

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

COMMENTS OF THE OPEN INTERNET COALITION

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SUMMARY

The current broadband situation in this country is unacceptable. In the last few years, the United States has slipped well behind the world leaders in the deployment and performance of our broadband networks. In today's market for broadband Internet access, consumers have at best only two choices for accessing high speed Internet services. Consequently, this proceeding is an important element in the growing national conversation about the need to engage in a significant course correction.

The Open Internet Coalition believes that a necessary first step is to develop a comprehensive federal broadband policy that ensures that we increase affordable access to the Internet and promote a healthy, open Internet ecosystem. The open and neutral architecture of the Internet has enabled consumers to access any web site and use any service of their choosing and has allowed innovation to occur at the edges of the network, free from centralized control of gatekeepers. Maintaining an open Internet is critical to ensure that applications developers have incentives to invest in new products and services and will better enable entrepreneurs to bring the benefits of "innovation without permission" to consumers.

The Commission should act now to address inherent, structural problems in the broadband market to prevent them from developing into intractable regulatory problems in the future. Cable and DSL network operators still

comprise an effective duopoly, together accounting for more than 96 percent of high-speed lines. Newer broadband technologies, such as wireless, suffer from limitations that keep them from providing effective competition to the cable/DSL duopoly. By setting the appropriate “rules of the road” now, the Commission can best address the structural problems in the broadband market and the incentive of network operators to discriminate against third-party applications and content, and lay the groundwork for a market in which consumers see the benefit of competition at both the application-level and network-level.

The Open Internet Coalition urges the Commission to collect and evaluate information regarding network operators’ network management practices. By making such information public, the Commission, along with other affected parties, would be able to ensure that network operators are living up to the principles of the Commission’s *Broadband Policy Statement* and are otherwise not engaging in discriminatory conduct.

In order to protect consumers and provide application developers with sufficient incentives to innovate, the Commission should also make its *Broadband Policy Statement* enforceable and should, at minimum, add an enforceable non-discrimination principle to the existing four principles.

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proceeding is an important element in the growing national conversation about the need to engage in a significant course correction. The Open Internet Coalition believes that a necessary first step is to develop a comprehensive federal broadband policy. Such a policy must ensure that we increase affordable access to the Internet and promote a healthy, open Internet ecosystem.

To foster such an ecosystem, the Commission can no longer focus only on the investment incentives of incumbent carriers. Instead, the Commission must restore basic openness safeguards, which initially allowed the Internet application industry to flourish, but now have been allowed to shrink. In this way, the Commission will set the stage for consumers to demand faster broadband connections, as the Internet community supplies the next generation of applications and content.

The Open Internet Coalition encourages this conversation and urges the Commission to take a stronger leadership role in promoting comprehensive and thoughtful policies that protect an open Internet. We look forward to working with the Commission toward this goal. The Open Internet Coalition is a non-profit organization that represents consumers, grassroots organizations, trade associations, and businesses that share a common goal – keeping the Internet fast, open, and accessible to all Americans.²

² Coalition supporters include the following organizations: eBay, Google, IAC, Sling Media, TiVo, Free Press, Educause, Earthlink, American Library Association, American Association of Law Libraries, Association of Research Libraries, the Computer and Communications Industry Association, Data Foundry, Electronic Retailing Association, Internet 2, NetCoalition, Public Knowledge, Skype, TechNet, US PIRG, and the Future of

I. AN OPEN INTERNET IS CRITICAL TO THE CONTINUED SUCCESS OF THE INTERNET IN DRIVING ECONOMIC GROWTH, EMPOWERING CONSUMERS, AND ADVANCING FIRST AMENDMENT VALUES.

From its inception, the Internet has enabled consumers to access any web site and use any service of their choosing. The open and neutral architecture has allowed innovation to occur at the edges of the network, free from centralized control of gatekeepers. An open and neutral Internet has made it a near perfect engine for the global information economy, with sellers able to reach buyers worldwide and buyers able to decide which products and services they want without being limited by the choices of intermediaries.

The openness of the Internet has also been a boon to rural users, both for rural consumers who now have access to the same range of products and services as their urban counterparts and for rural sellers who are able to conduct business with customers around the country and world. In addition to its commercial benefits, the Internet no less has taken its place as a unique worldwide forum for free expression.³ The 21st century information superhighway marries the power of free speech and free markets – producing the greatest engine of democratic deliberation and open commerce since the

Music Coalition. A more complete list and more information can be found at www.openinternetcoalition.org.

