

I. THE RECORD MAKES CLEAR THAT COMPETITION, NOT GOVERNMENT REGULATION, BEST ADVANCES THE INTERESTS OF CONSUMERS.

A. Broadband Competition Is Vibrant, Growing, and Dynamic.

The evidence submitted in the initial comments confirms that the broadband marketplace is extremely competitive and growing more so. Most consumers already enjoy broadband choice, and a diverse array of providers and technologies are vying to provide additional options.

Numerous and varied commenters, who disagree on many other things, are united in the view that competition in the broadband marketplace is vibrant, growing, and dynamic. They provide abundant evidence to support the Commission's own findings that "[v]igorous competition between different platform providers already exists in many areas and is spreading to additional areas" and that "many consumers have a competitive choice for broadband Internet access services today."² Service providers, in particular, are keenly aware of the investments they are making, the innovations they are delivering, and the competition they face:

- **CTIA:** "Broadband services, especially wireless broadband, are exploding across the country."³
- **TIA:** "[C]onsumers today generally have broadband options available from a host of providers and platforms, including wireline, cable, wireless and satellite. And the trend is more choice, not less, as new wireless technologies emerge, spectrum is made available, and broadband over power line technologies mature."⁴
- **BellSouth:** "There is no serious dispute that the broadband market is competitive. . . . Competitive pressures require entities to act in a manner acceptable to the customer or risk losing the customer to a competitor."⁵

² *Id.* ¶¶ 47, 62.

³ CTIA, The Wireless Ass'n ("CTIA") Comments at 2 (representing wireless providers).

⁴ Telecomm. Industry Ass'n ("TIA") Comments at 2 (representing companies that manufacture or supply communications products and services).

⁵ BellSouth Comments at 4-5.

- **Cingular Wireless:** “[M]arket forces are working to make broadband Internet access more widely available, just as Congress hoped and intended. . . . Prices to the consumer are rapidly decreasing, and the profit margin on generic broadband access is narrow.”⁶
- **Verizon:** “Robust and increasing intermodal competition gives most customers multiple options for obtaining broadband Internet access.”⁷
- **AT&T:** “[T]he market for broadband Internet access services is competitive and . . . consumers are deriving substantial benefits from the broadband services available today.”⁸
- **OPASTCO:** “Competition . . . has undoubtedly intensified . . . and all indications are that competition will increase even further, as satellite services strengthen their marketing efforts in rural areas, wireless ‘3G’ services continue to expand, and broadband over power line (BPL) technology becomes more economical. This current and growing level of competition provides rural ILECs serving as broadband Internet access providers with a strong incentive to treat their customers well.”⁹
- **Time Warner:** “[B]roadband competition is burgeoning. There is no basis to conclude that market forces will be inadequate to ensure that broadband service providers meet consumers’ needs.”¹⁰
- **USTA:** “Competition to provide broadband services is here and growing every year[.]”¹¹

Clearly, the broadband marketplace is evolving at a frantic pace. New services and applications are introduced almost constantly while existing providers are compelled to innovate and improve the quality of their services and applications. New business models are constantly emerging while old business models must rapidly adapt to the new broadband marketplace. Most importantly, consumers are enjoying the benefits of a free, unregulated, competitive marketplace that is delivering the services they want and expect from a wide range of providers.

⁶ Cingular Comments at 6.

⁷ Verizon Comments at 5.

⁸ AT&T Comments at 4.

⁹ Org. for the Promotion and Advancement of Small Telecomm. Cos. (“OPASTCO”) Comments at 3 (representing “small telecommunications carriers serving rural areas of the United States”).

¹⁰ Time Warner Comments at 1.

¹¹ U.S. Telecom Ass’n (“USTA”) Comments at 3.

B. Competition Is Better Than Government Regulation in Delivering Benefits to Consumers.

Competition in the broadband marketplace ensures that providers go out of their way to meet the vigorous demands of consumers. No provider can disregard consumers' expectations without jeopardizing its ability to attract and retain customers. Accordingly, the marketplace is delivering the services consumers need and expect without creating harms from which consumers require "protection." These successes are being achieved without government interference in the marketplace. And it is clear that adoption of new "consumer protection" regulations would be not only unnecessary but also counterproductive; it would undermine long-standing congressional and Commission policies that are successfully promoting the widespread availability and deployment of broadband services.

The amazing success of the Internet and broadband services has been a direct result of policies favoring competition over regulation and, more specifically, Congress's and the Commission's commitments to not regulate Internet services. As Congress found in 1996, when the Internet was vastly less advanced and accessible than it is today: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."¹² In fact, Congress left no doubt that it believed the success of the Internet was directly related to the government's "hands-off" policy when it codified that policy into the Communications Act:

It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation.¹³

¹² 47 U.S.C. § 230(a)(4).

¹³ *Id.* § 230(b)(2).

