



# ELECTRONIC FRONTIER FOUNDATION

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DIGITAL WORLD

JULY 2, 2014 | BY MITCH STOLTZ

## What on Earth Is Going On at the FCC? A Guide to the Proposed Net Neutrality Rules

The main battlefield for the **net neutrality fight** right now is at the Federal Communications Commission (FCC), in a “**rulemaking**” underway this summer, which asks for public comment about a new set of proposed rules that the FCC claims will protect the open Internet. This process is one of the most important ways Internet users, businesses, trade groups, and public interest organizations can make their voice heard in this critically important national debate. To help that along, let's take a close look at the process and the proposal the FCC has put on the table.

### The quick version

This isn't the FCC's first neutrality rodeo. **Time** and **again**, the FCC has proposed open Internet rules but they keep getting **knocked down** in court. The FCC's latest proposed rules are intended to replace a prior set of regulations that a court **threw out** in January.

The **new proposal** has three main parts. The first is a transparency rule that requires Internet access providers to disclose how they manage traffic and price their services. The second is a ban on blocking websites or other Internet services, and the third is a “no commercially unreasonable practices” rule that the FCC says will stop the sort of non-neutral practices by Internet providers that many people are concerned about.

EFF and many others believe the “commercially unreasonable practices” rule won’t stop non-neutral practices like special access deals, pay-for-play, and preferential treatment for privileged Internet users. And we continue to have the same concern about the proposed rules that **we raised** about the 2010 rules – namely, that the exceptions are too broad.

Now for a slightly longer explanation.

## What’s a rulemaking, anyway?

The FCC is using a process called “notice and comment rulemaking.” Agencies like the FCC aren’t elected by the people but can still make rules that all must follow. So, when the FCC makes rules, it has to follow a process that keeps it accountable to the people, at least in theory. The FCC usually has to publish its proposals for new rules along with an explanation, and then allow the public time to comment on them. By law, the FCC then has to take those comments, as a whole, into account when it writes the final rules. Congress can step in at any time by passing new laws for the FCC, and people affected by a final rule can challenge it in court, though in most cases the courts won’t second-guess an agency’s judgment about which rules are best.

The FCC is made up of five commissioners, one of whom is the chairman. It must include both Democrats and Republicans, and three out of the five typically come from the President’s party. Proposing new rules and issuing final rules both require a majority vote.

## What's the FCC actually proposing to do about net neutrality?

The FCC published a “Notice of Proposed Rulemaking,” or NPRM, on May 15th. It's titled “**Protecting and Promoting the Open Internet.**” The actual proposed rule is 2 pages long, with 65 pages of explanation by the FCC. The proposed rules are:

1. **Transparency:** Broadband Internet access providers have to “disclose accurate information” about “network management practices, performance, and commercial terms.”

2. **No blocking:** Wired (fixed) ISPs may not block “lawful content, applications, services, or non-harmful devices.” Mobile broadband providers may not block “lawful websites.”

3. **A standard for special deals:** ISPs cannot engage in “commercially unreasonable practices.” It's not clear what this will mean, but it's meant to prevent some kinds of non-neutral behavior.

The second and third rules both have an exception for “reasonable network management.”

These are only proposed rules; they're not in force yet. But these rules, or something very similar, will likely become the final binding rules unless the public can convince the FCC (at least 3 of the 5 commissioners) to change them.

The FCC also asks the public to comment on whether the FCC should “**reclassify**” broadband Internet access as a “telecommunication service,” which, we believe, would give the FCC more effective authority to target non-neutral practices and promote real competition. And the FCC asks whether or not net neutrality rules should extend to mobile broadband, an issue we'll break down in a future post.

## The FCC's proposal on transparency

The FCC's transparency rule from 2010 is still in force, because **the D.C. Circuit appeals court** didn't throw out that part of the older net neutrality rules. But this year's NPRM is an opportunity to tell the FCC what information we think ISPs need to disclose, so that the public can see when and how ISPs are degrading speeds or offering preferential treatment. As **we've seen**, some non-neutral behaviors are hard to distinguish from ordinary network congestion, so transparency is vital. We have **some ideas** on how to improve the transparency rule.

