

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December 2010*

(Prepared by John Windhausen and Bob Bocher, January 24, 2011)

Key Terms:

FCC: Federal Communications Commission

BB ISP: Broadband Internet Service Provider

BB IAS: Broadband Internet Access Service

SS: Specialized Services (broadband services that do not meet the technical definition of BB IAS but contain some of the same characteristics)

PP: Paid Prioritization (a practice by which the BB ISP enhances the delivery of some Internet traffic over other traffic for a fee)

NN: Net Neutrality

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
WIRELINE (includes broadband services over DSL, T1 lines, cable, and fiber)	Non-Discrimination	No Discrimination	No unreasonable discrimination (and no need to show "harm")	Non-discrimination is a critical part of the Order. Broadband providers cannot "unreasonably" discriminate based on content, for instance, by enhancing or degrading the transmission. Of special concern are actions by providers that inhibit users from "accessing the content, applications, services, or devices of their choice" or actions that impair free expression. The "no unreasonable discrimination" standard for BB ISPs is the same standard that applies to telephone companies under "common carriage." Note, however, that this standard allows "reasonable" discrimination (see "network management" discussion below).
	No Blocking	No Blocking	No blocking (and no degradation that effectively blocks)	No blocking is another critical part of the Order. Providers cannot block any legal content, applications or services, whether or not such compete with the provider's own content, applications or services. The Order states, "Freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."

* FCC news release is at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1221/DOC-303745A1.pdf. Full Order is at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf. ALA has taken a strong position in favor of net neutrality and has submitted numerous comments to the FCC. See, for example, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020374022> and <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020923490>. For background on this issue and how it impacts libraries, see the ALA site at <http://www.ala.org/ala/issuesadvocacy/telecom/netneutrality/index.cfm>.

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December of 2010

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
WIRELINE (continued)	Paid Prioritization (PP)	Ban on Paid Prioritization	PP is "likely" unreasonable.	Paid prioritization is closely related to the above two issues. Providers offering priority service to third parties—who are willing to pay to have their traffic favored over other traffic—will likely not be permitted, but the FCC will allow a BB ISP to explain why a particular “pay-for-priority” service should be allowed. Prohibiting pay-for-priority service is especially important to libraries and other community anchor institutions that lack the financial ability to pay.
	Specialized Services	Assurances that SS will not replace Internet access or be used to circumvent key parts of the Order	SS are exempt from the net neutrality rules above as long as they do not supplant Internet-based services.	Specialized services, while somewhat vaguely defined, can include services like Voice Over IP (VOIP) and some video services. The FCC will monitor this area to ensure that such services are not used to circumvent the Order’s open Internet protections. The Open Internet Advisory Committee (see below) will help the FCC monitor SS.
	Transparency and disclosure	Full disclosure of services	Full disclosure, but exact methods left to BB ISPs	Providers must disclose on their websites accurate information on their network management practices, performance and terms of service so that consumers can make informed choices. The Order also states, “Disclosure increases the likelihood that broadband providers will abide by open Internet principles.” Disclosure does not cover competitively sensitive information or information that might compromise network security.
FIXED WIRELESS (includes satellite)	Same as Wireline	Same as Wireline	Same as Wireline	Fixed wireless includes services that are primarily accessed by fixed endpoints using stationary equipment like traditional computer workstations.
MOBILE WIRELESS (includes cellular and Wi-Max services)	Non-Discrimination	No Discrimination	The Order does not apply a non-discrimination standard to mobile wireless providers. For this reason, the Order does not afford wireless the same level of protections as wireline.	This is a major disappointment. ALA argued that libraries and consumers should be entitled to net neutrality protections no matter how they access the Internet. Mobile broadband Internet access serves users primarily via mobile devices like smartphones. The Order reasons that mobile broadband is at an earlier stage of development vs. fixed broadband and does not impose a non-discrimination requirement on mobile broadband at this time. The Order says the FCC “will closely monitor the development of the mobile broadband market” and will adjust its rules as needed.

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December of 2010

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
MOBILE WIRELESS (continued)	No Blocking	No Blocking	Mobile wireless providers may not block lawful websites, telephony or video that compete with a mobile wireless BB ISP's own services.	Again, the "no blocking" rule does not provide mobile wireless customers as much protection as wireline services. Wireless BB ISPs may not block lawful websites or applications that compete with their telephone or video services, but they may block other applications.
	Paid Prioritization	Ban on Paid Prioritization	Nothing in Order	There is no rule prohibiting mobile carriers from providing paid prioritization.
	Transparency and disclosure	Full disclosure of services	Same as Wireline	See above comment under Wireline.
DEFINITIONS	Network Management	Network management exception should be narrowly defined.	All the above NN rules are "subject to "reasonable network management." Reasonable network management must be "appropriate and tailored to achieving a legitimate network management purpose."	BB ISPs argue that they must have the right to manage their networks to prevent congestion, block spam, and otherwise ensure the network operates smoothly. ALA was concerned that "network management" could be a loophole that allows BB ISPs to block certain kinds of traffic or certain users. The FCC decided to limit "reasonable" network management to actions that are "tailored" to a legitimate purpose, but it dropped the word "narrowly" before "tailored," which gives BB ISPs a bit more flexibility.
	Do the rules apply to BB IAS providers when they serve libraries or educational institutions?	Providers must adhere to NN rules to the extent they provide service to libraries and educational institutions.	BB IAS is defined as those entities providing "mass market" retail broadband service to consumers that purchase "standardized" broadband services and includes schools and libraries that participate in the E-rate program.	Originally, the definition of BB IAS was limited to "consumers", which might have been interpreted as households but not libraries, schools and other similar institutions. ALA argued vociferously that clarification was necessary to ensure these institutions have the same protections as residential consumers. The definition of BB IAS was changed to incorporate most of ALA's concerns. However, the NN rules do not protect those large enterprise (business) customers that purchase "customized" or "individually negotiated" services.

