

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of:)	
)	
Petition of Free Press et al. for Declaratory)	
Ruling that Degrading an Internet)	
Application Violates the FCC's Internet)	
Policy Statement and Does Not Meet an)	
Exception for "Reasonable Network)	
Management")	WC Docket No. 07-52
)	
Vuze, Inc. Petition to Establish Rules)	
Governing Network Management Practices)	
by Broadband Network Operators)	
)	
Broadband Industry Practices)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

Matthew A. Brill
Barry J. Blonien
Jarrett S. Taubman
LATHAM & WATKINS LLP
555 Eleventh Street, NW
10th Floor
Washington, DC 20004

Counsel for Time Warner Cable Inc.

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REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits these reply comments addressing the comments filed in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The comments filed in response to the Free Press and Vuze Petitions¹ overwhelmingly demonstrate the ill-conceived nature of their call for increased Internet regulation. The record confirms that traffic management policies, including in particular measures that mitigate network congestion caused by peer-to-peer ("P2P") applications, are not only reasonable, but imperative. Moreover, a diverse array of commenters agree that the competitive broadband marketplace effectively and efficiently disciplines the conduct of service providers, whereas prescriptive rules would be overbroad and counterproductive.

¹ Petition for Declaratory Ruling of Free Press, et al., WC Docket No. 07-52 (filed Nov. 1, 2007) ("Free Press Petition"); Petition for Rulemaking of Vuze, Inc., WC Docket No. 07-52 (filed Nov. 14, 2007) ("Vuze Petition").

Even if Petitioners and their supporters could demonstrate that particular traffic management practices are unreasonable — and they have not — the Commission appropriately adopted nonbinding *principles*, rather than enforceable *rules*, in the *Broadband Policy Statement*.² The Administrative Procedure Act, not to mention the Due Process Clause, squarely precludes the declaratory rulings and enforcement actions Petitioners seek, even apart from the absence of any legitimate rationale for seeking to ban the traffic management practices at issue.

Finally, the case for new rules governing broadband providers' disclosure practices is as weak as the argument for regulating the substance of their network management policies. There has been no showing that consumers are deprived of meaningful information; rather, the push for more detailed disclosures concerning traffic management comes mainly from application providers seeking to circumvent important restrictions. In any event, existing laws provide ample remedies for inadequate disclosures, and the Commission lacks authority to establish an additional (and superfluous) layer of regulation.

DISCUSSION

I. THE RECORD DEMONSTRATES THAT NETWORK MANAGEMENT IS IMPERATIVE AND BEST GOVERNED BY MARKET FORCES.

A wide and diverse range of commenters resoundingly agree that network management — including in particular traffic management policies that mitigate the harms caused by P2P applications — is not only reasonable, but essential to easing congestion and maintaining service quality. In addition to broadband providers (including cable operators,³ wireline

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Policy Statement, 20 FCC Rcd 14986 ¶ 5 n.15 (2005) (“*Broadband Policy Statement*”).

³ *See, e.g.*, Comcast Comments at 17-18, 24; National Cable & Telecommunications Association (“NCTA”) Comments at 4-5.

telecommunications carriers,⁴ and wireless carriers⁵), many other entities including equipment manufacturers,⁶ content owners,⁷ and ad hoc coalitions⁸ recognize that network management is critical to protecting consumers' interests. Perhaps most significantly, many technologists, think tanks, and public interest organizations with no direct interest at stake strongly oppose Commission regulation of broadband providers' traffic management practices.⁹

A. The Record Demonstrates the Need for Traffic Management, Including Measures That Mitigate the Impact of P2P Applications.

Several commenters describe the substantial challenges confronting broadband providers, as they strive to deliver increasingly robust service in the face of rapidly growing bandwidth consumption and significant changes in traffic patterns.¹⁰ Broadband providers must ensure that subscribers can not only access websites and send e-mails efficiently, but also enjoy more

⁴ See, e.g., AT&T Comments at 6; Embarq Comments at 3; Frontier Communications Comments at 3-5; Qwest Comments at 6; Verizon Comments at 2-4, 18-19.

