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The FCC Adopts Net Neutrality Rules, but the Debate Continues

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On December 21, 2010, the Federal Communications Commission (“FCC” or “Commission”) adopted net neutrality rules by a 3-2 vote.² According to the FCC, these “high-level rules” will protect openness without burdensome regulation and provide broadband providers and the Commission with the flexibility to adapt as the Internet changes and evolves.³ President Obama issued a statement on the day the rules were adopted, congratulating the FCC and calling its action important to the promotion of innovation, economic growth and job

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 - ² The rules were adopted after consideration of comments following the FCC’s Notice of Proposed Rulemaking and Notice of Further Inquiry, both of which fueled continuous debate. *In re Preserving the Open Internet Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52 (Oct. 22, 2009); *see also In re Preserving the Open Internet Broadband Industry Practices*, Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191, WC Docket No. 07-52 (Sept. 1, 2010). Some of the rules are subject to the Paperwork Reduction Act, 44 U.S.C. §§ 3501, *et seq.*, which, in part, provides for a review process involving the Office of Management and Budget and allows certain public participation. That process is not yet complete and the FCC intends that after its completion all of the rules will receive final publication and then take effect at the same time.
 - ³ *See In re Matter of Preserving the Open Internet Broadband Industry Practices*, 25 FCC Rcd 17905, ¶ 10 (2010) (the “Order”).

creation, and the protection of consumer choice, while safeguarding the open and democratic spirit of the Internet.⁴

The FCC Chairman, Julius Genachowski, began his statement welcoming the adoption of the rules with a quote from Tim Berners-Lee, the inventor of the World Wide Web, who noted that while the Internet and Web generally thrive without regulation, some basic values should be legally preserved.⁵ The Chairman stated that without such rules there was no process to monitor Internet openness as technology and business models develop, no recourse for stakeholders who are harmed by openness violations, and more uncertainty for businesses and consumers. He also noted the extensive participative process engaged in by the Commission and the broad range of entities that accepted the final rules as striking an acceptable balance between freedom and oversight. Recently, the Chairman, noting the deep public interest in the net neutrality issue, stated that “more than two hundred thousand commenters expressed their views on our proposed network.”⁶

⁴ President Barack H. Obama, Statement by the President on Today’s FCC Vote on Net Neutrality, The White House (Dec. 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/21/statement-president-today-s-fcc-vote-net-neutrality>.

⁵ Statement of Chairman Julius Genachowski, Order at 135 (“Genachowski Statement”).

⁶ Julius Genachowski, FCC Chairman, Written Statement Before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives (Feb. 16, 2011), at 2, *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/021611_Net_Neutrality/Genachowski.pdf. It should be noted that the Securities and Exchange Commission (“SEC”) may disagree with the notion that this issue is of wide public interest, having recently agreed to take “no action” against AT&T if it did not include a shareholder initiative concerning net neutrality in its 2011 proxy materials, because “we do not believe that net neutrality has emerged as a consistent topic of widespread public debate such that it would be a significant policy issue for purposes of rule 14a-8(i)(7).” *See* Letter and attachments from Gregory S. Belliston, Special Counsel, SEC, to David B. Harms, Sullivan & Cromwell (Feb. 2, 2011), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/trilliumasset020211-14a8.pdf>. *But see* Letter from Al Franken and Ron Wyden, U.S. Senators, to Honorable Mary L. Schapiro, Chairman, SEC (Mar. 9, 2011), *available at* <http://wyden.senate.gov/newsroom/press/release/?id=db23b0c8-775d-4191-8bb1-69ad9127b605>, taking contrary view (noting high number of public comments filed at the FCC about network neutrality and summarizing Presidential, congressional, lobbyist and journalistic attention to the issue). It is not known whether the flurry of action in Congress shortly after the SEC asserted this position would have or might yet affect the SEC’s reasoning: the House of Representatives debated and approved a provision barring the FCC from spending funds to enforce the new net neutrality rules; Congressional hearings were held about the rules; and the House Energy & Commerce Committee and one of its

Not everyone agreed with the Chairman’s assessment. In fashioning its rules, the Commission navigated through an ocean of comments ranging from those asserting that the agency lacked jurisdiction and should refrain from adopting any rules, to those urging that it rely on Title II of the Communications Acts of 1934 for authority to regulate the relevant services under a common carrier regime. Various commenters urged a light touch, no touch, or a guiding hand. Many of these comments embraced the same values—such as promoting competition, investment and innovation, free expression, and consumer protection—but offered widely disparate views on how to advance and achieve these goals. The final Commission vote was along partisan lines, with the Democratic Commissioners, Michael J. Copps and Mignon Clyburn, voting with the Chairman to adopt the rules, and the Republican Commissioners, Robert M. McDowell and Meredith Attwell Baker, dissenting. The differences among the Commissioners reflected the passionate public debate on the subject and the appropriate role of the FCC, if any, in enforcing openness principles.

