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MEMORANDUM

TO: Interested Persons
FROM: Miller & Van Eaton, P.L.L.C.
DATE: January 24, 2011
RE: FCC Network Neutrality Report and Order

This memo reviews the FCC's Network Neutrality Report and Order,¹ with a particular focus on how it may impact local governments.

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¹ *In re Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 10-201 (Dec. 23, 2010).

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OVERVIEW

I. What is network neutrality? And why is it controversial?

“Network neutrality” is a debate about a broadband network operator’s control of the content and services using the operator’s network. When does the operator’s role of traffic cop slip into the role of censor and monopolist extracting unfair terms and prices as a condition of using the network? Do the broadband networks of today allow a network operator to bias the network’s performance to favor certain (commercial and/or political) interests over others? If so, will network operators have an economic incentive to censor and monopolize?

Proponents of “network neutrality” argue the “last mile” connections to broadband networks have strong “natural monopoly” tendencies. A smart cable modem or telephone operator will maximize profits and market control by imposing unfair terms and conditions because the network is so important, and users have no real competitive choice to access the Internet.

Opponents of “network neutrality” argue that the Internet and the network technologies that allow access to Internet services are the opposite of natural monopolies. If one “last mile” network behaves poorly, consumers will shift to a competitor. Government regulation of this behavior will discourage innovation and advancements designed specifically to correct for any market imbalances. The telecommunications networks which will succeed are those that offer the most benefits to society and that remain open to all.

Network neutrality advocates respond that a public highway system should not limit on-ramps and off-ramps to only those cars and trucks that pay extra or agree to carry content that the highway operator sells. They further claim that operating the network in a neutral, non-discriminatory manner will be comparable to the electricity grid, which is indifferent to the devices that can be “plugged in.” This design empowers end-users to develop innovative uses of electricity without the approval of the electricity distributor.

The broadband network owners claim that there is no real threat because almost all consumers have a choice between cable modem, telephone DSL, and cellular telephone as their on-ramps. They maintain that imposing costly network neutrality regulations will reduce the incentive to build out better networks.²

² Order ¶ 40.

Unlike other communications technologies,³ the Internet has long been marked by this openness. This openness first arose for technical reasons but it was further developed in the 1990s, when the Internet backbone had many long distance company providers and many start-ups creating services available over the Internet. The on-ramps were the old dial-up access telephone lines which, by rule, were required to treat all internet traffic on a non-discriminatory basis. Now, however, broadband Internet services travel over cable tv and telephone DSL lines. These services are not regulated like the old narrowband voice telephone lines of the 1990s. Accordingly, network neutrality advocates claim that broadband network owners could undermine the Internet's openness to further their own commercial interests. Indeed, the FCC has documented actions in which network owners have interfered with network traffic to further their own interests.⁴

II. What are the FCC's new network neutrality rules?

The FCC adopted three basic rules:

- **Transparency.** Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
- **No blocking.** Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and
- **No unreasonable discrimination.** Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

Both the “no blocking” and “unreasonable discrimination” rules are subject to a provider’s “reasonable network management” and its efforts to protect public safety and otherwise comply with the law. We describe the rules in more detail below.

³ Perhaps the best example is the traditional cable television model, where the power lies at the *center* of the network (*i.e.*, the cable company selects *all* the content and applications on the network, and the devices that may be used). In contrast, because of the Internet's openness, the power lies at the *ends* of the network, where end-users can supply and use applications, services, and devices of their own choosing.

⁴ Order ¶ 35.

III. How do the rules affect local governments?

The new rules may affect local governments in four ways:

(a) The rules protect local governments, like other end-users and “edge providers,” from broadband Internet access providers’ control.

Many local governments are both end-users of the Internet and “edge providers”: entities that develop applications, services, or devices that run over the Internet. The FCC’s new rules—although subject to numerous, often-ambiguous exceptions—claim to protect entities in positions similar to local governments. Unfortunately, the rules do not explicitly mention local governments as a class of user or provider.

(b) The rules may impose new obligations on local governments.

The rules may directly apply to local governments that provide broadband Internet access service. These local governments will need to ensure that they comply with the new rules.

(c) The rules may preempt local government efforts to regulate network neutrality or similar broadband practices.

Since the FCC asserts it is now regulating network neutrality for internet access, these federal regulations may preempt any conflicting local regulations.

(d) The FCC’s novel view of its statutory authority may impact local governments in other areas.

The FCC’s new rules rest on a new, broad reading by the FCC of the agency’s statutory authority, which could prove harmful to local governments if the FCC uses this authority to challenge local government actions in the future.

IV. Does the FCC address broadband Internet access service’s classification as an “information service”?

The FCC avoids the issue. Although last summer, the FCC initially considered re-classifying Internet access service as a “telecommunication service,” which would have empowered the FCC to regulate the service under Title II of the Communications Act, the FCC did not take this approach. Instead, the FCC regulates “broadband Internet access service”—a term that does not appear in the Communications Act. The FCC claims that Congress bestowed direct authority upon the FCC under Section 706 of the 1996 Telecommunication Act, and that its “ancillary authority” arising out of a number of provisions of the Communications Act empowers the Commission to regulate this service.

