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## **B. Summary**

NASUCA urges the Commission to reject proposals for a regulatory “hands-off” approach to net neutrality. In many instances, to support their position, the entities that oppose net neutrality rely on an erroneous assumption of effective competition for the broadband platform. In other instances, the comments do not adequately address the economic incentive and the potential for providers of the basic Internet infrastructure -- when they are also broadband service providers (“BSPs”) -- to engage in anticompetitive behavior by limiting access to their networks, or by degrading the service that they offer to Internet application providers whose products compete with their products. In addition, NASUCA urges the Commission to reject recommendations for *ex post* remedies. Waiting for the harmful effect of industry consolidation and concentration before instituting remedies would harm consumers in the meantime, and would also irrevocably alter the historically open nature of the nation’s Internet infrastructure.

NASUCA reiterates its recommendations made in the initial comments that the Commission should: (1) adopt a fifth broadband principle, to protect net neutrality; and (2) establish net neutrality requirements through a rulemaking proceeding to strengthen the Commission’s ability to enforce the principle, including the adoption of fines and threat of license withdrawals. As stated in its initial comments, NASUCA (in an earlier Commission proceeding) previously addressed the dire consequences of network discrimination, stating, “Such discrimination against network content or services is not sound public policy and will inhibit the numerous innovations and consumer benefits

associated with broadband networks.”<sup>3</sup> NASUCA reiterates this earlier concern and disagrees strongly with those who claim that net neutrality stifles innovation.

NASUCA also reiterates its recommendations that the Commission: (1) require Internet access providers to provide consumers with clear information about any limits that the providers may have on downloading, as well as about pricing practices and time limits on introductory rates, and (2) monitor the practices of broadband providers, analyze consumer complaints carefully, and collaborate with state regulators to assess the status of the market.

## **II. REASONS FOR NET NEUTRALITY**

### **A. Purpose of Nondiscrimination**

As argued in NASUCA’s comments, the Commission should institute a principle of nondiscrimination that does one thing only -- prevent BSPs from leveraging their market power in the provision of *access* to gain control over *content*. As Google Inc. (“Google”) observes:

From the beginning, the struggle to preserve an environment of network neutrality has been miscast or misunderstood by many. Much of what has passed for dialogue between the interested parties unfortunately has been fueled by excessive rhetoric, confusion, and occasional misrepresentation. The verbal battles have obscured several areas of common interest, as well as the precise outlines of disagreement. If nothing else, this proceeding should help clear away some of the fog.<sup>4</sup>

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<sup>3</sup> *In the Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271, NASUCA Comments (January 17, 2006) at 9.

<sup>4</sup> Google, at 2.

Preventing discrimination is not “rate regulation,” as the American Consumer Institute (“ACI”) argues.<sup>5</sup> Nor is preventing discrimination a way for the government to gain control over the Internet, as the Internet Freedom Coalition (“IFC”) contends.<sup>6</sup> On the contrary, preventing discrimination is simply an effort to ensure that consumers have access to the *whole* Internet -- now, and as it evolves in the future.

**B. Defining “Net Neutrality” or “Nondiscrimination”**

Many commenters oppose “net neutrality,” apparently without understanding what it means. Several commenters base arguments against net neutrality on the fact that the term is still being defined. ACI claims to have considered different definitions of nondiscrimination, and to have found them all insufficient to meet three requirements -- simplicity, clarity, and enforceability.<sup>7</sup> Yet ACI provides no examples of what exactly was considered, or why such definitions failed. In fact, ACI seems to get caught up in the derivation of the word “discrimination,” failing to see that the *idea* as it applies to the broadband market is far more important than the philological underpinnings of the word itself. IFC and the National Cable & Telecommunications Association (“NCTA”) also claim that proponents of net neutrality cannot decide what it means, or how to define it.<sup>8</sup>

The Commission’s NoI explicitly asked for recommendations on how nondiscrimination should be defined.<sup>9</sup> Arguing that the policy must be rejected *because*

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<sup>5</sup> ACI, at 6.

<sup>6</sup> IFC, at 9 and 12.

<sup>7</sup> ACI, at 8.

<sup>8</sup> IFC, at 8; NCTA, at 17-19.

<sup>9</sup> NOI, at ¶ 10.

it is not completely defined misses the point of the NoI entirely. Furthermore, net neutrality *can* be defined. NASUCA proposed as follows: Net neutrality is the consistent treatment of all packet traffic of any given type, regardless of the packet's origin, destination, ownership, or content.<sup>10</sup>

Some commenters opposed to net neutrality base their positions on the misconception that nondiscrimination would prevent network engineers from using packet management techniques to ease the flow of information over networks. For example, CTIA - The Wireless Association® (“CTIA”) argues that nondiscrimination means that a “bit is a bit,” and that no prioritization at all would be allowed under net neutrality.<sup>11</sup> Other commenters also believe that net neutrality means “no packet management.”<sup>12</sup> AT&T Inc. (“AT&T”) contends that proponents of net neutrality engage in “‘dumb pipes’ rhetoric,” which in AT&T’s view is “unhinged from reality.”<sup>13</sup> In contrast to these views, NASUCA does not oppose “intelligent” packet management, provided that those who control the pipes do not have the opportunity to favor their own traffic.

