

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

In the Matter of the Petition of)	
)	
Free Press et al. for Declaratory Ruling that)	RM- _____
Degrading an Internet Application Violates the)	
FCC's Internet Policy Statement and Does Not)	
Meet an Exception for "Reasonable Network)	
Management)	
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

**COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
ON PETITION FOR DECLARATORY RULING REGARDING
INTERNET MANAGEMENT POLICIES**

I. INTRODUCTION

On June 15, 2007, the National Association of Telecommunications Officers and Advisors ("NATOA"), along with its local government partners, the National Association of Counties ("NACo") and the National League of Cities ("NLC"), submitted comments in response to the Notice of Inquiry ("NOI"), released April 16, 2007, in the above-captioned proceeding. At the time our comments were submitted, opponents of net neutrality charged that proponents were overreacting to a few, isolated instances of

discriminatory action by some broadband providers¹ and that the issue was essentially a “solution in search of a problem.”²

Subsequent actions by certain network owners, particularly AT&T,³ Verizon,⁴ and Comcast,⁵ have belied broadband service providers’ protestations that they would not engage in discriminatory behavior. It appears the problem has been found.

As a result of allegations that Comcast was “intentionally degrading lawful peer-to-peer traffic while repeatedly denying accusations that it was engaging in this practice,”⁶ Free Press *et al.* (collectively, “Petitioners”) have filed a Petition for Declaratory Ruling (“Petition”). They are urging the Commission to conclude ““that the practice by broadband service providers of degrading peer-to-peer traffic violated the FCC’s Internet Policy Statement” (“Policy Statement”) and that such practices do not meet the Commission’s exception for reasonable network management.”⁷

Keeping in mind that any broadband policies and practices must not adversely affect the continued deployment of broadband services to all parts of our nation, NATOA offers the following comments. NATOA’s membership includes local government

¹ See Comments of the National Association of Telecommunication Officers and Advisors, the National Association of Counties, and the National League of Cities in *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry (rel. Apr. 16, 2007), p. 7-9 (“Comments”).

² See, e.g., *The Web’s Worse New Idea*, Wall Street Journal, May 18, 2006, available at <http://www.opinionjournal.com/editorial/feature.html?id=110008391>.

³ In August 2007, AT&T censored a performance by the band Pearl Jam in which lyrics were selectively muted.

⁴ In September 2007, Verizon rejected a request for a text-message program on its mobile system from Naral Pro-Choice America, an abortion rights organization.

⁵ See *Petition for Declaratory Ruling*, WC Docket No. 07-52, filed by Free Press *et al.*, November 1, 2007, at p. 7 (“Petition”).

⁶ *Id.* at p. ii.

⁷ See Public Notice DA 08-91, released January 14, 2008. Vuze, Inc. filed a Petition for Rulemaking asking the Commission to initiate a proceeding “to clarify what constitutes “reasonable network management,’ by broadband network operators and to establish that such network management does not permit network operators to block, degrade or unreasonably discriminate against lawful Internet applications, content or technologies” as used in the Commission’s Internet Policy Statement.” NATOA has filed separate comments in response to this Petition.

officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of services for the nation's local governments.

II. PETITION FOR DECLARATORY RULING

A. Internet Policy Statement

On August 5, 2005, the Commission adopted an Internet Policy Statement in which the Commission sought to “offer[] guidance and insight into its approach to the Internet and broadband that is consistent with [] Congressional directives.”⁸ As such, the Commission set forth four guiding principles:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.⁹

The Commission did not include a specific policy statement incorporating the principle of nondiscrimination. Furthermore, the Commission made it clear that the

⁸ See Federal Communications Commission, Policy Statement, Aug. 5, 2005, ¶ 3, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁹ *Id.* at ¶ 4.

principles were not rules and that they were subject to “reasonable network management.”¹⁰