⁵ See CTIA—The Wireless Association (“CTIA”) Comments at 2, 6; Wireless Communications Association International, Inc. (“WCA”) Comments at 6; LARIAT Comments at 4-7.

⁶ See, e.g., Fiber-to-the-Home Council (“FTTH Council”) Comments at 16–17; Telecommunications Industry Association (“TIA”) Comments at 9.

⁷ See NBC Universal Comments at 3; Recording Industry Association of America (“RIAA”) Comments at 3-4.

⁸ See, e.g., Hands Off the Internet Comments at 10-13.

⁹ See, e.g., George Ou Comments at 9; Information Technology & Innovation Foundation (“ITIF”) Comments at 8-10; Technology & Democracy Project Discovery Institute Comments at 1-3; Institute for Policy Innovation Comments at 2; Labor Council for Latin American Advancement Comments at 1; Small Business & Entrepreneurship Council at 1; Reason Foundation Comments at 1; Free State Foundation Comments at 3; Progress & Freedom Foundation Comments at 1-2; cf. Center for Democracy and Technology Comments at 2-3 (opposing FCC regulation in spite of its concerns about some network management practices).

¹⁰ NCTA Comments at 3-5, 8; AT&T Comments at 6; CTIA Comments at 2; FTTH Council Comments at 11; RIAA Comments at 3-4; Hands Off the Internet Comments at 10; ITIF Comments at 8-10.

latency-sensitive applications such as VoIP and streaming video.¹¹ As AT&T explains, network engineers constantly must “devise creative solutions to new problems, ranging from unexpected equipment failures and spikes in bandwidth to the proliferation of viruses, worms, spyware, denial-of-service attacks, and other threats to network security.”¹² In addition, broadband providers increasingly use network management tools to promote public safety and ensure dependable services for government agencies and emergency responders that rely on the Internet and other managed-IP networks.¹³ In short, broadband providers rely on network management “to improve the functioning of the Internet.”¹⁴

The record further confirms that P2P applications in particular, if left unmanaged, would pose significant threats to the efficient operation of broadband networks and, in turn, consumer welfare. Indeed, in an unmanaged environment, P2P applications could effectively hijack the Internet and crowd out other uses, as several commenters observe.¹⁵ Commenters also forcefully refute the notion that capacity upgrades alone could solve the problem of P2P-induced congestion, explaining that such upgrades “would mean imposing massive costs on average

¹¹ See Technology & Democracy Project Discovery Institute Comments at 1; University of Arkansas for Medical Sciences Comments at 1 (advocating network management’s beneficial impact on physicians’ long-distance consultations with patients).

¹² AT&T Comments at 24.

¹³ See Technology & Democracy Project Discovery Institute Comments at 1; Verizon Comments at 27.

¹⁴ Verizon Comments at 3.

¹⁵ See, e.g., Comcast Comments at 26 (citing independent research demonstrating that very few individuals, using P2P applications on a single node, can severely degrade quality); Frontier Communications Comments at 3 (commenting that without network management practices, “there is no market mechanism to prevent [P2P] technology from taking over all available spare capacity”).

consumers for a network engineered to meet the interests of the few,”¹⁶ and in any event P2P applications are designed to devour whatever new bandwidth becomes available.¹⁷

B. The Record Also Confirms That Oversight of Network Management Is Best Left to the Marketplace.

The comments also make clear that market forces represent the best mechanism for policing the conduct of broadband providers. Comcast offers a thorough and detailed description of its network management practices, which plainly “do not entail any form of discrimination based on content, application, or service utilizing the P2P protocol or the identity of the entity or person offering or using the content, application, or service.”¹⁸ Instead, Comcast’s policies and others like them rely on “purely objective criteria that focus on the effects that all protocols have on network congestion and, correspondingly, [their] customers’ use of the Internet.”¹⁹ But even if Petitioners and their supporters were correct that traffic management policies like Comcast’s could threaten to harm consumers, most commenters recognize that the Commission would be unable to develop rules that proscribe potentially abusive policies without sweeping in important pro-consumer conduct.²⁰ The constantly shifting demands placed on broadband providers, and the resultant diversity of network management policies in place, preclude one-size-fits-all solutions. Rather, in the dynamic and competitive Internet arena, broadband providers must

¹⁶ NCTA Comments at 4.

