

## Making Sense of the FCC's Net Neutrality NPRM

*Presented by John Heitmann, Todd  
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## **Telecommunications Practice Group**

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The Telecommunications Practice Group at Kelley Drye & Warren LLP was formed in 1996 and quickly grew into one of the largest and most respected telecommunications practices in the United States. Today, with more than 20 attorneys, our telecommunications practice has unmatched experience serving the U.S. and global telecommunications industry.

Kelley Drye telecommunications attorneys practice in virtually all related fields, including federal and state regulatory, corporate/transactional, litigation/dispute resolution, intellectual property and finance/restructuring. Our group generates valuable synergies in terms of legal, business and technical expertise, and knowledge of industry players in both the domestic and international markets. Kelley Drye represents clients in virtually all segments of the telecommunications industry, from landline to wireless to Voice over Internet Protocol (VoIP) both domestically and abroad. Our international capabilities are particularly strong in India where we have an active affiliate office, as well as in parts of Southeast Asia, Europe and Latin America.

### **State and Federal Regulatory Proceedings**

Our attorneys actively practice before the Federal Communications Commission, the Federal Trade Commission, Congress, the Department of Justice and all state public utility commissions in proceedings that shape the rules under which our clients and their competitors operate. In these proceedings, we focus on both competitive public policy and business/operational issues.

We routinely assist clients in obtaining requisite federal authorizations and state licensing in all 50 states and U.S. territories. We advise U.S. and foreign companies in obtaining federal common carrier service authorizations, as well as in complying with complex foreign affiliation and international settlements rules. We advise undersea cable system operators on cable landing licenses and satellite system operators on FCC licenses, spectrum allocations and applicable international regulations. We also have represented satellite companies in spectrum allocation and international licensing and other policy areas.

We regularly advise carriers on issues such as FCC and/or foreign licensing and other policy and compliance issues, including access charges, universal service contributions, interconnection, privacy, numbering and tariffing.

Kelley Drye often is called upon to represent companies in connection with regulatory inquiries, investigations, audits and enforcement proceedings. This area has become increasingly active, particularly in the area of universal service funding and privacy matters.

### **Complaint Proceedings and Trial and Appellate Litigation**

We represent our clients in a wide array of interconnection, carrier-to-carrier agreement and regulatory related dispute resolution and complaint cases before arbitration panels, state regulatory commissions and the FCC. We have considerable experience in representing clients in state and federal litigation involving matters, such as access charges and other intercarrier

compensation, as well as franchise rights and obligations and pole attachment fee disputes. We also advise our clients in matters before the FCC, the FTC, state public service commissions and State Attorneys General regarding telecom carrier advertising and marketing practices as well as class action litigation.

We also represent Competitive Local Exchange Carriers, Interexchange Carriers and their trade associations in appeals of state arbitration decisions in federal district courts, and in appeals of FCC and state commission decisions before the U.S. Courts of Appeals.

### **Transactions, Strategic Advice and Financings**

Kelley Drye's Telecom Group negotiates and drafts contracts, including interconnection agreements, commercial agreements and carrier-vendor agreements, for a wide variety of ventures on behalf of CLECs, IXC's, Internet Service Providers, wireless carriers, equipment manufacturers, and shared tenant service providers. We also advise clients on strategic partnering, joint service provisioning, and purchases of services and network capacity. We represent clients in all types of telecoms transactions.

We provide many of our telecommunications clients assistance in the formulation, revision and implementation of business plans to ensure that they keep pace with the prevailing and developing competitive, legal and regulatory climate.

We provide combined corporate, finance, securities, tax, environmental, international trade and regulatory services for clients involved in complex domestic or international transactions, such as undersea fiber optic cables and equipment project finance. We also assist many early stage companies in obtaining financing, including initial public offerings for those ready to access the public markets.

Our attorneys have broad experience in mergers, acquisitions and divestitures, joint ventures, leveraged buy-outs, tender offers and related litigation, corporate defense and reorganizations, including those that are part of bankruptcy proceedings. In mergers and acquisitions, our Group has assumed various roles in transactions, including counsel to buyers, sellers, investment and merchant banking groups or sponsors, management groups, boards of directors, financial institutions, and institutional investors.

### **VoIP**

Many of Kelley Drye's clients have entered the VoIP business. The convergence of voice, data and video has created a new set of opportunities and challenges for our telecommunications and Internet business clients. Kelley Drye's Telecom Group attorneys have the experience and diversity of expertise to cut across virtually every segment of the telecom and technology industries.