B. BitTorrent, Inc.

As set forth in greater detail in the Petition, BitTorrent, Inc. offers users the ability to download movies, TV shows, games and music. In August 2007, it was reported that some Comcast broadband subscribers were noticing that their BitTorrent transfers were being “cut off,” along with a “significant decrease in download speeds.”¹¹ When questioned regarding these complaints, Comcast “denied any blocking, degrading, or “filtering” any protocols.”¹² After further investigation by the Associated Press and others, Comcast finally admitted that it had “delayed” BitTorrent traffic.¹³

Petitioners argue that “unless the FCC acts, even broadband service providers which agreed in merger agreements to follow the Policy Statement – such as Verizon and AT&T – may feel emboldened to engage in activity mirroring Comcast’s.”¹⁴ Further, Petitioners claim that “by interfering with video transfers, Comcast is trying to protect its television and On Demand video services.”¹⁵ Petitioners urge the Commission to clarify that the intentional degrading, delaying, or blocking of an application or class of applications violates the Commission’s Policy Statement and to declare that “degrading targeted applications does not meet the Policy Statement’s exception for reasonable network management.”¹⁶ There is “no plausible technical or economic reason to suggest that blocking particular applications is a reasonable way to manage a network, especially

¹⁰ *Id.* at f. 15.

¹¹ Petition at p. 8.

¹² *Id.*

¹³ *Id.* at p. 10.

¹⁴ *Id.* at p. 7.

¹⁵ Cecilia Kang, *Comcast Defends Role as Internet Traffic Cop*, Washington Post, February 13, 2008, available at <http://americanbuddhist.net/comcast-defends-role-internet-traffic-cop>.

¹⁶ *Id.* at p. 14.

because network providers have numerous nondiscriminatory methods to manage the network.”¹⁷ In addition, Petitioners want the Commission to declare that “secretly degrading an Internet application, while advertising access to the Internet and not prominently notifying customers, constitutes a deceptive practice.”¹⁸

C. Reasonable Network Management

In our earlier comments, we noted that “not all discrimination is necessarily bad” and that “some discrimination is necessary,” in part, because “different services impose different burdens on the network. Because of demand, the network may have to degrade service quality to ensure that all users may be served. While this practice may appear to be discriminatory, it actually permits continued service to all users.”¹⁹ For instance, it may be necessary to manage network traffic to give priority to voice calls or, in the event of an emergency, to public safety needs. Such practices would be examples of management, not of discrimination.

For its part, Comcast denies blocking Internet traffic: “We have a responsibility to provide all of our customers with a good Internet experience and we use the latest technologies to manage our network so that they can continue to enjoy these applications.”²⁰ In other words, the company maintains that its complained of actions merely constitute “reasonable network management” practices permissible under the Commission’s Policy Statement.

¹⁷ *Id.* at p. iii.

¹⁸ *Id.*

¹⁹ Comments at p. 6-7.

²⁰ Yinka Adegoke, *Comcast says not blocking Internet downloads*, Reuters, October 22, 2007, available at <http://www.reuters.com/article/idUSN2244631420071022?sp=true>.

While it has been stated that peer-to-peer traffic causes a heavy load on networks, and that such use by a few may inhibit the enjoyment and use by others, there remains little specific data as to the extent of such use and the necessity for denying access to such content as a means of managing a network. Certainly, usage can be monitored and subscribers may be required to obtain appropriate levels of service if such terms and conditions are readily conveyed at the time service is requested. Recently, Time Warner Cable announced that it would conduct a trial in Beaumont, Texas where the company will “bill high-speed Internet subscribers based on their amount of usage rather than a flat fee, the standard industry practice. . . . The company believes the billing system will impact only heavy users, who account for around 5 percent of all customers but typically use more than half of the total network bandwidth.”²¹ “Slowing network congestion due to downloading of large media files such as video is a growing problem for Time Warner Cable. The company said the problem will worsen as video downloading becomes more popular.”²² This statement alone would tend to support the theory that network owners are seeking to protect their own content and that of their partners over content that they neither own nor control.

Petitioners disagree with Comcast’s argument that the company was merely engaging in reasonable network management. Petitioners want the Commission to declare that broadband service providers cannot “intentionally degrade *any* applications,

²¹ As we pointed out in our earlier comments, some argue that the issue of net neutrality will go away with the availability of sufficient bandwidth.