¹⁷ *See* Verizon Comments at 34.

¹⁸ Comcast Comments at 27.

¹⁹ *Id.*

²⁰ *See* Embarq Comments at 1, 5; WCA Comments at 5-7; U.S. Telecommunications Association (“USTA”) Comments at 7; TIA Comments at 15-16; Hands Off the Internet Comments at 9; American Homeowners Grassroots Alliance Comments at 3; Free State Foundation Comments at 6-7; *see also* Federal Trade Commission Internet Task Force, *Staff Report: Broadband Connectivity Competition Policy*, at 11, 125, 160 (June 2007) (“FTC Report”); Ex Parte Filing United States Department of Justice, WC Docket No. 07-52, at 1, 10 (Sept. 1, 2007) (“DOJ Ex Parte Filing”).

retain flexibility to respond to new sources of network congestion and other threats to service quality. Any necessary discipline should be imposed by market forces, and not government regulators.

As commenters note, the Commission’s longstanding refusal to regulate the Internet — whether in response to calls for “net neutrality” mandates or earlier efforts to impose “open access” requirements on broadband providers — has paid enormous dividends as network owners have invested more than a hundred billion dollars in broadband infrastructure, which in turn has enhanced consumer welfare immeasurably.²¹ There is no reason to abandon that wildly successful policy. To the contrary, the vigorous and growing competition in the broadband arena more than ever before ensures that service providers will respond swiftly to the evolving needs of their subscribers.²² Petitioners and their supporters consider the marketplace ineffectual, but they fail to counter arguments that the Internet in general, and broadband services in particular, have experienced robust development precisely because the government has chosen to rely on market forces rather than regulation.

In any event, the harms alleged by these parties are illusory and therefore fail to justify regulatory intervention.²³ As TWC and many others demonstrate in their comments, the network management practices at issue are eminently reasonable because they protect the vast majority of subscribers from service degradations caused by a small minority of individuals’ extraordinarily

²¹ See, e.g., AT&T Comments at 1-2; Verizon Comments at 12-13; Qwest Comments at 3; USTA Comments at 4; TIA Comments at 7.

²² See, e.g., AT&T Comments at 4, 10; CTIA Comments at 3; Qwest Comments at 3; Verizon Comments at 10.

²³ See American Homeowners Grassroots Alliance Comments at 3; ITIF Comments at 3; Technology & Democracy Project Discovery Institute Comments at 1; Reason Foundation Comments at 2.

heavy usage of P2P applications.²⁴ Indeed, virtually all network-based industries employ similar types of traffic management policies during peak periods of demand to prevent service outages and performance problems.²⁵ While proponents of regulation suggest that Comcast and other broadband providers employ traffic management policies that target P2P applications “without regard to their impact on the network,”²⁶ nothing could be further from the truth. As Comcast explained in its comments, its network management practices are narrowly tailored to specific network impacts. Comcast does not “*prevent, restrict, or limit* the use of applications and services using P2P protocols,” but “merely delay[s] unidirectional uploads,” and “only during periods of peak network congestion.”²⁷ If broadband providers failed to employ such measures, even a small number of users simultaneously using P2P applications could more than double the time it takes for a web page to download, disrupt streaming video, and destroy the quality of VoIP calls.²⁸ Thus, far from threatening the viability of VoIP services (including P2P-based applications like Skype), as the Open Internet Coalition appears to fear,²⁹ traffic management

²⁴ See Time Warner Cable (“TWC”) Comments at 11; NBC Universal Comments at 1; NCTA Comments at 4; Verizon Comments at 3; CTIA Comments at 2, 6; FTTH Council Comments at 16-17.