This article identifies and explains the open net rules adopted by the FCC and outlines the reasons and analysis cited for adopting those rules, including some of the contrary views offered in the rulemaking process. It highlights a few points of special interest to antitrust lawyers and concludes by identifying the challenges to the rules.

I. WHAT ARE THE NEW RULES?

The rules adopted by the FCC are brief, consisting of less than a page. Three basic rules apply to wireline broadband providers:

Rule 1 – Transparency: This rule requires a broadband provider to disclose publicly 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.”⁷

Under this rule, the required disclosures of network management practices may comprise information explaining how congestion and security matters are handled, including the indicators of congestion and the frequency with which it occurs; the imposition of any usage

subcommittees marked up and passed a resolution disapproving those rules, which the House subsequently approved. AT&T Senior Executive Vice President Jim Cicconi testified at one of the subsequent Congressional hearings that while having no rules might be preferable, if the rules that the FCC actually adopted are enforced with restraint, the approach is reasonable and would achieve helpful certainty that would encourage more investment. *See* James W. Cicconi, Senior Executive Vice President External & Legislative Affairs, AT&T, Statement Before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives (Mar. 9, 2011), available at http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/Cicconi.pdf.

⁷ Order at App. A, § 8.3.

limits, as well as what happens if those limits are exceeded; and the types of traffic subject to special management.⁸ The disclosure should also include any measures taken with respect to specific applications, such as blocking or special rates, and any device-attachment rules. Disclosure of performance characteristics should include information such as the expected and actual access speed and latency, the suitability of real-time applications, and the impact end users could expect from specialized services.⁹ Disclosure of commercial terms like pricing, privacy, and redress options, would also be necessary. The rule does not require disclosure of competitively sensitive network information, or information that would compromise security of the network, neither of which the Order specifically defines.¹⁰ The goal is not full, but “appropriate” disclosure.

The Order states that a primary purpose of transparency is to allow independent engineers, consumer watchdogs, and other third-parties, to monitor and evaluate network management practices that potentially violate openness principles.¹¹ Disclosure not only allows end users to decide which provider they will choose, but promotes end-user choice and interest. It is suggested that absent disclosure requirements, start-ups and edge providers¹² might lack the technical information required to develop and maintain a wide range of Internet content, applications, services, and devices of their choosing, which provides end users with options.¹³ With respect to the form of disclosure, providers should at a minimum, “prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to

⁸ *Id.* ¶ 56.

⁹ Specialized services are services offered by broadband providers that share capacity with broadband Internet access service over providers’ last-mile facilities. Currently, these services can include voice over Internet Protocol (“VoIP”) and Internet Protocol-video. The concern with respect to specialized services, according to the FCC, is that they may bypass or weaken open Internet protections if broadband providers offer specialized services that are substantially similar to, but do not meet the definition of broadband Internet access service. Further, broadband providers may develop or provide more capacity for specialized services at the expense of capacity for broadband Internet access service. *Id.* ¶ 112.

¹⁰ *Id.* ¶ 59.

¹¹ *Id.* ¶ 60.

¹² The Order uses “edge provider” to refer to content, application, service, and device providers. Order ¶ 4, n.2; *see also infra* at 13.

¹³ Order ¶ 53.

current and prospective end users and edge providers as well as to the Commission, and must disclose relevant information at the point of sale.”¹⁴

The types of disclosures suggested by the FCC do not represent a definitive list and do not offer a safe harbor. Rather, according to the Order, “[b]roadband providers should examine their network management practices and current disclosures to determine what additional information, if any, should be disclosed to comply with the rule.”¹⁵ Commissioner Baker in her dissent expressed the view that disclosure rules may lock-in what will be suboptimal requirements as the Internet evolves, and may limit its evolution.¹⁶ The guiding principle of the Commission majority, however, is flexibility in terms of how the rules are implemented, leaving the details to the discretion of providers, and a willingness to fill in the rest on a see-as-we-go basis.

Rule 2 – No blocking: Under the no blocking rule, fixed broadband providers may not block lawful content, applications, services, or non-harmful devices, unless such action is necessary to meet reasonable network management needs.¹⁷ According to the FCC, the no blocking rule will protect “[t]he freedom to send and receive lawful content and to use and provide applications and services without fear of blocking [which] is essential to the Internet’s openness and to competition in adjacent markets such as voice communications and video and audio programming.”¹⁸ The rule refers not only to actual blocking, but any impairment or degradation that makes any application or service effectively unavailable to end users.¹⁹

The no blocking rule applies to all lawful traffic transmitted to or from end users²⁰ and further, entitles them to connect to and use any lawful and non-harmful device of their choice.²¹

¹⁴ *Id.* ¶ 57.

¹⁵ *Id.* ¶ 56.

¹⁶ *See id.*, Dissenting Statement of Commissioner Meredith Attwell Baker at 186-87 (“Baker Statement”).

¹⁷ *Id.* ¶ 63.

