

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
Broadband Industry Practices	)	WC Docket No. 07-52
	)	
	)	FCC 09-93



**INITIAL COMMENTS**

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January 14, 2010

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**INITIAL COMMENTS**

The Federal Communications Commission (Commission or FCC) on October 22, 2009, released a Notice of Proposed Rulemaking (NPRM)<sup>1</sup> seeking to codify the FCC’s existing four Internet policy principles contained in its broadband policy statement adopted August 5, 2005.<sup>2</sup> In addition, NPRM seeks to codify two new policy principles concerning “nondiscrimination” and “transparency.” The NPRM further seeks to codify a rule that defines “reasonable network

<sup>1</sup> *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (released Oct. 22, 2009).

<sup>2</sup> *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and requirements*, CC Docket Nos. 95-20, 98-10, *Inquiry Concerning High-Speed Access to the Internet Over cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy Statement, FCC 05-151( Released September 23, 2005).

management” to help ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.<sup>3</sup> NTCA files these comments in response to the NPRM.

## I. INTRODUCTION AND SUMMARY.

The Internet is, unquestionably, a success story. The Commission points to the 1.6 billion people it reaches worldwide,<sup>4</sup> the 600,000 Americans who earn part of their living through the eBay auction platform,<sup>5</sup> and the \$130 billion annual business that broadband Internet access is today.<sup>6</sup> The Internet is transforming health care, education and energy usage and is a platform for free speech.<sup>7</sup> There is no debate over whether the Internet is working for the American public.

NTCA agrees with the Commission in that the Internet’s openness and the transparency of its protocols are critical to its success.<sup>8</sup> As a communication conduit the Internet has revolutionized the way information is disseminated and received. Unfettered access to the Internet to both send and receive content is essential.

NTCA further believes that the Commission’s four principles contained in its broadband policy statement adopted August 5, 2005 will help to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers. NTCA also supports adding a transparency principle to the FCC’s original principles so long as it does not impose undue economic burdens on small rural Internet access providers. NTCA, however, cautions the Commission to be very careful in how it structures its newly proposed principle of

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<sup>3</sup> See Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (enacting 1996 Act “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

<sup>4</sup> NPRM ¶17.

<sup>5</sup> *Id.*, ¶20.

<sup>6</sup> *Id.*, ¶ 21.

<sup>7</sup> *Id.*, ¶¶ 21-22.

<sup>8</sup> *Id.*, ¶ 3.

“nondiscrimination.” Strict prohibitions against all forms of price and service discrimination will hamper the development of broadband services.

All of the Commission’s open Internet principles, including that of nondiscrimination must be considered in conjunction with the Commission’s yet to be defined “reasonable network management” definition. How the principles are weighed against the definition of “reasonable network management” will determine whether a public Internet service provider has managed its network in a reasonable, equitable and competitively neutral manner. The balance between the principles and reasonable network management will also be crucial to ensuring that future broadband networks are widely deployed, open, affordable, and accessible to all consumers.

The U.S. Court of Appeals for the District of Columbia Circuit is currently considering whether the Commission has the statutory authority to enforce its principles and more broadly, its authority to regulate in this arena. NTCA urges the Commission to delay acting in this proceeding until after the Commission and interested parties have the opportunity to analyze the Court’s decision and its impact on this proceeding.

**II. THE DEFINITION OF “REASONABLE NETWORK MANAGEMENT” MUST PROVIDE SMALL INTERNET ACCESS PROVIDERS THE FLEXIBILITY TO MANAGE THEIR NETWORKS IN A REASONABLE, EQUITABLE AND COST EFFECTIVE MANNER.**

The proposed rules prohibiting certain actions are all subject to “reasonable network management.” In the proceeding the Commission will attempt to define term “reasonable network management” with more specificity and clarity. While the proposed rules are designed to further the Commission’s goals of encouraging investment and innovation, promoting

competition and protecting the rights of users, the Commission acknowledges that “there may be times when strict application of those rules would be in tension with these goals.”<sup>9</sup>

The interpretation of the phrase “reasonable network management” is critically important. The Commission recognizes that there may be instances where the actions of one user or a group of users could jeopardize the experience for others or could be harmful or unlawful. Internet access providers therefore must have the flexibility to respond to consumer behavior in a manner that protects the network and consumers using the network.