²⁵ See Progress & Freedom Foundation Comments at 2-3 (likening broadband network management tools to grocery stores’ express checkout lanes, airlines’ rate differentiation, and “singles” lift-lanes at ski resorts, among other common means of dealing with congestion).

²⁶ Open Internet Coalition Comments at 6.

²⁷ Comcast Comments at 27, 31, 33 (emphasis in original). Comcast explains that it not only refrains from managing P2P applications in most instances, but also “does not manage such applications as ‘iChat, VoIP services, VPNs, chat servers, or e-mail.’” *Id.* at 30.

²⁸ *Id.* at 26.

²⁹ Open Internet Coalition Comments at 6. Tellingly, the Coalition never alleges — because it cannot — that the traffic management policies at issue here in any way restrict the ability of customers to use applications like Skype. Rather, as shown above, these policies actually facilitate the ability of consumers to use such applications.

policies that mitigate the impact of multiple, simultaneous, unidirectional P2P upload sessions are vital to *protecting* VoIP and other latency-sensitive applications.

Finally, the record confirms that mandates restricting traffic management policies are not only unnecessary, but would be affirmatively harmful. By stifling broadband providers' ability to ameliorate network congestion, "net neutrality" mandates would chill investment and innovation,³⁰ exacerbate the digital divide,³¹ and reduce reliability for government agencies and emergency responders who rely on the Internet and managed-IP networks.³² Therefore, as TWC explained in its opening comments, the Commission should heed the sound recommendations of the Federal Trade Commission and Department of Justice to avoid new regulations, "particularly given the indeterminate effects on [consumer] welfare of potential conduct by broadband providers and the law enforcement structures that already exist."³³

II. THE COMMISSION APPROPRIATELY DECIDED TO ADOPT NONBINDING PRINCIPLES, RATHER THAN ENFORCEABLE RULES, IN THE *BROADBAND POLICY STATEMENT*.

As TWC and others demonstrated in their opening comments, and as reaffirmed above, the traffic management policies at issue are eminently reasonable and thus fully consistent with the *Broadband Policy Statement*. Even assuming Petitioners could demonstrate some harm to consumers, however — and setting aside Petitioners' unwarranted disregard for the efficacy of competition — any "violations" of the *Broadband Policy Statement* could not form the basis for a declaratory ruling or enforcement action. While Free Press and a few commenters ask the

³⁰ See Embarq Comments at 1, 3, 5; FTTH Council Comments at 34-35; TIA Comments at 7; U.S. Chamber of Commerce Comments at 9; WCA Comments at 6, n.15.

³¹ See AT&T Comments at 20.

³² See Verizon Comments at 27.

³³ FTC Report at 160. See also DOJ Ex Parte at 1-4.

Commission to rule that the principles in the *Broadband Policy Statement* are binding,³⁴ and that traffic management practices like those employed by Comcast constitute a “violation,”³⁵ such arguments ignore the Commission’s well-reasoned refusal to adopt enforceable rules as well as important procedural requirements with which the Commission much comply.

The Commission plainly made the principles at issue nonbinding, appropriately recognizing the need for flexibility and the dangers of overbroad prohibitions. As noted above, the Commission has long recognized that reliance on market forces, supplemented by the bully pulpit, will serve consumers far more effectively than wooden rules of general applicability.³⁶ The Commission accordingly took pains to provide policy guidance without risking the stultifying effect of government mandates. As Chairman Martin explained upon adoption of the *Broadband Policy Statement*, “policy statements do not establish rules nor are they enforceable documents.”³⁷ The full Commission later reaffirmed that “[t]he Policy Statement did not contain rules.”³⁸ The Commission’s statement in the *Wireline Broadband Order* that it “[would] not

³⁴ See, e.g., Open Internet Coalition Comments at 10 (arguing that the Commission should “mak[e] clear that the *Policy Statement*’s four principles are enforceable”).

