

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

TO: The office of the Secretary

**COMMENTS OF THE AMERICAN CENTER FOR LAW AND JUSTICE REGARDING
THE NOTICE OF PROPOSED RULEMAKING ON PRESERVING THE OPEN
INTERNET**

January 14, 2010

Colby M. May, Esq.
Christopher T. Baker, Esq.
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
EXECUTIVE SUMMARY	1
I. Introduction.....	1
II. The FCC Lacks the Necessary Authority to Generally Regulate the Management Practices of Internet Service Providers	2
III. The Proposed Rules Fail to Comply with Necessary Fair Notice Requirements.	5
IV. The FCC Must Avoid Imposing Unauthorized Content Regulations.	8
A. The proposed rules do not contain explicit assurances against virtually inevitable future and more extensive content regulation.	8
B. The FCC lacks authority to regulate the content offered by Internet Service Providers. .	10
V. Conclusion	11

The American Center for Law and Justice (ACLJ), a non-profit legal organization dedicated to the preservation and advancement of constitutional liberties secured by law, hereby respectfully provides the following comments in connection with the captioned proceeding.

EXECUTIVE SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) fails to cite any specific statutory authority allowing it to promulgate the proposed rules regulating the practices of ISPs in the name of so-called ‘net neutrality.’ Further, the Commission’s assertions of ancillary authority either fail to cite any reasonably applicable authority or represent an untenable, all-encompassing power over all communications media, which cannot stand. Moreover, the proposed rules lack the necessary specificity to comply with due process standards of fair notice. Finally, even if the FCC possessed the authority to make the proposed rules, it must provide specific protection against the expansion of content regulation. These issues counsel against the implementation of the proposed rules to further regulate ISPs or the broader internet.

I. Introduction

On November 30, 2009, the Federal Communications Commission released its Notice of Proposed Rulemaking (FCC 09-93) (hereinafter “Net Neutrality NPRM”) to promote openness on the internet or ‘net neutrality.’ The new rules would essentially codify the four policy principles set forth in the FCC’s 2005 Policy Statement on Broadband Internet Access.¹ The proposed rules would, “[s]ubject to reasonable network management,” forbid broadband internet service providers (ISPs) from retarding or preventing user activities such as “sending or

¹ Preserving the Open Internet, Broadband Industry Practices, 74 Fed. Reg. 62638 (proposed Nov. 30, 2009) (to be codified at 47 C.F.R. pt. 8); FEDERAL COMMUNICATIONS COMM’N, FCC 05-151, POLICY STATEMENT (Sept. 23, 2005), *available at* <http://www.publicknowledge.org/pdf/FCC-05-151A1.pdf>.

receiving [] lawful content,” “running [] lawful applications or using [] lawful services,” and “connecting to and using . . . lawful, [non-detrimental] devices” of the users choice. ISPs could also not deny a user’s right to competition between network, application, service, or content providers.²

In addition, a fifth proposed rule would require providers to “treat lawful content, applications, and services in a nondiscriminatory manner,” also subject to exceptions for reasonable management.³ More specifically, the FCC maintains that this rule would prohibit broadband providers from “charg[ing] a content, application, or service provider for enhanced or prioritized access to [] subscribers.”⁴

Finally, the sixth proposed rule would codify a supposed transparency principle requiring ISPs to “disclose []information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections” otherwise outlined in the rules.⁵ For the reasons noted below, the Commission should avoid further regulation of ISPs and the broader internet.

II. The FCC Lacks the Necessary Authority to Generally Regulate the Management Practices of Internet Service Providers.

None of the referenced sources of authority mentioned in the notice of proposed rulemaking provide sufficient authority for the Commission to regulate the management practices of ISPs.

The Net Neutrality NPRM cites Section 201(b) of the Telecommunications Act of 1996 as “specific authority” to develop such rules, as the public interest requires, “to carry out the

² 74 Fed. Reg. 62645 (Nov. 30, 2009).