Our attorneys can anticipate new developments in laws and regulations, as well as business and technology trends, that will affect our clients in the future, and assist them in preparing for these developments. Our firm's ability to provide value to customers on a strategic level sets us apart from most other telecom practices. These factors combined give Kelley Drye's Telecom Group a

broad perspective that allows us to provide uniquely valuable insights to our clients in the roll-out and provision of VoIP services.

## **Wireless**

Kelley Drye maintains a significant wireless practice with full support for all spectrum allocation, licensing, compatibility and regulatory matters, as well as transactions for a broad array of companies involved in wireless technologies and services, including commercial mobile radio service providers, microwave systems, utilities and other private land mobile radio operators, innovators of new wireless technologies, satellite systems and trade associations.

Kelley Drye attorneys have been involved for over 20 years in a wide variety of wireless issues, including allocation and assignment of cellular, PCS, SMR, LMS aeronautical mobile telemetry, and 900 MHz paging spectrum; the transition from transmitter-by-transmitter licensing to licensing by wider geographic areas; obtaining legislative authority for the FCC to conduct auctions under the Omnibus Reconciliation Act of 1993; obtaining legislation to preempt states from rate and entry regulation of commercial mobile radio service providers under Section 332 of the Telecommunications Act; the elimination of resale obligations for paging carriers; the enforcement of roaming obligations for CMRS carriers; the prevention of mandatory discriminatory telephone number assignments; and efforts to obtain universal service funding for wireless services.

We have also advised utilities and other private radio operators on spectrum allocations and availability, frequency relocation arrangements, and license compliance issues in the Industrial and Business radio pools. We have advised satellite operators and others on such issues as DBS and MVDDS Ku-band spectrum sharing, Little LEO allocations and licensing in the UHF and 1.4 and 1.5 GHz bands, Mobile Satellite Service and digital satellite radio allocations, international spectrum allocations and foreign landing rights issues.

## **Satellites**

Kelley Drye's Telecom Group has in-depth experience in the satellite arena. Our attorneys have advised on regulatory issues regarding licenses to construct and launch mobile satellites in the 2 GHz band; filed comments in the FCC's rulemaking proceedings concerning use of the Ku-band by non-geostationary satellites; assisted clients with license applications for earth stations, including VSAT licenses and satellite license applications; and represented clients in numerous rulemaking proceedings concerning orbital spacing and other technical issues. Our group has also served the commercial needs of clients, drafting and negotiating contracts for sale, lease, or swap of transponder capacity; satellite launch agreements; satellite construction contracts; joint venture agreements for the operation of earth stations; and obtaining zoning permits to construct earth stations that were controversial due to health hazard concerns.

## **Internet Businesses, ISPs, Web Hosting**

Kelley Drye represents web hosting companies, Internet and application service providers (ISPs and ASPs), telecommunications and information service providers, software and hardware manufacturers, as well as traditional and new media providers in a wide array of regulatory and

transactional matters. Our work includes the preparation and negotiation of service agreements, vendor agreements, wireless portal and content agreements, dial-up port agreements, online and terms-of-use agreements, privacy policies and other policies for website operators.

We advise on all regulatory and transactional aspects of business conducted over the Internet or based entirely on the Internet:

- Privacy, data protection
- Encryption, security and Homeland Defense
- Electronic transactions and agreements and digital signatures
- Web hosting, web services and application services
- Internet and broadband services
- Online marketing, advertising and customer relations
- Software licensing
- Intellectual property
- Internet content restrictions
- Antitrust and unfair trade practices
- Venture capital and other financing
- Corporate and securities
- Regulatory reviews and investigations
- Tax

Kelley Drye attorneys also provide advice regarding security and content-based liability with a focus on spotting potential liability in proposed contracts or that may exist within new technology or service configurations. We review federal and state requirements for online and multichannel marketing campaigns and customer support for e-commerce service providers and merchant enterprises.

We assist clients with trademark and copyright matters, compliance with the Digital Millennium Copyright Act, negotiating online store front agreements and advise on digital signatures and certificate authority issues. We represent ASPs in all aspects of online law, including domain names, content liability issues, intellectual property protection, spamming, framing, privacy policies, fair trade and antitrust law, and tax. We advise banks, financial and securities institutions and companies on regulations affecting electronic financial services and online securities transactions.

