

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

In the Matter of Broadband Industry Practices)	
)	
Petition for Declaratory Ruling)	WC Docket No. 07-52
of Free Press, et. al)	
)	
and)	
)	
Petition for Rulemaking)	
of Vuze, Inc.)	

**COMMENTS OF
RANDOLPH J. MAY
PRESIDENT
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I. Introduction and Summary

The petition filed by Free Press and other organizations and individuals seeks a declaratory ruling that, in the words of the petition, “the practice by broadband providers of degrading peer-to-peer traffic violates the FCC’s Internet policy statement” and that such practices do not constitute reasonable network management.¹ The petition filed by Vuze, Inc. asks the Commission to initiate a rulemaking to clarify what constitutes “reasonable network management” for broadband network operators.

In the Policy Statement to which the two petitions refer the Commission adopted “principles” – not rules – which it said offered “guidance and insight into its approach to

* These comments express the views of Randolph J. May, President of the Free State Foundation, an independent, non-profit free market-oriented think tank. They do not necessarily represent the views of the Board of Directors, staff, or others associated with FSF.

¹ The petition refers to the Commission’s Policy Statement that sets *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (“Policy Statement”).

the Internet and broadband.”² The principles purport to encourage broadband deployment and preserve and promote an open and interconnected public Internet by stating that consumers are entitled to access lawful Internet content, run applications and use services of their choice, connect devices of their choice, and are entitled to competition among network providers, application and service providers, and content providers. Importantly, and key to the issues raised by the instant petitions, the Commission stated, surely and studiously, that “[t]he principles we adopt are subject to reasonable network management.”³

Putting aside for now any questions concerning the force, as a legal matter, of the principles contained in the Commission’s Policy Statement, the petitions before the agency bring to the fore the “reasonable network management” exception to the Commission’s guidance. Foremost, it is imperative that the Commission proceed very cautiously so as not to be drawn in by the “back door” into adopting, what are in effect, net neutrality mandates that it thus far appropriately has avoided adopting on a general basis. Because if it does get drawn through the back door, the Commission will be on a very slippery slope towards abandonment of the successful policy it adopted in 2002 of creating a “minimal regulatory environment” for broadband services.⁴ Instead, it will be on the path towards regulating broadband providers as traditional common carriers subject to non-discrimination requirements and rate regulation.

So the way in which the Commission disposes of the two petitions invoking the “reasonable network management” exception is extremely important. We can be sure

² Policy Statement, at para. 3.

³ Id., at note 3.

⁴ See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 F.C.C.R. 3019 (2002).

that, in today's dynamic technological and marketplace environment, with exponential increases in peer-to-peer traffic, spam, viruses, and other forms of malicious traffic, the role of network manager, or supervisor of network managers, is not a role the Commission is well-suited to play. Indeed, in today's dynamic, it is surely difficult, with all the challenges they confront, even for the full-time, highly-paid and highly-skilled professional network managers to perform their jobs in a way that ensures all their companies' broadband customers enjoy the most satisfactory Internet experience possible.

Having in mind the foregoing, the Commission should deny Vuze's request that it initiate a rulemaking proceeding to clarify—in essence to try to define in advance--- what constitutes reasonable network management. And, the Commission should not declare, as requested by Free Press and its allies, "that the practice by broadband providers of degrading peer-to-peer traffic violates the FCC's Internet Policy Statement." Rather, it should specifically acknowledge that, while it may examine petitions such as that filed by Free Press on an individualized case-by-case basis, in doing so it will give very wide berth and great flexibility to broadband providers to manage their networks in ways that benefit all of their subscribers. To the extent that any corrective action at all is warranted—and the Commission should have in mind the existence of potential non-FCC remedies and forums— such action almost certainly should take the form of some type of consumer education notification remedy, rather than any action that, in effect, constitutes economic regulation.

Below I expand briefly on the rationale for this recommended course of action.

