

November 2, 2009

Via Electronic Filing

Re: GN Docket Nos. 09-51, 09-47, 09-137, 09-157, 09-191;

WT Docket Nos. 08-165, 08-166, 08-167, 09-66; WC Docket No. 07-52

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Dear Chairman Genachowski:

We are professors of law who have spent many years devoted to research on the architecture of the Internet and its related policies. Several of us have testified before the FCC, filed comments with the FCC, and published widely on the topic of Network Neutrality and related issues; we were pleased that many of our ideas were cited and relied upon in the recent Notice of Proposed Rulemaking.

We regard the proposal as a historic and extremely important step forward. It sends an important message on behalf of this FCC and the Administration, and it is a significant achievement for which we applaud both your initiative and courage. We submit this extraordinary early letter only to flag what we believe are two ambiguities in the Notice that we hope can be addressed early to provide a clearer foundation for comments.

The FCC's proposed rule bars discrimination while allowing for reasonable network management. Each of these two sides of the rule, however, has been described with what could be understood as an ambiguity at their center, as we elaborate here.

Defining Non-Discrimination

Non-discrimination has been a central concept in telecommunications law and policy for nearly a century. The definition of non-discrimination will therefore be central to the operation of the rule and in particular its “fifth principle.”¹

While it is not entirely clear what its import is, the Notice in one paragraph uses the term in a manner that seems surprisingly narrow – to a degree that makes it unclear that the result could accurately be called a nondiscrimination principle. The

¹ Notice of Proposed Rulemaking, Preserving an Open Internet, GN Docket No. 09-191 (October 22, 2009) [*“NPRM”*], at Appendix A (proposing language for 47 CFR 8.13).

language in question is in Paragraph 106 of the NPRM where the Commission states:

“We understand the term ‘nondiscriminatory’ to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider.”

The important question is whether this language in Paragraph 106 is meant to be an exclusive or partial definition of non-discrimination. Is it meant to specify all practices considered nondiscriminatory, or meant to be a definition that specifies that this particular practice will be considered nondiscriminatory without making a statement about other practices?

For our part, we presume that this language is meant to be a partial definition, based on the FCC’s own stated policy goals, and also language in other parts of the NPRM. For example, in Paragraph 11, the Commission states: “The nondiscrimination principle would prohibit broadband Internet access service providers from favoring or disfavoring lawful content, applications, or services accessed by their subscribers.” Paragraph 110 states: “Based on the record, we propose a general rule prohibiting a broadband Internet access service provider from discriminating against, or in favor of, any content, application, or service, subject to reasonable network management.” There are other examples.² This language seems to suggest that the Commission did not mean to imply that charging a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider is the only practice that will be considered nondiscriminatory, but wanted to clarify that this practice also falls under the Commission’s definition of nondiscrimination. We think it would be helpful to understand what the FCC intended by this language for the sake of commentators.

Reasonable Network Management

The second significant ambiguity lies in the concept of “reasonable network management.” Because each of the six principles of the open Internet framework is subject to the qualifier of “reasonable network management,” the question of what is and is not “reasonable” is obviously key to the entire rule. Within recent memory, the outcome of the *Comcast* controversy, for example, depended almost entirely on what the phrase “reasonable network management” meant.

In Paragraph 137 the Commission writes:

² For example, the NPRM specifies that ISPs can “discriminate” in favor of emergency communications. If “discrimination” is limited to Paragraph 106’s “charg[ing]” for priority, it is unclear why the FCC would state that emergency communications can be prioritized unless the Commission is merely seeking to authorize ISPs to charge for that emergency priority.

“We seek comment on our proposal not to adopt the standard articulated in the Comcast Network Management Practices Order in this rulemaking.”

We seek to understand whether, by this language, the Commission seeks comments on what the standard should be, or whether the Commission proposes not to have one. The NPRM could be read to suggest that the Commission does not believe a specific standard is necessary. We note that the FCC states that “reasonable” network management is permissible for many categorical purposes, such as congestion management, and claims it will determine what is reasonable on a case-by-case basis. The text of the proposed changes to the Code of Federal Regulations states in part that “reasonable network management” consists of “(a) reasonable practices” for particular purposes and “(b) other reasonable network management practices.” *NRPM*, Appendix A, section 8.3.

We think it is surprising that the FCC would not want to provide some guidance on the applicable standard for reasonable network management, lest, as a law professor would say, the exception swallow the rule. We do understand from the Notice that the Commission makes clear that it does not want to adopt the standard in *Comcast*, that a network management practice “should further a critically important interest and be narrowly or carefully tailored to serve that interest.” Again, if that is to be discarded, is the Commission asking commentators what the standard should be, or proposing no standard at all?

The omission approach, as we've said, is rather distinct from the Martin Commission's approach in *Comcast*. It is also distinct from the recent decision by the Canadian Radio-television Telecommunications Commission. There the CRTC established a framework where the ISP must “demonstrate that the ITMP [Internet traffic management practices] is designed to address the need and achieve the purpose and effect in question, and nothing else; establish that the ITMP results in discrimination or preference *as little as reasonably possible*; demonstrate that any harm to a secondary ISP, end-user, or any other person is *as little as reasonably possible*; and explain why, in the case of a technical ITMP, *network investment or economic approaches alone would not reasonably address* the need and effectively achieve the same purpose as the ITMP.”³

* * *

Our purpose in raising these concerns in this early letter is to encourage the FCC to provide early clarification in two areas for commentators. First, on what

³ Canadian Radio-Television and Telecommunications Commission, *Review of the Internet traffic management practices of Internet service providers*, File Number 8646-C12-200815400, at para. 43 (Oct. 21, 2009). (emphasis added).

Paragraph 106 means. Second, on whether the FCC is soliciting feedback on what factors or test it should apply to judge whether a particular network management practice is “reasonable”.

Further, we hope to aid the FCC in its more general goal of providing predictability in this area.⁴ The two sources of unusual ambiguity that we have identified appear at odds with that goal. Though surely unintentional, these sources of ambiguity appear likely to provide particularly generous opportunities to try to work around the Commission's efforts in this area.

We close by reiterating our extremely strong support for the Commissions' efforts in this area. There is little question that this rulemaking marks a historic effort of the FCC to defend the identity and founding principles of the Internet as it develops and reaches more and more areas of American life. It is, as such, an undertaking in the public's best interest, and we look forward to working with the Commission during the entire process.

Yours sincerely,

Jack Balkin, Professor, Yale Law School
John Blevins, Assistant Professor, South Texas College of Law
Jim Chen, Dean and Professor, University of Louisville School of Law
Larry Lessig, Professor, Harvard Law School
Barbara van Schewick, Assistant Professor, Stanford Law School and
(by courtesy) Stanford Department of Electrical Engineering
Tim Wu, Professor, Columbia Law School

Cc:

Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker

⁴ See, e.g., NPRM, para. 108 (“predictability in this area will enable broadband providers to better plan for the future, relying on clear guidelines for what practices are consistent with federal Internet policy.”).