
FCC Shifts Net Neutrality Debate into High Gear

by John K. Hane and Glenn S. Richards

Last week the FCC launched a Notice of Proposed Rulemaking (NPRM) proposing to adopt six “open Internet” rules that would bind all broadband access providers, including those providing mobile and satellite broadband services. If adopted, the rules could have pervasive and lasting effects in many industry sectors, including broadband, voice and video service providers, infrastructure, device, chipset and other component vendors, content publishers and distributors, software publishers, and application service providers.

The NPRM abandons the “net neutrality” moniker in favor of a new phrase, “the free and open Internet.” Nonetheless, views on every aspect of the debate remain highly polarized, driven by vast economic stakes in the outcome, disagreements about the factors that have made the Internet a success, philosophical differences about the nature of the Internet and disagreement over the role of the FCC in 21st century communications. The [NPRM](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294159A1.pdf) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294159A1.pdf) puts the FCC at center stage in the debate for now, but the federal courts and Congress may take prominent or even decisive roles. Some parties, notably including two of the five sitting FCC commissioners, question the FCC’s legal authority to adopt and enforce the rules it has proposed. If the federal courts agree, the FCC will have to re-tool its approach or look to Congress to expand its jurisdiction.

The draft rules attempt to strike what the FCC sees as a balance between preserving the traditional “openness” of the Internet while permitting “reasonable network management” and possibly some “managed services,” recognizing that requiring network providers to treat all traffic the same could be counterproductive. Admitting the difficulty of drawing subtle distinctions and the uncertainty of how Internet technologies and services will develop, the NPRM proposes draft rules that are brief and relatively general by FCC standards. The FCC would leave the details, including the nuances of permitted and prohibited practices, to be worked out in case-by-case adjudications over time.

Proposed Rules

The rules would codify the four principles of the FCC's 2005 Internet Policy Statement and would add new nondiscrimination and transparency requirements. Under the proposed rules a broadband Internet access provider:

- Could not prevent users from sending or receiving the lawful content of the user's choice over the Internet;
- Could not prevent users from running the lawful applications or using the lawful services of the user's choice;
- Could not prevent users from connecting to and using on its network the user's choice of lawful devices that do not harm the network;
- Would not be allowed to deprive any user of "the user's entitlement to competition among network providers, application providers, service providers, and content providers;"
- Would be required to treat lawful content, applications, and services in a nondiscriminatory manner.
- Would be required to disclose information concerning network management and other practices as is reasonably required for users and content, application, and service providers to "enjoy the protections" of the rules.

The draft rules allow network providers to engage in "reasonable network management", which includes steps to (i) mitigate congestion and address quality of service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the "transfer of unlawful content" and (iv) prevent the "unlawful transfer of content." The list is not exclusive: the draft rules would also permit "other reasonable network management practices." The contours of "reasonable" would have to be determined case-by-case. The NPRM asks for comment on these proposed rules.

The NPRM also asks how the FCC should treat "specialized" and "managed" services, which it defines as "Internet-Protocol-based offerings (including voice and subscription video services, and certain business services provided to enterprise customers), often provided over the same networks used for broadband Internet access service."

What's at Stake

The battle fronts are the blurry line between transport and value-added services and the more discernable one between the edge and the core. The NPRM asserts that the Internet's "legacy of openness and transparency" has been critical to its "success as an engine for creativity, innovation and growth" because Internet protocols are "free and open for any entrepreneur to use: they do not require the securing of permission or the payment of royalties." The NPRM asserts that much of the Internet's success can be attributed to innovation at the edge made possible by openness in the core.

The central question in the debate is whether Internet access providers should be entitled to set conditions of access to their networks and to differentiate among network traffic, both for their own customers and for traffic originating from or destined for elsewhere on the Internet. Network providers argue that they must build more and more intelligence into their networks in order to manage surging traffic, to introduce new and enhanced services and to earn a fair return. However, some fear that more intelligence in networks

threatens the egalitarian nature of the Internet itself, providing the ability and incentive for network operators to thwart innovation at the edge by, in effect, picking winners and losers.