¹⁸ *Id.* ¶ 62.

¹⁹ *Id.* ¶ 66.

²⁰ *Id.* ¶ 64.

²¹ *Id.* ¶ 65.

The Order specifically prohibits providers from imposing fees on edge providers to avoid being blocked.²² The FCC explains that this rule is consistent with current industry practice.²³

Rule 3 – No unreasonable discrimination: This rule prohibits unreasonable discrimination by fixed broadband providers in transmitting lawful network traffic. Only *unreasonable* discrimination is proscribed because, as the Order explains, some differential treatment can be beneficial and reasonable. Maximizing end-user choice and control “are touchstones in evaluating the reasonableness of discrimination.”²⁴

The rule was grounded in the FCC’s finding that broadband providers have both the incentive and technical ability to handle network traffic in a discriminatory manner that could harm competition and innovation.²⁵ The Commission refrained, however, from adopting the view of some commenters who advocated a more rigid form of the rule where no discrimination whatsoever would be permitted. The Commission recognized that some end user-controlled options—for example, where premise operators such as coffee shops and airports can restrict access to adult sites by patrons—would be beneficial to consumers.²⁶ The FCC also did not prohibit broadband providers from offering a pricing menu based on usage as urged by some, finding that such a rule would cause light end users of the network to subsidize heavy end users, and discourage efficient use of the network.²⁷

The types of practices that would trigger FCC concern include those that impair free expression, harm actual or potential competition in Internet content and services, or interfere with the freedom of end users to determine what content they see and what applications, services, and devices they will use.²⁸ An impairment of free expression may include targeting of particular blogs or websites because of their content, and harming competition might include blocking or degrading a competitor’s voice service.

The Order also specifically discourages “pay for priority” arrangements where a provider prioritizes certain traffic for a fee, as a significant departure from current practice and norms that

²² *Id.* ¶ 23.

²³ *Id.* ¶ 67.

²⁴ *Id.* ¶ 71.

²⁵ *Id.* ¶ 68.

²⁶ *Id.* ¶ 52.

²⁷ *Id.* ¶ 72.

²⁸ *Id.* ¶ 75.

could raise entry barriers and increase transaction costs for edge providers, many of whom may be small innovative entrepreneurs.²⁹ The hardest hit by such arrangements could include non-commercial end users, such as schools, libraries, individual bloggers, and advocacy groups. The Commission also found that the revenue potential from a pay for priority arrangement could incentivize broadband providers to tamper with or neglect the quality of non-priority traffic.³⁰

Special Considerations for Mobile Broadband

The new net neutrality regime also applied to mobile broadband access. However, the FCC declined to impose the third rule, which mandates “no unreasonable discrimination.”

With respect to the no blocking rule, unlike wireline providers, mobile broadband providers were prohibited only from blocking legal websites or applications that compete with their voice or video telephony services, rather than all lawful content, applications, services, or non-harmful devices, as required of wireline providers. And because mobile broadband faces more operational constraints and has speeds and capacity that are typically lower than for fixed service, the FCC determined that there is “greater pressure on the concept of ‘reasonable network management’ for mobile providers.”³¹ This partial exemption from the scope of the no blocking rule was justified on the basis that “[m]obile broadband is an earlier-stage platform than fixed broadband, and [] is rapidly evolving.”³²

The FCC also characterized the mobile broadband provider market as more competitive than the wireline market, ³³ stating that “most consumers have more choices for mobile

²⁹ Commissioners Capps and Clyburn advocated an outright ban of “pay for priority” arrangements. *See id.*, Statement of Commissioner Michael J. Capps at 142-43 (“Capps Statement”); Statement of Commissioner Mignon L. Clyburn at 179 (“Clyburn Statement”). However, as discussed below, Commissioner Baker believed that such arrangements could be pro-consumer and pro-competitive. Baker Statement at 184-85.

³⁰ Order ¶ 76.

³¹ *Id.* ¶ 95.

³² *Id.* ¶ 94.

³³ The Order notes at paragraph 32 that as of December 2009, approximately 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided broadband service. It also cites the Antitrust Division’s finding that the wireline broadband market was highly concentrated and that it was uncertain to what extent mobile broadband will compete with wireline broadband, particularly given that the largest mobile broadband providers also offer wireline access. This and other evidence were cited by the

broadband than for fixed (particularly fixed wireline) broadband).”³⁴ The exemptions were also based on recent developments, including what the Commission viewed as “meaningful recent moves toward openness in and on mobile broadband networks, including the introduction of third-party devices and applications on a number of mobile broadband networks, and more open mobile devices.”³⁵ Another development was anticipation of the positive market effects expected from the openness provisions the FCC imposed on mobile providers that operate on upper 700 MHz C Block spectrum.³⁶ Instead of subjecting mobile broadband providers to the identical set of rules as wireline providers, the FCC stated that it would closely monitor the wireless broadband market for future developments.³⁷

II. THE FCC BALANCES COMPETING CONCERNS

A. The Court Rejects the FCC’s Jurisdiction to Enforce Net Neutrality Principles

On April 6, 2010, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) issued its eagerly awaited decision in *Comcast Corp. v. FCC*.³⁸ Writing for

majority of the Commission as a reason why the marketplace could not be relied upon to serve consumer interests when it comes to Internet openness. *Id.* at n.143.

