

[US] FCC Proposes Network Neutrality Rules

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On 22 October 2009, the Federal Communications Commission (“FCC”) released a Notice of Proposed Rulemaking (“NPRM”) (a document that solicits comments on a proposed federal rule) seeking public input on draft rules to preserve an open Internet.

Response by interested parties was immediate. Many severely criticize the effort, claiming it to be overbearing, unnecessary, and likely to result in unintended negative consequences for investment, innovation, and entrepreneurship. Proponents give two major supporting arguments. First, they aver that the rules are necessary to prevent Internet access service providers (“ISPs”) from reducing or even eliminating innovation by Internet content and telecom service companies. Second, sans rules, ISPs can suppress free speech and civic discourse on the Internet. The FCC also has created a vessel to stir up public debate by launching openinternet.gov, a blog-like website where the public can easily post their own ideas as well as vote or comment on others. As of 1 December 2009, 1,744 people have contributed 159 posts, 1,040 comments, and 14,506 votes.

If promulgated, all ISPs, including wireless and satellite providers, will be required to abide by the rules. Broken down, the rules would restrict ISPs from preventing or discouraging users from sending, receiving, running and using lawful content, applications, and devices connected to the Web, or from favoring one type of content, application or device over another. They would also require disclosure of network management and other practices employed to prevent the transfer of illegal content.

This NPRM is based on the FCC’s 2005 Policy Statement regarding Internet and broadband. The four principles contained there entitled consumers to (i) access lawful Internet content, (ii) run applications and use services, subject to the needs of law enforcement, (iii) connect their choice of legal devices that do not harm the network, and (iv) compete among network providers, application and service providers, and content providers. The NPRM expands on the Policy Statement in two important ways. First, the language has been reformatted in order to make the rules legally binding. Second, the FCC proposes an exceptionally broad non-discrimination principle that delineates unqualified prohibitions on ISPs. This is significantly stronger than the general prohibition on “unjust or unreasonable discrimination” required by common carriers.

Opponents state that the broadband industry is still in its infancy and should be left to self-regulation by the marketplace. In essence, government should not try to fix what is not broken. FCC Commissioner Robert M. McDowell cautioned that he “does not agree with the majority's view that the Internet is showing breaks and cracks and that the government . . . needs to fix it.” USTelecom believes that “it would be a mistake to replace today's open and dynamic environment with a government-managed ‘mother may I’ approach to innovation.” Verizon states that “the Commission should not adopt rules that would effectively dictate the structure of what is still a new and developing area by treating [Internet content and telecom service companies] and [ISPs] as separate parts of the broadband Internet ecosystem.” Many postings on openinternet.gov subscribe to this free market line of thought.

Another point of contention is centered on the definition of “reasonable network management.” ISPs are against any regulation that limits their ability to attenuate congestion and fear that an attempt to define reasonable practices will have a negative effect across the country. AT&T has stated that the imposition of “a non-discrimination standard that does not contain some form of reasonableness limitation would be more restrictive than the prohibition against ‘unreasonable discrimination’ adopted for monopoly-era telephone companies in the Communications Act of 1934.”

Proponents are most concerned with the stifling of innovation and civic participation. They are united on one overarching point — government inaction will essentially grant network providers the right to block, degrade, or slow down any content on the Internet for any reason. They bolster their arguments by pointing to specific examples, provided in the NPRM, where carriers have discriminated against applications, services, and even particular users. Some think the proposed rules are not strong enough and require clarity to ensure that they will be effective and enforceable.

Recently, an alliance of Internet content and telecom service companies including Google and Facebook wrote to the Commission pressing for a strong anti-discrimination policy because ISPs currently have the legal right to block their products from the marketplace. This complements Lawrence Lessig’s argument (quoted in the NPRM) that “If the principle of end-to-end is abandoned . . . innovators must now include in their calculation of risk the threat that the [ISP] might either block or tax a particular application. That increased risk will reduce application investment.”

The debate continues with both sides cooperating by providing comments that the FCC will turn to regulations to both protect the openness of the Internet as well as promote innovation.

FCC Notice of Proposed Rulemaking In the Matter of Preserving the Open Internet Broadband Industry Practices

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf

FCC Policy Statement of 5 August 2005

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