## **Cable and Media**

We represent several cable and cable over builder companies in connection with an assortment of regulatory matters. Our representation in this area has been particularly focused on telephony and VoIP regulation issues raised as cable companies add voice and broadband services. This includes

licensing matters, interconnection rights, USF responsibilities, pole attachment fee disputes, and compliance issues.

### **Outsourcing and Vendor Contracts**

We advise clients on outsourcing IT infrastructure management, applications development, financial and accounting operations, call center management, web hosting and various other business processes and functions. Supported by our Government Contracts Practice group, we offer extensive outsourcing experience involving federal and state government agencies. We have significant experience in drafting and negotiating outsourcing agreements in the high technology arena having handled many transactions both in the U.S. and Asia.

We advise clients on issues specific to outsourcing arrangements, such as allocating currency exchange risks and inflation risks and dealing with data privacy issues, export controls and other related issues. We help clients explore creative ways to obtain additional benefits from their outsourcing relationships, such as using gain-sharing arrangements or setting up ancillary agreements for commercializing the resulting intellectual property. We provide counsel on the regulatory and transactional aspects in the acquisition/sale of technology companies, as well as compliance with the Sarbanes-Oxley Act.

Kelley Dye attorneys are highly skilled in all phases of drafting and negotiating information technology agreements such as enterprise agreements, managed services agreements, Internet access and service agreements, web site development; web site hosting; web site terms and conditions; linking agreements; content license agreements; and clickwrap and e-commerce agreements. Our attorneys routinely draft and negotiate Service Level Agreements (SLAs); cross-license agreements; sales agreements, vendor agreements, intellectual property ownership provisions, termination liability provisions, limitations of liability and indemnification provisions, and various other provisions that typically arise in such transactions. We draft and negotiate documents for operating systems and other software vendors and licensees; network equipment suppliers and purchasers including web-based software distribution licenses; network equipment purchases; operating system licenses; website design and/or transfer agreements; and end-user terms of use. We regularly assist clients in developing acceptable use policies, privacy policies and legal disclaimers and provide counsel on compliance with HIPAA and EU privacy and safe harbor issues, and help clients to develop policies that allow for trans-border data flow.

### **International Matters**

Kelley Dye maintains one of the largest international telecom practices in the world, with full support for international transactions, acquisition of satellite and undersea cable capacity, settlements negotiations, and strategic partnering. Kelley Dye has played a leading role in several major international telecom transactions, including the acquisitions of the Tyco Global Network and Teleglobe by VSNL (now known as Tata Communications Limited), India's leading ISP and telecommunications provider.

With respect to transactions involving the acquisition of a U.S. business by a foreign entity, Kelley Dye has successfully obtained the required clearance from the Committee on Foreign Investment in

the United States (CFIUS) on many transactions. In addition, Kelley Drye attorneys have negotiated national security agreements on behalf of foreign telcos with the U.S. Government agencies exercising responsibility for national security matters (known as Team Telecom) on many occasions over the past five years.

We routinely advise numerous foreign-affiliated U.S. carriers on U.S. entry, licensing and foreign affiliation rules, and other FCC rules and policies, including FCC reporting and the payment of regulatory fees and universal service contributions. We also assist these carriers with a wide variety of corporate, transaction, immigration and tax matters, including the establishment of offices in the United States.

The corporate attorneys in the Telecom Group have extensive hands-on experience with the entire array of contracts and agreements that are standard throughout the global telecommunications industry, including Purchase and Sale agreements; Merger and Amalgamation agreements; IRU and other capacity agreements; collocation and carrier hotel arrangements; traffic termination agreements; Master Services Agreements and service level agreements; operating agreements between U.S. and foreign correspondent carriers; joint marketing agreements; real estate and office space leases; reseller agreements; OEM agreements; shareholder agreements; management agreements; and many others.

Kelley Drye provides sophisticated advice to incumbent foreign carriers when they confront legal or regulatory issues in their home countries that previously have arisen in the United States. Such issues include, among others, universal service, mandatory network unbundling, interconnection and access methodologies, rates and requirements, intercarrier compensation, VoIP regulation, settlement and termination rates for international traffic, carrier presubscription, broadband policies, and the assignment and allocation of numbering resources. In addition, we routinely provide monitoring and update services to foreign carriers on selected issues of interest in the U.S. telecoms market.