The FCC's draft rules fall on the side of protecting innovation at the edge at the possible expense of throttling evolution of the core, potentially influencing investment decisions worth billions of dollars and affecting every stakeholder in the Internet ecosystem. However, the real effect of the rules is uncertain because of the vague and perhaps broad carve-out for "reasonable network management" and because the NPRM also asks how so-called "managed services" should be treated. Public comment and intensive lobbying will help determine whether the FCC adopts rules and, if so, how extensively those rules regulate the network management practices of broadband Internet access providers.

Interests of Stakeholders

Broadband Internet access providers are most directly affected, since the rules would prohibit certain practices and impose affirmative nondiscrimination and disclosure requirements. Notably, content, application and other service providers are protected by the nondiscrimination and disclosure obligations, so broadband providers must answer not only to their subscribers but presumably to any person who offers a web application or publishes a web site. Under the proposed rules it seems likely that ISPs would have to dedicate staff and resources to responding to inquiries and complaints from all corners of the Internet.

Subject to reasonable network management and a possible exemption for managed services, the rules could also have the effect of limiting the incentives for ISPs to expand into ancillary services, because they may not be permitted to use their network facilities to differentiate ancillary services from those provided by third parties. Over time the rules could diminish the prospects for cross-service subsidization and may lead to metered usage or more extensive use of service level tiers defined by peak and aggregate bandwidth.

Wireless carriers that provide Internet access have argued that they should be exempt from network neutrality rules because their bandwidth is both scarce and expensive relative to wireline services. The draft rules would cover wireless and satellite providers, but the NPRM leaves open the possibility that the "reasonable network management" carve-out could mean different things as applied to different technologies. Wireless carriers are expending prodigious amounts of capital to meet rising demand for mobile data, and if net neutrality rules undermine voice and SMS revenue, that income will have to be made up somewhere. The FCC has acknowledged that the wireless carriers face unique challenges to increasing capacity and we expect that it would interpret any network neutrality rules in that context.

Internet application and content providers would be the most direct beneficiaries (if one accepts the FCC's premise that their interests are at risk without FCC intervention). The rules would prohibit ISPs from blocking or degrading access to their applications, content and services and from favoring most applications, content or services provided by the ISP. The rules also give application and content providers a right to know how ISPs are managing their networks and apparently give them standing to bring complaints against ISPs, whether or not they have a contractual relationship with the ISP. However, the effects may not be the same for every application or content provider. If Internet access providers respond to the rules by moving away from flat rate pricing and towards metered usage, providers of Internet video and other bandwidth-intensive services may face new challenges.

Satellite service providers would be covered to the extent they provide Internet Protocol data transmissions directly to the public. The definition of "broadband" for purposes of the rules is, in essence, any non-dialup IP connection between an end user and the Internet. As with wireless carriers, the FCC is likely

to take account of the unique technical characteristics of fixed and mobile satellite services, including capacity constraints, in determining what constitutes “reasonable network management.”

Residential broadband users are not likely to notice significant changes immediately if the FCC adopts net neutrality rules. Over time, pricing of “triple play” and “quad play” bundles and the relative prices of *a la carte* services could change, and ISPs could introduce new “managed services” to avoid neutrality rules. Consumers would likely have better access to information about actual services levels and limitations, and sources reporting information about ISP network management would likely emerge.

Mobile broadband users may notice significant changes if the FCC extends the rules to wireless services. Users would have more flexibility to attach devices of their choice to the network, and those devices could be optimized to provide specialized services that could compete with carrier-provided services (voice, text, video, navigation, etc). The already fast growth of web services optimized for the mobile environment may accelerate. If consumers begin to “bring their own devices to the network” and choose third party services over carrier-provided services it may become easier for them to switch providers. However, if web applications and services displace traditional wireless carrier revenue centers such as voice and text messaging, prices for mobile broadband access could fall more slowly than otherwise or could rise.