³ NOI at 12 (Separate Statement of Comm. Jonathan S. Adelstein) (“The Internet is increasingly becoming the dominant medium binding us. The neutral communications medium is essential to our society. It is the basis of a fair competitive market economy. It is the basis of democracy, by which community should decide what to do. It is the basis of science, by which human kind should decide what is true.”) (quoting Sir Tim Berners Lee, the Inventor of the World Wide Web).

moveable-type press.

Maintaining an open Internet is critical to ensure that applications developers have incentives to invest in new products and services. Basic nondiscrimination guarantees will rebalance the FCC's current, one-sided regulatory approach so that both sides of the broadband investment equation — application providers and network owners — are put to work for the interests of Internet users. Without such a balance, broadband network operators acting as gatekeepers for applications and services will not be able to replicate the full range of innovation that will occur if applications developers can count on an open Internet. Policymakers should ensure that the next Google, Facebook, or YouTube can seek funding based on the merit of its technology and business model, not whether it is able to strike deals with network operators. In this way, an open and neutral Internet will better enable entrepreneurs to bring the benefits of “innovation without permission” to consumers.⁴

Consumer demand for broadband comes from the applications that consumers access via their broadband service, rather than from the service itself.⁵

⁴ See Letter from Wireless Founders Coalition for Innovation to Chairman Kevin Martin, WT Docket Nos. 06-150, 96-86, PS Docket No. 06-229, June 7, 2007, at 3 (“What makes the Internet so friendly from an entrepreneur’s perspective is its Openness. One does not have to ask Comcast or Time Warner Cable or even Verizon’s DSL division for permission to launch a new product, service, or device. To borrow the Nike slogan, you can ‘just do it.’”).

⁵ See Commissioner Robert M. McDowell, Address to the Broadband Policy Summit III, Arlington, VA, at 13-14 (June 7, 2007) (“[C]onsumers don’t buy fat pipes; they buy applications and content that require fat pipes. As consumer demand for more bandwidth-intensive applications and content increases, so does the incentive for network owners to provide more bandwidth”).

Thus, the Commission's public interest analysis must consider not only the financial incentives of operators to build broadband networks, but also whether the broadband environment to which they control access is conducive to the investments and innovations of a vast number of applications developers. By striking the appropriate balance and ensuring an open Internet, the Commission will enable a virtuous cycle of innovation and investment in which new software-based applications and services enhance the value of broadband to consumers, and, therefore, to network operators.

II. THE COMMISSION SHOULD ACT TO ADDRESS INHERENT PROBLEMS IN THE BROADBAND MARKET THAT ARE PRESENT NOW AND PREVENT THEM FROM DEVELOPING INTO INTRACTABLE REGULATORY PROBLEMS LATER.

Despite the importance of protecting the innovation discussed above, the Commission's NOI unfortunately takes a "wait and see" approach toward ensuring that broadband networks remain open and neutral. However, the major problem in today's broadband marketplace is structural.⁶ No one reasonably can dispute that cable and DSL network operators still comprise an

⁶ By focusing on the structural problems inherent in the broadband marketplace, we do not intend to diminish the reality and the threat of anticompetitive behavior on the part of network operators. Before the network neutrality issue came into the spotlight and the network operators commenced their "best behavior," then SBC Communications Chairman Edward Whitacre told Business Week that he expected companies like Google, Yahoo! and Vonage to pay to use his companies "pipes." Other network operator executives also discussed their plans to charge certain companies more in order to have their sites load faster than those of their competitors. For a discussion of various instances of discrimination by network providers, see John Windhausen, Public Knowledge, *Good Fences Make Bad Broadband: A Public Knowledge White Paper*, at 16-22, Feb. 6, 2006, available at <http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf>.

effective duopoly in the market for residential broadband service, together accounting for more than 96 percent of residential high-speed lines according to the most recent FCC statistics.⁷ Thus, cable modem and DSL operators have “both the technical capacity and the commercial incentive to control” the Internet to the detriment of consumers.⁸ This structural condition alone should preclude a “wait and see” approach toward the issues raised in this proceeding.⁹

A. Newer Broadband Technologies Do Not Provide Effective Competition to the Cable/DSL Duopoly

Though other types of broadband services are being deployed slowly and gaining in popularity, these services do not yet meaningfully compete with the existing cable/DSL duopoly. Even the most successful of the non-cable/DSL broadband options – wireless – still lags well behind cable and DSL, and does not provide significant competition to the existing duopoly. According to the latest FCC statistics, wireless high-speed lines comprise fewer than 2.5 percent of all high-speed lines.¹⁰ Moreover, though wireless broadband services continue to grow, they suffer from limitations that will keep them from offering a viable

⁷ FCC Wireline Competition Bureau, Industry Analysis and Technology Division, High-Speed Services for Internet Access: Status as of June 30, 2006, at Table 3, Chart 6 (Jan. 2007) (“Broadband Statistics”).

