

E-ALERT | Communications, Technology and Media

December 27, 2010

FCC RELEASES FULL TEXT OF NET NEUTRALITY RULES: EFFECTS ON INDUSTRY AND USERS WILL DEPEND UPON FUTURE ACTIONS

Following its well-publicized vote on December 21, the Federal Communications Commission (FCC) late last week released the full text of new rules to govern the fixed and mobile broadband connections that consumers, small businesses, and other retail subscribers depend upon to access the Internet. The FCC's decision is the product of years of debate in Congress and the FCC as to how best to ensure that the Internet remains an "open" platform for innovation and communication through which any party with a broadband connection can launch a new service, express a diversity of opinions, and communicate with others on a global basis.

The full text of the new rules and the accompanying Order make clear that the FCC — whether under its current or future leadership — will have considerable discretion in determining the scope of acceptable business and technical practices for Internet access providers in their management of network traffic to and from subscribers' broadband connections. By adopting a case-by-case approach to specific questions about broadband network practices, the FCC's decision leaves for another day the ongoing debate about whether and to what extent regulation is necessary to preserve the openness of the Internet.

Despite the inherent uncertainty in the new rules, the FCC did make clear that mobile broadband connections (e.g., Internet access via 3G and 4G mobile devices running Windows Phone 7, Blackberry, iOS, or other mobile operating systems) will be subject to lesser regulation than their fixed counterparts — finding that mobile services are "rapidly evolving" in a manner that fixed connections, such as DSL and cable model access, are not. A summary of the FCC's new rules and the different approaches taken in the fixed and mobile environments are summarized below.

New Rule	Providers of Fixed Broadband Connections	Providers of Mobile Broadband Connections
Prohibition on Blocking	May not block any lawful content, applications, services, or non-harmful devices.	Prohibition on blocking applies only to lawful websites and competing voice or video telephony applications. No requirement to permit non-harmful devices on the network or to allow subscribers to access and use all lawful online applications. Provider-offered "app stores" also are not affected.

New Rule	Providers of Fixed Broadband Connections	Providers of Mobile Broadband Connections
Prohibition on Unreasonable Discrimination	<p>May not “unreasonably discriminate” in transmitting lawful network traffic to consumers.</p> <p>The FCC said it likely would be “unreasonable” for a fixed broadband provider to agree to favor a particular party’s traffic over others (or to favor its own traffic over others), but it stopped short of adopting an absolute ban on these “pay for priority” arrangements.</p>	<p>No express prohibition on unreasonable discrimination, but FCC cautioned that it would monitor developments and trends in mobile broadband networks.</p>
Transparency	<p>Must publicly disclose accurate information as to network management practices, network performance, and commercial terms — for the benefit of Internet access subscribers as well as content, service and device providers seeking to reach those subscribers. Mobile providers must include information about their certification process, if any, for third-party devices and applications.</p>	
Reasonable Network Management	<p>All prohibitions imposed by these rules are subject to the right of providers to engage in “reasonable network management.”</p> <p>The FCC signaled that most practices designed to address traffic that is harmful to the network or unwanted by subscribers (e.g., spam), or to mitigate the effects of congestion would be considered reasonable. Practices that may be unreasonable for fixed providers may be reasonable for mobile providers, given the FCC’s finding that mobile networks are subject to unique constraints.</p>	
Tiered Service Permitted	<p>Tiered broadband service is permitted, meaning that a broadband provider can charge a subscriber more based on the amount of bandwidth consumed.</p>	
Specialized Services Permitted	<p>Providers can offer “specialized services” — such as IPTV video services like AT&T’s U-verse, or VoIP services — that share capacity with broadband Internet access service. However, the FCC implied that it may take future action if providers appear to shift too much capacity away from Internet access services in favor of specialized services.</p>	

IMPLICATIONS

Much of the net neutrality debate has turned on whether innovation best occurs at the “ends” of the network (*i.e.*, in content/applications) or in its “middle” (*i.e.*, in network structure). Proponents of net neutrality argue that rules will protect content innovation by preventing broadband providers from crowding out opportunities for new entrants and favoring affiliated content providers. Opponents charge that regulation will stifle much-needed investment in network growth and innovation.

The FCC's order aims to thread the needle and in large part preserves the status quo in which Internet access providers exert little control over the fixed broadband experience but greater control over its mobile counterpart. Yet if subscribers migrate in large numbers from fixed to mobile broadband as carriers launch faster 4G services, online content, service and application providers may desire greater regulatory intervention in the mobile context. At the same time, some online content and service providers — especially those providing high-bandwidth applications like HD gaming and video — may benefit if they are among the entities able to reach an agreement with mobile carriers for “pay for priority” arrangements guaranteeing a more robust and reliable user experience.

UNCERTAIN FUTURE

The exact date on which the new rules will go into effect is uncertain. Because the new rules require collection of information by industry, they must go through a further approval process at the White House's Office of Management and Budget (OMB). President Obama is a strong supporter of the FCC's decision and we fully expect that OMB will approve it. Based on past experience, however, the OMB process could take several weeks to several months.

Once the new rules are approved by OMB, they are expected to become effective 60 days after notice of OMB approval is published in the *Federal Register*. Nevertheless, questions regarding the FCC's implementation of its new rules remain. As the contentious debate between the three Democratic commissioners approving the order and two Republican commissioners opposing it illustrates, what constitutes “reasonable” network management or “unreasonable” discrimination, for example, is often in the eye of the beholder. The current FCC is likely to interpret the new rules expansively, but in the future the FCC may apply them more narrowly.

Finally, and perhaps most importantly, the FCC's decision, which angered both opponents of net neutrality and advocates of more forceful rules, will be subject to intense scrutiny in Congress and likely will be challenged in federal court. As this process unfolds, we will continue to keep you apprised of major developments and their implications.

If you have any questions concerning the FCC's new net neutrality rules, please contact any of the following members of our communications and media practice group, or another Covington attorney with whom you regularly work:

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