Attorney  
Biography

**John J. Heitmann**

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John Heitmann is a partner in the firm's Washington, D.C. office and a founding member of the Telecommunications practice group. Mr. Heitmann focuses his practice on representing service providers and users in regulatory, appellate, litigation and transactional matters involving a broad range of communications law issues.

Mr. Heitmann represents companies in proceedings before the Federal Communications Commission (FCC) and state public utility commissions (PUCs). He has extensive experience in and regularly advises clients on regulatory policy, interconnection, compliance and enforcement matters.

Mr. Heitmann represents carriers in interconnection negotiations, arbitrations and dispute resolution proceedings before state PUCs and arbitration panels. He has appeared before more than a dozen state PUCs and multiple arbitration panels.

Mr. Heitmann also represents carriers in state, federal and appellate court litigation involving telecommunications-related issues. He has prevailed in cases before the U.S. Court of Appeals for the Fourth and Eleventh Circuits, and has cases pending in several federal courts.

In addition, Mr. Heitmann represents companies in transactional matters involving the sale and procurement of telecommunications, telecommunications capacity and facilities. He advises companies on regulatory and contractual compliance matters associated with telecommunications, information and technology service contracts.

**Representative Experience**

*NuVox v. BellSouth* (11th Cir. 2008)

Briefed, argued and succeeded in preserving a lower court victory overturning a Florida Public Service Commission order with respect to “commingling” under federal telecommunications law.

Successfully represented client in complex case involving interconnection agreement-based litigation before the Fourth and Eleventh Circuit Courts of Appeal, multiple federal district courts and multiple state commissions.

Successfully represented clients in joint interconnection agreement arbitration proceedings before nine state public utility commissions.

Representing clients in FCC regulatory proceedings involving unbundled network elements (UNEs), special access, 271 elements, broadband, forbearance, intercarrier compensation, customer proprietary network information (CPNI), mergers, resale and copper loop retirement.

Representing clients in state commission proceedings involving UNEs, intercarrier compensation, interconnection agreement arbitration, compliance audits and copper loop retirement.

Representing clients in dispute resolution proceedings involving carrier-to-carrier contracts before numerous state commissions and arbitration panels.

**Representative Experience**

Counseling clients on compliance, business strategy, litigation risk and product development with respect to telecom-regulatory and contractual requirements involving a wide array of subject matters, including intercarrier compensation (reciprocal compensation and access charges), UNEs/EELs, collocation, interconnection, building access, provisioning/OSS, privacy/CPNI, universal service/USF, net neutrality, CALEA, pole attachments, truth-in-billing, win-back/retention marketing, slamming, numbering/number portability, 911/E911, regulatory fees, reporting requirements and compliance with law enforcement requests.

Negotiating and drafting telecommunications-related contracts for clients, including interconnection agreements, commercial agreements, pole attachment agreements, infeasible rights of use (IRUs) and backhaul/facility/capacity agreements.

Representing clients on regulatory-related aspects of mergers and acquisitions, financings, offerings, etc.

Representing clients in state commission certification and transactions approval proceedings.

Advising clients with respect to and drafting carrier policy statements on privacy, CPNI, CALEA, FTC Red Flags, acceptable use and network management.

**Memberships and Associations**

Federal Communications Bar Association

**Professional Activities**

TelecomHUB, Board of Directors

**Client Advisories**

“FCC Initiates Proceeding to Develop a National Broadband Plan,” April 9, 2009

“Annual CPNI Certification and Statement Filings Due March 1, 2008/FCC Enforcement Bureau Releases Certification Template,” February 1, 2008

“Court Decision Questions a Carrier’s Recovery of the PICC and Emphasizes Carrier Obligation to Comply with Truth-in-Billing,” November 9, 2007

“Kelley Drye Issues Advisory on Commentary Sought by FCC,” June 22, 2007

**Speaking Engagements**

“Open Internet: Discrimination, Security and Privacy,” CompTel Dallas Show, March 2009

“Telecom Outlook 2009: Local to Global Perspectives,” TelecomHUB – Tysons Corner, February 2009

“Federal Regulatory Update: the Year in Review and the Year Ahead,” CompSouth Annual Meeting – Austin, November 2008

**Speaking Engagements**

“Navigating Uncharted Waters: Telecom Policy in the Obama Administration and the 111<sup>th</sup> Congress,” Kelley Drye Webinar, November 2008

“Growing Momentum for Electronic Communication Privacy Regulation and Legislation: What to Expect from the Next Congress, Federal Agencies, States and Courts,” Kelley Drye Seminar, October 2008

“Key Legal Issues in Telecom Deals – It’s More than Just Price,” CompTel Regional Workshop - Boston, April 2008.