II. Discussion

I am confident the broadband providers interested in this proceeding will provide the Commission with much useful information concerning the growth of usage on their own and other broadband networks, including the growth in peer-to-peer traffic, and the challenges presented by such traffic growth and certain practices that impact network management. And I am confident they also will provide considerable information concerning already-expended and projected investment in network facilities required to keep up with the expanding usage and network-impacting practices. I do not want to duplicate that information here. It suffices to point to just a bit of it to provide context for the course recommended herein.

This is the way a recent article from the *Economist* entitled “Technology in 2008” began: “Peering into Tech.view’s crystal ball, the one thing we can predict with at least some certainty is that 2008 will be the year we stop taking access to the internet for granted. The internet is not about to grind to a halt, but as more and more users clamber aboard to download music, video clips and games while communicating incessantly by e-mail, chat and instant messaging, the information superhighway sometimes crawls with bumper-to-bumper traffic.”⁵ The article goes on to say that:

[U]sers are changing the way they use the internet: they are now uploading, as well as downloading, gigabytes galore—thanks to the popularity of social networks like Facebook, YouTube and MySpace. Hailed by the industry as the wave of the future, ‘user-generated content’ is proving to be a tsunami of unprecedented proportions. Everyone, it seems, is suddenly a budding Martin Scorsese, bent on sharing his or her home-made videos with fellow YouTubers. Once the biggest files being shared via Napster and other P2P (peer-to-peer) networks were MP3 music tracks occupying a few modest megabytes. Today, music videos

⁵ “Technology in 2008,” December 23, 2007, available at: http://www.economist.com/science/displaystory.cfm?story_id=10410912

and TV episodes of hundreds of megabytes are being swapped over the internet by BitTorrent, Gnutella and other file-sharing networks.

And, finally, it concludes:

While major internet service providers like AT&T, Verizon and Comcast all plan to upgrade their backbones, it will be a year or two before improvements begin to show. By then, internet television will be in full bloom, spammers will have multiplied ten-fold, WiFi will be embedded in every moving object, and users will be screaming for yet more capacity.

The point is not to say that each assertion or projection in the *Economist* article will prove correct in every respect. But much more data along the same lines could be produced to show that the direction of Internet growth, with peer-to-peer traffic growth leading the way, is clearly on a steep upward trajectory. A recently released Discovery Institute report is to the same effect, estimating “[t]he U.S. Internet of 2015 will be at least 50 times larger than it was in 2006. Internet growth at these levels will require a dramatic expansion of bandwidth, storage, and traffic management capabilities in core, edge, metro, and access networks.”⁶

Tsunami, indeed. Traffic tsunamis require enhanced and expert network management, whatever the type of network. Telecom networks are no exception. And they require investment in new transmission facilities and network operations facilities and applications. The recent Nemertes Research study projected that new investment exceeding \$100 billion will be required in the U.S. by 2012 to handle the Internet traffic growth.⁷

⁶ Bret Swanson and George Gilder, “Estimating the Exaflood—The Impact of Video and Rich Media on the Internet,” Discovery Institute, January 2008, at 3.

⁷ “The Internet Singularity, Delayed: Why Limits in Internet Capacity Will Stifle Innovation on the Web,” Nemertes Research, November 2007.

It is against this backdrop that the Commission confronts the “network management” petitions, and it is this backdrop that commends the agency to proceed very cautiously. Because if the FCC abandons, or even is perceived as abandoning, its heretofore generally (but not always consistently so) deregulatory broadband policies of the past five years, the investment that has led to such rapid increases in widespread broadband deployment and usage will be threatened.⁸ It is more than a bit ironic that Ben Scott, Free Press’s policy director, was quoted recently as stating: “The best answer to any capacity crunch is to build the kind of high-capacity networks available in the world’s leading broadband nations.”⁹ True enough. But it takes boatloads (make that aircraft carrier loads!) of money to build these networks, and unless the government is going to do it, which it shouldn’t, the FCC must not impose common carrier-like regulations that eliminate or reduce private sector investment incentives.

