

## OMB-approved Net Neutrality Rules Become Effective Soon: Detailed Broadband Service Notices Required

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With the recent approval by the Office of Management and Budget, the stage is set for the Federal Communications Commission's (FCC) net neutrality rules to be published soon in the Federal Register and to become effective 60 days after publication. A key component of the new rules requires that all broadband Internet service providers (i.e., cable operators, LECs, satellite and wireless) "publicly disclose accurate information regarding the network management practices, performance and commercial terms" of the service to help consumers to make informed choices and for "content, application, service and device providers to develop, market, and maintain Internet offerings." All broadband providers should begin developing these comprehensive disclosures immediately to ensure compliance as early as November when the rules could take effect.

While the net neutrality rules codify three basic principles widely followed by broadband providers—transparency, no blocking of lawful content/applications and no unreasonable discrimination—the new disclosure rules will require significant attention, including detailed analysis of broadband performance metrics. Our summaries of the FCC's Dec. 2010 net neutrality decision are available [here](#) and [here](#).

### Specific disclosure requirements

#### *Performance characteristics*

The FCC requires disclosure of a general description of the broadband service and technology. For each level or tier of broadband service offered to customers, the provider must measure and disclose the mean upload and download speeds in megabits per second during the "busy hour" between 7:00 pm and 11:00 pm on weeknights. In addition, broadband providers must disclose the mean round-trip latency during this time period. The suitability of each level of service to particular real-time applications must be described. Wireless provider disclosures are more flexible subject to expected additional FCC guidance.

The FCC will allow broadband providers to measure these metrics using the same methodology used by the FCC in compiling its recent report "[Measuring Broadband America](#)." Alternatively, the FCC will allow disclosure of actual performance based on internal testing or consumer speed test data. The FCC encourages broadband providers to disclose the source of their performance measurements and underlying methodology. Performance measurements should be periodically reviewed and updated.

If a broadband provider offers “specialized services” (which the FCC says include facilities-based VoIP), the disclosure must explain how such specialized services may affect the capacity available for, and the performance of, the broadband Internet access services that are provided.

### Commercial terms:

- Pricing—Providers must disclose monthly prices, usage-based fees, early termination fees or other fees for additional network services;
- Privacy Policies— Providers must disclose whether Internet traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes. For example, if Internet traffic is inspected as part of network management practices this must be disclosed;
- Redress Options—The disclosure must include procedures for resolving customer and edge user complaints and for answering questions.
- *Network management practices*
- Congestion Management—Providers must describe their congestion management practices, including the purpose of the practices, the types of traffic subject to the practices, and their effect on customers’ experience with the service. The disclosure should explain the triggers for congestion management and the frequency of congestion normally experienced. If there are usage limits for a service, they should be identified and the consequences of exceeding them explained. While the FCC stated that Comcast’s congestion management disclosures will likely satisfy the rules, there is no safe harbor and the sufficiency of disclosures will be considered on a case-by-case basis;
- Application-Specific Behavior—Providers must disclose whether and why they block or subject particular protocols or protocol ports to higher rates. Similarly, disclosure is required of practices modifying protocol fields contrary to standards or otherwise favoring or disfavoring specific applications or classes of applications. The FCC states that agnostic network management is reasonable (i.e., does not discriminate based on protocols or uses);
- Device Attachment—Providers must disclose any restrictions on the types of devices and any approval procedures for devices to connect to the network;
- Security—Providers must disclose practices used to ensure customer and network security to the extent that such practices are likely to affect a consumer’s ability to access the content, applications, services, and devices of choice. No disclosure is required of security practices which could reasonably be used to circumvent network security.

## Disclosure on website and point of sale

Disclosures can be made on the broadband provider's website and hard copy disclosures are not necessary. Notice must also be provided to prospective customers at the "point of sale" for service (e.g., telephone, online or "brick and mortar" sales point), which may be accomplished with reference to a specific web address where the disclosures are clearly posted and easily found. It is not sufficient to provide an address for the general purpose home page of the broadband provider unless the link to the disclosures is clearly and readily accessible there.

If the point of sale for the broadband service is a brick and mortar location and paper copy disclosures are not provided, then equipment for prospective customers to view the disclosures on the web, such as a computer, tablet or smartphone should be available. In addition, all disclosures must be accessible to disabled customers.

With the effective date of the new rules now imminent, it is important for broadband providers to establish the appropriate disclosures and to otherwise ensure that their services comply with network neutrality requirements. We are assisting a number of broadband service providers concerning their disclosures and related network neutrality obligations. Please feel free to contact us if you desire assistance.

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