⁸ NOI at 9 (Separate Statement of Comm. Michael J. Copps).

⁹ NOI at 12 (Separate Statement of Comm. Jonathan S. Adelstein) (“Some suggest that there is a lack of hard evidence of a problem, but we miss important signals if we do not take these leading broadband providers at their word. Providers may be on their best behavior for now with the spotlight turned on net neutrality. But decisions being made today about the architecture of the Internet could affect its character for years to come, so it is important that we make our expectations clear.”).

¹⁰ Broadband Statistics at Table 3.

alternative to cable and DSL in the near term.¹¹

Today and for the foreseeable future, wireless broadband services will be used as a complement to and not a substitute for residential DSL and cable modem connections. As such, they offer consumers no alternative to the discriminatory practices of network operators, even if these connections provided full-featured access to the Internet, which they do not.¹²

Thus, while wireless broadband services are growing in popularity among users who desire mobile Internet access to applications such as e-mail and stripped-down Web access, wireless services will not offer a viable market substitute for residential users who wish to access more bandwidth-intensive applications such as those featuring video-based content.

Another reason to doubt the effectiveness of competition from wireless broadband services is that two of the largest wireless broadband providers — Verizon Wireless and AT&T — are affiliated with two of the largest LEC DSL

¹¹ For example, in response to a recent petition filed by Skype asking the Commission to confirm a consumer's right to use Internet communications software and attach devices to wireless networks, wireless network operators noted their limitations relative to wireline networks. *See* Comments of T-Mobile USA, Inc., RM-11361, at 19 (Apr. 30, 2007) (“[W]ireless spectrum is a shared and scarce resource, unlike the dedicated capacity deployed in a wireline network.”); Comments of AT&T Inc., RM-11361, at 42-43 (Apr. 30, 2007) (noting that congestion and resource constraints are “particularly acute in the wireless industry”); Comments of CTIA — The Wireless Association, RM-11361, at 38 (Apr. 30, 2007); Comments of Sprint Nextel Corp., RM-11361, at 24 (Apr. 30, 2007).

¹² In responding to the recent Skype Petition, *see* RM-11361, wireless operators reserved the right — and, in some cases, described their efforts — to block applications and content on network management grounds. In contrast, wireline broadband operators at least publicly maintain that they will not engage in blocking. *See* Adam Bender, *Antitrust Laws Inadequate, Net Neutrality Supporters Say*, Comm. Daily, June 11, 2007, at 7. This again demonstrates that wireless broadband networks are not a sufficient alternative to cable and DSL.

providers. Thus, these providers are less likely to deploy wireless broadband services that compete with and potentially cannibalize their affiliated DSL services. Furthermore, these same operators have every incentive to prohibit the use of those wireless connections for services, such as VoIP, that compete with AT&T and Verizon's legacy phone business. This reality points up the need for policymakers not simply to count the number of available technology platforms, but rather those platforms that are operated independently of each other, and especially not controlled by incumbent broadband providers following a "walled garden" business model.

In addition, Verizon and AT&T's control over special access facilities in their respective local service regions gives them the incentive and ability to harm the competitiveness of broadband offerings from other major wireless providers such as T-Mobile and Sprint Nextel.¹³ In other words, even as the four major wireless operators roll out wireless broadband offerings, they do not offer meaningful competition to the cable/DSL duopoly.

B. The Limited Competition that is Feasible in the Broadband Marketplace May Not Be Sufficient to Protect Against Harmful Discrimination by Broadband Network Operators

A further aspect of the need to protect the openness of the Internet is that facilities competition in the market for broadband Internet access is inherently

¹³ See Comments of Sprint Nextel Corp., WT Docket No. 07-71, at i (May 7, 2007) ("[AT&T and Verizon] are effectively able to set a price floor for the provision of wireless services – thereby protecting their own landline broadband services from more intense competition from wireless alternatives."); Reply Comments of BT Americas, Inc., RM-11361, at 2-5 (May 15, 2007).

limited quantitatively, and may never be a sufficient check on the power of network operators to limit consumer choice. While the Coalition certainly welcomes full-blown intermodal broadband competition and believes that such competition serves the interests of all end users, facilities-based intermodal competition is not to be a reliable safeguard against destructive discrimination.¹⁴

As pointed out by Dr. Barbara van Schewick of Stanford Law School, network operators have common incentives to discriminate against third parties that are not necessarily addressed by increased facilities-based competition. In an article assessing the need for network neutrality rules to protect application-level innovation, Professor van Schewick concluded that “a network provider may have the ability and incentive to exclude rival content, applications or portals from its network” and that such incentives exist *even if* the network provider faces competition from at least one other network provider.¹⁵

Described this way, Professor van Schewick describes a problem that the FCC is

¹⁴ While it is certainly true that increased facilities-based competition increases the likelihood that one service provider will act as a “maverick,” policymakers should not count on the emergence of a maverick but should provide as many regulatory incentives as feasible to encourage them.