**A. The Commission Should Avoid Adopting Best Practices For Determining Whether A Carrier Is Managing Its Network Reasonably.**

The Commission should not adopt guidelines or standards that outline reasonable or best practices. It is impossible to predict the potential sources of congestion or harms of the future and it is equally impossible to predict what will be a reasonable reaction in each situation. What is reasonable and best for one provider will not be the same as what it is for another. Consumer behavior and expectations may vary regionally and the technical capabilities of providers will vary. Small providers may not have the ability to identify and separate or distinguish traffic in the same manner as large providers. The reasonable network management exception should be flexible enough to permit each provider to do what is reasonable to protect its network according to its particular set of circumstances and issues.

**B. Given Transparency, There Should Be a Presumption That Internet Access Providers’ Network Management Practices are Reasonable.**

In order to protect the access provider and discourage frivolous complaints, NTCA suggests that if the Commission moves forward with these rules, the Commission makes clear that any complainant bears the burden of proving that the network management practice in

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<sup>9</sup> NPRM ¶ 133.

question is unreasonable. An Internet access provider who is transparent in its practices, fully disclosing how it manages its network, should enjoy the presumption that its actions to protect the network are reasonable.

**C. It is Reasonable Network Management to Prioritize Content to Meet Consumer Demands and Expectations.**

There are certain classes of content that will require priority access to the network. For example, certain classes of video services may require priority during peak volume times to be usable. The Commission must permit Internet access providers to prioritize content so long as the customer is made aware of the practice. At the same time, the Commission must not mandate that certain content or classes of content be given priority. The Internet access provider should be able to create packages to sell to the consumer that meet demands. For example, an access provider may offer a basic service with a disclaimer that some applications may not work during periods of peak volume and offer another tier of service specifically designed to prioritize streaming video to a business customer with video conferencing needs. The Commission should not interfere with the marketing plans of Internet access providers, so long as conduct is not anti-competitive.

**III. THE COMMISSION SHOULD BE CAUTIOUS IN IMPOSING A STRICT NONDISCRIMINATION STANDARD**

The Commission proposes a general rule prohibiting a broadband Internet access service provider from discriminating against, or in favor of, any content, application, or service, subject to reasonable network management.<sup>10</sup> NTCA believes this proposal is premature and too broad. Some “discrimination” is necessary and desirable for the effective operation of the network. It

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<sup>10</sup> NPRM ¶ 103.

also provides all consumers who are using a network's public Internet service the ability to receive the quality service agreed to in their subscriber agreements.

**A. A Nondiscrimination Principle May Have Unintended and Harmful Consequences**

The “need” for Commission action to regulate discriminatory conduct purportedly stems from “some conduct” that is occurring that warrants “closer attention” and “could call” for additional action by the Commission, “including some instances in which some Internet access service providers have been blocking or degrading Internet traffic.” Given the millions of Internet users in this country, one might expect that the Commission has received numerous complaints about providers blocking traffic or that the Commission could point to countless instances of provider bad behavior. Instead, the Commission references exactly two instances of alleged misconduct by access providers. Complaints against both were filed years ago and were appropriately managed by the Commission. NTCA does not believe that the actions of two providers, more than two years ago, indicate a systematic failure of open markets.

The Federal Trade Commission recognizes the danger of Internet access regulation. After completing its analysis of broadband markets, it suggested that policy makers “proceed with caution in evaluating calls for network neutrality regulation,” pointing out that it may be “difficult to avoid unintended consequences here, where the conduct at which regulation would be directed largely has not yet occurred.”<sup>11</sup> It stated that we do not yet know what effects regulation would have on consumers.

There is no way to anticipate technological advances or consumer behavior and the Commission must be careful that it does not set up a regulatory regime of unintended consequences. The Commission has not considered the broad array of services that broadband

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<sup>11</sup> Federal Trade Commission, *Broadband Connectivity Competition Policy*, 155 (2007).

Internet access providers do or could provide to their end users. Rather than a strict nondiscrimination prohibition, the Commission should consider regulation that seeks to safeguard consumers and application providers from unreasonable and anticompetitive conduct.

**B. If the Commission Adopts a Nondiscrimination Requirement, it Should Clarify the Language to Prohibit “Unjust and Unreasonable” Discrimination**

If the Commission moves forward with a nondiscrimination principle, the language should be clarified to be consistent with the Commission’s intent. The nondiscrimination requirement currently reads as an absolute ban on discrimination of content, applications or services, “subject to reasonable network management.” The Commission creates an absolute bar, while simultaneously recognizing that some discrimination may be necessary.