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December of 2010

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
DEFINITIONS (continued)	Do the rules apply to private networks or libraries?	Private networks and libraries should not be subject to net neutrality regulations.	NN rules do not apply to virtual private networks, backbone providers, coffee shops, public waiting areas or libraries providing Internet access.	Private networks typically serve a closed set of users (such as branches of a large corporation) and do not serve the general public. Libraries sometimes use private networks to connect directly to each other or to a main library (intranets). ALA asked that private networks and library Internet access not be covered by these rules, and the FCC agreed. This means the FCC will not be involved with library Internet use, and libraries can continue to have locally developed Internet acceptable use policies.
	Who determines what is "lawful content?"	Determination of "lawful content" should be made by a court, not BB ISPs.	Nothing in the Order (Though the Order discourages BB ISPs from examining Internet content.)	Net Neutrality rules are only intended to protect "lawful" content, not illegal content, such as child pornography. But it is not clear who determines whether or not certain content is lawful. ALA expressed concern that BB ISPs might inspect Internet content to determine whether it is lawful and might block traffic based on their own judgment. ALA asked that BB ISPs not block content unless it is found "unlawful" by a court. (From a legal perspective, only a court, not an ISP, can determine if any content is unlawful.) The FCC did not accept ALA's recommendation, but it discouraged BB ISPs from inspecting Internet content.

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December of 2010

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
LEGAL	Legal Authority: One of the most contentious issues. In the summer of 2010, the FCC Chairman proposed to regulate BB ISPs under Title II of the Communications Act (like telephone companies) but to subject them to fewer regulations. The FCC Chairman called this the "Third Way."	ALA supported the Third Way approach and argued that BB ISPs should be treated as "common carriers" under Title II and subject to a non-discrimination rule.	The Order does not adopt the Third Way or rely upon Title II. Instead, the FCC proposed to enforce its net neutrality rules under the more general authority of Title I of the Communications Act.	Many members of Congress opposed treating broadband providers as common carriers under Title II, arguing that even the Third Way's lighter regulatory touch would be "overly regulatory." The FCC Chairman backed off, and the Order adopts net neutrality rules under the uncertain authority of Title I. AT&T and the cable industry accepted this approach. Nevertheless, this strategy also has its risks. In April 2010, a federal court overturned the FCC's effort to force Comcast to stop blocking certain peer-to-peer traffic, finding that the FCC did not have authority under Title I to order Comcast to change its behavior. The FCC's legal authority to issue these new net neutrality rules under Title I is being challenged in the courts. The FCC's use of Title I will satisfy some critics in Congress who objected to the Title II/Third Way approach. But other members remain dissatisfied, which already has been demonstrated in the 112 th Congress through the introduction of the Internet Freedom Act (H.R. 96), and the Internet Investment, Innovation, and Competition Preservation Act (H.R. 166). Both of these bills severely restrict or prohibit the FCC from developing regulations to keep the Internet open.
	Enforcement	FCC Complaint Process	Both informal and formal Complaints, based on the Cable Access Complaint Process.	ALA supported the right of individual consumers (and libraries) to file complaints alleging a violation of net neutrality rules. The FCC agreed.
			Rocket Docket may be used to accelerate complaint review	The so-called "Rocket Docket" is intended to speed up the process of handling complaints, but it has had mixed results because even some "Rocket Docket" complaints have not been resolved quickly.
	Emergency, Public Safety		Nothing supersedes law enforcement, public safety obligations of BB ISPs.	BB ISPs may give priority to certain Internet traffic if required for public safety or law enforcement purposes.
MISC.	Copyright	ALA asked for copyright decisions to be made by a court, not by the BB ISP.	Nothing prevents reasonable actions by BB ISPs to address copyright infringement	As with the discussion of "lawful content" above, ALA expressed concern that giving BB ISPs the unfettered right to enforce copyright laws could compromise personal privacy, but the FCC did not adopt ALA's recommendation.

ALA Washington Office Summary of the FCC's Net Neutrality Order Issued in December of 2010

	THE ISSUE	WHAT ALA WANTED IN THE ORDER	WHAT IS IN THE ORDER	BACKGROUND, FURTHER EXPLANATION
MISC. (continued)	Two-Year Review		All net neutrality rules will be reviewed in two years	The purpose is to give the FCC a chance to see how its rules have worked and whether adjustments to the rules are needed. (It is undetermined whether the FCC will, in fact, revisit the rules.
	Advisory Committee		Creates an Open Internet Advisory Committee pursuant to the Federal Advisory Committee Act	The Advisory Committee will give technical advice to the FCC in enforcing the net neutrality rules and particularly the "reasonable network management" rules and in the area of SS.
	Effective Date		The entire net neutrality Order and Rules will not take effect until 60 days after OMB publishes forms concerning information disclosure (transparency) in the Federal Register.	If OMB takes time to review and approve the disclosure forms, the effective date of the net neutrality rules could be delayed for several months.
	Usage-based Pricing		Order allows BB ISPs to charge end users for different "tiers" of service, or even to charge end users "usage fees."	While this is not (technically) a NN issue, the Order leaves open the possibility that BB ISPs could increase the rates they charge consumers (and libraries) for broadband connections and also opens the door for BB ISPs to charge "per-minute" or "per-megabit" usage fees. Currently two libraries with the same broadband connection (e.g., 5 Mbps) pay the same Internet fee, regardless of how much it is used.