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<sup>10</sup> NASUCA, at 12-13.

<sup>11</sup> CTIA, at 22.

<sup>12</sup> See Institute for Policy Innovation (“IPI”), at 3; IP Switching Manufacturers, at 2-4; Time Warner, Inc. (“Time Warner”), at 3 and 10.

<sup>13</sup> AT&T, at 37. AT&T discusses and opposes three types of net neutrality, one of which is the “dumb pipes” approach (which would prohibit any type of traffic prioritization). The other two types of net neutrality described by AT&T are: (1) proposals to allow broadband providers to prioritize packets only for all applications in broadly defined categories, and to bar them from reaching commercial arrangements with application or content providers for the sale of such services, and (3) proposals to permit commercial agreements for such enhancements, but subject to a common carrier style nondiscrimination obligation. *Id.*, at 51-55.

NASUCA's recommended definition of nondiscrimination took into account the fact that some packet management is necessary, indeed vital, to the proper functioning of the Internet. A policy of nondiscrimination would simply prevent broadband access providers from using packet management techniques for purely strategic business reasons -- e.g., blocking or degrading traffic to or from competitors. This policy would by no means prevent the management of packet traffic for legitimate engineering reasons.

NASUCA agrees with the majority of commenters who provide an extensive list of legitimate packet management policies.<sup>14</sup> There is no question that network engineers *should* prioritize packets relating to latency-sensitive, security, and emergency applications above those related to mere web-surfing. And, in fact, NASUCA agrees with the United States Telecom Association's ("USTelecom's") observation that "[n]o network -- be it a highway, railway, electrical network, or traditional telephone network - - has ever been built without regard to prioritization of traffic, peak loads, and capacity management."<sup>15</sup> NASUCA does not argue that net neutrality, or nondiscrimination, should diminish the ability of network engineers to provide the most efficient and reliable Internet possible. NASUCA simply recommends that a principle of nondiscrimination should prevent broadband access providers from degrading or blocking packet traffic based on origin, destination, or ownership of the packet.

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<sup>14</sup> See American Library Association (ALA"), at 3; American Cable Association, at 3-4; BT Americas, Inc. ("BTA"), at 12-13; Center for Democracy and Technology ("CDT"), at 10; Embarq Corporation ("Embarq"), at 6; Google, at 22-23; and Time Warner, at 11-12.

<sup>15</sup> USTelecom, at 12.

### C. Applying a Principle of Nondiscrimination

Several commenters seek to show that discrimination in other areas of the economy, even other areas of the Internet world, can be beneficial. These commenters would have the Commission believe that their examples prove that policies preventing discrimination are *bad*. However, each of these examples fall short of the mark.

The U.S. Chamber of Commerce (“USCC”) points out that many web sites pay companies such as Akamai to expedite delivery of their material.<sup>16</sup> According to USCC:

Akamai stores copies of content on its servers around the country. By allowing a user to download information from a server nearby, rather than from one on the other side of the United States, the download will be considerably faster. Differentiated services like those provided by Akamai are not “neutral,” but are pro-consumer, because those able to afford the service can pay for expedited delivery if they require faster transmission.<sup>17</sup>

This example is misleading in the context of net neutrality because it lacks the key element under debate -- whether or not *BSPs* should be able to choose what material is accelerated on its way to the consumer. In the Akamai example, a web site itself chooses to serve its customers better by caching its material near its customers. In this case Akamai is not an editor, nor is it a gatekeeper in any way. Akamai is an enabler of fast content delivery. NASUCA submits that this arrangement is a proper and legitimate service, and completely *unlike* a *BSP* deciding which web sites should be served with faster traffic.

As another example, the Content and Service Providers Coalition (“CSPC”) argues that access providers should be able to form affiliate partnerships in much the

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<sup>16</sup> USCC, at 4.

<sup>17</sup> Id.

same way that Amazon formed an alliance with FedEx.<sup>18</sup> CSPC's argument fails to persuade, however, because the example is logically reversed to the point of irrelevance. In its example, CSPC argues that Amazon does the consumer a favor by making a deal with FedEx, so that FedEx is the preferred delivery company in exchange for better delivery rates. CSPC's position is that BSPs are better able to negotiate with content providers for better rates, thus enhancing the value of access to the consumer.

The example collapses, however, when one considers that FedEx is merely the delivery mechanism, as is a BSP, for the ultimate consumer good. Most consumers do not care what organization delivers their purchases from Amazon, as long as it is quick, cost effective, and handles packages well. In the same way, consumers really do not care who the broadband access provider is, as long as it provides quick and cost effective service, and handles *packets* well. The example fails because it confuses the delivery mechanism with the ultimate good to be delivered.<sup>19</sup> In the Amazon example, the ultimate good is the book or CD purchased from Amazon, which is then delivered by FedEx. In the broadband example, the ultimate good is the content available *through* broadband access. FedEx is not a monopoly supplier of delivery services, and it does not limit consumers' access to certain retailers. But in the absence of a policy of nondiscrimination, the monopoly BSP *will limit* access to certain content providers.