³⁵ See Free Press Petition at 14-25 (describing alleged “violations”); Open Internet Coalition Comments at 8 (urging Commission to “make clear that technology- and application-specific degradation or blocking is a *per se* violation of the [*Broadband Policy Statement*]”).

³⁶ See *supra* at Part I.

³⁷ News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement* (Aug. 5, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf. See Separate Statement of Commissioner Copps, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”) (distinguishing the principles set forth in the *Broadband Policy Statement* from enforceable rules).

³⁸ *Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, FCC 07-31 ¶ 11 n.20 (rel. Apr. 16, 2007) (“*Broadband Industry Practices NOF*”); see *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia*

hesitate to take action” if it learned that service providers’ conduct were inconsistent with the principles in the *Broadband Policy Statement*³⁹ meant only that the Commission would consider adopting rules if a market failure emerged (which it has not) — *not* that it would bypass the Administrative Procedure Act (“APA”) and issue a declaratory ruling or propose enforcement action.

In addition to the Commission’s own statements and actions in adopting the principles, black-letter tenets of administrative law make clear that a *policy statement*, in contrast to *rules* adopted pursuant to notice-and-comment procedures, cannot provide the predicate for declaring “violations” that warrant enforcement action.⁴⁰ Section 553 of the APA sets forth specific procedures that the Commission must follow before it may adopt binding substantive rules.⁴¹ The absence of any notice of proposed rulemaking seeking comment on binding “net neutrality” restrictions precludes the declaratory rulings and enforcement action sort sought by Free Press and its few supporters (even apart from the complete lack of merit in their allegations of harm to consumers).⁴² The Commission issues declaratory rulings to clarify *existing* law, not to create

Communications Corp., to Time Warner Cable Inc. and Comcast Corp., Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 223 (2006) (noting that “the Commission chose not to adopt rules in the Policy Statement”).

³⁹ *Wireline Broadband Order* ¶ 96.

⁴⁰ See 47 U.S.C. §§ 501-503, 552(a)(1) (authorizing enforcement action based on violations of *existing* rules); *Northern California Power Agency v. Morton*, 396 F. Supp. 1187 (D.D.C. 1975) (setting aside agency’s rate increase for failure to accord adequate notice, where agency failed to publish any description of procedures to be followed in ratemaking proceedings), *aff’d*, 539 F.2d 243 (D.C. Cir. 1976).

⁴¹ 5 U.S.C. §§ 553(b), (c).

⁴² See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (“[R]egulations subject to the APA cannot be afforded the ‘force and effect of law’ if not promulgated pursuant to the statutory procedural minimum found in the Act.”); *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (reversing purported rule based on Commission’s failure to issue a notice of proposed rulemaking describing the particular obligation at issue).

rules in the first instance.⁴³ Indeed, Vuze’s decision to file a petition for rulemaking, rather than petition for declaratory ruling, reflects these important limitations.

Moreover, the APA’s strictures are grounded in constitutional Due Process principles, which require clear notice to parties that may be subject to punishment and accordingly bar retroactive penalties based on an asserted violation of a rule that was not in existence at the time of the challenged conduct.⁴⁴ Even apart from the absence of formal notice, the principles set forth in the *Broadband Policy Statement* do not adequately apprise broadband providers that they could be penalized for employing traffic management policies. To the contrary, the *Broadband Policy Statement* expressly authorizes reasonable network management.⁴⁵ Consequently, any attempt to enforce the principles set forth in the *Broadband Policy Statement* would run afoul of the Due Process Clause.⁴⁶

⁴³ See, e.g., *Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation*, Order, 11 FCC Rcd 9051 ¶ 4 (1996) (rejecting petition for declaratory ruling because it did “not ask us to resolve a controversy or uncertainty with respect to the Commission’s *existing* rules”) (emphasis added).

