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The Impact of the FCC's Net Neutrality Rules

Net neutrality is the name that has become associated with rules designed to ensure that Internet Service Providers (“ISPs”) treat all sources of data equally. In 2005, the FCC made its first attempt to protect consumers’ right to access and use the content, applications, services and devices of their choice without discrimination or restriction. Due to a number of technological changes and legal issues, these rules have become inadequate. So, last month, the FCC released its first complete set of network neutrality rules. These new rules reflect a compromise that seeks to preserve the openness and neutrality of the Internet while avoiding the legal pitfalls of the more aggressive neutrality rules some had sought.

The FCC’s most recent Order, sets forth three basic principles:

1. Fixed and mobile broadband providers must be transparent.
2. Fixed and mobile broadband providers cannot block competitive services, but mobile broadband providers may block applications.
3. Fixed broadband providers cannot unreasonably discriminate, while mobile broadband providers may discriminate as long as they justify it.

The Order states that for service providers to be transparent, they must “publicly disclose accurate information regarding the network management practices, performance, and

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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.” Therefore, ISPs must disclose how they manage network congestion, the speeds they offer and what types of applications work over those speeds. ISPs also must disclose how users can trigger security restrictions, how the ISP inspects its traffic and how end-users can address problems with their ISP. Additionally, ISPs must disclose how their own VoIP and IPTV services affect how they deliver Internet traffic. Yet, while the FCC will provide enforcement, it will be up to consumers and watch dog groups to police ISPs and prove to the FCC that an ISP is being unreasonable if problems occur.

The Order also declared that fixed broadband providers, “shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.” However, the rules do not require ISPs to judge what is lawful content and what is not. The FCC also addressed issues involving the [Comcast dispute](#) of the past few years, by ordering that ISPs cannot degrade content to the point where it cannot be accessed by consumers. The Order also holds that providers cannot block devices from wired networks with overly burdensome certification procedures.

The Order states further that fixed broadband providers, “shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service. [But,] [r]easonable network management shall not constitute unreasonable discrimination.” Therefore, consumers can regulate what type of content comes into their homes, and the FCC will determine whether discrimination harms end users, a competitive service to one an ISP provides, or free expression, such as slowing traffic from a website that the ISP disfavors.

Notably, from a jurisdictional standpoint, the FCC determined that ISPs do not *provide* the Internet, instead they provide *access* to the Internet. This is a significant conclusion as it cements the FCC’s regulatory control over ISPs because the FCC has jurisdiction over access services provided over wire and radio.

In short, while the Order provides some additional clarity and guidelines, they are far from a comprehensive regulatory or enforcement scheme and do not seem to have much force behind them. The new rules give the government broad authority over certain practices, but limit its opportunity to police the day-to-day operations of ISPs and activities on the Internet. These policing functions are largely left to consumers and watch dog groups, , which likely means that many of the current and projected problems, such as claims regarding ISP discriminatory practices, will be left to individual cases to be resolved.

A complete copy of the FCC’s Order is available [here](#).

What do you think? Does the FCC’s Net Neutrality Order serve the public interest? How will it impact ISPs? Consumers? Will the Order have a positive or negative for the

development and growth of the Internet? We welcome your thoughts! Please feel free to comment at our interactive blog at blog.tlgdc.com.

If you have questions about this issue, or if we may be of assistance to you, please feel free to contact us.

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