

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL USA 20/2017

24 August 2017

Dear Minister Counsellor,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18, and as Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights pursuant to Article 41 of the American Convention on Human Rights.

In this connection, we would like to bring to the attention of your Government information received concerning the potential repeal of administrative regulations that currently protect and promote an open Internet.

According to the information received:

On 12 March 2015, the Federal Communications Commission (“Commission”) issued an Order adopting rules and standards that seek to “protect consumers from practices that can threaten the open Internet.” These rules and standards include:

The No Blocking Rule, which prohibits providers of broadband internet access service (“broadband providers”) from blocking “lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”

The No Throttling Rule, which prohibits broadband providers from “impair[ing] or degra[ding] lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”

The No Paid Prioritization Rule, which prohibits broadband providers from engaging in network traffic management that “directly or indirectly favor[s] some traffic over other traffic ... either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”

The Internet Conduct Standard, which prohibits broadband providers from “unreasonably interfer[ing] with or unreasonably disadvantag[ing] end users’ ability to select access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users,” subject to reasonable network management.

The Commission’s 2015 Order also adopted “targeted, incremental enhancements” to the **Transparency Rule** established in 2010. The 2010 Transparency Rule required broadband providers to “publicly disclose accurate information management practices, performance, and commercial terms of [their] 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.” The 2015 Order’s enhancements required, among other things, additional disclosures concerning prices, other fees, data caps and allowances, privacy policies, network traffic inspection and information dissemination, network performance characteristics, and user-based and application-based network practices. The 2015 enhancements also require “a mechanism for directly notifying end users if their individual use of a network will trigger a network practice, based on their

demand prior to a period of congestion, that is likely to have a significant impact on the end user's use of the service.”

On 23 May 2017, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) that, among other things, proposes to eliminate the Internet Conduct Standard, and seeks comment on whether to “keep, modify, or eliminate” the No Blocking Rule, the No Throttling Rule, the No Paid Prioritization Rule, and the 2010 Transparency Rule and its 2015 enhancements.

Before explaining our concerns with the proposed rule changes, we wish to stress the U.S. Government's obligation to respect and protect the right to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights (“Covenant”), which the United States ratified on 8 June 1992. The White House ratification statement reaffirmed that the right to freedom of expression is “inherent in a democracy.”¹ Ratification of the Covenant, the statement concluded, “underscor[es] [the United States'] commitment to these principles at home and abroad.”²

In particular, Article 19(2) protects the right to seek, receive, and impart information of all kinds, regardless of frontiers and through any media. This right to freedom of expression is also enshrined under Article 13(1) of the American Convention on Human Rights (“American Convention”), which grants individuals the “right to freedom of thought and expression,” and Article IV of the American Declaration of the Rights and Duties of Man (“American Declaration”), which grants every individual the “right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” It bears mention that Article XIII of the American Declaration establishes the right to take part in the “life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries”.

Under Article 19(3) of the Covenant, restrictions on the right to freedom of expression must be “provided by law,” and necessary for “respect of the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals.” Article 13(1) of the American Convention permits similar restrictions. Permissible restrictions on the Internet are the same as those offline.³

Under Article 2(1) of the Covenant, the United States has an obligation “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognized under the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Under Article 2(2) of the Covenant, the United States “undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect” to the right to freedom of expression. In addition to legislation and judicial decisions, the adoption of “administrative” and “educative” measures may also be required to fulfill the United States' positive obligation to respect and ensure freedom of expression.⁴

Read together with Article 19(2) of the Covenant, Article 2 imposes on the United States an obligation to protect individuals within its territory and jurisdiction from any undue or discriminatory interference with their freedom to seek, receive, and impart information of all kinds.

The UN Special Rapporteur has explained that net neutrality – the “principle that all Internet data should be treated equally without undue interference” – is critical to States' parties' fulfillment of their Article 19(2) and Article 2 obligations. The right to seek, receive, and impart information without discrimination presumes

¹ White House Statement on the Ratification of the International Covenant on Civil and Political Rights, 5 June 1992.

² *Id.*

³ Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/17/27, para. 69.

⁴ U.N. Human Rights Comm., General Comment No. 31 para. 7, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.1326 (May 26, 2004).

the freedom to access and “choose among information sources.”⁵ In the digital age, this freedom is “meaningful only when Internet content and applications of all kinds are transmitted without undue discrimination or interference by non-State actors, including [broadband] providers.”⁶

The IACHR Special Rapporteur has also recognized that the principle of net neutrality is “a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of article 13 of the American Convention.”⁷ This principle ensures that “free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference.”⁸ The Special Rapporteur has explained that net neutrality facilitates and maintains innovation, interoperability, and open standards, giving “all people the ability to innovate on the Internet, creating content, applications, and services in a decentralized manner, without the need for authorizations, bureaucracies or permits.”⁹

In their 2011 Joint Declaration on freedom of expression, the Special Rapporteurs – together with the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information – affirmed that international human rights law prohibits “discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.”¹⁰ Additionally, the Declaration emphasized that broadband and edge providers “should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.”¹¹ In their 2014 Declaration, they reaffirmed the need for States to “actively promote universal access to the Internet regardless of political, social, economic or cultural differences, including by respecting the principles of net neutrality.”¹²

The full texts of the human rights instruments and standards outlined above are available online at www.ohchr.org and can also be provided upon request.