³ *Id.* at 62646

⁴ *Id.*

⁵ *Id.* at 62648.

provisions of th[e] Act.”⁶ This portion of the Act, however, deals only with the regulation of ‘common carriers.’ Because ISPs provide more than a mere telecommunications service, they have been classified as ‘information services’ and do not qualify as common carriers.⁷ The Telecommunications Act prohibits the FCC from treating service providers as common carriers except “to the extent that it is engaged in providing telecommunications services.”⁸ Thus, because ISPs are providing more than mere telecommunication services, Section 201(b) cannot provide the necessary authority to treat them as common carriers.

The FCC’s assertion of ancillary jurisdiction is also misplaced. The Commission claims ancillary jurisdiction when “subject matter falls within the agency’s general grant of jurisdiction and the regulation is ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities,’” and here asserts that this “test is met with respect to broadband Internet access service.”⁹ However, as the D.C. Circuit stated in *American Library Association v. FCC*, “ancillary jurisdiction is limited to circumstances where: (1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its *statutorily mandated responsibilities*.” 406 F.3d 689, 700 (D.C. Cir. 2005) (emphasis added). This language underscores the point that, even if the regulation of ISP management fell under the FCC’s general jurisdiction, to exercise ancillary jurisdiction in lieu of a specific statutory grant, the Commission must still cite to some reasonable grant of statutory power to support its claim of jurisdiction. The Net Neutrality NPRM fails to do so.

⁶ *Id.* at 62644.

⁷ *Nat’l Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 973 (2005); *Howard v. AOL*, 208 F.3d 741, 752 (9th Cir. 2000).

⁸ 47 U.S.C. § 153(44) (LexisNexis 2009).

⁹ 74 Fed. Reg. 62644 (Nov. 30, 2009).

In an effort to substantiate its claim to ancillary authority, the FCC also asserts that the proposed ‘open internet’ rules will further the congressional *policy* enunciated in Section 230(b) and the broadband goals of Section 706(a),¹⁰ codified at 47 USC § 230 and 47 USC § 1302(a), respectively. These sections, however, are merely statutory policy statements (modern day statutory preambles), a fact the Commission recognizes.¹¹ These references do not amount to “operative part[s] of the statute, and [do] not enlarge or confer powers on administrative agencies.”¹² Therefore, like agency policy statements, these cannot serve as the basis for enforceable authority, as they only state what the legislation aims to accomplish or promote.¹³ Broad statements promoting certain policies or goals do not create the type of mandates necessary to activate ancillary jurisdiction.

Further, the FCC’s broad assertion that the increasing relationship between the internet and voice and video services traditionally regulated by the FCC under express statutory obligations cannot justify its proposed broadband regulations.¹⁴ Ancillary jurisdiction on this basis is completely unsustainable. This broad theory of FCC authority would render the agency virtually omnipotent over any communication service arguably under the umbrella of any portion of the Telecommunications Act. The FCC would be an all powerful entity subject only to those limitations imposed by Congress. Such a situation, however, has been expressly rejected by the courts¹⁵ and thus cannot stand.

¹⁰ 74 Fed. Reg. 62644 (Nov. 30, 2009).

¹¹ *Id.*

¹² Brief of Petitioner at 47, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. argued Jan. 8, 2010); *Ass’n of Am. R.R.s. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); see *Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (“[A]s the preamble is no part of the act, [it] cannot enlarge or confer powers.”).

¹³ *Pac. Gas and Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

¹⁴ 74 Fed. Reg. 62644 (Nov. 30, 2009).

¹⁵ Reply Brief of Petitioner at 25, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. argued Jan. 8, 2010); *Ry. Labor Executives Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (“Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”).

In sum, the agency can point to no authority entitling it to promulgate the proposed regulations. It fails to cite any specific grant of authority to regulate ISP behavior in the proposed manner and, likewise, fails to proffer any adequate basis for the ancillary jurisdiction it claims.