³⁴ *Id.* ¶ 95.

³⁵ *Id.*

³⁶ As the Order notes, Verizon, one of the largest mobile broadband providers, has recently started offering service under these provisions. *Id.* at n.297.

³⁷ *Id.* ¶ 105. Commissioner Clyburn wanted to apply all the rules equally to mobile broadband. Clyburn Statement at 178. Whether to exempt mobile broadband was the subject of further public comments. *In re Preserving the Open Internet Broadband Industry Practices, Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding*, GN Docket No. 09-191, WC Docket No. 07-52 (Sept. 1, 2010).

³⁸ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The *Comcast* case arose after the company had allegedly blocked access by its high-speed Internet subscribers to a bandwidth-intensive peer-to-peer (“P2P”) file-sharing application called BitTorrent. The FCC concluded that Comcast could have managed the network traffic issues associated with BitTorrent without “discriminating” and blocking its customers’ access to that application. By the time the *Comcast* order was issued, Comcast had already committed to change its approach to managing traffic congestion. The FCC, nevertheless, required Comcast to disclose its network management practices. *See also In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 (2008). Order ¶¶ 54-55.

the majority, Judge David S. Tatel described the case as presenting the question of whether the FCC “has authority to regulate an Internet service provider’s network management practices.”³⁹ The D.C. Circuit’s answer was that the jurisdictional basis cited by the FCC to do so did not in fact give the FCC that authority.⁴⁰ This holding struck down the FCC’s approach to fostering net neutrality and breathed new urgency into the controversial net neutrality debate.

Prior to the *Comcast* decision, the FCC had protected the openness of the Internet largely through a set of principles and policy statements, rather than enforceable rules. FCC Chairman Michael K. Powell, serving during the Administration of President George W. Bush, announced principles he labeled the “four Internet freedoms.”⁴¹ Although the FCC never formally enacted the principles as rules, those principles were included in the policy statement adopted in 2005 under Chairman Kevin J. Martin during the same Administration.⁴² These principles and policy statements guided the FCC in investigating access providers who were alleged to have interfered unreasonably with or blocked their customers’ choice or use of Internet applications or equipment.⁴³

³⁹ *Comcast Corp. v. FCC*, 600 F.3d at 644 (Tatel, J., majority opinion).

⁴⁰ The FCC asserted jurisdiction in *Comcast*, based on Title 1 of the Communications Act of 1934, which, as amended, concerns information services. The court rejected that assertion, finding that the grant of ancillary power to the FCC in Title 1, which was cited by the FCC, confers jurisdiction where it relates to a specifically delegated power in the Communications Act, which the FCC did not have with respect to the Internet.

⁴¹ The four were: 1) the freedom to access legal content, 2) the freedom to run applications of the consumer’s choice, 3) the freedom to attach any devices to the consumer’s home Internet connection, and 4) the freedom to receive meaningful information about the consumer’s service plan. See Michael K. Powell, Chairman, FCC, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium: “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age,” University of Colorado School of Law (Feb. 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

⁴² *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986, ¶ 4 (2005).

⁴³ Parties to a transaction requiring FCC approval also have sometimes agreed to accept net neutrality principles or policy statements as a binding condition of approval. This has resulted in a patchwork of companies required to follow net neutrality principles for specified periods of time. See *In the Matter of Verizon Commc’ns Inc. & MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18433, ¶ 143 (2005); see also *In re SBC Commc’ns Inc. & AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18290, ¶ 144 (2005).

For the FCC, ignoring the *Comcast* decision was not easy because it could impact practices important to the operation of the Internet and to an enormous and innovative online economy. Net neutrality was also of substantial interest to President Barack Obama, as well as to some in Congress.⁴⁴

B. The Public Debate over Net Neutrality and the Role of the FCC

The dialogue over whether the Commission should act to preserve Internet openness implicated an extensive range of legal, policy and practical concerns,⁴⁵ including the question of whether the Commission had jurisdiction to act in this area, which was at the heart of the decision in *Comcast*.

One option, viewed with great concern by carriers who provide broadband access to customers, and as potentially involving the heaviest regulatory intervention, was whether to regulate broadband Internet access as a common carrier service under Title II, perhaps with regulatory forbearance from some of the most intrusive obligations. This possibility alarmed carriers who had made large investments over many years to provide high-speed Internet, arguably in reliance on earlier decisions by the FCC and the courts to not regulate broadband Internet access under Title II.⁴⁶

⁴⁴ As then-candidate Obama stated during his election campaign, “I will take a backseat to no one in my commitment to net neutrality, because once providers start to privilege some applications or Web sites over others, then the smaller voices get squeezed out and we all lose.” Barack H. Obama, Address at Google Headquarters, Mountain View, Cal. (Nov. 17, 2007). Chairman Genachowski had also been a top campaign advisor to candidate Obama on issues such as net neutrality. Moreover, some in Congress began to focus on possible legislation to deal with the challenges posed by the *Comcast* decision, even while others urged against any congressional action.