THE RULES

V. What service is the FCC regulating?

The FCC's new rules apply to “**broadband Internet access service**” which the FCC defines as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.⁵

VI. Does every broadband service meet this definition?

No. The definition includes two important “carve-outs.”

Mass-market. The rules only apply to a service that is “mass-market.” The FCC explains that this is a service “marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.”⁶ It would not include enterprise service offerings, which are typically offered to larger organizations in customized or negotiated arrangements.

All or substantially all Internet endpoints. The rules also only apply to a service that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints. “Specialized services” that offer connectivity to one or a small number of Internet endpoints do not qualify. For example, broadband Internet access service does not include connectivity bundled with e-readers, heart monitors, or energy consumption sensors.⁷ The term also does not include VoIP service, IP video service, virtual private network services, content delivery network

⁵ Order ¶ 44.

⁶ Order ¶ 45.

⁷ Order ¶ 47.

services, multichannel video programming services, hosting or data storage services, or Internet backbone services. The FCC pledged to closely monitor these specialized services to ensure that these exceptions do not swallow the rule.⁸

VII. What are the two types of broadband Internet access service?

The FCC describes two types of broadband Internet access service—“**fixed**” and “**mobile**”—depending on the end-user equipment that is associated with the service. “Fixed broadband Internet access service” reaches end-users primarily at fixed endpoints using stationary equipment, such as a modem that connects an end user’s router, computer, or other Internet access device to the network. The term includes fixed wireless broadband services and fixed satellite broadband services.⁹ “Mobile broadband Internet access service” is a service that reaches end-users primarily using mobile stations, include smartphones.¹⁰

VIII. Could local government provision of Internet access qualify as “broadband Internet access service?”

Yes. If the local government provides a service that is marketed and sold on a standardized basis, and that allows access to substantially all Internet endpoints, it could be subject to the new rules. Additionally, if the local government provides the “functional equivalent” of such a network, it could be subject to the new rules.

IX. Do the rules apply to entities (including local governments) that acquire Internet service from a broadband provider to allow their patrons to access the Internet from their establishments (e.g., coffee shops, bookstores, airlines)?

Not directly. The rules do not apply to the owner of these establishments (“premise owner”), but the rules do apply to the entity that provides the broadband Internet access service. The premise owner, not his customers, is the end-user. The provider and the premise owner can—as a reasonable network management practice—agree to restrict certain traffic to the facility, but such restrictions should generally be disclosed to the premise owner’s customers.¹¹

⁸ Order ¶¶ 112-114.

⁹ Order ¶ 49.

¹⁰ *Id.*

¹¹ Order ¶¶ 52, 89.

X. What is the service provider's obligation to disclose its practices?

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.¹²

Although the FCC deliberately left this transparency rule flexible, it described various types of information that may be disclosed including: network practices (congestion management, application-specific behavior, device attachment rules, security); performance characteristics (service description, impact of specialized services); and commercial terms (pricing, privacy policies, redress options).¹³ This rule applies to both fixed and mobile broadband Internet access providers.

XI. How and where must a provider disclose such terms?

A provider must disclose its practices on a publicly available, easily accessible website and at the point of sale. End users must be able to easily identify the disclosures that apply to their service.¹⁴

XII. What is the “no blocking” rule for *fixed* broadband Internet access service?

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.¹⁵

The FCC explained that this rule also reaches practices that “degrade” content, applications, services, or non-harmful devices so as to make them effectively

¹² Order ¶ 54.

¹³ Order ¶ 56.

¹⁴ Order ¶ 57.

¹⁵ Order ¶ 63.

unusable.¹⁶ A provider cannot require payment of a fee in order to avoid being blocked.¹⁷

XIII. What is the “no blocking” rule for *mobile* broadband Internet access service?

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block **consumers from accessing lawful websites**, subject to reasonable network management; nor shall such person block **applications that compete with the provider’s voice or video telephony services**, subject to reasonable network management.¹⁸

This rule is narrower than the fixed broadband Internet access rule in important ways. A mobile provider *can* block content (other than website access),¹⁹ applications (other than competing voice or video applications), and the use of any devices. The FCC explained that its bar on blocking competing applications does not impact a provider’s “app store.”²⁰

XIV. What is the “non-discrimination” rule for *fixed* broadband Internet access service?

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.²¹

The FCC explained that it would be concerned about discrimination that harms an actual or potential competitor to the broadband provider (*e.g.*, by slowing

¹⁶ Order ¶ 66.

¹⁷ Order ¶ 67.

¹⁸ Order ¶ 99.

¹⁹ A provider must allow *access* to all websites, but it can presumably block certain content at such websites.

²⁰ Order ¶ 102.