III. The Proposed Rules Fail to Comply with Necessary Fair Notice Requirements.

Even if the FCC possessed the necessary statutory authority to regulate as it proposes, the present proposed rules are inadequate. The proposed rules are vague and fail to provide the requisite fair notice necessary to satisfy due process. In 1995, *G.E. v. EPA* dealt with due process requirements surrounding agency regulations.¹⁶ The case arose from G.E.'s undertaking intermediate steps before final disposal of certain waste chemicals. The EPA argued that regulations required immediate incineration, while GE argued it should first be able to use a recycling process to reclaim certain byproducts.¹⁷ The court entertained whether, by imposing a fine on G.E. instead of merely requiring it to alter its procedure, the EPA violated due process.¹⁸ According to the court, while agency regulatory interpretations are afforded great deference, due process prevents validation where an agency ““fails to give fair warning of the conduct it prohibits or requires.””¹⁹ In other words, “where [a] regulation is not sufficiently clear to warn a party about what is expected of it, an agency may not deprive a party of property by imposing . . . liability.”²⁰ Absent some pre-violation effort on behalf of the agency to initiate compliance, due process requires that a regulated entity must be able to discern the standards with which it is required to comply by review of the regulations or other public statements.²¹ In *G.E.*, the court determined that nothing in the language of the disputed regulations adequately

¹⁶ 53 F.3d 1324 (D.C. Cir. 1995).

¹⁷ *Id.* at 1326.

¹⁸ *Id.* at 1328.

¹⁹ *Id.*

²⁰ *Id.* at 1329.

²¹ *G.E. v. EPA*, 53 F.3d at 1329.

notified that “pre-disposal processes” were prohibited. Additionally, the court cited other factors weighing against provision of adequate notice, including where the regulations were in the code, the existence of disagreement within EPA regional divisions over meaning and enforcement, and *the inadequacy of certain extraneous policy statements*.²²

The Commissions proposed rules exhibit similar deficiencies. As originally drafted, the proposed rules were intended as broadly stated policy goals designed to promote openness and equality in the further development of the internet.²³ Such policy statements are necessarily broad as they are intended to provide overall direction by which to shape future rules, regulations, and procedures covering a variety of subjects within a certain field of interest. However, broad policy statements do not provide the level of notice required by due process.

Just as G.E. was not made sufficiently aware of what actions were required for compliance, under the proposed rules, ISPs could not possibly discern what actions are specifically prohibited or what actions might qualify as “reasonable network management.” The FCC acknowledges the generality of the proposed rules. It “propose[s] to codify the four principles at the current level of generality . . . [to] help establish clear requirements while giving [] the flexibility to consider particular circumstances case by case.”²⁴ Despite this acknowledgement of the obvious ambiguity of the proposed rules, the FCC cites the “unpredictable evolution” of internet services as justification.²⁵ Nevertheless, the ever-evolving nature of services in no way circumvents the necessity of fair notice.

In order to comply with due process, the proposed rules must provide clear definitions to enable the reasonable determination of requirements. First, the definition of “reasonable network

²² *Id.* at 1331–33.

²³ FEDERAL COMMUNICATIONS COMM’N, FCC 05-151, POLICY STATEMENT (Sept. 23, 2005).

²⁴ 74 Fed. Reg. 62644 (Nov. 30, 2009).

²⁵ *Id.* at 62644.

management” is insufficiently broad. While the first portion of the proposed definition provides certain examples of ‘reasonable’ practices, Section (b) provides for “other reasonable network management practices,”²⁶ but fails to further define what these other practices might entail. Such a broad “catch-all” provision certainly does not provide strict limits for what conduct is allowable. This defect might be cured if the remainder of the proposed rules sufficiently outlined specifically prohibited conduct, but this is not the case. For instance, Section 8.15 requires disclosure of certain information “concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified,” but does not specifically describe what information will be required.²⁷ Any final version of the proposed rules must outline with reasonable particularity the disclosure required.