⁴⁵ The arguments made to the Commission largely reflected the same debate that was taking place about network neutrality five years earlier, as reflected in an earlier article appearing in the predecessor of this publication. David S. Turetsky, *The Net Neutrality Debate: What's It About and What's at Stake?* (The Party Line), Spring 2006, available at http://www.deweyleboeuf.com/en/People/T/~ /media/Files/inthenews/2009/20091009_NetNeutralityDebate.ashx.

⁴⁶ Broadband access services provided over telephone lines or via cable connections have not been subject to common carrier regulation. Nor do major providers of those services view that there is a need for Congress or the FCC to take any action to enforce net neutrality. See generally *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 200 FCC Rcd. 14853 (2005); *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 FCC Rcd. 4798 (2002).

Those against “government intervention,” as some characterized the prospect of FCC net neutrality rules, argued that in addition to the FCC lacking jurisdiction, the Internet in reality is open and likely to remain so, and because consumers increasingly have a choice of broadband providers, the openness they may desire can be achieved through competition. These commenters also cautioned that there are potentially heavy and unforeseeable costs to government intervention in the marketplace, including from increased litigation that would create uncertainty and deter investment and innovation.

With respect to wireless, a number of commenters argued that wireless markets have generated extensive investment, innovation, and exploding usage, and are increasingly becoming an important platform for Internet access, in part because wireless services have largely been unregulated. They also warned that departing from that unregulated model was unwise, risky, and potentially costly. They cautioned that net neutrality rules for wireless broadband Internet access would exceed the FCC’s jurisdiction and that such overreaching would open the door to even more questionable exercises of FCC jurisdiction that could upset the balance between regulation and free enterprise, and usurp policy decisions more appropriately left to Congress. Commenters also urged that a show of restraint by the government with the Internet would provide a model of limited government intervention in the Internet for the rest of the world to follow.

Commenters favoring the adoption of the FCC’s rules sometimes stated that preserving openness is a fundamental requirement given the structure of the Internet. They argued that the Internet was built to have an end-to-end architecture, with the “middle” of the network designed to serve all applications without changing protocols or optimizing particular applications, and with the intelligence and differentiation, including innovative content, applications and devices, primarily located at the ends.⁴⁷ According to this view, to continue to incentivize and spur widespread investment and innovations in content, application, and devices, it must be beyond question that the ends are open, meaning that end users have unimpaired access to and choices of edge providers, and that edge providers have an unimpaired ability to reach customers. It was argued that this innovation at the “edge” spurs a growing economy through a virtuous cycle of investment, increased usage, and rising demand for network connectivity and high-speed access, all of which could be irreversibly compromised by a lack of openness that might allow broadband providers, instead of customers, to choose winners and losers and undermine important Internet freedoms. It was also argued that Internet openness would promote wider deployment of broadband Internet access, fostering the goals of the very highly regarded National Broadband Plan, which was approved by the FCC in 2010.⁴⁸

⁴⁷ Order ¶ 13, n.13.

⁴⁸ The goal of the National Broadband Plan was to promote mobile broadband infrastructure and innovation, accelerate universal broadband access, foster competition, and advance a public safety communications network. 2010 Broadband Action Agenda, FCC National

Advocates of the FCC adopting rules pointed to what they viewed as actual episodes of Internet blocking or unreasonable discrimination, such as the blocking by rural telephone company, Madison River Communications, of its customers' ability to access its competitors' VoIP services,⁴⁹ and Comcast's blocking of BitTorrent. Noting that broadband providers often have investments or ownership in content and applications that compete with other content and applications, these commenters emphasized that, absent regulations, carriers offering broadband have significant incentives to interfere with openness. Even if instances of interference were now absent or minimal, these advocates argued that broadband providers are gaining access to increasingly sophisticated tools which could be used to favor the broadband provider's services, applications or devices, at the expense of others. They were also confident that the cost of regulation would be relatively low since the rules would largely incorporate current industry practices rather than impose major new behavioral standards. The benefits of preserving openness, on the other hand, were claimed to be substantial.

In addition to allowing written comments, the Commission's rulemaking process included public hearings, meetings with interested stakeholders, and issuance of a draft set of rules to sharpen and focus the comment process. Ultimately, the Commission majority may have viewed its decision to issue what it called "high-level rules" as less than a dramatic development since, to the great relief of most broadband access providers, the Commission did not base these rules on Title II. Also, many aspects of the rules embodied the Internet openness principles that were adopted earlier by the FCC and which providers already had experience following.