NASUCA recommends that the Commission reject outright the disingenuous arguments put forth by some commenters that a principle of nondiscrimination would

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<sup>18</sup> CSPC, at 3.

<sup>19</sup> This brings to mind the old marketing adage – “No one wants a drill; they want a hole.” In the same spirit, “No one wants *delivery* (or access); they want *content*.”

make the government a censor of the Internet.<sup>20</sup> This argument runs counter to even a basic understanding of the issues at hand in this proceeding. NASUCA submits that neither it nor *any* other party in this proceeding wants the government involved in censoring, or editing, or limiting in any way the content and applications available to consumers via the Internet. In contrast, NASUCA argues that a principle of nondiscrimination *prevents* censorship by existing BSPs.

Without a policy of nondiscrimination, BSPs will be free to pursue affiliate arrangements with content and application providers. Because some content providers will then have a competitive advantage over others, this practice will necessarily inject editorial bias at the very least, and editorial blocking at worst, into the distribution side of the Internet economy. The Internet will be effectively censored by the access providers, each one administering its own sub-Internet.

#### **D. Reasons for Ensuring Nondiscrimination**

Several commenters claim that the issues in the NoI relating to nondiscrimination constitute a “solution in search of a problem.”<sup>21</sup> AT&T cites a recent paper authored by multiple economists.<sup>22</sup> The paper states, among other things:

We believe the issues raised in the net neutrality debate can be effectively addressed by using antitrust authority where appropriate, allowing Internet pricing flexibility, and fostering more efficient use of spectrum to facilitate entry into the broadband market.

Our basic message is that government should allow firms to experiment with different business models for Internet services.

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<sup>20</sup> See, e.g., IFC, at 3.

<sup>21</sup> See CTIA, at 2; Qwest Communications International, Inc. (“Qwest”), at 3-4.

<sup>22</sup> AT&T, at 4.

Allowing such market flexibility is likely to be the best way to insure efficient innovation on the information superhighway.<sup>23</sup>

NASUCA disagrees with this paper for several reasons, which NASUCA discussed in its initial comments and will reiterate here. A principle of nondiscrimination, or net neutrality, is a proper preventive measure to protect consumers and also to promote the development of competition for broadband facilities.

In its initial comments, NASUCA provided examples of traffic blocking and traffic degradation that harmed consumers.<sup>24</sup> Other commenters provide additional examples in their initial comments. For example, BTA shows that Verizon Wireless blocks iTunes in favor of its own VCast product.<sup>25</sup> Data Foundry, Inc. (“DFI”) provides multiple examples of BSPs violating the tenets of the Commission’s four Policy Principles by prohibiting certain content, disallowing applications such as voice over Internet protocol (“VoIP”), peer-to-peer (“P2P”) applications, and forbidding the use of off-the-shelf routers.<sup>26</sup> EarthLink, Inc. and New Edge Network, Inc. (“EL/NEN”) refer to actual customer service agreements to show the restrictions placed on consumers by access providers.<sup>27</sup> The quantity and variety of examples of service restrictions and improper traffic management undermine entirely the main argument raised in initial

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<sup>23</sup> William J. Baumol, et al, *Economists’ Statement on Network Neutrality Policy*, AEI-Brookings Joint Center (2007) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976889#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976889#PaperDownload)).

<sup>24</sup>NASUCA, at 10-13.

<sup>25</sup> BTA, at 10.

<sup>26</sup> DFI, at 6-8 and Attachment A.

<sup>27</sup> EL/NEN, at 7-8.

comments against net neutrality -- namely, that there are no examples of misbehavior.<sup>28</sup>

BSPs have proven that they have the ability and incentive to manage packet traffic inappropriately.<sup>29</sup>

### **E. Competition in the Broadband Access Market**

Some commenters claim that there is adequate competition in the broadband access market to prevent discrimination, but fail to substantiate their assertions. CTIA, for example, claims the broadband market is “exceptionally competitive.”<sup>30</sup> Hands Off The Internet (“HOI”) calls competition “dynamic.”<sup>31</sup> Qwest cites subscriber statistics from the FCC’s *High Speed Internet Access* reports and claims that it is “beyond dispute that the market for broadband services is competitive,”<sup>32</sup> and AT&T refers to a “vigorous cable-telco rivalry.”<sup>33</sup> Sprint claims that competition is adequate (except for Sprint -- in the market for special access lines).<sup>34</sup> Verizon even argues that network providers *are not big enough* to have market power:

[O]nly a network provider with power in the national or global market for broadband access could possibly engage in the type of

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<sup>28</sup> Commenters claiming that there is no evidence of anticompetitive behavior include ACI, at 4-5; CTIA, at 10; CDT, at 4-5; Embarq, at 1; Hispanic Technology and Telecommunication Partnership, at 2; NCTA, at 2 and 8-9; Qwest, at 5; Sprint Nextel Corporation (“Sprint”), at 1-2; Time Warner, at 6; USCC, at 1-2; and Verizon and Verizon Wireless (“Verizon”), at 28.