Chipmakers, consumer electronics makers and mobile device makers. The rules could benefit companies selling products for the network edge by ensuring that products they develop will work across the platforms of multiple carriers. The rules may help ensure open markets for more specialized devices and could allow manufacturers to add Internet features to more devices from televisions to appliances to specialized mobile devices. Consumer electronics makers and their chipset vendors rely on mass scale and widespread distribution of their products, so it is important for their business that all Internet connections conform to certain common standards. Although compatibility has not been an issue to date, the rules’ bias towards protecting innovation at the edge presumably could benefit makers of edge devices.

Network Infrastructure Vendors. The rules could constrain broadband Internet access providers from using certain traffic management features now available or developed later, and therefore could impose a degree of commoditization on network elements, which critics warn will thwart innovation and reduce margins. The degree to which these predictions are realized depends on how broadly or narrowly the FCC interprets “network management” and the degree to which it permits providers to offer managed services on shared networks.

DBS providers may welcome the assurance of long-term nondiscriminatory access to consumers’ broadband Internet connections, which could allow DBS providers to emulate or duplicate many enhanced video services provided their cable and telco competitors. A robust net neutrality framework would allow DBS providers to integrate web-delivered services into their offerings with confidence that their cable and telco competitors (which provide the vast majority of residential broadband connections) could not block or degrade those services.

Video producers, programmers and broadcasters. The proposed rules would ensure that consumers can continue to access all legal content that a video producer, programmer, broadcaster or anyone else places online. Over time, this should provide some marginal additional leverage to content owners and programmers that rely on proprietary networks for downstream distribution of their programming, especially as broadband penetration grows. However, as long cable, satellite and telco video providers remain the collection engine for multichannel video subscriber fees, the theoretical ability to distribute video directly online may not translate into viable alternative business models for many players.

“Over-the-top” video providers. In theory, network neutrality should facilitate the growth in “over-the-top” and alternative video services by ensuring that ISPs—particularly triple play ISPs—do not favor their own platforms and services over emerging services. However, the major multichannel video program distributors will continue to enjoy prominent relationships with programmers (and, indirectly, with content owners) and may find ways to lever these relationships to benefit their online platforms that are beyond the reach of network neutrality rules.

Public safety and critical infrastructure. The draft rules are expressly subject to existing requirements with respect to law enforcement and do not limit an ISP’s ability to deliver emergency communications or to address the needs of public safety or national or homeland security authorities. The NPRM also acknowledges that potential future offerings including telemedicine, smart grid deployments and e-learning may require managed services rather than typical best-effort Internet delivery.

A Wild Card—FCC Jurisdiction

The most far-reaching impact of this proceeding will not come from where the FCC draws the line between permitted and prohibited network practices, because the real contours of that line will have to be worked out case-by-case over time. Far more important is the threshold issue of whether the FCC has the authority to draw that line in the first place. As more and more traditionally FCC-regulated services migrate to the Internet, they often fall beyond the reach of legacy FCC jurisdiction. The FCC’s power and relevance will gradually erode if its regulatory authority cannot, in effect, follow electronic communications traffic to IP networks. The NPRM recounts the FCC’s policies “to preserve and promote the open Internet” but does not explicitly identify the FCC’s source of authority to impose the rules.

The question of the FCC’s authority to regulate broadband Internet access provider practices may be answered, at least in part, by United States Court of Appeals for the DC Circuit, where Comcast has challenged a 2008 order in which the FCC found that Comcast had violated the FCC’s 2005 *Internet Policy Statement* by degrading peer-to-peer traffic. Comcast’s appeal challenges the FCC’s jurisdiction to conduct an adjudication to resolve a complaint against its practices. The NPRM establishes a very long comment period—comments are due January 14, 2010 and replies are due March 5—in part because of the complexity of the issues, but probably also to allow the FCC to move forward with the benefit of the Court of Appeals’ decision, which should be released some time next year.

If you have questions about the NPRM or wish to consider submitting comments to the FCC, please contact the Pillsbury attorney with whom you regularly work or any of the attorneys below.

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