The Commission majority indicated that its primary objective in promulgating the new rules is to promote and protect end-user choice. Thus, the Commission explained that its transparency rule is intended to ensure that consumers are able to make informed choices and switch providers if necessary. While disclosure inevitably entails some burdens, the trade-offs, according to the FCC, were considered worthy.

The Commission applied the no blocking and no unreasonable discrimination rules to all "content, applications, services," [which also] refer[s] to all traffic . . . that may not fit cleanly into any of these categories" rather than limiting these restrictions to voice or video Internet traffic, which are arguably more likely to be the subject of blocking and discrimination.⁵⁰ The FCC suggested that this broader approach would be more consistent with enabling the end user to determine who succeeds and who fails. With respect to the no unreasonable discrimination rule, which some have claimed is unclear as to what the rule prohibits, the FCC explained and cautioned that discrimination against content or services that compete with those of the broadband provider, or conduct that may infringe First Amendment rights, would raise the

Broadband Plan, available at <http://www.broadband.gov/plan/broadband-action-agenda.html>.

⁴⁹ See *In re Madison River Commc'ns, LLC*, 20 FCC Rcd. 4295 (2005).

⁵⁰ Order ¶ 64.

greatest concerns. The FCC suggested that the rules would protect end-user freedom, but with a light touch.

However, as indicated above, the Commission was unequivocally hostile toward pay for priority arrangements. The Commission stated that, “as a general matter, it is unlikely that pay for priority would satisfy the ‘no unreasonable discrimination’ standard.”⁵¹ Some commenters, including Commissioner Baker, would have preferred that the FCC not prohibit these arrangements without a closer look. As she and others argued, in essence, there may be circumstances where it is necessary for a broadband provider to guarantee a particular quality of service to an edge provider or consumer in order to make an application or particular content work effectively. In such circumstances there might be a cost savings for consumers if some of the cost of delivery is borne by edge providers. The FCC majority found, however, no evidence (or commitment on the part of broadband providers) that higher revenues from pay for priority would be used to lower broadband subscription costs or otherwise subsidize consumers. Instead, the FCC feared that the availability of such revenues might give broadband providers an incentive to limit the quality of non-priority traffic and prioritize their own content, applications, or services at the expense of competitors, and at the cost of end-user freedom and choice. The only legitimate basis for providers to depart from core openness principles in the FCC’s view was to exercise reasonable network management.

C. What is Reasonable Network Management?

The majority of the Commission thought that general and broad rules could be written to preserve Internet openness without unduly tying the hands of broadband

providers to manage their networks. Thus, the Commission prohibited only network management practices that were not “reasonable” or reflected “unreasonable” discrimination. For some, these terms were too vague to be useful, but others recognized that, as is so often the case with telecommunications regulation, the “devil is in the details.”

In acknowledging that some forms of discrimination could be beneficial, the Commission seemed to recognize that carriers operate in a world of limited resources in terms of bandwidth, equipment, and other components, which are deployed irregularly by geography, and are available unevenly, sometimes varying by time of day. The needs and demands of customers for bandwidth and services also vary, meaning that a one-size-fits-all model may not work for everyone. Part of the job of broadband providers is also to engage in “network management” and it is inevitable that the decisions they make can impact the availability and quality of delivery to customers. In response to these issues, the Commission made clear that technical considerations relating to network architecture could provide a legitimate basis for a properly tailored management practice. This would include, as indicated above, considerations

⁵¹ *Id.* ¶ 76.

based on congestion, security, traffic management, and options such as parental control and tiered services.⁵²

The FCC, however, deliberately left much of the construction of what constitutes reasonable network management to be determined on a case-by-case basis. Such a standard, if determined, is not unacceptably vague, but rather, appropriately flexible. The Commission's rules were intended both to facilitate network planning and to provide a framework to evaluate and address complaints as they may be filed, thus allowing the Commission's rules to remain relevant and provide guidance even as network management practices evolve in a constantly changing marketplace.⁵³

Despite such assurances, some small businesses have already complained that they are concerned about the possibility of being burdened with the defense of costly complaints. For example, the founder of a small independent Internet service provider recently testified before Congress that with slim margins and low net profits per subscriber, the company can ill afford to defend itself against litigation filed pursuant to rules that he characterized as “vague” and “not fully defin[ed].”⁵⁴ Others have testified that the enforcement mechanisms in place are complex and favor the rights of complainants.⁵⁵

D. Antitrust Analogy

To antitrust lawyers, some aspects of the FCC's approach should be quite familiar: The FCC framework consists of relatively succinct rules that are intended to be interpreted on a case-by-case basis in response to the filing of complaints. Similarly, the Sherman Act offers concise, generalized prohibitions that are interpreted and applied on a case-by-case basis.

There are some similarities as well between the antitrust law Rule of Reason, which is used in many cases to assess whether conduct contravenes the antitrust laws, and the new FCC

⁵² Order ¶¶ 80-93.