The Commission’s previous enforcement behavior against access providers has targeted unreasonable, anti-competitive behavior, not necessarily discriminatory behavior. That is the appropriate policy and the language of any policy or rule should clearly reflect that. Discriminatory conduct and anti-competitive conduct are not the same. It is entirely possible for behavior to be discriminatory and in the best interest of the consumers using the network, but not anti-competitive. For example, during peak hours a provider may find that a particular application is causing too much congestion, harming the network. The access provider may have a policy that any application using more than X amount of bandwidth during certain hours will be managed in a manner that allows the application to function and also permits all consumers using the network to receive the broadband services agreed to in their service agreements. The access provider may have no knowledge of the content traveling over that application, but must take action to preserve the collective experience for its subscribers. Taking steps to protect the network by managing bandwidth-hogging applications would be discriminatory, but it would serve the collective good. The action, in itself, would not indicate anticompetitive behavior. The

Commission's rules should recognize that some discriminatory behavior that is not anticompetitive is desirable.

The *NPRM* acknowledges that the “nondiscrimination” requirement would mean that an Internet access provider could not charge a content, application or service provider for prioritized access to its subscribers, but it could charge its subscribers different rates for different services. Therefore, some form of “discrimination” is anticipated even though the proposed rule does not accurately reflect that.

The language of any rule or policy should be carefully worded to indicate that it is discriminatory conduct for anticompetitive reasons that will not be tolerated. The Commission questions whether an “unjust or unreasonable discrimination” standard, as is found in Section 202 of the Communications Act, would be preferable.<sup>12</sup> NTCA believes that the addition of “unjust and unreasonable” to the language of the nondiscrimination principle would more clearly indicate the Commission's intentions.

The Commission may believe that the “unjust and unreasonable” language is unnecessary because the types of discrimination that would be considered permissible would likely fall under the “reasonable network management” exception. However, drafting the principle in this manner would cause the potential rule to be interpreted by its exceptions, rather than its language. Clear language offers Internet access service providers more certainty and guidance about permissible behavior.

#### **IV. NTCA SUPPORTS THE PRINCIPLE OF TRANSPARENCY**

NTCA has no issue with requiring broadband Internet access service providers to disclose their network management practices to their consumers. However, the Commission must be

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<sup>12</sup> *NPRM* ¶ 109.

careful to avoid imposing additional cost on small providers and the language of the principle should be revised to make clear the Commission's intent.

**A. The Commission Must Not Impose Additional Cost on Small Providers in its Effort to Achieve Transparency**

Consumers should be aware of what it is they're paying for in all instances, including when they purchase broadband services. NTCA agrees that disclosure enables broadband subscribers to understand and take advantage of the technical capabilities and limitations of the services they purchase and will benefit the content and application providers.<sup>13</sup> However, the Commission should let the individual service providers determine the best way to reach their subscribers. Each provider must perform a balancing act, weighing disclosing enough information to be useful against providing too much information that results in consumer confusion. The service providers are closest to their customers and can respond to their subscribers' needs and know how to disseminate information in a manner that will be effective.

The Commission questions whether there are standard labeling formats or technological tools that could be used. NTCA cautions the Commission that even if such things do exist, they are likely only within the economical reach of large providers. NTCA's members operate within very slim margins and every time new regulation imposes additional cost, it interferes with broadband deployment and upgrades.

The Commission should only offer basic suggestions about what information should be disclosed to consumers and content and application providers and let each Internet access service provider determine the specifics and best method for dissemination.

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<sup>13</sup> NPRM, ¶ 119.

## **B. The Language of the Provision Should Have a Consumer Focus**

The language of the Transparency Provision is unclear. As it reads now, “an Internet access provider must disclose such information . . . as is reasonable required for users . . . to enjoy the protections specified in this part.”<sup>14</sup> NTCA cannot determine how a disclosure of information permits any user to enjoy protections.

The stated purpose of the transparency requirement is to “ensure[] that all interested parties have access to necessary information about the traffic management practices of networks.”<sup>15</sup> If that is the intent of the principle, the language should reflect it. A nebulous provision that requires providers to disclosure enough information for users to enjoy protections, offers little guidance to the Internet access providers that must comply.

## **V. IPTV SHOULD NOT BE REGULATED UNDER THE NET NEUTRALITY PRINCIPLES.**

Many NTCA’s members offer Internet broadband access to their subscribers and an Internet protocol television (IPTV) product. There is much concern that the “open Internet” rules, if adopted, would destroy the IPTV business case. In order to make IPTV a viable business, the Internet access provider must, in some instances, prioritize its content over the network. The IPTV subscriber pays for the service and expects it to work as advertised. The service provides a competitive alternative to traditional cable and satellite television. The consumer benefit outweighs any potential harm.