<sup>29</sup> See generally BTA, DFI, EL/NEN.

<sup>30</sup> CTIA, at 10.

<sup>31</sup> HOI, at 6.

<sup>32</sup> Qwest, at 2.

<sup>33</sup> AT&T, at 59; see generally AT&T, at 55-62.

<sup>34</sup> Sprint, at 3.

anticompetitive conduct that regulation advocates forecast, and no provider has power in those markets.<sup>35</sup>

Verizon's argument completely misses the point that at the *local* level, there are often few choices of broadband access providers. Thus whatever company *does* provide access in that locality usually *has* market power.

AT&T asserts that net neutrality advocates ignore “40 years of economic scholarship demonstrating that vertical integration produces important pro-consumer efficiencies and that, except in well-defined circumstances, vertically integrated companies generally have no greater incentive to engage in welfare reducing anticompetitive conduct than non-vertically integrated companies,” because a “robust broadband competition keeps any individual provider from sabotaging the value of its broadband platform to consumers by degrading the complementary applications that ride on top of it.”<sup>36</sup> AT&T's faith in competition to prevent broadband providers from disadvantaging rival content and applications providers is misplaced. Precisely because “robust competition” among BSPs does not yet exist, AT&T's economic argument founders. AT&T's argument is even ironic in light of the famous threat by its former CEO, Edward Whitacre: “What [Google, Vonage, and others] would like to do is to use my pipes free. But I ain't going to let them do that.”<sup>37</sup>

AT&T further asserts that “even if there were some competitive defect in the broadband platform market,” the Commission need not be concerned because “[m]odern

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<sup>35</sup> Verizon, at 3.

<sup>36</sup> AT&T, at 67, cites omitted.

<sup>37</sup> “At Stake: The Net as We Know It,” Catherine Yang, Roger O. Crockett, and Moon Ihlwan, *BusinessWeek Online*, December 26, 2005.

antitrust analysis recognizes that, except in very specific contexts, even a *monopolist* in a platform market generally has no incentive to act anticompetitively towards unaffiliated applications providers that wish to use its platform.”<sup>38</sup> AT&T contends that “a platform provider free from retail price regulation -- as all broadband providers are today -- will normally have incentives to deal evenhandedly with independent providers of complementary applications, because discrimination in the applications market would simply devalue the platform and, as a general matter, would not enable the provider to earn any profits it could not otherwise earn for the underlying platform itself.”<sup>39</sup>

NASUCA disagrees that the Commission need not be concerned. There is a long history of incumbent local exchange companies (“ILECs”) favoring their affiliates, and discouraging rivals’ entry. Absent regulatory intervention, for example, rates for unbundled network elements (the “platform” that ILECs make available to competitive local carriers) would be priced significantly above existing rates. The empirical evidence of the track record of ILECs’ endless efforts to undo the directives of the Telecommunications Act of 1996 is far more persuasive than are AT&T’s theoretical postulations.

Other commenters, such as Google, agree with NASUCA, arguing that the broadband market is not competitive at all. Google calls the market “highly concentrated.”<sup>40</sup>

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<sup>38</sup> AT&T, at 67.

<sup>39</sup> AT&T, at 67-68, emphasis in original, cites omitted.

<sup>40</sup> Google, at 10; see also BTA, at 1-2.

Several commenters use this proceeding as an opportunity to advocate for measures to further competition. For example, BTA states that “the FCC should promote intra-modal competition via unbundling, line-sharing, and resale of wholesale broadband access services.”<sup>41</sup> EL/NEN state that “[t]he availability of copper UNE loops provides a market-based mechanism to address the potential for consumer-unfriendly or anticompetitive action that would otherwise occur in an unchecked duopoly and monopoly marketplace.”<sup>42</sup> NCTA refers to the dearth of competitors providing Internet backbone services to rural ILECs.<sup>43</sup> These are valid points, but not the focus of this inquiry.

There is insufficient competition in the broadband access market to prevent the exercise of market power,<sup>44</sup> and, therefore, arguments that market forces will provide the proper discipline for BSPs fall apart completely. According to Qwest and Time Warner, if consumers do not like the policies of their chosen broadband access provider, they can “vote with their feet” -- or choose another service provider with policies they do like.<sup>45</sup> This argument might be persuasive in a market with many competitors providing

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<sup>41</sup> BTA, at 16.

<sup>42</sup> EL/NEN, at 4.

<sup>43</sup> NCTA, at 2.

<sup>44</sup> See Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, “The Cable-Telco Duopoly’s Deployment of New Jersey’s Information Infrastructure: Establishing Accountability,” White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007 (“Cable-Telco Duopoly White Paper”). The Cable-Telco Duopoly White Paper was submitted as Attachment A to the Comments of the New Jersey Division of Rate Counsel in the proceeding *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, filed May 16, 2007.

