The FCC argued that the new open Internet rules for wireless services are effectively conditions on licenses intended to advance the public interest in innovation and investment.
- **Authority to Collect Information:** The Commission may require “full and complete information” from common carriers and their affiliates under Section 218 of the Communications Act.<sup>26</sup> The FCC asserted that this Section provides authority for the transparency rules to the extent that broadband providers are affiliated with common carriers.

## Enforcement

Although the FCC encouraged the private resolution of network management disputes, it also created enforcement mechanisms as a “backstop.”<sup>27</sup> First, parties may submit informal complaints requiring no filing fee. Second, formal complaints may be filed under a process similar to the Part

<sup>21</sup> *Id.* ¶ 114.

<sup>22</sup> *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010). The 2005 Internet Policy Statement consisted of four net neutrality principles. *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Policy Statement, 20 FCC Rcd. 14986 (2005). The Order largely builds upon these principles.

<sup>23</sup> The Commission found that “viewed as a whole, [the Communications Act] provide[s] broad authority to promote competition, investment, transparency, and an open Internet....” Order ¶ 116.

<sup>24</sup> 47 U.S.C. § 1302.

<sup>25</sup> 47 U.S.C. § 1302(b).

<sup>26</sup> 47 U.S.C. § 218.

<sup>27</sup> Order ¶ 152.

76 cable access rules. Formal complainants will be required to establish a prima facie case of an open Internet violation, which the broadband provider must then answer by showing that the challenged practice is reasonable. The complainant then will have an opportunity to show that the practice is not reasonable. Formal complaints will be placed on an accelerated docket. Additionally, the FCC may initiate investigations on its own initiative.

### Effective Date of the Rules

The transparency rule contains new information collection requirements subject to the Paper Work Reduction Act, which will require approval by the Office of Management and Budget (OMB). Accordingly, all of the new rules will become effective 60 days after the date of Federal Register notice announcing the decision of the OMB regarding approval of the information collection requirements.

The FCC also stated an intention to create an Open Internet Advisory Committee that would monitor the state of Internet openness and the effects of the FCC rules.

Finally, in light of the rapid pace of technology changes, the FCC said that it plans to review all of the rules adopted in the Order no later than two years after they become effective.

### Dissents

In dissenting statements, Commissioners McDowell and Baker argued that the rules are unnecessary because there is no factual record of widespread and continuing abuse of network management practices by Internet service providers or that such practices have been harmful to the Internet access market. They contended that the Order seeks to remedy “speculative harms alone” and in doing so would harm consumers by raising prices and slowing the deployment of broadband to unserved areas.<sup>28</sup> Commissioners McDowell and Baker also expressed concern that the FCC did not have authority to regulate the Internet and argued that the jurisdictional arguments likely

would fail to pass judicial review because they fail to contain a “limiting principle” and appear to give the Commission unbounded authority to regulate the Internet.<sup>29</sup>

### Response from Capitol Hill

Republicans on Capitol Hill expressed concern with the FCC’s new rules. Incoming House Commerce Committee Chairman Fred Upton (R-Mich.) and Senate Commerce Committee Ranking Member Kay Bailey Hutchison (R-Tex.) have said that they plan to introduce resolutions of disapproval under the Congressional Review Act.<sup>30</sup> Representative Marsha Blackburn (R-Tenn.), incoming vice chair of the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade, has announced she and other co-sponsors will introduce legislation that would nullify the FCC’s net neutrality rules. Additional legislation may be introduced as well. Conversely, some Democrats criticized the new rules as not going far enough to protect the open Internet.

It is a near certainty that the Order will be subject to additional challenges. Among other things, interested stakeholders may file petitions for reconsideration of the Order, appeal the Order in the courts, or oppose the information collection requirements before the OMB. We will be following these developments in future advisories.

*If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:*

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<sup>28</sup> Dissenting Statement of Commissioner Meredith Attwell Baker. Commissioner Baker particularly emphasized that the new rules favor edge providers—such as application and content providers—over networks and consumers.

<sup>29</sup> Dissenting Statement of Commissioner Robert M. McDowell.

<sup>30</sup> Adam Bender, *Republicans to Seek Reversal of Net Neutrality*, Communications Daily 5-7, Dec. 22, 2010.

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