Other terms similarly lack specific definitions and could potentially confuse regulated ISPs. Specifically, the rules fail to sufficiently develop what would constitute prohibited discriminatory treatment,²⁸ or what would constitute harm to the network.²⁹ Finally, the FCC actively rejects the adoption of a definition for “‘content, application, or service provider,’ because any user of the Internet can be such a provider.”³⁰ This admittedly “broad interpretation” allows every user to be characterized as a content, application, or service provider, but provides no guidance for determining when the transformation takes place and who may or may not be subject to regulation. Therefore, in order to ensure compliance, broadband providers would have no choice but to treat all users as providers as well.

²⁶ *Id.* at 62661.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 62645.

In sum, the proposed rules fail to provide adequate fair notice as required by due process. The rules must be more than mere policy statements. These rules simply codify prior policy statements or principles and do not provide the level of precision required to bring about compliance with a particular regulatory regime. Thus, even if the FCC possessed the authority to regulate ISPs in this manner, it must promulgate actual rules which provide adequate notice and refrain from attempting to enforce mere statements of policy.

IV. The FCC Must Avoid Imposing Unauthorized Content Regulations.

A. The proposed rules do not contain explicit assurances against virtually inevitable future and more extensive content regulation.

Other aspects of the Net Neutrality NPRM raise additional concerns. For instance, the Commission outlines several arguments advocating the need for more government involvement with the internet. The most troubling argument urges the government to become involved in the regulation of internet content due to the internet's recognized significant impact on public speech and debate as a tremendous new "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."³¹ The proposed rules do not deal specifically with the Commission's ability to regulate internet content, other than forbidding providers from preventing users from sending or receiving legal content.³² Nevertheless, the proposed rules present the possibility and increase the likelihood that further, more restrictive content regulation will result. In remarks published by the Progress and Freedom Foundation, Robert Corn-Revere notes that, while preserving openness is certainly the most heavily promoted goal of the current proposal, the FCC also refers to safety and security as

³¹ *Id.* at 62643.

³² 74 Fed. Reg. 62661 (Nov. 30, 2009).

additional aims.³³ In the same vein, the FCC is currently evaluating its authority to regulate content over all existing communication pathways.³⁴ Both of these facts evidence the existence of the ever-expanding nature of government regulation, characterized by Mr. Corn-Revere as “mission creep.”³⁵

FCC Commissioner Robert McDowell also recognized the danger that open internet regulations could expand, even unintentionally, to threaten free speech on the internet. Commissioner McDowell notes that it is precisely the absence of government control which facilitated the historically free environment for political discourse that is the internet. He also expresses his concern that internet regulations will only increase and cites the failure of the past “prime-time access rule” as an example of how even well-intentioned government regulation of content often results in the deprivation of information and not the facilitation of equality.³⁶

The internet has fast become the twenty-first century’s quintessential public forum. Government agencies must be fully aware of the serious First Amendment concerns implicated by content regulation across such a medium. Given the demonstrated potential for expansion of regulation in the internet realm and the current inquires by the FCC into regulating content, the lack of explicit assurances against content regulation in the proposed regulations understandably causes concern. Any regulation of the internet medium should contain explicit guarantees that

³³ Robert Corn-Revere, *The First Amendment, the Internet & Net Neutrality: Be Careful What You Wish For*, 16 PROGRESS ON POINT 28 (Dec. 2009), *available at* http://www.heartland.org/full/26627/The_First_Amendment_the_Internet_Net_Neutrality.html.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Remarks of Commissioner Robert M. McDowell, FCC, Speech, Civic Engagement and the Open Internet Workshop, GN Doc. No. 09-191; WC Doc. No. 07-52, Washington, D.C. (Dec. 15, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295236A1.pdf.