<sup>45</sup> See Qwest, at 12; Time Warner, at 7-8.

products that easily substitute for one another. However, as pointed out in NASUCA's initial comments,<sup>46</sup> competition in the market for broadband access -- especially for residential consumers -- is limited in much of the United States, and often consists, at best, of a duopoly consisting of the incumbent local exchange carrier and the incumbent cable provider. Contrary to AT&T's claim that "cable and telephone companies, once siloed from mutual competition because of their single-purpose networks, now compete fiercely to offer the 'triple play' of voice, video, and Internet access services,"<sup>47</sup> the presence of a duopoly does not provide "fierce" competition.

Requiring consumers to "choose" between sticking with the current BSP (or its duopolistic rival), even when it institutes policies unfavorable to consumers, or doing without broadband access at all, hardly constitutes a consumer-friendly policy. As Google argues, BSPs have the ability and incentive to discriminate inappropriately.<sup>48</sup> Referring to end-user viewers of content as "eyeballs," BTA points out that the concentrated market gives the "broadband provider the ability to leverage its control over the 'eyeballs' on its network into the market for charging distant users -- *i.e.*, originators of Internet traffic wherever situated -- supra-competitive rents for accessing the eyeballs on the monopoly broadband provider's network."<sup>49</sup> The Nebraska Rural Independent

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<sup>46</sup> NASUCA, at 28-29.

<sup>47</sup> AT&T, at 32.

<sup>48</sup> Google, at 10-12.

<sup>49</sup> BTA, at 11.

Companies (“NRIC”) argue that market concentration naturally leads to conduct that harms consumers.<sup>50</sup>

DivX, Inc. (“DivX”), shows that market forces alone are inadequate to protect the consumer because industry protections -- e.g., fees and switching costs -- are built into contracts:

In reality, however, there are significant costs associated with switching broadband providers, which means that some amount of content discrimination may not cause mass defections to rival providers. Such switching costs include long term contracts with high termination fees, the costs of finding an alternative provider, as well as new equipment and installation costs. In some instances, the consumer may have to switch multiple services because of the bundling practices of the broadband provider.<sup>51</sup>

On the other hand, Verizon claims that broadband access providers respond to consumers, and that the threat of losing consumers forces access providers to make the whole Internet available:

[B]roadband providers have a strong market incentive to allow their customers to access all lawful content and applications available on the Internet -- and to maximize the diversity of those applications and content -- because doing so increases the value of the providers’ networks and of the access services that they sell.

The greater the variety of such content and applications, the more consumers are likely to find purchasing broadband connections worthwhile. In sum, access providers’ economic self-interest motivates them to maximize their customers’ ability to reach valuable content and services on the Internet.<sup>52</sup>

Verizon fails to explain why it will not, then, agree to formalize a policy it claims to already follow. Why not allow the Commission to provide a guarantee to consumers that

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<sup>50</sup> NRIC, at 4-5.

<sup>51</sup> DivX, at 12.

<sup>52</sup> Verizon, at 31-32.

they will have access to the Internet without a BSP's interference? The ALA sums up the current situation, stating that "relying solely on market forces to prevent discriminatory practices simply places too much faith in the current environment in which competition is often reduced to a choice between the cable-telephone company duopoly."<sup>53</sup>

Numerous commenters provide a list of *platforms* for broadband access, some of which -- like broadband over powerlines -- are still largely theoretical.<sup>54</sup> These commenters imply that the existence of a variety of platforms for Internet access prove that adequate competition exists. Time Warner even states, "there is fierce competition among the major *platforms*."<sup>55</sup> The mere existence of multiple platforms, however, does not imply effective competition. In particular, nascent technologies do little to alleviate the bottleneck that telecommunications and cable companies now control for broadband access.

The emerging technologies are not widely deployed, are inferior to traditional wireline access, or are far more expensive than either cable or DSL service. Any of these weaknesses severely limits the substitutability of the emerging platforms for more traditional broadband platforms.

#### **F. Existing Consumer Protections are Not Enough**

Several commenters contend that consumers are adequately protected by existing measures, whether from the FCC, the Federal Trade Commission ("FTC"), antitrust

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<sup>53</sup> ALA, at 4.

<sup>54</sup> CTIA, at 3-4; Qwest, at 3; and Verizon, at 2.

<sup>55</sup> Time Warner, at 7 (*italics added*).

statutes, etc.<sup>56</sup> NASUCA replies that not only have these institutions failed consumers in the past, they are also slow to respond to changes in the way business is conducted. For this reason, consumers are likely to be harmed well before the FTC, for example, can or will act.<sup>57</sup> This is why a principle of nondiscrimination is important now -- before consumers are harmed by anticompetitive behavior.