⁴⁴ See *United States v. Lanier*, 520 U.S. 259, 269 (1997) (requiring that prior notice must be sufficient “to ensure that defendants reasonably can anticipate when their conduct may give rise to liability . . . by attaching liability only if the contours of the [rule violated] are sufficiently clear that a reasonable [person] would understand that what he is doing violates that [rule]”); *Trinity Broadcasting v. FCC*, 211 F.3d 618, 628-632 (D.C. Cir. 2000) (refusing to allow the Commission to apply its plausible interpretation of an ambiguous rule to refuse to renew a broadcast license when the interpretation was not “ascertainably certain” at the time of the conduct); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (“[W]e cannot defer to the Commission’s interpretation of its rules if doing so would penalize an individual who has not received fair notice of the regulatory violation.”).

⁴⁵ *Broadband Policy Statement*, 20 FCC Rcd 14986 ¶ 5 n.15.

⁴⁶ *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 265 (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly. . . .”).

Finally, Petitioners are unable to demonstrate that the Commission may issue a declaratory ruling or enforce the *Broadband Policy Statement* — again, assuming Petitioners could establish a “violation,” which they cannot — directly under the Communications Act itself. Because broadband network providers are not common carriers, as determined by the Commission and upheld by the Supreme Court,⁴⁷ they are not subject to the common carrier provisions of Title II, including the broad injunctions in Sections 201 and 202.⁴⁸ And nothing in Title I remotely speaks to the permissibility of network management practices, much less prohibits particular conduct with sufficient clarity to authorize enforcement action. Moreover, as many commenters point out,⁴⁹ no other statutory provision justifies reliance on the Commission’s ancillary jurisdiction in this context, because restricting broadband providers’ ability to employ traffic management policies would undermine, rather than promote, the congressional policies at stake.⁵⁰

⁴⁷ See, e.g., *Wireline Broadband Order*, 20 FCC Rcd 14853, *aff’d sub nom. Time Warner Telecom., Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002), *aff’d sub nom. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

⁴⁸ For this reason, the Consent Decree adopted in the *Madison River* case is inapposite. The Commission in *Madison River* never reached the merits of any complaint, because the allegations were resolved through a voluntary consent decree. In any event, the Commission entered that decree in reliance on its Title II authority, before adopting the information-service classification as to telecommunications providers in the *Wireline Broadband Order*. See *Madison River Communications, LLC*, Order Adopting Consent Decree, 20 FCC Rcd 4295, ¶ 1 (EB 2005).

⁴⁹ See, e.g., Hands Off the Internet Comments at 4; Comcast Comments at 50; RIAA Comments at 5; Center for Democracy & Technology Comments at 2-3.

⁵⁰ While Free Press argues that regulating the Internet would promote the congressional policies embodied in Section 230 of the Act and Section 706 of the 1996 Act, Free Press Comments at 18-20, it grossly mischaracterizes the statute. Notwithstanding Free Press’s selective quotations, Congress actually directed the Commission “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” 47 U.S.C. § 230(b). Similarly, Section 706 focuses on *eliminating* regulatory barriers to broadband

Because the absence of enforcement authority is manifest, the Commission should, at most, confine its focus to the merits of adopting new regulations. And because the case against any such rules is clear and compelling, the Commission should conclude that there is no such need. As TWC and many others have demonstrated, “net neutrality” mandates restricting broadband providers’ freedom to engage in network management would harm consumers’ interests, and, as shown below, there is neither a need nor adequate authority for the Commission to adopt rules concerning broadband providers’ disclosure practices.

III. THERE IS NO NEED FOR THE COMMISSION TO REGULATE BROADBAND PROVIDERS’ TERMS OF SERVICE, AND IN ANY EVENT IT LACKS AUTHORITY TO DO SO.

