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

In the Matter of Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators	WC Docket No. 07-52

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

The myriad comments filed in this proceeding illuminate the need for the Commission to adopt clear, enforceable principles – such as its Internet Policy Statement[1] and those that Vonage proposed in its initial comments[2] – to protect consumers and to prevent anti-competitive conduct from hindering internet growth and innovation.

I. The Commission Should Codify Its Internet Policy Statement

First, the Commission should codify the four principles contained in its Internet Policy Statement and enforce those principles on a case-by-case basis. The confusion surrounding the force and effect of the Internet Policy Statement is apparent. Some comments demonstrate an assumption that the Internet Policy Statement is, by itself,

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[1] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) ("*Internet Policy Statement*").

[2] *See Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Vonage Comments, WC Docket No. 07-52 (filed Feb. 13, 2008) ("Vonage Comments").

enforceable.[3] Many others, however, vehemently argue that the Internet Policy Statement "was not intended to, and cannot, have binding legal effect."[4]

If the Commission truly believes, as does Vonage, that these principles are necessary to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all customers,"[5] then it must explicitly convert those laudatory principles into enforceable regulations. Vonage takes no position on whether the Commission has the authority under the Internet Policy Statement to hold Comcast accountable for its previous actions, but the Commission should, at minimum, clarify that network operators are expected to comply with the Internet Policy Statement and will face enforcement action when they fail to do so.

Many of the network operators argue that case-by-case regulation is more appropriate than adopting "detailed regulations precisely defining what, given today's technology, is permissible or not."[6] Vonage certainly does not advocate the "sweeping *ex*

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[3] *See Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Free Press Comments, WC Docket No. 07-52, at 16-18 (filed Feb. 13, 2008); Open Internet Coalition Comments at 10 (filed Feb. 13, 2008) ("[T]he Commission should promptly act on the Free Press Petition, making clear that the *Policy Statement's* four principles are enforceable, and that degrading applications without regard to the actual burden to the network violates the *Policy Statement*."); TIA Comments at 3 ("As suggested by Free Press et al., the *Statement* can facilitate enforcement action when necessary.").

[4] *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Comcast Comments, WC Docket No. 07-52, at 46 (filed Feb. 12, 2008).

[5] *Internet Policy Statement*, 20 FCC Rcd at 14988 ¶ 4.

[6] *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Frontier Communications Comments, WC Docket No. 07-52, at 8 (filed Feb. 13, 2008).

ante regulation"[7] feared by some network operators. To deter harmful network management and to allow for effective "*ex post* case-by-case"[8] enforcement, however, the Commission must be clear about what standards it is enforcing. The first and most critical step is codifying the Internet Policy Statement.

II. The Commission Should Adopt Vonage's Rebuttable Presumptions

AT&T and others invoke tenets of antitrust law and "established competition-law principles to distinguish between forms of market intervention that are properly pro-*competition* (and thus pro-consumer) and forms of intervention that are merely pro-*competitor* (and thus potentially anti-consumer)."[9] Vonage's call for rebuttable presumptions fully comports with those pro-competition principles. Vonage has not asked the Commission to promulgate a complex set of intricate regulations, but rather three discrete presumptions that will provide network operators with clear notice of actions that the Commission generally considers anti-competitive, thus guiding their behavior in a way that protects consumers.

Indeed, it is well-established that "to cope with an uncertain and untidy reality, antitrust law adopts presumptions to guide private behavior and to facilitate the resolution of concrete cases" by courts and regulators.[10] "Through such presumptions, legal institutions cope with our inevitable ignorance about the particular facts of a case, about

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[7] *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Qwest Comments, WC Docket No. 07-52, at 4 n.10 (filed Feb. 13, 2008).

[8] *Id*.

[9] *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, AT&T Comments, WC Docket No. 07-52 at 29 (filed Feb. 13, 2008) ("AT&T Comments").

[10] Areeda and Hovenkamp, Antitrust Law § 305a (Aspen Publishers 3d ed., 2007).

the general facts of the market-place, and about the economic and social significance of one decision or another."[11] In other words, rebuttable presumptions such as those proposed by Vonage are useful tools to guide the behavior of network operators and assist the Commission with its enforcement obligations.

