

FCC Law Blog

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FCC Initiates Net Neutrality Rulemaking

In its latest move in the "net neutrality" debate, the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking (NPRM) in late October 2009 that breaks from the FCC's historically restrained approach to Internet regulation and proposes a host of new prohibitions and requirements on broadband providers. While some have praised the move as a necessary means to ensure continuing investment in innovative content and competition in the Internet access market, others have argued that formal regulation will discourage broadband providers from investing in infrastructure, stifle broadband-related job creation, and lead to congested, slow-moving networks. In addition, some opponents of the move have questioned whether the FCC even possesses the legal authority to regulate Internet network management.

As expected, the proposed rules would codify four existing Internet principles established by the FCC in 2005 as mere "guidelines." These four principles are the following:

- 1. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user's choice over the Internet.*
- 2. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice.*
- 3. Subject to reasonable network management, a provider of broadband Internet access service 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.*
- 4. Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.*

The proposed rules would also establish two new "nondiscrimination" and "transparency" rules:

5. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.

6. Subject to reasonable network management, a provider of broadband Internet access service 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 [the FCC's net neutrality principles].

Under the proposed definition of "reasonable network management," broadband providers would still be able to manage their networks to reduce congestion and address quality-of-service concerns, address harmful traffic or traffic that is unwanted by users, and prevent the unlawful transfer of content. Thus, while it may be reasonable for a broadband provider to temporarily limit usage during periods of congestion or to charge subscribers based on usage rather than a flat monthly fee, it would not be reasonable to block or degrade VoIP traffic but not other services that similarly affect bandwidth usage, or to block or deprioritize particular content on the basis of viewpoint alone. Similarly, it would be reasonable under the proposed rules for a broadband provider to prevent the unlawful distribution of copyrighted works or to block spam, child pornography, or content that a particular individual has requested be blocked.

Despite the vast expenditure of energy that has gone into debating whether the FCC should promulgate net neutrality rules and what form those rules should take, many commentators have questioned whether the FCC possesses the legal authority to regulate Internet network management. The FCC has argued in the *Comcast/BitTorrent* proceeding that it has ancillary jurisdiction over broadband Internet access service because the subject matter falls within the FCC's general statutory grant of jurisdiction and the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities." While this position was echoed by Chairman Genachowski and Democratic Commissioners Copps and Clyburn in the FCC's NPRM, the merit of the argument is far from clear. Republican Commissioners McDowell and Baker have both expressed doubts, and the *Comcast/BitTorrent* proceeding is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit. Oral arguments in the case are currently scheduled for January 8, 2010, which presents interesting timing for the case given the FCC's desire to complete its rulemaking next year. In addition, Senator John McCain (R – AZ) has introduced a bill (S. 1836) that would prohibit the FCC from regulating Internet services altogether.

The FCC is currently seeking comments from the public as to what form the final rules should take and whether the FCC possesses legal authority to regulate Internet network management in general. Comments are due on January 14, 2010 and reply comments are due on March 5, 2010.

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