TWC agrees with those commenters who note that transparency is an important aspect of a competitive marketplace, but strongly disagrees with Petitioners’ argument that the Commission should adopt rules governing disclosure practices. As the FTC observed in its Report, consumers already are aware of the potential “harms from certain conduct by, and business arrangements involving, broadband providers” and “have a powerful collective voice.”⁵¹ Indeed, broadband providers would ignore the importance of transparency at their peril, as the threat of consumer backlash always looms. Like most broadband providers, TWC provides consumers with meaningful information about the terms and conditions of its services, including limitations imposed by its “acceptable use” and “network management” policies, so

investment, not establishing them. Nor do the Commission’s rules regarding the C Block in the 700 MHz auction have any bearing on this proceeding. *See* Free Press Comments at 22-23. In that context, the Commission established “open access” conditions in advance through a rulemaking (as opposed to regulating existing services without first adopting an NPRM), leaving service providers free to bid on other, unrestricted spectrum or to avoid participating in the auction altogether. In any event, the Commission adopted the C Block rules based on its authority under Title III, which plainly has no application to most broadband services.

⁵¹ FTC Report at 161.

they can make informed decisions whether to subscribe to those services.⁵² There is simply no evidence of an information failure or, for that matter, any other harm that could justify the compelled speech that Petitioners request.

Moreover, as the Telecommunications Industry Association observes, “existing state and federal antitrust and unfair competition laws *already* protect consumers from unreasonable management practices.”⁵³ A consumer injured by inadequate, false, or misleading disclosures could raise those concerns with the FTC or state Attorneys General or pursue an individual civil action.⁵⁴ To date, however, the FTC has not uncovered any sign of “significant market failure or demonstrated consumer harm from conduct by broadband providers.”⁵⁵ To the contrary, as TWC and others explained in their comments, the broadband marketplace is not only functioning but thriving.⁵⁶

Furthermore, much of the push for new disclosure rules comes from application providers, rather than consumers.⁵⁷ The purpose of these providers’ calls for enhanced disclosures is not to protect consumers, but to undercut the effectiveness of network management practices. As AT&T notes, it is essential for a broadband provider to keep certain technical

⁵² See, e.g., Verizon Comments at 15 (“Most broadband providers ... routinely provide consumers with meaningful information concerning the nature and limits of their services, including in their detailed terms of service and generally in their marketing materials.”); NCTA Comments at 10–11 (“Virtually all cable operators include such ‘acceptable use’ and ‘network management’ disclosures in their subscriber agreements....”).

⁵³ TIA Comments at 18; see also FTC Report, at 130-31 (describing FTC’s role in ensuring accurate disclosures).

⁵⁴ See TIA Comments at 18; Comcast Comments at 48 n.136 (noting that Petitioners or other parties could raise concerns with DOJ, FTC, or state enforcement authorities).

⁵⁵ FTC Report at 11.

⁵⁶ See TWC Comments at 4; Comcast Comments at 5-11; NCTA Comments at 10; AT&T Comments at 3; American Homeowners Grassroots Alliance at 3.

⁵⁷ See, e.g., Open Internet Coalition Comments at 10-11; Vuze Petition at 15.

details confidential in order to protect its network and to ensure that its customers receive the highest-quality Internet access.⁵⁸ Verizon further points out that detailed disclosure of network management practices may actually result in “more confusion for customers,” while “facilitat[ing] the ability of criminals and the ill-intentioned to evade those protections and inflict harm on the network or subscribers’ services” and exposing subscribers to potential theft of personal data and other significant harms.⁵⁹ Yet proponents of regulation openly concede that they seek disclosures (at least in part) to make it easier for P2P providers and others to adopt “counter-measures” to circumvent broadband providers’ efforts to manage their networks.⁶⁰

In any event, the Commission’s authority to regulate broadband providers’ network management practices is uncertain as a general matter,⁶¹ and any compelled disclosure

⁵⁸ AT&T Comments at 33.

⁵⁹ Verizon Comments at 16. *See* Comcast Comments at 19 (“Providers typically do not disclose their network management practices in any detail, given network security and congestion concerns.”); NCTA Comments at 11 (“Disclosure of the details of specific existing network management technologies could ... be counterproductive to the extent that it enables web content distributors (and Internet customers) to *circumvent* such technologies without reducing the potential congestion caused by such distributors.”); Progress & Freedom Foundation Comments at 11 (“Any rules that forced service providers to divulge particular *methods* of network management would be highly counterproductive. Such disclosures of trade secrets could allow wrongdoers to attack networks in a way that erodes service quality and security.”).

