

Net Neutrality Legislation: A Framework for Consensus

General Principles

- I. Government has a role to play in protecting the open Internet and ensuring that Internet users are able to access the content they want, when they want.
- II. To address the uncertainty in the United States regarding open Internet rules, there should be a legislative framework for net neutrality that clearly and explicitly protects the interests of Internet users while fostering an environment that encourages investment and innovation.
- III. The Internet should follow the Powell Principles: users should have the freedom to access and convey content, freedom to use applications, freedom to attach personal devices, and freedom to obtain service plan information.
- IV. Above all, the purpose of any regulation should be to promote user choice over their broadband Internet access service consistent with applicable law.
- V. Nothing in the rules should restrict BIAS providers from protecting the needs of public safety, national security interests, law enforcement, and copyright infringement.
- VI. Any legislation should preserve the FCC's authority to address universal service, public safety, accessibility for individuals with disabilities, pole attachments and access to rights of way, and state and local barriers to broadband deployment with respect to BIAS.

Rules, Standards & Key Definitions

There is agreement that the ideas behind many of the definitions used in the Federal Communications Commission's (FCC) 2010 and 2015 Open Internet Orders (OIO) could be used, though the specific words may need to be adjusted to better fit the principles:

- I. **Broadband Internet access service (BIAS):** A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to, and enable the operation of, the communications service, but excluding dial-up Internet access service, enterprise services, virtual private network services, hosting, or data storage services.¹
- II. **Transparency:** A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.
- III. **No blocking:** Parties shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.
- IV. **No throttling:** Parties shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

¹ There are some aspects of this definition, as referenced in the 2015 Open Internet Order upon which participants were unable to reach consensus.

V. **No paid prioritization:** BIAS may not prioritize some traffic over other traffic in the provision of BIAS either:

- i. In exchange for consideration (monetary or otherwise) from a third party; or
- ii. To benefit an affiliated entity.

The agency shall have the authority to issue waivers for good cause shown or when in the public interest.

VI. **Reasonable network management:** A network management practice is a practice that has a network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

VII. **Non-BIAS Services:** Consistent with discussion of such services in the 2015 Open Internet Order non-BIAS data services are not subject to the rules:²

- i. Non-BIAS data services, sometimes referred to as specialized services, include applications such as enterprise services, videoconferencing for telesurgery, IPTV, and online, real-time gaming. These services must be optimized for specific content, applications, or services and “optimization must be specifically necessary to meet service requirements for specific levels of quality that are not assured by the Internet access service.”
- ii. However, specialized services may only be prioritized if there is “sufficient network capacity to provide them in addition to Internet access service” and their availability does not substantially degrade the “availability or general quality of Internet access services” for other users.

Scope

While the FCC’s [2015 Open Internet Order](#) necessarily could only regulate those entities within the scope of the FCC’s jurisdiction over “communications,” legislation would not be subject to this constraint. Some believe the OIO did not fully implement the Powell Principles because of the FCC’s limited jurisdiction, and that legislation should expand the scope of the no-blocking and no-throttling rules, which applied only to “person[s] engaged in the provision of [BIAS].” Some have argued that large edge providers may use their market power (in markets for online content, services or apps) to affect the BIAS market – such as by blocking access to their offerings by the customers of that BIAS provider in order to favor another BIAS provider in that market – or that they may impact the market by limiting the services available to other edge providers in order to favor their own services or products.

Legislation should protect the Internet from harm from all actors, not only BIAS providers. As such, any legislation should make clear that no party, including edge providers, shall be permitted to intentionally block or throttle consumer access to any lawful content based on the BIAS provider used by the consumer, subject to reasonable network management, nor should any party be permitted to block or throttle access to any lawful content that harms competition in the transmission of BIAS. However, these rules should not be used to prevent or limit the enforcement of copyright laws.

² In other context, the European Union’s fact sheet, [“Roaming charges and open Internet,”](#) specialized services are those which are “different from, and are provided in addition to, the open Internet access services and can meet the specific quality requirements of specific content, applications or services... They use the Internet protocol and the same access network but require a significant improvement in quality or the possibility to guarantee some technical requirements to their end-users that cannot be ensured in the best-effort open Internet.”

Institutional Attributes

One agency should be responsible for ensuring the open Internet principles are upheld. To work effectively, legislation should ensure the agency had the following attributes:

- I. Adequate capacity for in-house technical expertise, funding, and appropriate agency structure (e.g.: an office with clear responsibility and oversight).
- II. Support from, and a well-established interface with, an external transparent, multistakeholder expert body,³ capable of assessing complaints and doing its own monitoring and evaluation.
 - i. This body would not have legal power, but rather the ability to write reports or make recommendations on how to proceed.
- III. Anyone could bring a complaint, and an advisory committee (or other relevant outside groups) can make recommendations on which the agency should act upon.

Any open Internet legislation should establish the singular national open Internet standard that preempts state open Internet law. However, this would not affect states' ability to enforce their existing general consumer protection or competition authority, or police powers provided that such actions are not inconsistent with the balance set by the national policy.

Statutory Authority Over the Internet

There is broad agreement that the agency tasked with addressing open Internet legislation should have adequate authority to do so under bright line rules, and the general conduct authority in such a way as to avoid either:

- I. Having to fall back on some other, broader claim of authority; or
- II. The general conduct standard being so open-ended that the agency can use it to go far beyond the common, accepted understanding of what the open Internet means.

Enforcement and Authority

An agency will have no rulemaking authority to amend statutory, bright-line rules included in this document. An agency will enforce these rules by adjudication on a case-by-case basis.

There may be open Internet complaints that are not addressed by the bright-line rules.⁴ To the extent that there is a general conduct standard, the agency should have the authority to address open Internet issues not directly covered by the brightline rules as necessary to ensure that the principles of the open Internet are upheld. The same agency responsible for enforcing the rules should also enforce this general conduct standard for ease of enforcement as well as a unified approach.

The agency should have authority to issue a rule to declare an act or practice unlawful if it determines, based on a showing of clear and convincing evidence, that –

³ For example, this could be an agency advisory committee subject to FACA, which would require an agency employee to oversee the group. Similarly, the existing Broadband Internet Technical Advisory Group (BITAG) or Internet Engineering Task Force (IETF) offers a potential model for how such a group could work. This would serve to isolate a fact-finding body from political pressure.

⁴ Other issues may be addressed by other laws, such as Section 5 of the FTC Act and antitrust laws. The common carrier exception in the FTC Act should not preclude authority to regulate services that are not common carrier, but are provided to an entity that provides telecommunication service. A general conduct standard should apply to all entities not withstanding the FTC's common carrier exception.

- I. marketplace competition is not sufficient to adequately protect consumer welfare; and
- II. such act or practice –
 - i. causes or is likely to cause substantial injury to consumers; and
 - ii. is not –
 - a. avoidable by consumers themselves; and
 - b. outweighed by countervailing benefits to consumers or to competition.

Some members of this group maintain that with bright line rules, adjudication, and a general conduct standard there is sufficient protection for the open Internet without additional rulemaking authority.