“Wireline Regulatory Issues: Battles Over Switched and Special Access,” CompTel/Kelley Drye Regulatory Workshop, February 2008

“Telecom Deals: Legal and Regulatory Considerations for Creating an Exit Strategy,” CompTel Nashville Show, February 2008

**Bar Admissions**

District of Columbia, 1997

New York, 1995

**Court Admissions**

U.S. Court of Appeals – Fourth, Eleventh and District of Columbia Circuits

U.S. District Court – Northern District of Florida

District of Columbia Court of Appeals

State of New York Court of Appeals, 3rd Department

**Education**

New York University School of Law

J.D., *cum laude*, 1994

*NYU Journal of International Law and Politics*, articles editor

University of Notre Dame

B.A., *cum laude*, 1989

Notre Dame London Program, Spring 1998

Notre Dame Scholar

**Attorney  
Biography**

**Joan M. Griffin**

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**Areas of Concentration**

Joan Griffin is of counsel in the firm's Washington, D.C. office. She focuses her practice on telecommunications.

Ms. Griffin has significant practical experience as in-house regulatory and corporate counsel to major telecommunications corporations. She has in-depth knowledge of day-to-day operational issues as well as longer-term strategic concerns associated with the business of providing telecommunications service as a common carrier in the United States.

Ms. Griffin advises U.S. and foreign telecommunications carriers on U.S. international telecommunications policy and regulatory issues, with particular emphasis on foreign carrier entry and regulation; regulatory issues associated with new services, customer contract proposals and network routings; and compliance with ongoing reporting and other monitoring requirements, including compliance with U.S. Department of Justice consent decrees. She also is experienced in launching major foreign telecommunications companies as U.S. common carriers.

Ms. Griffin has substantial experience advising on regulatory issues associated with proposed mergers and acquisitions, joint ventures and corporate restructurings, and obtaining regulatory authorizations necessary to consummate transactions. Her practice in this area focuses on regulatory issues associated with foreign investment, including Committee on Foreign Investment in the United States (CFIUS) filings.

Ms. Griffin has formed and led numerous cross-functional project teams to the completion of critical corporate objectives, such as obtaining satellite and other wireless network authorizations, obtaining local zoning permits for controversial wireless transmission equipment, and negotiating and closing major customer contracts.

In addition, Ms. Griffin has experience in regulatory and business issues associated with satellite communications and Voice over Internet Protocol (VoIP).

Prior to joining the firm, Ms. Griffin held the following positions: chief U.S. regulatory counsel, British Telecommunications plc and assistant general counsel, Concert Communications Corporation, 1992-1997; regulatory counsel, GTE Corporation, 1991-1992; corporate counsel, Contel Corporation, 1989-1991; assistant general counsel, American Satellite Company (Contel ASC), 1981-1989; and attorney/advisor, National Highway Traffic Safety Administration, 1980-1981.

**Client Advisories**

“CFIUS – The Year Ahead,” January 12, 2009

“Foreign Investment and National Security Act of 2007,” August 6, 2007

“National Security Foreign Investment Reform and Strengthened Transparency Act of 2007,” March 14, 2007

“FCC and California Takes Actions Re IP-Based Services,” February 12, 2004

**Attorney  
Biography**

**Joan M. Griffin**

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**Bar Admissions**

District of Columbia, 1980  
Virginia, 2002

**Court Admissions**

U.S. Court of Appeals – District of Columbia Circuit

**Education**

Georgetown University Law Center  
J.D., 1980

Johns Hopkins University  
B.A., 1977

# Making Sense of the FCC's Net Neutrality NPRM

Joan Griffin, John Heitmann and Todd Daubert  
December 2, 2009

## Agenda

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- Introduction
- Overview of NPRM
- The new “nondiscrimination” rule, “reasonable network management” and “special” or “managed services”
- The new “transparency” rule
- Potential impact of new rules on applications and services like VoIP
- Application of new rules to wireless and other platforms

## GN Docket No. 09-191

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- NPRM released October 22, 2009
- Comments due January 14, 2010
- Reply comments due March 5, 2010