Similarly, some commenters claim that the Internet has evolved without any governmental oversight, and that introducing consumer protection rules now would harm its continuing development.<sup>58</sup> The basis of this argument is factually incorrect. The CDT notes that broadband was only recently freed from regulatory scrutiny, primarily via the *Brand X* decision in June 2005 and the FCC order exempting broadband from common carrier requirements in September 2005.<sup>59</sup> The ALA notes that:

[t]he Internet functioned very well for many years during which the providers of its underlying telecommunications network were subject to the Commission's common carrier regulations (Title II). We do not recall hearing arguments then that the regulatory environment was in some fashion inhibiting proper network management.<sup>60</sup>

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<sup>56</sup> See IPI, at 3.

<sup>57</sup> On June 27, 2007, the FTC issued a report, *Broadband Connectivity Competition Policy*, the culmination of FTC's two-day workshop held in February 2007 in Washington DC, as well as FTC staff's own research. In the report, the FTC asserts that, while the adequacy of competition in the market for broadband services is debatable, the potential harms from premature regulation outweigh the potential benefits of ensuring consumer choice. In short, FTC argues for a "wait and see" approach to consumer protection. In light of FTC's abnegation of responsibility, it is even more imperative that this Commission act now to prevent harm to consumers.

<sup>58</sup> Qwest, at 5-6; IFC, at 3.

<sup>59</sup> CDT, at 4-5. CDT also argues that the risks of negative publicity constrained the behavior of MCI, Verizon, SBC, AT&T, and BellSouth before and during their respective mergers. *Id.*

<sup>60</sup> ALA, at 3; see also Google, at 5.

The principle of nondiscrimination that NASUCA supports would simply codify, and guarantee for consumers, the business practices that consumers have come to expect.

**G. The Commission Should Act Now to Protect Consumers**

Some argue that it is premature for the Commission to act -- that until there is *more* evidence of anticompetitive traffic management, the Commission should remain on the sidelines.<sup>61</sup> Others point out that if the Commission waits to act, then consumers will be harmed before remediation can take place.<sup>62</sup>

The CDT argues that the Commission needs to “send a clear signal” that anticompetitive behavior will not be tolerated in the market for broadband access.<sup>63</sup> NASUCA agrees that anticipatory prevention is far preferable to correcting unacceptable behavior after consumers have already been harmed.

**III. ANALYSIS OF ARGUMENTS AGAINST NET NEUTRALITY**

**A. Investment, Deployment, or Innovation**

Contrary to the arguments of several commenters,<sup>64</sup> a principle of nondiscrimination will not hamper investment in advanced networks or retard broadband deployment. These arguments are made by those who have an interest in maintaining a stranglehold on Internet access. For example, AT&T refers to increasingly bandwidth-intensive applications (such as YouTube, video games, photo sharing) and the “exaflood”

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<sup>61</sup> See HOI, at 10-13; IPI, at 4; IFC, at 2; and Time Warner, at 7.

<sup>62</sup> Computer and Communications Industry Association (“CCIA”), at 1; DFI, at 13-14.

<sup>63</sup> CDT, at 12.

<sup>64</sup> See generally Ad Hoc Telecommunications Manufacturers (“AHTM”); CSPC, and NCTA.

of information being transmitted over the Internet, which, in turn, requires investment in network capacity.<sup>65</sup> AT&T contends that net neutrality requirements would “chill” network investment.<sup>66</sup> AT&T, however, fails to show the specific harm to its business or to its consumers that is caused by the net neutrality requirement that now governs its operations as a result of the FCC’s order approving AT&T’s acquisition of BellSouth. For example, AT&T does not identify any investment or innovation that it has forgone as a result of the net neutrality requirement.

NASUCA urges the Commission to reject these thinly veiled threats. The ALA points out that nondiscrimination language governed Title II operations until 2005, and that the period from 1995 to 2005 was a time of tremendous deployment of broadband capacity, and states. “We do not see how reintroducing this principle would suddenly result in decreased investment in network infrastructure.”<sup>67</sup>

Contrary to AT&T’s argument, CFA. et al. state that “[w]ith inadequate competition and little public obligation, the cozy duopoly dribbles out capacity at high prices and restricts the uses of the network, chilling innovation in applications and services and causing a much lower rate of penetration of broadband in the U.S. than abroad.”<sup>68</sup> Google cites a University of Florida econometric study showing that the

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<sup>65</sup> AT&T at 21-30.

<sup>66</sup> AT&T, at 55.

<sup>67</sup> ALA, at 4

<sup>68</sup> CFA et al, at 2. See also CFA et al, at 123 stating that “it was network neutrality that gave us the vibrant competition and innovation on the Internet that we have enjoyed for a quarter of a century.”

incentives for access providers to invest in broadband are *higher* with a principle of nondiscrimination than without.<sup>69</sup>

Although Time Warner claims that a policy of nondiscrimination will restrict innovation and reduce the ability of access providers to respond to consumer demands, it fails to provide any evidence to support its argument.<sup>70</sup> BTA points out that it is simply arrogant of the large BSPs to imply that it is only *they* who provide the innovations vital to continued development of the Internet.<sup>71</sup> Numerous start-ups and small technology companies flourish precisely because of the openness of the Internet. NASUCA urges the Commission to reject policies that could restrict the access of entrepreneurs who innovate.

