

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date : February 18, 2010

To : The Commission
(Meeting of February 25, 2010)

From : Gretchen T. Dumas
Legal Division

Subject: Filing of Reply Comments in Response to FCC's Notice of Proposed Rulemaking In the Matter of Preserving the Open Internet
GN Docket 09-191, WC Docket No. 07-52

RECOMMENDATION: The CPUC should file Reply comments in response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM), issued October 22, 2009, in which the FCC proposes to codify six "net neutrality" principles to govern the provision by Internet access service providers of access to the Internet.¹ Reply comments are due March 5, 2010.

BACKGROUND: In this NPRM, the FCC seeks "public input on draft rules to preserve an open Internet."² The FCC notes that it "has considered the issue of Internet openness in a wide variety of contexts and proceedings, including a unanimous policy statement, a notice of inquiry on broadband industry practices, public comment on several petitions for rulemaking, conditions associated with significant communications industry mergers, the rules for a major spectrum auction, and specific enforcement actions against particular parties."³ The FCC further notes that, "[t]hroughout this extensive process, one point has attracted nearly unanimous support: The Internet's openness, and the transparency of its protocols, have been critical to its success."⁴ The FCC also points out that Congress has mandated that the FCC preserve and promote advanced communications networks which are accessible to all Americans and serve national purposes.⁵

¹ Notice of Proposed Rulemaking, *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, GN Docket 09-91, WC Docket No. 07-52, rel. October 22, 2009 (NPRM). See also NPRM at ¶ 14.

² *Id.* at ¶ 2.

³ *Id.*

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶ 5, referencing 47 U.S.C. §254(b)(2).

In August 2005, the FCC “sought to safeguard and promote the open Internet by announcing four general Internet policy principles that would guide its interpretation” of this Congressional mandate.⁶ The FCC has not, however, codified these principles, known as the “*Internet Policy Statement*”. The *Internet Policy Statement* includes these four principles:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.*
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.*

The FCC noted that all the principles “are subject to reasonable network management,” although it did not define the term. In this NPRM, the FCC is proposing to codify the four principles that make up the *Internet Policy Statement*.

In March of 2006, the CPUC voiced support for the FCC’s *Internet Policy Statement* in comments filed in an FCC proceeding regarding “Consumer Protection in the Broadband Era.”⁷ In that filing, the CPUC stated:

Any consumer protections implemented by the FCC for broadband

⁶ *Id* at ¶ 5.

⁷Comments of the California Public Utilities Commission and the People of the State of California, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33), *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements* (CC Dockets Nos. 95-20, 98-10), *Conditional Petition of Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises, Consumer Protection in the Broadband Era* (WC Docket No. 05-271), March 1, 2006.

access should include policies supporting net neutrality consistent with the statement of principles articulated by the Commission in its August 5, 2005, Policy Statement. This policy statement outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. California believes that in addition to encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet, these policies represent important consumer protections.

Fundamentally, such policies promote consumer choice, choice that empowers consumers and provides fundamental consumer protection. California urges the FCC to consider rules implementing these principles as part of the FCC's consideration of consumer protection rules for the broadband marketplace.⁸

In this *NPRM*, the FCC states that “[t]he *Internet Policy Statement* has helped preserve the openness of the Internet over the past four years, but the time has now come to build on past efforts and to provide greater clarity regarding the Commission’s approach to these issues through a notice-and-comment rulemaking. This rulemaking process is intended to provide greater predictability as well as to help address emerging challenges to the open Internet.”⁹

Thus, here, the FCC proposes to adopt six rules to preserve the “Open Internet.” The six rules include the four original principles of the *Internet Policy Statement*, rewritten as carrier obligations rather than as consumer entitlements, as well as two newly-proposed rules – one addressing nondiscrimination and one addressing transparency. The FCC describes its proposal as follows:

“[W]e offer draft rules, including a codification of the existing Internet policy principles, additional principles of nondiscrimination and transparency, an acknowledgement that these principles apply to all forms of broadband Internet access, and a discussion of “managed” or “specialized” services. The nondiscrimination principle would prohibit broadband Internet access service providers from favoring or disfavoring lawful

⁸ *Id* at p.13.

