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## **FCC Releases Net Neutrality NPRM**

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FCC Chairman Genchowski had made it very clear that net neutrality was very high on his priority list when he took the helm of the FCC. True to his word, on October 22 the FCC issued a Notice of Proposed Rulemaking (NPRM) that opened a far-ranging inquiry into this highly contentious issue.

In 61 pages of detailed legal, economic, technical and policy analysis, the FCC proposes to:

- codify the four principles the Commission previously articulated in its 2005 Internet Policy Statement;
- codify a fifth principle that would require a broadband Internet access service provider (IASP) to treat lawful content, applications, and services in a nondiscriminatory manner;
- codify a sixth principle that would require an IASP to disclose information concerning network management and other practices reasonably required for users and providers of content, applications and services to enjoy the protections specified in this rulemaking; and
- make clear that the principles are subject to reasonable network management, and would not limit an IASP in delivering emergency communications or addressing the needs of law enforcement, public safety, or national or homeland security.

The NPRM also requests comments on:

- a category of “managed” or “specialized” services, how to define them, and what principles or rules, if any, should apply;
- how the new rules should govern non-wireline forms of Internet access, such as mobile wireless (an especially fertile ground for dispute), unlicensed wireless, licensed fixed wireless, and satellite; and
- enforcement procedures that the Commission should use to ensure compliance.

Some noteworthy details:

- While the proposed rules would apply to broadband Internet access, they would not apply to dial-up Internet access, or to private “intranets.” The exemption for dial-up may offer some comfort to small and rural Internet service providers.
- Unlike the FCC’s existing Internet Principles – which state what “consumers are entitled to” – the proposed rules are phrased as obligations imposed on IASPs. But this raises the issue of what sorts of entities the rules should apply to. AT&T has called on the FCC to apply Net Neutrality rules to application service providers such as Google, as well IASPs. While the NPRM seeks comments on that idea, the rules as proposed would apply only to IASPs.
- The proposed Non-Discrimination Rule would prohibit IASPs from charging content, application, and service providers for enhanced or prioritized access to subscribers, but makes no mention of charges to the end users. This might allow, for example, the end user to subscribe to a service that increases throughput (and hence quality) for a video channel, even if it reduces throughput to the same user’s other applications. The Chairman did say at the meeting that users should have the final say on their own Internet experience.
- The NPRM tees up the issue of whether so-called “managed services” should be exempt from some or all of the Net Neutrality rules. Examples include IP-enabled cable television-like services (AT&T’s U-verse, Verizon’s FIOS video), facilities-based VoIP services, and telemedicine applications. These are delivered over the same network facilities as Internet access, but are not themselves traditional Internet services. This issue will almost certainly be hotly contested.
- The NPRM asks whether only “unreasonable” discrimination should be prohibited. Such a limitation would allow forms of discrimination that may be desirable for end users (*e.g.*, to promote quality of service for a particular application). While the IASPs can be expected to support that approach, there may be a catch: the concept of prohibiting “unreasonable discrimination” has traditionally been a fundamental component of common carrier regulation, and IASPs do not want to be treated as common carriers. Additionally, drawing the line that defines “unreasonable” will be a contentious task.
- In exploring the “transparency” rule, the NPRM seeks comment on the proper balance between giving consumers the information that they need and overwhelming them with detail. The NPRM also asks whether the transparency rule should require IASPs to give details of network management to content/application/service providers and/or to the FCC. While the IASPs may have limited concerns about providing this information to consumers, they will likely fight this extension of the concept.

- There will be numerous FCC “workshops” in this proceeding, and more importantly, a formal process of technical outreach led by the FCC’s Office of Engineering and Technology. The latter seeks details on what is reasonable network management, what is workable in terms of transparency, and how the FCC can prevent the rules from having detrimental impact.
- Commissioners McDowell and Baker dissented in part, laying down their “markers” as to how they would oppose the Chairman’s proposal with the “factual and legal predicates” of the NPRM. Commissioner McDowell agreed on the need to preserve an open Internet, but wanted it done through non-government management entities such as ICANN and other voluntary entities – a “bottom up” rather than a “top down” approach. He argued that countries that regulate the Internet more than the U.S. tend to be less free than the U.S., and are waiting for the U.S. to enact more regulation in order to justify their own more intrusive and political regimes. And while the Chairman has stated that a goal of Net Neutrality is to protect innovation at the “edge” of the network, McDowell noted an unprecedented overlap between “edge” applications and “core” ISPs. He also suggested that any anti-competitive conduct by IASPs could be addressed by anti-trust laws.

Comments on the NPRM are due to be filed by ***January 14, 2010***. Reply comments are due ***March 5, 2010***.

Recent history suggests that the proceeding will be a titanic battleground. Time to strap on your armor, grab your lance, and head to the field of combat. Let the tilting begin!