#### **B. Who is Funding the Internet?**

Some commenters argue that preventing BSPs from charging content providers and application providers a premium for prioritized access to consumers would “cripple” the Internet.<sup>72</sup> Others, such as Time Warner, argue that proponents of net neutrality would have end-users absorb all of the cost of the Internet infrastructure, while allowing content and application providers to do their business for free.<sup>73</sup> Both of these arguments are completely at odds with reality and the intent of a policy of nondiscrimination.

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<sup>69</sup> Google, at 30. *See also* <http://www.hearusrnow.org/fileadmin/sitecontent/TheDebateonNetNeutrality.pdf>.

<sup>70</sup> Time Warner, at 9.

<sup>71</sup> *See* BTA, at 12.

<sup>72</sup> *See, e.g.*, Qwest, at 11.

<sup>73</sup> Time Warner, at 13.

Currently, consumers pay for access to the Internet and content, and application providers pay for access to the Internet. The current situation, where access providers do not charge a premium to content and application providers, is hardly “crippling” for the Internet. Google notes that:

[o]verall, the four Bell companies alone receive some \$15 billion annually in special access revenues from hauling data traffic for Internet content and applications companies, Internet service providers, and other corporate and institutional users of the local network. The sums that Internet companies pay for connectivity and transport of data to and from their servers, and over the Internet backbone networks, are in addition to the \$20 billion a year in fees that subscribers pay broadband providers for access to the Internet.<sup>74</sup>

Net neutrality would not put the burden of funding the Internet on end-users. But neither would it allow certain content providers to buy preferred access to consumers. Net neutrality preserves the two-sided nature of the Internet. NASUCA also notes that, in addition to paying for internet access *directly*, consumers also pay *indirectly* through the goods and services they purchase from the content and application providers that also buy Internet access.

### **C. Other Arguments Against a Policy of Nondiscrimination**

Some commenters warn that a consumer protection measure such as the principle of nondiscrimination would have negative unintended consequences.<sup>75</sup> These warnings ring hollow. The opponents to net neutrality provide no examples of what negative consequences might occur. In contrast, supporters of net neutrality specify clearly the harm they seek to avoid through a policy of nondiscrimination -- namely, the

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<sup>74</sup> Google, at 25.

<sup>75</sup> See generally AHTM, HOI, Time Warner.

consolidation of power over content in the hands of those entities that already control the pathways of the Internet.

Although some commenters claim that implementing a policy of nondiscrimination would be costly, onerous, or difficult,<sup>76</sup> they provide no support for this argument. If the claims of incumbent telephone and cable companies are correct -- that they are already operating according to the principle of nondiscrimination -- then the act of codifying such behavior, and guaranteeing its continuation, should not cause *any incremental change* in their behavior, and thus should *not* raise any costs at all. The “it’s too costly” argument is simply another way that the bottleneck providers of broadband access seek to maintain control over their domain.

Some commenters suggest that broadband access providers should be free of all regulatory restraints so that they can “experiment” will new business models.<sup>77</sup> Although NASUCA commends these commenters for apparently seeking innovative ways to serve consumers, “experimentation” *at the expense of consumers* is ill-considered and improper. Furthermore, any so-called “experiment” is likely to be biased in its results because consumers will likely have only the unpleasant “choice” of submitting to the experiment (such as higher prices or reduced access to Web content), or doing without broadband access altogether.

Other commenters argue that access providers should be free to make mutually beneficial deals with content and application providers.<sup>78</sup> These commenters contend that

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<sup>76</sup> Qwest, at 11; CTIA, at 23.

<sup>77</sup> See IPI, at 2; Verizon, at 42-44; AT&T, at v.

<sup>78</sup> USCC, at 4; Internet Content and Service Provider Coalition, at 3-4.

such arrangements are simply business deals intended to enhance the value of the Internet to consumers.<sup>79</sup> However, this line of reasoning completely ignores the fact that consumers would have no voice in what deals are made, or what content is prioritized. Again, consumers would either have to accept whatever pacts are made, or do without broadband access.

AT&T contends that if the Commission were to adopt a net neutrality principle for broadband providers, it would also need to apply the same principle to others involved in Internet businesses. AT&T asserts, for example that if “the Commission ultimately concludes that a principle of nondiscrimination is necessary to foster competition on the Internet, it could not rationally exempt Google’s search services from that principle.” AT&T, at 89. AT&T elaborates:

Moreover, the Commission would have at least as strong a jurisdictional argument for imposing such regulation on the information services offered by Google as on the information services (Internet access) offered by broadband networks. In the *Pulver Order*, the Commission explained that it has Title I authority to regulate information services—even when the provider of those services does *not* provide transmission capability to its end users. Thus, the Commission declared that Pulver’s Free World Dialup service is “subject to the Commission’s jurisdiction” even though “Pulver does not offer transmission to its members.” That same jurisdictional conclusion applies with at least equal force to Google’s search services—indeed, with more force, given Google’s use of a massive proprietary CDN [content delivery network] in the delivery of its services.<sup>80</sup>

AT&T’s argument makes the logical leap from the Commission’s determination that it has Title I authority to regulate information services, to some sort of requirement that the Commission impose on all information services the same regulations that it does on those

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<sup>79</sup> Id.

<sup>80</sup> AT&T at 89-90, emphasis in original, cite omitted.

who own and control -- rather than just use -- the networks through which end users receive their broadband service. The Commission should decline to take that leap, however.

#### **IV. POLICY RECOMMENDATIONS**

##### **A. Enforcement of the Policy Statement**

As stated in NASUCA's initial comments and reiterated by numerous commenters,<sup>81</sup> the Commission should add an enforcement mechanism to the Policy Statement already in place. According to DFI, the policies, as currently written, are "toothless and inspirational at best."<sup>82</sup> Google states that "actual rules with actual remedies will have a far greater deterrent effect on the broadband providers than unenforceable proclamations."<sup>83</sup>

##### **B. Extension of the Policy Statement**

Several commenters take the same position as NASUCA, that the Commission's Policy Statement should be amended to include a principle of nondiscrimination.<sup>84</sup> The CCIA argues that the conditions of the AT&T-BellSouth merger should be extended to all carriers, over all 50 states.<sup>85</sup> DivX agrees, arguing that:

if it makes good policy sense for Verizon and AT&T to be legally bound by the Policy Statement principles, then it makes even better sense to ensure that all broadband Internet access providers –

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<sup>81</sup> NASUCA, at 23; see also, for example, CFA et al, at 27-29.

<sup>82</sup> DFI, at 14.

<sup>83</sup> Google, at 22.

<sup>84</sup> See NRIC, at 9;

<sup>85</sup> CCIA, at 6.

whether cable modem, DSL, wireless or broadband over power line providers – are bound as well. Similarly, the AT&T/BellSouth “neutral routing” requirement should be extended to all broadband Internet access providers, regardless of technology, so that all broadband subscribers are protected from harmful discrimination practices.<sup>86</sup>

The CDT points out that “it should be clear that market forces will not provide much protection if the practices in question are not transparent. Simply put, consumers cannot exert pressure against practices they do not know are occurring.”<sup>87</sup> Thus, CDT proposes that transparency become a part of the policy. The CCIA also recommends that BSPs “comply with specific disclosure requirements and inform end users of both download and upload speeds, latency, and other quality factors.”<sup>88</sup> The Information Technology Industry Council agrees:

ITI urges the Commission to expand the Broadband Policy Statement by adopting the principle that consumers should receive meaningful information regarding their broadband service plans. In proposing the Broadband Connectivity principles, and in subsequent advocacy of these principles, ITI and the High Tech Broadband Coalition recommended an explicit statement that consumers receive clear, meaningful disclosure of service plan capabilities and limitations. That principle was left out of the FCC’s Broadband Policy Statement, and it must be included.<sup>89</sup>

NASUCA supports the principle as recommended by CFA, et al.: “To encourage broadband deployment and preserve and promote the open and interconnected nature of

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<sup>86</sup> DivX, at 9. NASUCA raised a similar concern regarding broadband deployment in its initial comments submitted In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, Notice of Inquiry (filed May 16, 2007) at 14, 17-19.

<sup>87</sup> CDT, at 13.

<sup>88</sup> CCIA, at 4.

<sup>89</sup> Information Technology Industry Council, at 2.

the Internet, the ability of Internet users to produce, distribute, and access the lawful Internet content of their choice and use applications and services of their choice shall not be impeded.” NASUCA also concurs with CFA, et al. that the FCC should declare that these principles are enforceable under Title II of the Act. As CFA, et al, explain: “The Supreme Court deferred to the FCC’s expertise and authority in allowing it to abandon the obligation of nondiscrimination. If the agency has the discretion and authority to [sic] such a historic mistake, it certainly has the same discretion and authority to correct its error, when presented with such clear evidence of its failure.”<sup>90</sup>

## **V. CONCLUSION**

NASUCA urges the Commission to reject the BSP-dominated efforts to prevent the adoption and enforcement of a reasonable nationwide policy of net neutrality. NASUCA also urges the Commission to consider the specific measures to protect consumers that NASUCA describes in its initial comments and in these reply comments.

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<sup>90</sup> CFA et al, at 4; 27-29.

Respectfully submitted,

/s/ David C. Bergmann

David C. Bergmann

Assistant Consumers' Counsel

Chair, NASUCA Telecommunications  
Committee

Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

Phone (614) 466-8574

Fax (614) 466-9475

[bergmann@occ.state.oh.us](mailto:bergmann@occ.state.oh.us)

NASUCA

8380 Colesville Road, Suite 101

Silver Spring, MD 20910

Phone (301) 589-6313

Fax (301) 589-6380