⁹ *NPRM* at ¶ 6.

content, applications, or services accessed by their subscribers, but would allow broadband providers to engage in reasonable network management. The transparency principle would require providers of broadband Internet access service to make available relevant information regarding network management practices to the consumers who purchase their service; to content, application, and service providers, who must ensure that their offerings function on the Internet; and to the Commission. All of the principles would be subject to reasonable network management and the needs of law enforcement, public safety, and homeland and national security. We also acknowledge that broadband Internet access service providers have flexibility to develop and deploy new technologies and business models, including by offering managed or specialized services that are distinct from traditional broadband Internet access service. We seek detailed comment below on this framework, the two additional proposed principles, as well as the scope of the exceptions to the principles.¹⁰

The FCC proposes to enforce these rules on a case-by-case basis,¹¹ and would apply the rules to “all platforms for broadband Internet access, including mobile wireless devices....”¹²

The six draft rules the FCC proposed are as follows:¹³

All providers of broadband Internet access service would be required to comply with the following rules:

1. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet.
2. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user’s choice.
3. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network.

¹⁰ *Id* at ¶ 11.

¹¹ *Id* at ¶ 12.

¹² *Id* at ¶13.

¹³ *Id* at ¶¶ 92, 104, 119.

4. Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.
5. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.
6. Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

The FCC notes that the fifth rule – the nondiscrimination rule – if adopted, would 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. We propose that this rule would not prevent a broadband Internet access service provider from charging subscribers different prices for different services.”¹⁴ The FCC also asks “whether an ‘unjust or unreasonable discrimination’ standard would be preferable to the approach we propose.”¹⁵

DISCUSSION: Staff recommends that the CPUC file Reply comments supporting the following FCC proposed actions:

- > Codification of the first four principles that formed the basis of the 2005 *Internet Policy Statement*, as redrafted by the FCC.
- > Codification of the newly proposed transparency rule (sixth rule) as drafted by the FCC.
- > Codification of a nondiscrimination rule (fifth rule) that is narrower than the one the FCC proposed
- > If the FCC decides to apply the rules to wireless Internet access providers, the rules should take into consideration the unique technology of such providers.

Regarding the transparency rule, the CPUC should support a rule that requires Internet access providers to disclose that they are managing their traffic, and the possible impacts on customers. However, Internet access providers should not be required to disclose technical details of what is being used to manage traffic if that

¹⁴ *Id* at ¶ 106.

¹⁵ *Id* at ¶ 109.

information could provide a roadmap for countermeasures to avoid the management.

Staff also proposes that the CPUC support a nondiscrimination rule that would prohibit “unjust or unreasonable” discrimination; and that the rule require only that the Internet access provider treat access to similar content in a similar manner. Thus the goal would not be to treat all content the same, but rather to require access providers to treat like content in the same manner, consistent with the disclosed limitations of the purchased end-user service.

Carriers should have the ability to price, shape, and manage their networks to facilitate reasonable Quality of Service. For instance, the rules should not prevent an end user customer who wants access to video conferences all day long from buying a higher tier of service to get the Quality of Service needed for quality transmission and avoid any caps on the amount of data the customer can use each month. The goal would be to set reasonable terms and conditions on the access providers but not micromanage their service. In that way the FCC can maintain necessary and reasonable consumer protections but allow the access providers to reasonably respond to market demands.

Finally, in opening comments, a number of parties expressed support for the FCC’s jurisdictional authority to act in this matter.¹⁶ Other commenters called into question the FCC’s jurisdictional authority to set forth these rules and to enforce them once they are in place.¹⁷ Staff recommends that the CPUC, in its comments, support the legality of the FCC’s jurisdiction in this proceeding.

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¹⁶ See Comments of Center for Democracy & Technology, p.20-22.

¹⁷ See Comments of AT&T, p. 8; Comments of the Texas Office of Public Utility Counsel.