⁶⁰ *See* Vuze Petition at 11 (“[W]hile Vuze has been able to minimize any serious impact on its service, it has been forced to engage in constant guesswork—since the tactics are largely hidden—and to play a ‘cat and mouse’ game with network providers.”); Free Press Comments at 62 (among other things, disclosure would allow consumers “to use counter-measures”); Open Internet Coalition Comments at 9 (describing “arms race” in which application providers seek to overcome broadband providers’ traffic management policies).

⁶¹ *See, e.g.,* Center for Democracy & Technology Comments at 8 (“CDT is not certain ... whether the Commission is best positioned or even has jurisdiction to address this issue.”); *see also* *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (striking down cable regulations imposed under Commission’s Title I ancillary authority on the ground that rules were antithetical to the Act’s basic regulatory parameters); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (holding that the Commission lacked

requirement would be especially problematic because it would threaten to violate the First Amendment. As the Supreme Court has recognized, “unjustified or unduly burdensome disclosure requirements might offend the First Amendment” by chilling protected speech, and therefore at a minimum must be “reasonably related to the [Government’s] interest in preventing deception of consumers.”⁶² It is not enough that consumers or other third parties have some vague interest in receiving additional information about a business’s practices or methods.⁶³ Rather, the Supreme Court has made clear that a governmental body seeking to sustain a restriction on protected speech “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁶⁴ Based on the complete absence of record evidence showing consumer harm, the imposition of a mandatory disclosure requirement would not pass constitutional muster.

Even if the Commission possessed the requisite statutory authority and could justify new disclosure requirements, logic and fairness would dictate that any such rule would need to reach all entities—including P2P and other Internet application providers—that “exert[] structural influence on whether the Internet will treat applications and content ‘neutrally.’”⁶⁵ The interest of consumers in obtaining accurate information from broadband providers applies equally to Internet applications and content. In particular, P2P providers should disclose how their

authority under Title I to impose broadcast flag regulations); *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 798-99 (D.C. Cir. 2002) (holding that the Commission lacked authority under Title I to impose video description requirements for the benefit of visually impaired individuals).

⁶² *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

⁶³ *See, e.g., Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (“Were consumer interest alone sufficient, there is no end to the information that [the Government] could require manufacturers to disclose about their production methods.”).

⁶⁴ *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

⁶⁵ AT&T Comments at 32. *See also* NTCA Comments at 7–8.

applications actually work (*e.g.*, that many such applications effectively turn a consumer's computer into a commercial server) and how they impact the consumer's broadband Internet access service. As SafeMedia notes, a recent report by the U.S. Patent and Trademark Office found that leading P2P applications "induced users to share documents — often without the users['] explicit knowledge."⁶⁶ Therefore, if there is an existing information failure, it is attributable to P2P providers, which typically fail to make adequate disclosures to consumers.

CONCLUSION

For the reasons discussed above and in TWC's opening comments, TWC urges the Commission to reject the Free Press and Vuze Petitions and refrain from adopting any regulations that would restrict a broadband provider's right to adopt reasonable network management practices.

Respectfully Submitted,

/s/ Matthew A. Brill

Matthew A. Brill
Barry J. Blonien
Jarrett S. Taubman
LATHAM & WATKINS LLP
555 Eleventh Street, NW
10th Floor
Washington, DC 20004

Counsel for Time Warner Cable Inc.

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⁶⁶ Comments of SafeMedia Corp. at 3 (citing U.S. Patent and Trademark Office, *Filesharing Programs and "Technological Features to Induce Users to Share,"* at 1-4 (Nov. 2007), available at www.uspto.gov/web/offices/dcom/olia/copyright/oir_report_on_inadvertent-sharing_v1012.pdf).