## Goal: Preserve the “Open Internet”

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- Proposed rules address a user’s ability to access the Internet
- Proposed rules attempt to balance
  - Open and transparent Internet
  - Ability of broadband providers to engage in reasonable network management
  - Safety and security of Internet

## Context for Proposal

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- Internet Policy Statement and Wireline Broadband Order (2005)
- Comcast Network Management Practices Order (2008)
- Proposed legislation

## Legal Authority

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- Ancillary jurisdiction
  - Regulation of facilities-based broadband Internet access service providers will advance goals of Sections 230(b) and 706(a)
- Impact of court action on the Comcast Network Management Practices Order

## Definitions

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- “Internet”
  - Not private intranets
- “Broadband”
  - Not dial-up
- “Broadband Internet access service”
  - Not “managed” or “specialized” services
- “Broadband Internet access service provider”
  - Not coffee shops or waiting rooms
  - Not Internet access that is not intentionally offered for sale

## Proposed rules

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- Codify existing Internet principles
  - Content: subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet.
  - Applications and services: subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user’s choice.
  - Devices: subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network.
  - Competition: subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user’s entitlement to competition among network providers, application providers, service providers, and content providers.

## Proposed Rules (cont.)

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- New Principles
  - Discrimination: subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.
  - Transparency: subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

## Key Points re Proposed Rules

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- Rules would apply regardless of technology employed
- Rules would apply to broadband Internet access service providers, but should they apply to content, application, or other service providers?
- Rules are subject to “reasonable network management”
- Rules subject to needs of law enforcement, public safety, and homeland/national security

# Implementation

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- General concepts now – specifics determined through adjudication
  - Should there be procedural rules governing complaints?
  - Petitions for declaratory ruling

# Nondiscrimination

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- New nondiscrimination principle
  - Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.
  - Also subject to
    - the needs of law enforcement
    - public safety
    - homeland and national security

## Nondiscrimination (cont'd)

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- Key concepts
  - No discrimination vs. no unjust or unreasonable discrimination
  - “Socially beneficial discrimination” vs. “socially harmful discrimination”
  - Applicable to which portion of the network?
  - Carve-outs / exceptions

## Nondiscrimination (cont'd)

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- “Reasonable network management”
  - Manage congestion
  - Address harmful and unwanted traffic
  - Prevent unlawful content
  - Prevent unlawful transfers of content
  - Others?

## Nondiscrimination (cont'd)

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- Special and managed services
  - Not broadband Internet access service
  - How to define?
    - IP-based
    - Voice
    - “Subscription video”
    - Certain “business services” provided to “enterprise customers”
    - Specialized applications (telemedicine, smart grid, e-learning)
  - Goals: innovation, investment, research and development, competition and consumer choice, safeguarding the open Internet

## Nondiscrimination (cont'd)

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- Other issues
  - How much do I have to do?
  - How much can I do?
  - Security
  - Prioritization
  - Parallel system
  - Network economics: resources and capacity
  - Standards

# Transparency

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- New transparency principle
  - Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.
    - Also subject to the needs of law enforcement, public safety, and homeland and national security

# Transparency (cont'd)

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- Issues
  - Level of disclosure to
    - Users
    - Content, application and service providers
    - Government
  - Best practices for disclosures
    - Policies
    - Events
  - Enforcement

## Applications, Services and “Openness”

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- The Internet Consists Of Interoperable Packet Switched Networks
  - The “openness” described in the NPRM seems to be based on the use of interoperable applications on the Internet.
- The “openness” of the Internet can be limited by use of Internet-based applications that are not interoperable (e.g., VoIP calls)
  - The NPRM focuses primarily on facilities-based providers of broadband Internet access services rather than application providers.

## Applications, Services and Bandwidth Allocation

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- “Best Efforts” v. “Quality of Service” (“QoS”)
  - Best Efforts: All packets are equal
  - Quality of Service: Some packets are more important than others (managing packet loss, latency and jitter)
- Strategies for providing QoS in a best-effort environment:
  - Over-provisioning capacity
  - Prioritized tunneled Virtual Private Networks (“VPNs”)
- Apart from over-provisioning capacity, strategies for providing QoS would likely be defined as “managed” or “specialized” services
- Key Question: FCC asks whether allocation of available bandwidth for managed or specialized services versus broadband Internet access service is a critical factor
- The FCC’s proposals could lead to a form of virtual structural separation
  - Each facilities-based provider of broadband Internet access service could be required to operate a portion of its network on a “best efforts” basis