⁵³ *See generally id.* ¶ 41.

⁵⁴ Laurence Brett Glass, Owner & Founder, Lariat, Prepared Testimony at Hearing on “Ensuring Competition on the Internet; Net Neutrality and Antitrust” Before the Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, U.S. House of Representatives (Feb. 15, 2011), at 3, *available at* <http://judiciary.house.gov/hearings/pdf/Glass02152011.pdf>.

⁵⁵ Larry Downes, Senior Adjunct Fellow, TechFreedom, Written Testimony at Hearing on “Ensuring Competition on the Internet; Net Neutrality and Antitrust” Before the Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet, U.S. House of Representatives (Feb. 15, 2011), at 3, *available at* <http://judiciary.house.gov/hearings/pdf/Downes02152011.pdf>.

rules allowing “reasonable network management” and prohibiting “unreasonable discrimination.” Antitrust lawyers generally are comfortable enough with application of the Rule of Reason on a case-by-case basis. They also understand that such an approach preserves for businesses the opportunity to engage in joint conduct that may include ancillary anti-competitive aspects, but which on balance is pro-competitive. An examination that looks closely at the relevant facts and assesses the reasons for the restraint, possibly less restrictive alternatives, and weighs the overall benefits and costs, may be common to both approaches.

It would not be unfair to say that, in general, the antitrust Rule of Reason allows companies to conduct business without undue risk or interference. In fact, the standard has become relatively difficult for plaintiffs to satisfy and is increasingly applied to types of conduct that were considered a *per se* violation of the antitrust laws in the past.⁵⁶ An assessment similar to that under the Rule of Reason is sometimes made in Sherman Act Section 2 cases to determine whether monopolies have engaged in anti-competitive conduct to maintain or preserve their monopoly power. Where there is a strong pro-competitive business case for a monopolist’s action that may also make it more difficult for competitors to enter and compete, that action may not lead to antitrust liability.

Of course, the analogy of the antitrust Rule of Reason to the standard in the FCC Net Neutrality rules is imperfect. The Rule of Reason standard has been around since *Standard Oil*,⁵⁷ and the relevant analysis has evolved and become more clear over a lengthy period of time and many successive court decisions.⁵⁸ The standard that will be applied under the FCC rules, however, arguably lacks the pedigree and familiarity that comes with a century of case law.⁵⁹ On the other hand, unlike the antitrust statutes, a considerable amount of guidance has been provided by the Order, and the rules are to be applied and interpreted by the same entity that wrote them, which should promote predictability as compared to the antitrust laws, particularly after a few adjudications. Moreover, unlike the antitrust laws, there is no provision in the FCC

⁵⁶ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that minimum resale price maintenance should be reviewed under the Rule of Reason).

⁵⁷ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁵⁸ See *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (only unreasonable acquisition and maintenance of monopoly is illegal); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints should be determined under the Rule of Reason); *Leegin Creative Leather Prods.*, 551 U.S. 877 (minimum resale price maintenance agreements should now be evaluated under the Rule of Reason).

⁵⁹ *But see* Order ¶ 77 & n.240 (“[s]eventy-five years of experience have shown” the “unreasonable” qualifier to work well in administering the telecommunications law) (citation omitted).

rules for treble damages, which significantly reduces the stakes and risks associated with the adjudication of complaints at the FCC.

Another possible difference between the antitrust Rule of Reason and the FCC's rules is that the FCC arguably may have the latitude to weigh a broader range of considerations under its applicable statutory standards as compared to antitrust enforcers. For instance, many types of FCC proceedings involve application of a "public interest" standard which, unlike a Clayton Act Section 7 standard or the antitrust Rule of Reason, may generally include very broad values such as, "accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public and generally managing spectrum in the public interest."⁶⁰

In his statement issued upon adoption of the rules, the Chairman emphasized a host of principles to benefit consumers and innovators, including the right to know about their Internet access and how the network is managed, a right to send and receive lawful traffic, and a right to a level playing field where neither the government nor private gatekeepers choose who will thrive. Given the breadth of what the FCC can consider as part of the public interest, and the intended benefits of the rules as expressed by the Chairman, it is no surprise that the FCC rejected proposals that any net neutrality rules prohibit only anti-competitive discrimination causing "substantial consumer harm." As the Order explains, the broad purposes of the rules, which include removing impediments to investment, and protecting competition as well as "consumer choice, free expression, end user control, and the ability to innovate without permission, cannot be achieved by preventing only those practices that are demonstrably anticompetitive or harmful to consumers."⁶¹

III. WHAT'S NEXT?

The Commission has adopted net neutrality rules, but several tests and outcomes may lie ahead.

First, the rules will be subjected to further court review, with Verizon and others having already attempted to move forward with an appeal.⁶² The primary jurisdictional basis claimed

⁶⁰ *In re Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.; For Consent to Assign Licenses & Transfer Control of Licensees*, MB Docket No. 10-56, 2011 FCC LEXIS 414, ¶ 23 (Jan. 20, 2011).