¹⁵ Barbara van Schewick, *Toward and Economic Framework for Network Neutrality Regulation*, 5 J. on Telecomm. & High Tech. L. 329, 370 (2007). Prof. van Schewick explains that a network operator that faces competition in the market for Internet services may nevertheless be able to discriminate against unaffiliated content and applications because, among other reasons, its ability to exclude competitors is conferred by network technology rather than market power, and its ability to discriminate against (rather than exclude) competitors coupled with subscriber switching costs will reduce the likelihood of its losing subscribers due to its discriminatory behavior. *Id.* at 368-78. A copy of Prof. van Schewick’s paper is attached as Attachment A.

familiar with: the abuse of a terminating access monopoly.¹⁶ Just as the Commission has acted to protect consumers from such abuse in other contexts, so should the Commission act here to protect openness on the Internet. If the Commission adopts the safeguards urged by the Open Internet Coalition, it will have gone a long way towards avoiding the intractable terminating access battles that have marred rational pricing models on the phone network.

Professor van Schewick is not alone in explaining that competition alone may not address the concern that network operators will discriminate against unaffiliated applications and content. Economist Joseph Farrell of the University of California at Berkeley has also noted that limited competition may not necessarily remove the incentives of network operators to discriminate against unaffiliated applications and content.¹⁷ In answering a similar question, another scholar has noted that competition among service providers may not be enough to keep the service providers from blocking certain content.¹⁸ To summarize, the number of facilities-based broadband network operators is inherently limited and, as such, share a common incentive to discriminate against independent and unaffiliated applications and content. In such circumstances, competition –

¹⁶ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146, 16 FCC Rcd 9923, 9934-35, ¶ 28 (2001) (discussing the difficulties posed by the terminating access monopoly, and noting that “providers of terminating access may be particularly insulated from the effects of competition”).

¹⁷ Joseph Farrell, *Open Access Arguments: Why Confidence is Misplaced, in Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* 195 (Thomas M. Lenard & Randolph J. May eds., 2006).

¹⁸ Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 33-36 (2006).

whether intermodal or intramodal – is not reliable protection against harmful discrimination that limits consumer choice.¹⁹

C. The Commission Should Act Now and Set “Rules of the Road” That Protect an Open and Neutral Internet

A holistic approach will best address the structural problems in the broadband market and the incentive of network operators to discriminate against third-party applications and content. Failing to act now to anticipate and forestall such problems may well preclude a later, necessarily disruptive roll-back of the network operators’ business models. By setting the appropriate “rules of the road” now, the Commission can lay the groundwork for a market in which consumers see the benefit of competition at both the application-level and network-level.²⁰

Moreover, in today’s global economy, it is important for the United States to take the lead in ensuring the protection of application-level companies –

¹⁹ This is certainly not the only communications regulatory area in which competition alone does not solve the incentive of carriers to discriminate against competitors. For example, in the intercarrier compensation arena, competition alone does not necessarily lead to lower access charges because each carrier has the incentive to abuse its terminating access monopoly with respect to its own subscribers. See Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 310-13 (2005). In the wireless arena, the Commission explicitly recognized that competition alone would not push wireless carriers into implementing a local number portability solution. *Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, WT Docket No. 01-184, FCC 02-215, para. 21 (rel. July 26, 2002).

²⁰ AT&T and Hands Off The Internet representatives have been quoted as saying that there is no need for a law aimed at “a theoretical situation.” Adam Bender, *Antitrust Laws Inadequate, Net Neutrality Supporters Say*, Comm. Daily, June 11, 2007, at 7. But the problem of network operator abuse of their gatekeeper positions is theoretical in the same way that fires in high-rise buildings are “theoretical,” which does not preclude the installation of sprinkler systems and other precautions.

many of which are U.S.-based companies who could face discrimination at the hands of network operators in other countries. It would be difficult for U.S.-based software applications companies to complain about discrimination overseas if our own policies condone such discrimination domestically. The Commission should take the lead now to ensure an open and neutral Internet worldwide.

