

FCC Provides Guidance on Net Neutrality Rules

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On June 30, 2011, the Federal Communications Commission (FCC) issued a Public Notice clarifying the scope of the so-called "transparency" rule that it adopted in its December 2010 *Open Internet Order*.¹ Although the FCC's net neutrality rules have yet to take effect, the FCC's clarification should ease the burden on fixed and mobile broadband providers in satisfying the transparency requirements when they become effective.

Overview of FCC's Transparency Rule. The rule requires fixed and mobile providers of broadband Internet access services to disclose publicly accurate information regarding their network management practices as well as the performance and commercial terms of their services. The FCC identified approximately 30 discrete topics that it suggested a broadband provider should address, at least in some respect, in order for its disclosures to comply with the transparency rule. According to the FCC, the transparency rule is intended to ensure that consumers have the information they need to understand the capability of their broadband service.

Guidance On Complying With The FCC's Transparency Rule. The Public Notice, which was issued by the FCC's Enforcement Bureau and the Office of General Counsel, offers guidance to broadband providers in complying with the following five aspects of the transparency rule:

1. Point-of-Sale Disclosures. Broadband providers are required to disclose network management practices, network performance characteristics, and commercial terms "at the point of sale." *Open Internet Order* at ¶ 57. The FCC clarified that the transparency rule does not compel the distribution of disclosure materials in hard copy

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or extensive training of sales employees to provide the disclosures themselves. Instead, prospective customers at the point of sale can be directed, orally and/or prominently in writing, to a web site where the required disclosures can be found. Broadband providers that rely on a web page for point-of-sale disclosures should provide customers with access to the disclosures by making available a computer, tablet, or smartphone at their brick-and-mortar retail outlets (*i.e.*, not telephone or Internet sales centers).

2. Service Descriptions. Broadband providers are required to disclose accurate information regarding the network performance for their broadband services, including actual speed and latency. *Open Internet Order* at ¶¶ 54, 56. While acknowledging that it is currently investigating key performance broadband measurements, including baseline connection speed and latency, the FCC indicated it expects the initial results of this investigation to be finalized and publicly released before its net neutrality rules become effective. In the meantime, the FCC clarified the requirement to disclose network performance information as follows and, in so doing, encouraged fixed and mobile providers to disclose the source of their performance measurements and the underlying methodology used to evaluate such performance:

- *Fixed Broadband.* Fixed broadband providers that participated in the FCC's broadband performance measurement project can satisfy their service description obligations by disclosing their results from the project. Providers that did not participate may use the same methodology employed during the project (which has yet to be released) to measure the actual performance of their broadband offerings. Alternatively, a broadband provider may disclose actual performance based on: (i) internal testing; (ii) consumer speed test data; or (iii) other network performance data, including reliable, relevant data from third-party sources.
- *Mobile Broadband.* Until the FCC obtains data regarding mobile broadband performance, mobile broadband providers with access to reliable information on network performance may disclose the results of their own or third-party testing. According to the FCC, such disclosures could include mean upload and download speeds in megabits per second and mean roundtrip latency. A mobile broadband provider that lacks reliable information on their network performance metrics can disclose a Typical Speed Range representing the range of speeds or latency that its customer can expect along with a statement that such information is the best approximation of actual speeds and latency.

3. Extent of Required Disclosures. Although the *Open Internet Order* indicated that its list of approximately 30 topics to be disclosed was "not necessarily exhaustive," *Open Internet Order* at ¶ 56, the FCC clarified that disclosure of such information will suffice for compliance with the transparency rule "at this time."

4. Disclosures to Content, Application, Service, and Device Providers. In addition to making consumer disclosures, broadband providers are required to disclose accurate information sufficient for "content, application, service, and device providers [collectively, 'edge providers'] to develop, market, and maintain Internet offerings." *Open Internet Order* at ¶ 54. The FCC clarified that a separate set of disclosures tailored to edge providers will not be necessary as the disclosures made to consumers should suffice for edge providers as well.

5. Disclosures Regarding Security Measures. Broadband providers are required to disclose information concerning "practices used to ensure end-user security or security of the network." *Open Internet Order* at ¶ 56. In response to concerns about the burden associated with this requirement, the FCC clarified that it is primarily concerned about security measures that are likely to affect a consumer's ability to access particular content, applications, services, and devices, such as measures that while intended to prevent the spread of viruses, malware, spam, or other threats to consumers prevent end users from making full use of their broadband service. The FCC also noted that it does not expect providers to disclose internal network security measures, such as routing security practices, that do not directly bear on a consumer's choices.

[1] *Preserving the Open Internet, Broadband Industry Practices*, 25 FCC Rcd 17905 (2010).