⁶¹ Order ¶ 78; *see also generally* Turetsky, *supra* note 14 (discussing difficulties of depending on antitrust law to address net neutrality concerns).

⁶² Notice of Appeal of Verizon, *Verizon v. FCC*, No. 11-1014 (D.C. Cir. Jan. 20, 2011). Verizon's appeal was dismissed as premature because it preceded final publication of the new rules, but an appeal will certainly be taken. *Verizon v. FCC*, No. 11-1014, 2011 U.S. App. LEXIS 6908 (D.C. Cir. Apr. 4, 2011) (*per curiam*).

by the FCC for the new rules was Section 706 of the 1996 Telecommunications Act,⁶³ which directs the FCC to encourage wider deployment of advanced telecommunications by removing barriers to infrastructure investment, and grants ancillary authority over web-based voice, video and audio services addressed in other portions of the communications laws. One major question on appeal will be whether the Commission’s additional arguments for jurisdiction are sufficient to survive the reasoning of *Comcast*.⁶⁴ Commissioner McDowell issued a lengthy statement characterizing the new rules as exceeding the Commission’s jurisdiction, both under the *Comcast* decision and in the view of more than 300 members of Congress who, he said, had the actual authority to regulate the Internet. He criticized the rules as an unnecessary intervention that would allow unelected commissioners to determine winners and losers by exercising the power to define what is and is not “reasonable.”⁶⁵ If the rules do not pass jurisdictional muster again, a subsequent question will be whether the Commission will then decide to engage in another rulemaking based on Title II, although undoubtedly deciding as well to forbear from applying all of Title II’s requirements.

Second, Congress has taken a strong interest in these rules, with the Republican-controlled U.S. House of Representatives in particular viewing the rules as government overreaching. It cannot be said for certain that both the House effort to restrict the FCC from spending any money to implement the rules,⁶⁶ or House passage of a Resolution of Disapproval of the rules under the Congressional Review Act, will be to no avail.⁶⁷ It seems quite unlikely, however, that the Senate or President would cooperate to disable the new rules, although one hesitates to say flatly that this is impossible given the tumultuous nature of recent budget and appropriations engagements. It is also possible, although unlikely, that Congress might pass legislation about net neutrality through a more conventional legislative process.

Finally, after all the debate, it is possible that the rules just might be implemented. After all, many prominent carriers or their representatives, including AT&T, and two influential trade associations, the Cellular Telecommunications Industry Association (“CTIA”) and the National Cable Television Association (“NCTA”), had determined not to oppose the rules ultimately

⁶³ 47 U.S.C. § 1302.

⁶⁴ Both Commissioners Clyburn and Copps would have preferred to assert an additional jurisdictional basis for the new rules, including Title 2 of the Communications Act. Clyburn Statement at 178-79; Copps Statement at 142.

⁶⁵ See Order, Dissenting Statement of Robert M. McDowell at 145-46 (“McDowell Statement”).

⁶⁶ See H.R. 1, H. Amdt. 80, 112th Congress (Feb. 17, 2011). This amendment was included in the legislation passed by the House.

⁶⁷ Erin Marie Daly, *House Votes Down FCC Net Neutrality Rules*, Law360 (Apr. 8, 2011).

adopted by the FCC. They may have decided that achieving greater certainty is sufficiently valuable to make it unnecessary or undesirable to oppose what arguably were “high-level” rules, not based on Title II, and which might be consistent for the most part with current industry practices.

One irony is that regardless of the outcome, Comcast, which by its conduct and the success of its appeal helped to drive the FCC’s rulemaking, did not have a big voice in the recent debate and may not be substantially affected by any court determination of whether the rules survive. That is because when the FCC was considering and adopting these rules, Comcast was in the process of seeking and obtaining the FCC’s approval to acquire control of NBC Universal, contingent upon Comcast’s enforceable agreement to adhere to net neutrality principles for a number of years, notwithstanding its earlier appellate court victory.⁶⁸ On the other hand, the Order contained some belated good news for Comcast—the Commission opined that Comcast’s description of its congestion management practices after the BitTorrent affair likely would have satisfied the requirement under the new rules to disclose its congestion management practices.⁶⁹

Commissioner McDowell described the rules as a solution in search of a problem.⁷⁰ Chairman Genachowski described the rules as proving greater certainty and promoting innovation, job creation, U.S. competitiveness and private investment.⁷¹ Regardless of whether either view is correct, one thing is a near certainty: given the high level of public and congressional attention, the continued involvement of the courts, and the constant evolution and change of technology, the issue of net neutrality will garner considerable attention and interest, if not passion, for some time to come.



⁶⁸ See *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 2011 FCC LEXIS 414 (Jan. 20, 2011).

⁶⁹ Order at n.177.

⁷⁰ McDowell Statement at 146.

⁷¹ Genachowski Statement at 135.