## Applications, Services and Prioritization

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- Prioritization for public safety and law enforcement would be permitted
- Permissibility of prioritization for other purposes at issue
  - Service Type
    - Broadband Internet Access v. Managed or Specialized
    - Everything Else
  - Provider Type
    - Facilities-Based v. Non-Facilities-Based
  - Network Type
    - Fixed v. Mobile
    - Shared v. Dedicated Resources

## Mobile Wireless and Other Platforms

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- What are the implications of the principles for mobile wireless platforms?
  - All technology platforms would be subject to the principles, but how the principles are applied may vary based upon differences between various platforms.
- How should the “any device” principle apply to mobile wireless platforms?
  - How to prevent harm to network?
  - Should SIM cards or universal modems that can be inserted into any device be required?
  - Should tethering be required, and if so, should that alone satisfy the any device principle?
  - What should be the timeframe for implementation?
- How should the “nondiscrimination” principle apply to mobile wireless platforms?
  - Should application vary based on device, application or network (converged platforms)?
  - Should the FCC bless certain practices (e.g., identifying circumstances when blocking video and VoIP are acceptable)?
  - What should be the timeframe for implementation?

## Questions?

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- Please submit your questions via the “Q & A” box on the bottom of your computer screen
- If you have any additional questions that were not addressed during the webinar, please contact us at [dcevents@kelleydrye.com](mailto:dcevents@kelleydrye.com)

## Contact Info

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# NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.  
See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

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**FOR IMMEDIATE RELEASE:**  
December 2, 2009

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**FEDERAL COMMUNICATIONS COMMISSION'S  
OFFICE OF ENGINEERING & TECHNOLOGY ESTABLISHES  
TECHNICAL ADVISORY PROCESS FOR OPEN INTERNET PROCEEDING AND  
ANNOUNCES WORKSHOP**

Washington, D.C. – The Federal Communications Commission (FCC) today announced that the Chief of the FCC's Office of Engineering & Technology (OET) has established a Technical Advisory Process to ensure that decisions in the Commission's proceeding on the open Internet reflect a thorough understanding of current technology and future technology trends. The process will provide an inclusive, open, and transparent forum for obtaining the best technical data and insights from a broad range of stakeholders, including through a public workshop on December 8, 2009 in the Commission meeting room.

The Technical Advisory Process was called for in the FCC's October 22, 2009 Notice of Proposed Rulemaking, "In the Matter of Preserving the Open Internet, Broadband Industry Practices" (FCC 09-93), GN Docket No. 09-191, WN Docket 07-52, which proposed draft rules to preserve the open Internet. OET has now established a technical working group comprised of engineers and technologists from across the FCC's bureaus and offices to receive information from stakeholders on the technical issues in the open Internet proceeding. The working group will hold *ex parte* meetings with engineers and other interested parties to understand the range of views in the technical community on the issues presented by the open Internet rulemaking, identify any areas of common ground between stakeholders, and clarify the scope of key differences. In addition, FCC engineers from the working group will be integrated into other teams within the Commission considering the various issues raised in the open Internet proceeding.

The Technical Advisory Process will include a workshop on December 8, 2009 starting at 10 a.m. in the Commission meeting room, which will be open to the public and live streamed via the Internet. The workshop will consist of tutorial presentations by experts on network management practices for various Internet access service delivery platforms, followed by questions from the Commission's technical working group and members of the public.

An agenda for the workshop will be made available soon. The workshop will be open to the public; however, admittance will be limited to the seating available. Audio/video coverage of the workshop will be broadcast live with open captioning over the Internet from the website for this proceeding at <http://www.openinternet.gov>.

Reasonable accommodations for persons with disabilities are available upon request. Please include a description of the accommodation you will need. Individuals making such requests must include their contact information should FCC staff need to contact them for more information. Requests should be made as early as possible. Please send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau: 202-418-0530 (voice), 202-418-0432 (TTY).

For additional information about the workshop, please contact Walter Johnson at (202) 418-0807 or by email at [walter.johnston@fcc.gov](mailto:walter.johnston@fcc.gov), or Jon Peha at (202) 418-2406 or by email at [jon.peha@fcc.gov](mailto:jon.peha@fcc.gov).

Parties wishing to meet with the technical working group should contact Sandra Mata at (202) 418-2470 or by e-mail at [sandra.mata@fcc.gov](mailto:sandra.mata@fcc.gov) .

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