

UTILITIES AND TELECOMMUNICATIONS ALERT

FCC ISSUES OPEN INTERNET NPRM

Comments Due: July 15, 2014

Reply Comments Due: September 10, 2014

On May 15, 2014, the Federal Communications Commission issued a notice of proposed rulemaking (NPRM) to propose rules to reinstate and revise the Open Internet rules applicable to broadband services that were vacated by the D.C. Circuit's January 14 decision in *Verizon v. FCC*. The *Verizon* court upheld the Commission's transparency rule which remains in effect, but vacated rules addressing broadband provider blocking and discrimination as an illegal extension of Title II regulation to information services that the Commission has not classified as telecommunications services subject to Title II.

The Commission's proposal, if adopted, would enhance the transparency rule, and establish new rules to address broadband provider blocking and discrimination, accepting the court's invitation to establish such rules under the authority of Section 706. The NPRM also establishes a broader, inchoate standard of "commercial reasonableness" that would apply to all broadband provider practices. The Commission also invited comment on whether broadband services should be subject to Title II and established new enforcement mechanisms.

The NPRM is peppered with tentative conclusions that, if adopted, would create a parallel, confusing and likely highly ineffective new system of regulation and enforcement for broadband providers. The following are the highlights of the NPRM:

Transparency Rule: The Commission tentatively concluded that it should enhance the transparency rule to improve its effectiveness for end users, edge providers, the Internet community and the Commission. The Commission requested comment on improved disclosure to end users and different types of disclosures to different classes (e.g., end users, edge providers, the Commission). The Commission tentatively concluded that broadband providers must disclose in a timely manner to consumers, edge providers, the public, and the Commission when they make changes to their network practices, as well as any instances of blocking, throttling, and pay-for-priority arrangements. The transparency rule will continue to apply in the mobile broadband context and the Commission requested comment on enhancements.

No-Blocking Rule: The Commission adopted a modified version of the 2010 no-blocking rule that required nondiscriminatory treatment of all edge providers to address the court's concern that it constituted impermissible common carriage regulation. Rather than simply apply Title II regulation, the Commission, in an abrupt break from past policies, proposed to clarify that the rule does not preclude broadband providers from negotiating individualized, differentiated arrangements, and even with similarly situated edge providers (subject to the separate "commercial reasonableness" rule discussed below). The Commission also proposed an alternative rule that would prohibit pay-for-priority agreements with edge providers. The Commission tentatively concluded that broadband providers must provide a "minimum level of access" to all end-user subscribers and requested comment on a number of standards for such access (e.g., "best efforts", "minimum quantitative performance, or "reasonable person"). The Commission proposed continuing a lower bar for mobile broadband providers (which currently

cannot block lawful content or apps that compete with their own voice or video services), and requested comment on expanding that prohibition.

“Commercial Reasonableness” Rule: The Commission tentatively concluded to adopt a revised rule to permit broadband providers to engage in individualized practices (*i.e.*, discrimination), while prohibiting those broadband provider practices that are “commercially unreasonable” and that threaten to harm Internet openness. The Commission also requested comment on an alternative standard. The Commission tentatively concluded that this standard operates independently of the no-blocking rule. The Commission requested comment on whether it should adopt a rule prohibiting unreasonable discrimination under Title II. The Commission proposed adopting a number of factors to guide its application of the “commercial reasonableness” standard, including: the impact on competition; the impact on consumers; the impact on speech and civic engagement; consideration of “industry practices”; and “good faith” negotiation requirements. The Commission also requested comment on *per se* commercially unreasonable practices and safe harbors.

Legal Standard: The Commission’s proposal relied upon Section 706(a) and (b), although the Commission also sought comment on whether it should rely on Title II. It requested comment on whether it should: 1) revisit its classification of broadband Internet access service as an information service; or 2) separately identify and classify as a telecommunications service a service that broadband providers furnish to edge providers. Under either approach, the Commission requested comment on whether and how it should exercise its section 10 forbearance authority. The Commission also sought comment on its authority to regulate mobile broadband services under Title III.

Enforcement: The Commission tentatively concluded that enforcement must promote legal certainty, flexibility, and effective access to dispute resolution. To those ends, the Commission recommended a case-by-case enforcement approach, based on a combination of formal and informal complaints. The Commission also requested comment on other mechanisms, including business-review letters, non-binding staff opinions, enforcement advisories, arbitration, mediation, multi-stakeholder processes, and technical advisory groups.

Significance of the NPRM: Absent a significant industry effort to modify the proposals in this NPRM, the Commission could establish a confusing and complex parallel regulatory and enforcement system that threatens to disrupt the Open Internet, restrict access and raise costs for small innovators, suppress investment, raise prices for consumers, and siphon resources away from the Commission’s already heavily-taxed common carrier mechanisms. Yet the NPRM makes only tentative conclusions, and as with any NPRM, a concerted effort to improve the proposed rules could yield significant benefits.

While Title II offers well-established legal standards, the NPRM is replete with a variety of new standards with no statutory basis: “commercially reasonable”, “best efforts”, “industry practices”, “reasonable man”, and “good faith” negotiations. These standards have no statutory foundation, and invite uncertainty and weak enforcement. The NPRM as proposed will be particularly disruptive for smaller companies that are the victims of discrimination but lack the resources and Commission access to monitor where better deals are being struck and obtain effective dispute resolution. While alternative resolution mechanisms are well-intended, they lack legal foundation and could suffer from due process concerns. Having more clear

prohibitions on unpalatable practices would eliminate discriminatory and anticompetitive practices on the front end, rather than relying on piecemeal enforcement after the fact.

Eckert Seamans offers unique expertise on Open Internet issues and invites interested parties to become actively engaged in the Open Internet proceeding in the coming months, including potentially forming a coalition of providers to file comments and reply comments. If you would like to participate in that coalition, or have any questions about the Commission's new Open Internet proceeding and related statements, please contact **Earl Comstock** at 202.659.6627 or **Jim Falvey** at 202.659.6655.

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