such regulations cannot evolve into or serve as a “Trojan Horse” for impermissible speech restrictions.³⁷

B. The FCC lacks authority to regulate the content offered by Internet Service Providers.

Even if the FCC possessed the necessary authority to generally regulate ISPs, nothing provides the Commission with the authority to regulate overall web content. First, the authority allowing the FCC to regulate the content of broadcast media in no way entitles it to do so with respect to the internet. Traditionally, media corporations across varying conduits have been afforded protection for decisions on what information they select for transmission.³⁸ Nevertheless, greater FCC regulation was permitted with respect to broadcast media, but has been denied extension to other formats.³⁹ The Supreme Court noted that this lesser standard was based on “the history of extensive government regulation” of broadcasters, “the scarcity of available frequencies,” and broadcasting’s invasiveness. The Court specifically declined to extend this lesser standard to the internet, as “[t]hose factors are not present in cyberspace.”⁴⁰

Likewise, the greater powers of the FCC with respect to common carriers do not extend to ISPs. The Supreme Court has noted that telecommunications services classified as common carriers are subject to more exacting and mandatory regulation under the Telecommunications Act.⁴¹ However, the Court found that the FCC properly treated internet services providers as providing “information service” rather than merely telecommunications service and thus did not

³⁷ Corn-Revere, *supra*, note 33; Corynne McSherry, *Is Net Neutrality a FCC Trojan Horse?*, Electronic Frontier Foundation Deeplinks Blog, Oct. 21, 2009, <http://www.eff.org/deeplinks/2009/09/net-neutrality-fcc-perils-and-promise> (last visited Jan. 13, 2010).

³⁸ See *Miami Herald Pub. Co., Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (giving editorial discretion to newspapers).

³⁹ *FCC v. Fox TV Stations*, 129 S.Ct. 1800, 1821 (2009) (Thomas, J., concurring); *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

⁴⁰ *Reno*, 521 U.S. at 868.

⁴¹ *Nat’l Telecommunications Ass’n*, 545 U.S. at 973.

qualify them as common carriers.⁴² More succinctly, ISPs provide “enhanced services” where they engage in not merely the transmission of information, but rather certain “editorial” decisions similar to those made by print media and cable operators.⁴³ Therefore, the more extensive authority to regulate content provision by common carriers cannot be extended to ISPs.

Thus, even if the FCC possessed the necessary authority to regulate as an internet “traffic cop,” no existing amplification of its authority would allow it to engage in internet content regulation. Of course, certain materials do not enjoy First Amendment protection and such content may be subject to more extensive regulation. However, this is a question of First Amendment law and not merely agency authority. In sum, beyond the limited categories of material of which the First Amendment allows greater regulation, the FCC has no power to engage in the business of regulating internet content.

V. Conclusion

There is no specific statutory authority supporting the FCC’s proposed rules for regulating the practices of ISPs in the name of so-called ‘net neutrality.’ Further, the Commission’s assertions of ancillary authority either fail to cite any reasonably applicable authority or represent an untenable, all-encompassing power over all communications media, which cannot stand. Moreover, the proposed rules are far too vague to comply with the necessary due process standards of fair notice. Finally, even if the FCC could regulate as it proposes, it must provide protections against further expansion into the realm of content regulation in cyberspace. All of these issues counsel against the implementation of the proposed rules to further regulate ISPs or the broader internet.

⁴² *Id.* at 987.

⁴³ *Howard*, 208 F.3d 741, 752 (9th Cir. 2000).

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'Colby M. May', with a long horizontal flourish extending to the right.

Colby M. May, Esq.
Director & Senior Counsel, Washington Office
Christopher T. Baker
Counsel, Washington Office
American Center for Law and Justice–DC
201 Maryland Avenue NE
Washington, DC 20002-5703
(202) 546-8890
(202) 546-9309 fax
cmmay@aclj-dc.org

January 14, 2010