III. THE COMMISSION SHOULD MONITOR BROADBAND INDUSTRY PRACTICES BY REQUIRING NETWORK OPERATORS TO REPORT RELEVANT INFORMATION.

The questions posed in paragraph 8 of the NOI are extremely important and go to the heart of potentially destructive broadband industry practices. While the Internet initially was agnostic at the network level as to the applications that ran on the network, today's technology allows network operators to distinguish between applications that run on the network and to control their operation.²¹ Thus, questions regarding network operators' packet management practices, including particularly whether providers prioritize traffic to favor their own content and applications, are critical in order to ensure that the openness of the Internet is not harmed.

Unfortunately, the parties currently in the best position to respond to the questions regarding the network operators' packet management practices are the network operators themselves. Application-level companies and other non-network operators do not have access to the information needed to study the

²¹ Van Schewick, *supra* note 15, at 338.

network management practices at issue in paragraph 8 of the NOI.

Moreover, even if they were able to deduce certain information regarding network operations, the reality is that companies that develop software-based applications do not have the expertise to monitor broadband operators' network management practices. Furthermore, in most cases, including especially that of a typical start-up, an application-level company's financial and human resources are likely to be wholly inadequate for it to monitor network operator practices.

Instead, the Commission should collect and evaluate information regarding network operators' network management practices.²² As a starting point, the Commission should require network operators to respond to the questions posed in paragraph 8 of the NOI and should require network operators to keep that information current by submitting semiannual reports offering a description of their network management practices, as well as reporting on any complaints received and how such complaints were resolved, if at all.

By making such information public, the Commission, along with other affected parties, would be able to ensure that network operators are living up to the principles of the Commission's *Broadband Policy Statement* and are otherwise not engaging in discriminatory conduct.²³ It is not enough that network

²² In addition to oversight by the Commission, the Coalition welcomes possible oversight by the FTC exercising its traditional consumer protection role.

²³ This information would also enable the FTC to ensure that broadband providers are living up to their promises to subscribers and that consumers are otherwise being protected.

operators themselves claim they are “watching and being vigilant that no one is doing anything stupid that would make the Internet not function.”²⁴ The public, through the expert agencies charged with guarding the public interest, should be watching and vigilant as well, armed with the proper analytic tools and empirical record.

IV. THE COMMISSION’S *BROADBAND POLICY STATEMENT* IS NOT ENOUGH BY ITSELF TO SAFEGUARD AN OPEN INTERNET.

In paragraph 10 of the NOI, the Commission asks if the *Broadband Policy Statement* should be amended. As an initial matter, the Coalition strongly believes that the *Policy Statement* should be made enforceable. Mere principles, whose enforceability is unclear, are insufficient to protect application-level innovation and competition and do not provide adequate incentives to application-level entities to invest in new products and services.

In addition to making the existing *Policy Statement* enforceable, the Coalition believes that, at minimum, an enforceable non-discrimination principle or rule should be added to the existing four principles.²⁵ While such a non-discrimination principle conceivably could take a number of forms, the language supplied by AT&T as a voluntary regulatory condition of its the recently-

²⁴ Adam Bender, *Antitrust Laws Inadequate, Net Neutrality Supporters Say*, Comm. Daily, June 11, 2007, at 7 (quoting Mike McCurry, Co-Chairman, Hands Off The Internet).

²⁵ NOI at 10 (Separate Statement of Comm. Michael J. Copps) (“It is time for us to go beyond the original four principles and commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.”).

approved merger with BellSouth provides a good start.²⁶ Under such a condition, a network operator would be prohibited from providing or selling to Internet content, application, or service providers, including those affiliated with the network operator, any service that privileges, degrades or prioritizes any packet based on its source, ownership or destination.²⁷

As discussed above,²⁸ such enforceable non-discrimination principles are needed to protect the open and neutral nature of the Internet, to provide applications developers with adequate incentives to innovate, and to ensure that consumers benefit from innovation and competition at both the application and network levels.

* * *

This proceeding presents the Commission with a critical opportunity to protect the innovation that has characterized the open and neutral Internet so far, and the Open Internet Coalition welcomes the Commission's attention to this crucial area. We look forward to working with policymakers to ensure that consumers benefit from both application-level and network-level innovation.

²⁶ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, FCC 06-189, at 154 (rel. Mar. 26, 2007).

²⁷ This formulation also mirrors the language in the Snowe-Dorgan amendment that was considered by the Senate Commerce Committee in June 2006. S.2917, 109th Cong. (2006)

²⁸ See Section I, *infra*.

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