Based on these standards and the Commission’s comments and questions regarding the proposed rule changes, we would like to raise the following concerns:

Concerns Regarding the Possible Repeal or Weakening of Bright Line Rules Against Blocking, Throttling, and Paid Prioritization

We are concerned that the repeal or weakening of these rules will permit broadband providers to block or throttle Internet traffic associated with competing services, or charge more for access to certain types of Internet data at regular speeds, such as video streams. Particularly concerning is the prospect of paid-prioritization schemes, where broadband providers speed up prioritized content and force all other non-prioritized content into slow lanes. These schemes effectively give preferential treatment to services that enjoy commercial arrangements or other ties to the broadband provider, or grant faster access to the highest bidder. We are concerned that the ensuing “hierarchy of data” stifles innovation among edge providers that are unaffiliated with the broadband provider, whom will be forced to bear higher costs to obtain access on the broadband provider’s network.¹³ We are also particularly concerned about the chilling effect on digital innovation among startups or smaller edge providers, which will be inherently less equipped to pay for priority compared to their more established competitors. The threat to innovation may entrench the dominant position of broadband providers and affiliated services and weaken market competition, potentially creating an Internet

5 Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, U.N. Doc. A/HRC/35/22, para. 23.

6 *Id.*

7 Inter-Am Comm’n H.R., Office of the Spec. Rapporteur for Freedom of Expression, Standards for a Free, Open, and Inclusive Internet, OEA/Ser.L/V/II CIDH/RELE/INF.17/17, para. 11.

8 *Id.*

9 *Id.*, at para. 26.

10 Joint Declaration on Freedom of Expression and the Internet (2011), para. 5(a).

11 *Id.*, para. 5(b).

12 Joint Declaration on Universality and the Right to Freedom of Expression (2014), para 1(h)(iii).

13 A/HRC/35/22, *supra* note 5, at para. 24.

where end users are subject to “higher costs or lower quality of service” when they seek to access Internet content and applications of their choice but that have been relegated to slow lanes.¹⁴ The prospect that end users may also be manipulated or otherwise “compelled to engage with content that has been prioritized without their knowledge or input” also raises serious questions about their freedom to choose among information sources without undue interference or discrimination.¹⁵

Concerns Regarding the Proposed Repeal of the Internet Conduct Standard

The Internet Conduct Standard currently provides the Commission with the discretion to monitor and if necessary regulate interferences with net neutrality that unduly impair the right to seek, receive, and impart information online. We are concerned that the elimination of such discretion will remove regulatory oversight in a rapidly changing digital environment where broadband and edge providers continue to experiment with and roll out new methods of managing and pricing access to Internet traffic and content. In particular, zero rating, the practice of not charging for the use of Internet data associated with a particular application of service even while other services or applications are subject to metered costs, is a development that the Commission should continue to monitor closely under the Internet Conduct Standard. The impact of zero rating on freedom of expression is the subject of ongoing debate: On one hand, zero rating arrangements may enhance Internet access and spur digital innovation in areas that otherwise lack robust connectivity infrastructure; on the other, they may also trap less privileged end users in “permanently walled online gardens.”¹⁶ In any case, zero rating programs should not replace public policies aimed at bridging the digital divide. Such partial-access solutions are at odds with ‘internet universality’: the notion that internet regulation and development should be human rights-based, open, accessible, and reflect multi-stakeholder participation.¹⁷

While it is arguable that the Internet Conduct Standard should be tightened or clarified, we are concerned that its wholesale repeal will remove a critical safeguard of net neutrality and, by extension, the freedom of expression of end users.

Concerns Regarding the Possible Repeal or Weakening of the Transparency Rule and its 2015 Enhancements

Finally, we are concerned that the weakening of current disclosure requirements will undermine public access to information regarding broadband providers’ network management practices and commercial terms of service. The relevant disclosures enable end users and other relevant stakeholders – such as other domestic regulatory bodies, civil society, academics, and international organizations – to understand how the exercise of freedom of expression is restricted or regulated on broadband providers’ networks, and to seek clarification, raise public awareness, or challenge such restrictions where appropriate. Such disclosures are therefore fundamental to the public’s right to receive information protected under Article 19(2).

It is our responsibility, under our mandates to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain what amendments, if any, the Commission will make to the No Blocking Rule, No Throttling Rule, No Paid Prioritization Rule, The Internet Conduct Standard, and the Transparency Rule and its 2015 Enhancements, and how these amendments are consistent with Your Excellency’s Government’s obligations under Articles 19(2) and 2 of the Covenant.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ A/HRC/35/22, *supra* note 5, at para. 24; see also OEA/Ser.L/V/II CIDH/RELE/INF.17/17, *supra* note 7, at paras. 29 – 31.

¹⁷ OEA/Ser.L/V/II CIDH/RELE/INF.17/17, *supra* note 7, at para. 13.

3. Please explain what safeguards and procedures, if any, the Commission seeks to establish to protect net neutrality in a manner consistent with Your Excellency's Government's obligations under Articles 19(2) and 2 of the Covenant.

We would appreciate receiving a response within 60 days.

In view of the above comments, we urge the U.S. Government to take all steps necessary to conduct a comprehensive review of the Commission's NPRM and ensure its compliance with international human rights standards.

Finally, we would like to inform your Government that this joint communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: (<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council.

Please accept, Minister Counsellor, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Edison Lanza

Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights