

management practices – the broadband network operators – failed to respond meaningfully to the questions posed in the NOI and, instead, simply rehashed their arguments that there is no problem in the broadband industry that would be solved by “net neutrality” or openness principles. Nonetheless, their comments do reveal a broad industry consensus supporting the four principles set out in the Commission’s *Broadband Policy Statement*, as the network operators concede that they should not block lawful content or applications and that such behavior could be subject to *ex post* enforcement.

The record created in response to the NOI, including the many comments in support of net neutrality principles and openness of broadband networks generally,² leaves the Commission with several critical tasks. The Commission should:

- Require broadband network operators to respond to the questions posed in paragraph 8 of the NOI, which have been left unanswered in the network operators’ comments. This information should be kept current in semiannual reports and supplemented by reports on any complaints received and how

² See, e.g., Comments of Google Inc.; Comments of DivX, Inc.; Comments of the Consumer Federation of America, Consumers Union, and Free Press; Comments of the Computer & Communications Industry Association at 5-7; Comments of the National Association of State Utility Consumer Advocates at 23-31; Comments of the Center for Democracy and Technology at 14; Comments of the American Library Association; Comments of the New Jersey Division of Rate Counsel at 4-8; Comments of Data Foundry (urging enforcement of the *Policy Statement*). See also Comments of Earthlink, Inc. and New Edge Network, Inc. (supporting net neutrality and Internet openness through promotion of last-mile, facilities-based competition); Comments of BT Americas Inc. (same).

such complaints were resolved, if at all.

- Clarify that the broadband *Policy Statement* is enforceable and set out a fair enforcement procedure.
- Supplement the existing four principles of the *Policy Statement* with a non-discrimination principle that permits reasonable network management and engineering practices, but that prohibits discriminatory behavior with commercial motives such as favoring affiliated content or applications.

The record of this proceeding demonstrates that there is now a significant imbalance between the investment expectations of network operators and those of application developers and content providers, with the interests of the network operators given too much weight. The Commission should redress this imbalance for the benefit of consumers of broadband services and the public at large. The Commission should take a holistic approach that takes into account the incentives of all of the essential contributing parts of the Internet, including software applications developers and content providers. As spelled out in the Coalition's initial Comments, the problems evident in the marketplace for broadband products and services are structural problems and must be solved by structural solutions that will lead to net neutrality and openness.

I. THE COMMISSION SHOULD REQUIRE NETWORK OPERATORS TO PROVIDE RELEVANT INFORMATION REGARDING THEIR BROADBAND SERVICE OFFERINGS

Perhaps the most important aspect of the NOI was the Commission's desire to "seek a fuller understanding of the behavior of broadband market participants today," including broadband service providers' packet management and prioritization practices.³ Even network operators acknowledge the need for "the Commission to gather a full and accurate factual record upon which it can make informed decisions about the *technical*, economic, and legal merits of current broadband industry practices"⁴ However, as discussed in the Coalition's initial comments, the parties currently in the best position to respond to the questions regarding the network operators' packet management practices are the network operators themselves.⁵ Application-level companies and other non-network operators do not have access to the information needed to respond regarding the network management practices discussed in paragraph 8 of the NOI.

Unfortunately, the network operators' sometimes lengthy comments were largely non-responsive with respect to their packet management and prioritization practices. Even those network operators that purported to respond to the questions posed by the Commission did so only in the most general terms, discussing, for example, some types of packet management practices that carriers

³ NOI, ¶ 8.

⁴ Comments of AT&T at 3 (emphasis added).

⁵ Comments of the Open Internet Coalition at 12-13.

may adopt rather than their own, actual practices.⁶ This in turn leaves the Commission no better off than it was prior to the release of the NOI – unaware of specific facts regarding current broadband industry practices.

As the Coalition suggested in its initial comments,⁷ the Commission should require network operators to submit information regarding their network management practices, including responses to the questions posed in paragraph 8 of the NOI and information regarding any complaints they may have received. By collecting and evaluating such information, the Commission would be able to determine whether network operators are living up to the principles of the Commission’s *Broadband Policy Statement* and are otherwise not engaging in discriminatory conduct that threatens the open Internet ecosystem.

II. THE RECORD DEMONSTRATES A BROAD CONSENSUS ON THE PRINCIPLES LISTED IN THE COMMISSION’S *BROADBAND POLICY STATEMENT*

While there are many issues on which commenting parties disagree, there is broad consensus that the four principles listed in the Commission’s *Broadband Policy Statement* accurately describe practices that network operators should not engage in. Such disfavored practices include, for example, blocking lawful content or applications or preventing nonharmful devices from being attached to the network. Even network operators such as AT&T and anti-open Internet groups such as “Hands Off the Internet” do not provide any reason for why

⁶ Comments of AT&T at 36-44.

⁷ Comments of the Open Internet Coalition at 13.

network operators should be permitted to block lawful content or applications or deny attachment of nonharmful devices to the network, and in fact acknowledge the applicability of the *Policy Statement* to broadband networks.⁸

In light of such a consensus, the Commission should take this opportunity to, *at minimum*, make the *Policy Statement* enforceable. While network operators claim that no change in policy is needed to protect the openness of the Internet and that the Commission may simply enforce its *Policy Statement* principles *ex post*,⁹ a procedure to enforce the *Policy Statement* is far from clear. While the Open Internet Coalition believes that an enforceable non-discrimination principle is needed in addition to the existing four principles,¹⁰ we nevertheless believe that even making clear that the *Policy Statement* is enforceable will provide much-needed clarity and give consumers, applications developers and content providers a minimum level of assurance that network operators will not engage in the most anti-competitive and exclusionary behavior.

⁸ Comments of AT&T at 64 (“In its *Broadband Policy Statement*, the Commission has already embraced the industry’s consensus against anticompetitive blocking or degradation. The issue here is not whether the Commission should adopt rules implementing that consensus. No major U.S. broadband provider has ever violated it, and *ex post* remedies are more than adequate to deal with any aberrations.”); Comments of Hands Off the Internet at 4, 14-16. *See also* Comments of Qwest Communications International Inc. at 13-14 (supporting the Commission’s *Broadband Policy Statement*); Comments of the United States Internet Industry Association at 7 (same); Comments of the United States Telecom Association at 9-10 (same); Comments of the Consumer Electronics Association at 2-3 (same); Comments of Alexicon Telecommunications Consulting at 2 (same); Comments of the National Association of Manufacturers at 2 (same); Comments of the Information Technology Industry Council at 1-2 (expressing support for the *Policy Statement* and a new principle that “consumers should receive meaningful information regarding their broadband service plans”).

⁹ *See, e.g.*, Comments of AT&T at 64; Comments of Hands Off the Internet at 4, 14-16; Comments of the Telecommunications Industry Association at 11.

¹⁰ Comments of the Open Internet Coalition at 14-15.

III. NETWORK NEUTRALITY DOES NOT PROHIBIT REASONABLE NETWORK MANAGEMENT PRACTICES

A sizable portion of the network operators' filings describe various network management practices that they believe would be threatened by rules designed to ensure an open and neutral Internet.¹¹ The Commission should not be swayed by straw-man arguments that network neutrality policies prohibit *any* network management and should instead focus on the issues of real concern, which is the potential for anti-competitive behavior by broadband network operators.

The network neutrality policies sought by the Coalition would not prohibit reasonable network management practices designed to, for example, block spam, viruses, or other harmful traffic, or to police content that is plainly unlawful (such as child pornography). Under any non-discrimination formulation proffered to date, including the language of the AT&T-Bell South merger condition, network operators would in no way be constrained in addressing unlawful activity.¹²

¹¹ See, e.g., Comments of AT&T at 21-44; Comments of the National Cable & Telecommunications Association at 22-30, 32-36; Comments of the United States Telecom Association at 13-14; Comments of the Telecommunications Industry Association at 3-7; Comments of CTIA at 7-10, 11-13; Comments of Verizon and Verizon Wireless at 16-20; Comments of the Wireless Communications Association International at 2-3.

¹² The Coalition believes that broadband network providers should be able to screen and block spam, viruses, Denial of Service (DoS) attacks and other traffic that could cause harm to the network, and traffic that is obviously unlawful (such as child pornography). They should also block other unlawful traffic upon request from a lawful government

The Open Internet Coalition also takes no specific position on the arguments made by copyright holders such as NBC Universal and the MPAA except to note that reasonable measures taken to stop piracy or other unlawful activity are simply not implicated by network neutrality principles.

Likewise, network operators would not face unreasonable network management restraints when bringing forward new applications such as telemedicine services. Indeed, the criticality of telemedicine applications is such that all parties should be accorded necessary prioritizations, not simply medical interests with the deepest pockets or those favored by a network operator.

Network neutrality rules *should* ensure that network operators' network management or traffic prioritization practices operate under a non-discrimination principle.¹³ Network operators' reasonable network management practices based on technical considerations should not encompass the right to engage in discriminatory practices with commercial motives.

CONCLUSION

As detailed in the Coalition's initial Comments, the problems in today's broadband marketplace are structural, in there is not sufficient intra- and inter-modal competition to assure consumer welfare and there are realistic doubts that

authority. The broadband network operator should not, however, have independent police authority to determine what is or is not "lawful." The above actions, if performed for legitimate network management reasons, do not violate the suggested proscription against discrimination by network operators.

¹³ Comments of the Open Internet Coalition at 14-15.

an increase in the number of facilities-based broadband networks will provide such assurance.¹⁴ The Coalition strongly supports a holistic approach to address those structural problems, including the incentive of network operators to discriminate against third-party applications and content. The Commission should act now to lay the groundwork for a market in which consumers see the benefit of competition at both the application-level and network-level.

Respectfully submitted,

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¹⁴ Comments of the Open Internet Coalition at 8-11.