## The no-blocking rule

The no-blocking rule in the new proposal is similar to the 2010 rule that was thrown out by the court. This time around, the FCC wants to come up with a standard for the "minimum level of access" that ISPs should provide between their customers and any other point on the Internet. Anything less than that minimum would be considered blocking.

In theory, providing a connection to a particular site or service that's too slow or intermittent to be usable would be a violation of the rule. The FCC wants advice from the public on how to define the minimum: by some traditional notion of "best efforts" delivery, technical performance measures such as maximum latency, or an evolving concept of "reasonable" service.

While a no-blocking rule has appeal, we're concerned that the exceptions to the rule are so broad that harmful blocking can happen anyway. These are the same **problems we were worried about** in 2010. First, the rule only covers "lawful content," which could be read to invite ISPs to become copyright police for the Internet, which would be bad news. Second, the proposed rule would have an exception for "reasonable network management," which could actually let ISPs block sites as long as they can present some justification that would satisfy the FCC.

## The “commercially unreasonable practices” rule: vague and ineffective

The core of the proposal, and probably the most contentious part, is the “commercially unreasonable practices” rule. This is where the goal of a neutral Internet runs up against the limits of the FCC’s current authority. In theory, this is a broadly worded rule that’s meant to let the FCC put a stop to non-neutral practices that don’t amount to blocking, but what the rule covers and how it will be enforced are all very up in the air.

The 2010 net neutrality rules contained a “no unreasonable discrimination” rule that was intended to ban harmful payola arrangements or any special deals by which monopoly ISPs would offer better access to certain websites.

The court threw this rule out last January, saying that it amounted to treating ISPs as “common carriers.” A common carrier is a business that’s required to serve all customers. It’s a legal framework that was traditionally applied to ferries, railroads, telegraphs, electric utilities, and the phone system. The court said that the FCC has the power to bring broadband ISPs under the common carrier rules, but if the FCC wants to do that, it must “reclassify” high speed Internet service as a “telecommunications service” under Title II of the Communications Act.

If it doesn’t reclassify, said the court, the FCC can’t regulate Internet access providers like common carriers and ban “unreasonable discrimination.” What’s more, without reclassifying, the rules must allow for “individualized bargaining” – special deals with favored partners.

This year’s FCC proposal raises the possibility that it will reclassify broadband as a Title II telecommunications service. As we’ve **explained**, that’s a good idea. But the FCC seems reluctant to reclassify. The “default” proposal in the NPRM – the one the FCC will adopt unless enough people speak up – is to replace the anti-

discrimination rule with an even more vague “commercially unreasonable practices” rule.

Many FCC-watchers have interpreted this to mean that non-neutral payola arrangements will be allowed in most circumstances, and that the only deals that will be blocked will be those that explicitly favor an ISP’s own Internet applications over its competitors (for example, if Comcast were to reduce the data rates of Internet video services like Netflix and YouTube in order to favor the Internet video provided by Comcast’s subsidiary NBC).

Ironically enough, even though they were supposedly designed to follow the court's instructions, even these new rules might not survive a court challenge. A court could conclude that the FCC is once again trying to impose common carrier obligations on ISPs without the authority to do so.

Finally, the NPRM lays out a lot of possibilities for what the “commercially unreasonable” rule could actually do. The overall theme of the FCC’s description is that if these rules are enacted, the FCC would become a “referee” looking at ISPs’ conduct and calling out actions that they think will harm the non-neutral Internet. The FCC would also hire an “ombudsman” to help smaller businesses and individuals bring complaints to the agency.

We’re very concerned about the “referee” model, because it could give the FCC too much power to make decisions on the fly, perhaps practicing the very kinds of favoritism that shouldn’t happen on a neutral Internet. Also, it deals with non-neutral behaviors after the fact, instead of providing clear rules at the outset. This could also create a very uncertain environment for ISPs and Internet users, and potentially help turn a future FCC into exactly the sort of arbitrary and intrusive regulator of the Internet that we fear.