A. Do Not Adopt An Anticipatory Rule

In light of the foregoing, the Commission definitely should not initiate a rule which looks to defining *ex ante* what constitutes “reasonable” network management. First, by the very nature of the daunting network management task created by the myriad challenges faced by the exponential growth of peer-to-peer traffic, not to mention spam viruses, security attacks, and other malicious kinds of traffic, the agency could not possibly anticipate all conduct that should fall within the reasonableness realm. Before the ink dried on any rule, almost certainly it would be outdated and overinclusive, threatening to curtail network management techniques that ought to be considered

⁸ By way of example of the investment, Verizon reportedly is making a \$23 billion investment in its FiOS fiber product to deliver broadband services. *Communications Daily*, January 15, 2008, p. 9.

⁹ “Time Warner Cable Plans Metered Broadband Trials,” *Communications Daily*, January 18, 2008, at 7.

reasonable in light of the then-prevailing circumstances. Second, the uncertainty created by the mere initiation of a rulemaking proceeding that likely would result in overly broad prohibitions will chill necessary new network investment. Third, if a rule were put in place, it obviously would have the effect of stifling the evolutionary development of new network management practices, freezing in place today's practices that may well not even be relevant, much less adequate, to meet tomorrow's network management challenges.

B. Proceeding on a Case-By-Case Basis, the Commission Must Give Network Managers Wide Berth and Preserve Flexibility

In disposing of the Free Press petition, the Commission should make explicit that, while it may entertain such complaints on an individualized case-by-case basis, its policy will be, absent clear and convincing evidence demonstrating substantial consumer harm, it will not act in a way that interferes with broadband providers' management of their networks. The Commission should follow this course, first, because proceeding on an individual adjudicatory basis will require the agency to focus on a set of specific facts alleged to cause harm in the context of real-world network management responsibilities. Second, proceeding this way will allow the Commission to articulate and demonstrate its understanding that network managers must be given wide berth to manage their networks in the general interest of all of their consumers, not a smaller segment with narrower interests. The Commission should emphasize that in managing networks the ideal cannot be allowed to become the enemy of the good. Flexibility is crucial to be able to deal with new and different network management challenges.

Third, proceeding on a case-by-case basis will allow the Commission to articulate and demonstrate its commitment to narrowly and carefully tailoring any corrective action

that it may require. The Commission should have in mind, and show that it appreciates, that there may be other more suitable forums that potentially provide remedies for conduct such as that complained of in the Free Press petition, assuming *arguendo* any such conduct violated legal norms. For example, contract remedies may come into play because each subscriber has a contract with his broadband provider. The Federal Trade Commission has authority to remedy deceptive advertising, and the FTC and the Department of Justice have authority to remedy unfair or anticompetitive trade practices. The existence of these other forums and potentially available civil and common law remedies is another reason the agency should proceed cautiously in considering whether any relief should be granted to remedy the conduct complained of (assuming such conduct could be proved).

Finally, to the extent the Commission determines in any individual case that any relief whatsoever should be granted in a case concerning reasonable network management, such relief almost certainly should take the form of narrowly-drawn consumer education remedies that have the effect ensuring that consumers are adequately informed concerning the network management practices undertaken by the providers. Such relief should not take the form of requiring an alteration in network management practices that, in effect, impose common carrier-like regulation.

III. Conclusion

In conclusion, the Commission should deny Vuze's request that it initiate a rulemaking proceeding to clarify—in essence to mistakenly try to define in advance--- what constitutes reasonable network management. And, the Commission should not declare, as requested by Free Press and its allies, that the practice by broadband providers

of degrading peer-to-peer traffic violates the FCC's Internet Policy Statement. Rather, in disposing of the Free Press petition, the agency should specifically state that, while it will entertain such petitions on an individualized case-by-case basis, in deciding them it will give great flexibility to broadband providers to manage their networks in ways that benefit all of their subscribers. To the extent that any corrective action at all is warranted—and the Commission should have in mind the existence of potential non-FCC remedies and forums in deciding whether it should act at all— such action almost certainly should take the form of some type of consumer education notification remedy, rather than any action that, in effect, constitutes a form of economic regulation.

Respectfully submitted,

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