Since the Internet was first introduced to consumers, Congress and the Commission (including four different Chairmen -- two Republicans and two Democrats) have held firm to these policies and commitments.¹⁴ As detailed in Comcast's and others' comments, the result has been massive investment and extraordinary innovation that has transformed Internet access from the finger-tapping, lethargic dial-up connections a decade ago to the high-speed broadband platform that continues to spur innovative content and applications that increase with every passing minute.¹⁵ Given the successes that continue to flow from the government's "hands-off" policies, the Commission should not adopt rules based on hypothetical harms but should take "a wait-and-see approach and consider rules only if and when it finds specific problems."¹⁶

II. THERE IS NO PROOF OF CONSUMER ABUSES THAT REQUIRE REGULATORY "SOLUTIONS."

The competitive nature of the broadband marketplace ensures that consumers need no new government "protections" from the conjectural concerns raised in the *Notice*. The record does *not* reflect credible evidence that consumers are being mistreated by providers of broadband services. Yet despite the absence of evidence of real-world harms, certain commenters (including ones who have been prophesizing doom since broadband was in its infancy) propose a wide range of regulations to address all manner of marketplace behaviors.

¹⁴ See Comcast Comments at 7-8 ("Bipartisan support for these deregulatory principles has resulted in ubiquitous broadband Internet access, robust (and growing) competition, and numerous benefits, many of which were inconceivable just a few years ago, flowing to American consumers.").

¹⁵ See Comcast Comments at 5-7; Verizon Comments at 5-7; OPASTCO Comments at 2-4; BellSouth Comments at 1, 6-8; Time Warner Comments at 3-4.

¹⁶ BellSouth Comments at 4.

Although the *Notice* sought comment on a number of areas of possible regulation (none of which are needed), certain commenters propose an even wider range of regulatory solutions to non-existent problems. For example, among other things, commenters urge the Commission to:

- Regulate the rates providers can charge for broadband services.¹⁷
- Regulate the terms of contracts between broadband access service providers and third-party content and application providers.¹⁸
- Regulate how networks are operated in order to ensure that the Internet remains “open.”¹⁹
- Regulate the content of marketing literature.²⁰
- Prohibit providers from charging early termination fees or any other switching costs when a customer breaks her or his contract with a provider.²¹
- Require broadband providers to contact third-party providers of certain subscriber services prior to deploying broadband service.²²
- Require broadband providers to notify customers having alarm systems of any potential limits on the effectiveness of their alarm systems when using broadband services.²³

¹⁷ See State of Alaska (“Alaska”) Comments at 3-4; State of Hawaii (“Hawaii”) Comments at 4-5. Alaska and Hawaii urge the Commission to adopt economic regulations similar to the rate integration rules of Section 254(g), which by its terms applies solely to “interstate interexchange telecommunications services,” in order to ensure that consumers in one state are not charged rates different than the rates charged by the same service provider in another state. Neither presents evidence of any problematic pricing practices, and neither discusses the ways in which price controls can discourage investment and thereby limit service availability.

¹⁸ See N.J. Office of the Ratepayer Advocate (“N.J. Ratepayer Advocate”) Comments at 23-26. The N.J. Ratepayer Advocate asserts that, absent regulation of the business and contractual relationships between broadband access providers and third-party content and application providers, a “two-tiered Internet” will emerge whereby broadband access providers’ “own services are offered to consumers at high quality and high speed, while signals from competing companies are intentionally degraded or slowed.” *Id.* at 23. Of course, had cable operators been prevented from offering a higher “tier” of Internet access, American consumers would still be accessing the Internet at speeds measured in the thousands, not millions, of bits per second.

¹⁹ See Nat’l Ass’n of State Util. Consumer Advocates (NASUCA”) Comments at 8-17; Pac-West Comments at 5-6.

²⁰ See AARP Comments at 4. This, of course, is something the Commission does not do even in the areas of heaviest regulation. AARP also urges the Commission to require broadband providers to “begin all sales transactions by providing consumers with all material terms and conditions of the offer.” *Id.*

²¹ See *id.* at 5.

²² See Alarm Indus. Communications Comm. (“AAIC”) Comments at 3-4.

- Mandate CPNI directory interoperability standards and require VoIP providers to use third-party verification procedures to switch customers to their services.²⁴
- Limit the information that broadband service providers may collect from their customers.²⁵

Adoption of any of these proposals would impose unnecessary regulation and impede continued investment and deployment of broadband services. It is telling that none of the parties making any of these proposals itself makes any investments to increase broadband availability or capabilities.

Equally important, these commenters provide no evidence of harms in the marketplace that would necessitate or justify the new and intrusive regulations they advocate. In fact, the evidence in the record shows the exact opposite, i.e., that unfettered competition is successfully generating massive consumer benefits. Absent evidence that the marketplace somehow fails to protect the interests of consumers, there is no conceivable basis for imposing new restrictions on unregulated information services.

III. THE COMMISSION SHOULD PROCEED CAUTIOUSLY IN ATTEMPTING TO EXERCISE ITS LIMITED AUTHORITY UNDER TITLE I TO REGULATE BROADBAND SERVICES.

A number of commenters make generalized assertions that the Commission may use its Title I ancillary authority to adopt new consumer protection regulations for broadband services.²⁶

²³ See *id.* at 3.