Any network management rules that force Internet access providers who are also IPTV providers to treat all content equally would gut the IPTV business model. The Commission must recognize that innovative IP-based offerings require regulatory flexibility and will not fit nicely

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<sup>14</sup> NPRM, ¶ 119

<sup>15</sup> *Id.*, ¶ 118.

within open Internet rules. It is premature to determine if it is appropriate to define a separate category of “managed or specialized services”<sup>16</sup> subject to different rules or how such a category should be defined. The Commission asks what managed services may be offered in the near future or what content, applications, or services may require enhanced quality-of-service offerings, and why?<sup>17</sup> NTCA is not in a position to make such predictions and is skeptical of any parties that claim they can. It is important, however, for the Commission to declare that any open Internet rules will not apply to business models that have quality of service requirements to be functional.

## **VI. THE FCC SHOULD NOT ACT UNTIL THE COURT DECIDES THE COMCAST V. FCC CONTROVERSY**

The U.S. Court of Appeals for the District of Columbia Circuit is currently considering issues that will likely directly impact the outcome of this rulemaking proceeding. In *Comcast v. FCC*,<sup>18</sup> the Court is considering whether the Commission has the statutory authority to enforce principles and more broadly, its authority to regulate in this arena. Following the release of the Court’s opinion, the Commission should seek public comment analyzing the impact of the court’s decision on the debate at issue. No rules regarding an “open Internet” should be considered until there is a decision from the Court.

There are several ways the *Comcast v. FCC* could influence the outcome of this proceeding. A few possibilities follow: 1 - The Court may find in favor of the FCC. If that happens, it may be determined that the Commission should continue to regulate the open Internet via adjudication rather than rulemaking. Rulemaking proceedings are lengthy processes and tend not to be vehicles that permit the agency to respond quickly to changes in technology or

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<sup>16</sup> NPRM, ¶150.

<sup>17</sup> *Id.*

<sup>18</sup> *Comcast v. FCC*, (U.S. Court of Appeals, District of Columbia, Case No. 08—1291).

consumer behavior. 2 – The Court may find that the Commission may not regulate Internet access providers absent a rulemaking, in which case the Commission moves forward as intended. 3 – The Court could conclude that the Commission lacks the jurisdictional authority to generally regulate the Internet. Such an outcome would require legislative action or a reclassification of Internet access services before rules could be adopted, making this proceeding particularly premature.

Both the public and the Commission will require an opportunity to review and analyze the *Comcast v. FCC* decision before completely understanding how open Internet debate should be framed moving forward. The Commission should suspend this rulemaking and encourage that debate before moving forward with plans to regulate an open Internet.

**VII. THE COMMISSION SHOULD CONSIDER RULES THAT MINIMIZE THE COMPLIANCE BURDEN ON SMALL BUSINESSES AS REQUIRED BY THE REGULATORY FLEXIBILITY ACT**

When an administrative agency adopts rules for an industry, the Regulatory Flexibility Act (5 U.S.C. Section 601) requires that it evaluate the economic impact of its rules and consider alternative, less burdensome requirements for small businesses, such as NTCA's members. NTCA recommends that if the Commission adopts rules in this proceeding that it carefully address the economic realities of small Internet access providers. Small providers should be exempt from any rules that require technical abilities beyond their current capabilities. Small providers should not be required to purchase additional equipment or software solely for the purpose of compliance with open Internet rules. The Commission should only adopt general rules and not ones that require small providers to provide customer notifications beyond their technical ability, or separate or identify traffic and applications that travel through the network.

Small providers urge the Commission to recognize that anti-competitive conduct can be avoided without the creation of guidelines or best practices that require technical upgrades.

### **VIII. CONCLUSION**

Based on the above stated reasons, NTCA concludes that the “reasonable network management” exception to the Internet policy principles must be defined in a manner that allows Internet access providers the flexibility to manage their networks in a reasonable, equitable and cost effective manner. The Commission’s new proposed principle of nondiscrimination is premature and too broad. A strict application of nondiscrimination could have unintended and harmful consequences, unnecessarily hampering the development of broadband services. The Commission should not act in this proceeding until the Commission and interested parties have the opportunity to analyze and comment on a decision from the U.S. Court of Appeals for the DC Circuit in *Comcast v. FCC*.

The Commission must also evaluate the economic impact of any new rules on small businesses and consider alternative, less burdensome requirements for small businesses. NTCA urges the Commission not to adopt rules that impose additional, unnecessary costs on small providers.

Respectfully submitted,



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January 14, 2010

## CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in GN Docket No. 09-191 and WC 07-52, FCC 09-93, was served on this 14<sup>th</sup> day of January 2010 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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