For instance, Vonage's proposed presumption that any undisclosed network management practice that causes advertised bandwidth to be unavailable or otherwise limited is unreasonable will encourage network operators to undertake only legitimate management and to provide consumers with the detail necessary to enable them to make informed choices. Certain network operators have claimed that disclosure will allow parties to circumvent various security measures and harm broadband networks.[12] As an initial matter, the Commission must take these claims with at least a tiny grain of salt. As Commissioner Copps recently noted:

> For as long as the FCC has existed, entrenched, powerful network operators have argued that harm will inevitably result from decisions that cut into their profits and reduce their absolute control over the network. In the 1950s and '60s, the government was told that the entire phone network could be compromised if innovations like *Hush-a-Phone* and *Carterfone* where attached to the end of the telephone line. In the early '80s, the Department of Justice was told that breaking up Ma Bell would leave the United States literally unable to respond to a nuclear threat. More recently, we were told that forcing telecom carriers to accept enforceable network neutrality rules would jeopardize their financial future as they reconsolidated. And late last year we were told that wireless carriers

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[11] *Id*. § 305f.

[12] *See, e.g.*, *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Verizon Comments, WC Docket No. 07-52, at 16 (filed Feb. 13, 2008) ("Verizon Comments") ("For example, identifying in detail every step that a network provider takes to defend its network from outside threats such as spam or denial of service attacks could well facilitate the ability of criminals and the ill-intentioned to evade those protections and inflict harm on the network or subscribers' services, or to steal personal data from subscribers' computers.").

> couldn't make an open access model work—until these very carriers changed their mind and came out in favor of just such a model.[13]

More importantly, however, Vonage does not ask the Commission to force network operators to disclose sensitive proprietary information or detailed technical information that could expose their networks to harm, but simply to disclose "the circumstances in which advertised bandwidth may not be available or may in some way be limited,"[14] so consumers have the information available to make informed decisions when choosing between broadband providers in the marketplace. This presumption comports with Chairman Martin's recent statement that reasonable network management at least "means providing transparency to broadband consumers – in the promises to deliver increased speeds, services, and pricing."[15]

AT&T and others acknowledge that "a broadband network operator *can and should* tell consumers, at an appropriate level of detail, about any material restrictions or limitations on their broadband Internet service."[16] AT&T nonetheless argues that the decision to make such a disclosure, and the nature of the disclosure, should be left

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[13] Statement of FCC Commissioner Michael Copps, *En Banc* Hearing on Broadband Network Management Practices at 2-3 (Feb. 25, 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280440A1.pdf ("Copps Statement").

[14] Vonage Comments at 8.

[15] Statement of FCC Chariman Kevin Martin, *En Banc* Hearing of Federal Communications Commission at 3 (Feb. 25, 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280446A1.pdf.

[16] AT&T Comments at 32 (emphasis added); *see also* Verizon Comments at 15 ("In a competitive market, broadband providers have strong incentives to provide consumers the type of meaningful information about that their services that will allow them to understand the options available to them and understand what it is they are buying.").

entirely to the network operators.[17] But, as Commissioner Copps recently noted, "[d]ecisions made without you are usually decisions against you."[18] Thus, adopting a rebuttable presumption, as Vonage proposes, will discourage network operators from making network management decisions "without" consumers. In the rare instance that a particular undisclosed management practice causes consumers to receive less bandwidth than they believe they have purchased but nonetheless has a legitimate pro-consumer justification, network operators will be free to demonstrate that to the Commission or the courts.

Similarly, Vonage asks the Commission to "[a]dopt a rebuttable presumption that network management that results in the blocking or material degradation of a service or application that competes with a service offered by the network operator (or its affiliate) is not reasonable."[19] Again, this does not create an intricate regulatory structure, but instead puts networks on notice that they will be presumed to violate the law if they manage their networks in a way that has anticompetitive effects and thus harms consumers. Of course, there may be certain legitimate network management practices that result in some level of service degradation. Network operators should have the opportunity to demonstrate the reasonableness of such action, and Vonage's proposal provides that opportunity.

Finally, there can be little debate that network management practices that result in the degradation of services necessary for 911 and E911 access should be presumed to be unreasonable.

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[17] AT&T Comments at 32-33.

[18] Copps Statement at 1.

[19] Vonage Comments at 8.

These presumptions will help protect consumers and public safety, facilitate the market through information disclosure, and protect the market from anti-competitive behavior. The Commission should confirm its commitment to nondiscriminatory network operation and provide the certainty necessary to encourage continued innovation and investment in Internet services and applications by codifying its Internet Policy Statement and placing clear and enforceable limits on "reasonable network management" through the narrowly-tailored rebuttable presumptions proposed by Vonage.

Respectfully submitted,

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