²² Yinka Adegoke, *Time Warner to test Internet billing based on usage*, Reuters, January 16, 2008, available at http://news.yahoo.com/s/nm/20080117/media_nm/timewarner_internet_dc.

and that such discrimination is not reasonable network management.”²³ (Emphasis added.)

While supportive of Petitioners and their efforts to improve broadband deployment and competition, usage, and consumer protection, we feel their request for such a declaratory ruling is too broad. While we agree that the “reasonable network management” exception should be clarified,²⁴ a declaratory ruling at this juncture, without more input from all affected parties, is premature.²⁵

However, our lack of support for a sweeping declaratory ruling should in no way be interpreted as support for the actions taken by any of the aforementioned network owners. Indeed, even assuming that a company’s behavior could be properly characterized as reasonable network management or explained by any other terms, the manner in which the network owners have interfered with applications or otherwise acted in refusing or “delaying” traffic is very troubling and poses serious consumer protection issues. We agree that the Commission should prohibit network owners from adversely interfering with consumers’ applications of choice and that fines should be imposed for doing so. Further, in the event the Commission finds that the allegations against Comcast are accurate and that Comcast’s actions misled the public, it should find that those network practices are deceptive.

D. Deceptive Business Practices

Regardless whether the Commission determines in this specific case that Comcast’s behavior violates the Commission’s Policy Statement, the Commission should

²³ Petition at p. 34.

²⁴ NATOA is supportive of the Petition for Rulemaking filed by Vuze, Inc. in which the Commission is being asked to “clarify what constitutes “reasonable network management.””

²⁵ We are also cognizant that there is a pending lawsuit alleging numerous causes of actions against Comcast premised on the BitTorrent incident.

declare that engaging in such behavior without proper notification to subscribers is a deceptive practice. NATOA has a long-standing policy that all communications providers must give consumers complete and accurate information about their services and that this information should be provided before the consumer commits to a service contract. Further, we believe that providers should continuously provide consumers with up-to-date service information by various means throughout the provision of such services.

On January 25, 2008, Comcast revised its terms of service regarding its policies on traffic management to “exactly mirror” that of the Commission’s Policy Statement.²⁶ While this first small step may lead to greater transparency in regards to the company’s practices, it is troubling that customers are not notified when a specific application is being adversely affected. It is one thing to be notified in small print in a service contract that your broadband provider may engage in network management practices that may adversely affect the applications you use. But it is quite another when you have no idea whether a particular application you are using is being “managed” or whether the connection to an application was broken by a “forged” packet or a legitimate cause.

III. CONCLUSION

As we stated in our earlier comments, the issue of net neutrality must be resolved and the Commission must act to protect the rights of all consumers to access the Internet content, applications, and services of their choice. If the Commission determines that

²⁶ Nate Anderson, *Comcast Tweaks Terms of Service*, ars technical, February 13, 2008, available at <http://arstechnica.com/news.ars/post/20080207>.

Comcast or any other network provider has engaged in deceptive practices, then the Commission should take appropriate and meaningful remedial steps.

Here, rather than issuing a declaratory ruling that broadband providers may not intentionally degrade *any* applications and that doing so does not constitute reasonable network management, we urge the Commission to initiate a rulemaking proceeding to address these and other broadband network management issues.²⁷

Respectfully submitted,

Libby Beaty
Stephen Traylor
NATOA
1800 Diagonal Road, Suite 495
Alexandria, VA 22314
(703) 519-8035
February 14, 2008

²⁷ Indeed, instituting such a proceeding is in line with recently introduced federal legislation. The “Internet Freedom Preservation Act of 2008” (H.R. 5353), introduced by Representatives Edward Markey and Charles Pickering, would require the Commission to determine, among other things, whether broadband network providers adhere to the Commission’s Policy Statement and if they engage in blocking, thwarting, or unreasonably interfering with broadband applications and services.