²⁴ See VeriSign Comments at 7-9; 3PV Comments at 9. Calls by certain parties for the Commission to address VoIP regulation in this proceeding are misplaced. See generally Ohio PUC Comments *passim*, NARUC Comments at 12-13, 15-16, app. C-G; AAIC Comments at 3. The regulation of VoIP services is currently being addressed in other dockets, including, most notably, in the IP-Enabled Services, WC Docket No. 04-36. Accordingly, the Commission should reject calls to adopt “consumer protection” regulations for VoIP services in this proceeding.

²⁵ See Ohio PUC Comments at 7-8.

²⁶ See, e.g., Alaska Comments at 2-3; NASUCA Comments at 9; VeriSign Comments at 7.

These commenters, however, fail to cite any precedent or provide any analysis that effectively supports their assertions.²⁷ As such, the Commission should discount such comments and adhere to its sound precedent of exercising restraint in relying on its Title I authority.²⁸

It is not surprising that commenters have been unable to back their calls for new Commission rules with supportive case law; as Comcast pointed out in its comments, the courts have repeatedly affirmed that the FCC's Title I authority is by no means unrestricted.²⁹ Rather, as the D.C. Circuit recently explained in *American Library Association v. FCC*,

[F]or the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act Second, the subject of

²⁷ Alaska, like the *Notice*, characterizes the *Brand X* decision as confirming the Commission's authority under Title I to impose regulatory obligations on broadband service providers. This is a misreading of the Supreme Court's decision. In *Brand X*, the sole issue before the Court was "the proper regulatory classification under the Communications Act of broadband cable Internet service," specifically, "whether [the Commission's] conclusion [that cable Internet service is an information service] is a lawful construction of the Communications Act under Chevron . . . and the Administrative Procedure Act." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2695 (2005). The Court's holding deals with nothing more; nowhere in *Brand X* does the Court purport to define the permissible scope of the Commission's Title I authority.

The *Notice* and Alaska cite to language in which the Court noted that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction." *Id.* at 2708. But the very next sentence explained that the Commission had "invited comment on whether it *can* and should" rely on its Title I authority to impose new regulatory duties. *Id.* (emphasis added). Thus, the Court recognized that the Commission was just beginning to explore its authority under Title I to impose regulations on unregulated broadband services. This is an acknowledgement of the *possibility* that Title I might be used to impose new regulatory burdens, not an affirmation in advance of any future Commission assertion of jurisdiction in this area.

²⁸ See *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling & NPRM, 17 FCC Rcd. 4798 ¶ 76 (2002) ("The Commission asserted ancillary jurisdiction over information services (then called 'enhanced services') in the Computer Inquiries. Since then, it has only exercised that authority in limited instances." (footnotes omitted)), *aff'd Brand X Internet Servs.*, 125 S. Ct. 2688. And, even in the Computer Inquiries, the assertion of ancillary jurisdiction was inchoate; the main thrust of those decisions was to create a *deregulated* environment for information services, and it was that deregulation that began the development of the enormous variety of information services enjoyed today.

²⁹ Comcast Comments at 9-11 (citing *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2003) (finding that "the FCC's authority under § 1 is broad, but not without limits")). Even in instances where the FCC has explicit statutory authority, the FCC has discovered that its actions pursuant to that authority are routinely subjected to intense and highly critical judicial scrutiny. See *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

the regulation must be “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”³⁰

None of the commenters have provided the analysis necessary to explain how the regulations proposed in the *Notice* -- or any of the others advocated in their comments -- are reasonably ancillary to the performance of the Commission’s statutorily-mandated responsibilities.³¹ Commenters’ assumption of such authority cannot displace the analysis that the courts have required to justify exercise of such authority.³² This is especially so in a marketplace in which the Commission and Congress have explicitly adopted policies of *deregulation* and those policies have produced ever greater benefits to consumers than anyone could possibly have expected.

³⁰ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 167 (1968) (quoting 47 U.S.C. § 152(a))).

³¹ The *Notice* summarily asserted that the Commission was given “ample” Title I authority to adopt a wide variety of “consumer protection” regulations, without providing further analysis. *Notice* ¶ 146.

³² *See* Section II *supra*. If and to the extent that the Commission determines it does have the authority to adopt certain regulations and that they are needed despite the factors discussed above, it should clearly delineate the role of the States in regulating broadband services. Although States have legitimate interests in protecting consumers, those interests are best furthered by the enforcement of laws of general applicability, not by the enactment of new regulations. Broadband service providers should not be required to comply with fifty different enforcement regimes and fifty different interpretations of the Commission’s rules. If the Commission concludes that States should be permitted to participate in enforcing its regulations, the Commission should establish clear parameters delineating the States’ responsibilities, and its rules should apply uniformly to all broadband access service providers.

IV. CONCLUSION

In light of the foregoing, there is no need for the Commission to adopt “consumer protection” regulations where it is clear that the free, unregulated, competitive marketplace is working well for the benefit of U.S. consumers and the American economy.

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