²¹ Order ¶ 68.

competing VoIP applications), that harms end users (*e.g.*, by inhibiting end users from accessing the content, applications, services, and devices of their choice), and that impairs free expression (*e.g.*, by slowing traffic from a particular blog).²² It also indicated that a “pay for priority” arrangement—one in which a broadband Internet access provider and a third party (an edge provider) enter into a commercial arrangement to favor the third party’s traffic—“would raise significant cause for concern.”²³

The FCC also indicated that a number of practices are *not* likely to be unreasonably discriminatory. The FCC noted that tiered and usage-based pricing for end-users is likely lawful.²⁴ In addition, discrimination that is not tied to specific uses of the network or to specific classes of uses is likely lawful, as well. Thus, a provider may treat heavy users differently than light users, provided that the regulation is not targeted at the underlying network use.

XV. What is the “non-discrimination” rule for *mobile* broadband Internet access service?

The FCC did not adopt a “non-discrimination” rule for mobile broadband Internet access service. These providers will have more freedom to limit consumers’ access to content, application, services, and devices. The providers could degrade traffic from certain applications or services (so long as the providers comply with the no-blocking rule). For example, providers presumably can slow traffic from a particular blog with which it disagrees, and enter into “pay for priority” arrangements with edge providers of their choosing.

XVI. What is “reasonable network management” and how does it impact the FCC’s rules?

The FCC explained that its no-blocking and non-discrimination rules are subject to “reasonable network management” practice, which the FCC defines as:

A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management

²² Order ¶ 75.

²³ Order ¶ 76.

²⁴ Order ¶ 72.

purpose, taking into account the particular network architecture and technology of the broadband Internet access service.²⁵

The FCC explained that reasonable network management purposes include “ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user’s choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network.”²⁶ The FCC said that it would develop the scope of reasonable network management on a “case-by-case basis.”²⁷

XVII. How will the FCC resolve disputes under the rules?

The Report and Order establishes a process for the filing of informal and formal complaints.²⁸

THE FCC’S AUTHORITY

XVIII. How does the FCC claim to have authority to adopt these rules?

The FCC claims it has both direct authority (Congress specifically authorized the FCC to act here) and “ancillary” authority (Congress generally authorized the FCC to make rules that are “not inconsistent” with the Communications Act).

XIX. How does the FCC claim that it has direct authority?

The FCC claims that Congress directly authorized it to make these rules through a statute that does not appear in the Communications Act at all, Section 706 of the Telecommunications Act of 1996.²⁹ In relevant part, it provides:

²⁵ Order ¶ 82.

²⁶ *Id.*

²⁷ Order ¶ 83.

²⁸ Order ¶¶ 153-54.

²⁹ Order ¶ 122. Section 706 is codified at 47 U.S.C. § 1302.

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.³⁰

When the D.C. Circuit struck down the FCC's previous network neutrality efforts, the court held that the FCC could not rely on Section 706 because the FCC had previously determined that the statute was *not* a substantive grant of authority to the agency.³¹ In this Order, the FCC disagrees that it ever read the statute in such a fashion and—to the extent that it did—it rejects the reading.³² The FCC explains that its earlier decision merely indicated that Section 706(a)'s reference to forbearance does not trump Section 10 of the Communications Act's specific forbearance requirements.³³

³⁰ 47 U.S.C. § 1302(a),(b).

³¹ *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (2010).

³² Order ¶ 119 n.370.

³³ Order ¶ 118.

The FCC also justified its rules based on Section 706(b)—viewing (b) as an “additional” (and apparently separate) source of authority—in light of a July 2010 report that found that broadband deployment to all Americans has not been reasonable and timely.³⁴

XX. How does the FCC claim that it has ancillary authority to make these rules?

The FCC’s so-called “ancillary authority” arises out of Section 4(i) of the Communications Act, which provides: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”³⁵

- The difficult question is whether the FCC’s new rules are “reasonably ancillary to the Commission’s effective performance of its statutory mandated responsibilities.” 47 U.S.C. § 154(i). To pass this test, the FCC must show that “its regulation of an activity over which it concededly has no express statutory authority (here . . . Internet management practices) is *necessary* to further its regulation of activities over which it does have express statutory authority.”³⁶

XXI. Did the FCC specifically address preemption of State and local authority?

Yes, but only in general terms. The FCC indicated that “[e]xcept to the extent a state requirement conflicts on its face with a Commission decision herein, the Commission will evaluate preemption in light of the fact-specific nature of the relevant inquiry, on a case-by-case basis.”³⁷ The FCC recognized that “states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complains” and further stated that it had “no intention of impairing states’ or local governments’ ability to carry out these duties unless we find that specific measures conflict with federal law or policy.”³⁸

³⁴ Order ¶ 123.

³⁵

³⁶ *Comcast Corp.*, 600 F.3d at 654 (emphasis added).

³⁷ Order ¶ 121 n.374.

³⁸ *Id.*

XXII. What is the effective date of the rules?

The rules are effective 60 days after the Federal Register publishes the Office of Management and Budget's approval of the new transparency rules.³⁹

XXIII. Have the FCC's rules been appealed?

Yes. On January 20, 2010, Verizon filed a Notice of Appeal with the D.C. Circuit. The company claimed that the Report and Order unlawfully modifies its license. We expect other entities to appeal, as well.

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³⁹ Order ¶ 161.