

At Last, FCC Poised to Act on Neutrality

by [David Sohn](#) [1]

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Just 14 days into 2010, CDT and numerous other parties filed extensive [comments](#) [2] on the FCC's proposal to adopt rules to preserve the Internet's open nature. Since then, multiple further comment rounds have resulted in many thousands of pages of additional filings from parties on all sides of the issue. Now, as the year winds down, the agency appears poised to act. Chairman Genachowski gave a [speech](#) [3] on the subject this morning, and the [FCC's agenda](#) [4] for its December meeting calls for a vote on open Internet rules.

This is big, and the Chairman should be commended for moving this matter forward - as CDT President [Leslie Harris stated](#) [5] this morning. The Internet's open character is too important to leave to chance. The handful of companies that provide most consumers with access to the Internet's "on ramps" should of course have substantial freedom to run their businesses and to seek profits as they see fit. But they should not be allowed to kill the goose that laid the golden egg by phasing out the concept of an open Internet and replacing it with a gatekeeper-controlled medium. Yet since the D.C. Circuit's decision in April in the [Comcast case](#) [6], it has been at best unclear whether the status quo offers any protection for Internet openness at all. It is high time for the FCC act.

The ultimate impact and effectiveness of FCC action, of course, will depend in part on the actual language of any final order and rules, and in part on how the FCC and (perhaps) reviewing courts interpret and enforce those rules over time. Questions I'm interested in include:

- What is the intended legal basis for the FCC's action? The Chairman stated that he is not going to rely on Title II of the Communications Act (the approach [he had suggested](#) [7] back in May and which CDT had supported in [formal comments](#) [8] in July). CDT will be looking closely to confirm that the legal basis will be appropriately narrow and targeted; as [CDT has consistently argued](#) [9], an overbroad assertion of FCC authority could open the door to exactly the kind of harmful efforts to "regulate the Internet" that neutrality opponents decry. And then there is the lurking issue of how the FCC's legal rationale will fare if and when it is challenged in court.
- What is the scope of the rules? In particular, how will the FCC police the line between Internet access services subject to the rules and other, non-Internet services that presumably will be outside the rules' scope? A final order could offer some guidance on this point, but the real test will be how the rules are applied over time.
- What constitutes "unreasonable discrimination" and what constitutes "reasonable network management"? In particular, how will either a final order or subsequent case-by-case enforcement actions address the important issue of whether and to what extent paid prioritization would be considered "unreasonable"?
- Finally, what about wireless? The Chairman's proposal envisions only a limited set of protections for mobile wireless Internet services. But as more and more people rely on mobile connections as a principal means of connecting to the Internet, how will it be tenable to exclude wireless from a large part of the rules? Technical challenges facing wireless providers must of course be considered, but failing to address wireless in an adequate manner would leave a gaping hole in the FCC's framework.

The bottom line is, implementing, interpreting, and enforcing the rules will be an ongoing process. The adoption of open Internet rules later this month would be a welcome and indeed crucial milestone - but the work of developing a sound legal framework to protect neutrality must continue



well beyond the FCC's December meeting.

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