Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

PRESERVING THE OPEN INTERNET	)	**GN Docket No. 09-191**
	)	
BROADBAND INDUSTRY PRACTICES	)	**WC Docket No. 07-52**

COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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SUMMARY

The market for broadband Internet access is thriving, and unnecessary and intrusive network management regulations will depress incentives for broadband investment in rural America. The Commission's Broadband Policy Statement already establishes reasonable guidelines by which carriers can operate, and the competitive nature of the market, coupled with existing consumer protection and business practices laws, render additional layers of Commission regulation at best unnecessary, and at worst a threat to the successful evolution of the broadband Internet marketplace. Providers must have the ability to manage their networks in the most efficient manner possible to ensure customer needs are met. Broadband services have flourished because technology and the marketplace have been allowed to develop in a largely unregulated environment. Regulation of broadband network management practices would be inconsistent with the deregulatory view of the Communications Act, and it is unlikely that regulation would be able to keep pace with rapid technological and market evolution. Accordingly, the Commission should set aside proposals for additional regulation.

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To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above captioned-dockets.[1] ITTA is an alliance of mid-sized local exchange carriers that collectively provide service to 24 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services.

The market for broadband Internet access is thriving, and unnecessary and intrusive network management regulations will depress incentives for broadband investment in rural America. The Commission's Broadband Policy Statement[2] already

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[1] *See, Preserving the Open Internet; Broadband Industry Practices: Notice of Proposed Rulemaking,* GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (rel. Oct. 22, 2009) (NPRM).

[2] *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;*

establishes reasonable guidelines by which carriers can operate, and the competitive nature of the market, coupled with existing consumer protection and business practices laws, render additional layers of Commission regulation at best unnecessary, and at worst a threat to the successful evolution of the broadband Internet access marketplace. Accordingly, the Commission should set aside proposals for additional regulation.

II. THE COMMISSION SHOULD REFRAIN FROM IMPOSING NETWORK MANAGEMENT REGULATIONS

A. REGULATION OUGHT NOT BE IMPOSED ABSENT A CLEAR NEED

The Commission is charged by Section 230(b)(2) of the Communications Act of 1934, as amended, 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."[3] Several years ago, as broadband innovation exploded, the Commission clarified its position that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[4] More than a half-decade later, and with a nearly 900% increase in high-speed

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Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities: Policy Statement, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, 20 FCC Rcd 14986, FCC 05-151 (2005) (Broadband Policy Statement).

[3] 47 U.S.C. § 230(b)(2).

[4] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers; Universal Service Obligations of Broadband Providers; Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements: Notice of Proposed Rulemaking,* CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, at para. 5 (2002) (2002 NPRM).

and advanced services lines across the Nation,[5] the Commission must not impose unnecessary and burdensome requirements that discourage investment and innovation. Although the Commission noted that it "must always be alert and ready to act" against risks "that result in consumer harm,"[6] those concerns do not attend the current market.

The Commission's proposal is confounding because it seeks to impose broad *ex ante* regulation in the absence of an evident problem. Generally, regulations of any type should not be imposed unless the market is incapable of policing itself. By contrast, the broadband Internet access market has grown impressively over the past decade, encountering only two instances in which the Commission was compelled to adjudicate a dispute. In 2005, the Commission acted swiftly to address the alleged blocking of VoIP traffic by a telephone company.[7] That proceeding did not end in a declaration of policy, or promulgation of rules, but rather a voluntary settlement agreement that evidences recognition that inappropriate discriminatory treatment of traffic will not be tolerated. And, in 2008, Comcast, following a Commission proceeding, revised its terms of service to mirror the Broadband Policy Statement.[8] It is clear that carriers respond swiftly to the

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[5] "High-Speed Services for Internet Access: Status as of June 30, 2008," Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, at Tables 1 and 2 (Jul. 2009).

[6] 2002 NPRM, *supra fn.* 4, at para. 5.

[7] *See, Madison River LLC and Affiliated Companies: Order*, File No. EB-05-IH-0110, 20 FCC Rcd 4295, DA 05-543 (2005).

[8] "Comcast Tweaks Terms of Service in Wake of Throttling Uproar," Eric Bangerman, Feb. 7, 2008, http://arstechnica.com/news.ars/post/20080207-comcast-tweaks-terms-of-service-in-wake-of-throttling-uproar.html (last viewed Jan 13, 2010). The Commission subsequently ruled that Comcast's initial practices were unreasonable. *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press, et al., for Declaratory Ruling that Degrading an Internet Application*

interest of consumers and the marketplace.[9] The Commission should not impose additional regulations that will disturb investment incentives while purporting to cure what are, in fact, non-existent ills. Moreover, the Commission must be wary of "relying on a record of abuse that in fact [does] not exist;" in *National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission,* the D.C. Circuit remanded a FERC Order, explaining,

> FERC staked its rationale in part on a record of abuse, but that abuse is non-existent. Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision making.[10]

The Commission must heed that warning here. There is no evidence to support the type of intrusive regulations the Commission proposes. As noted wryly by the American Consumer Institute (ACI), "little of great consequence has happened, but in the view of

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Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management:" Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52, FCC 08-183 (2008). Comcast's appeal of the Order is pending; oral arguments in the United States Court of Appeals, District of Columbia Circuit, occurred January 8, 2010. *See, Comcast Corp. v. FCC,* Case No. 08-1921 (D.C. Cir.).

[9] In other instances, Verizon reversed a decision on text messaging after a public outcry. "Verizon Reverses Itself on Abortion Messages," Adam Liptak, New York Times (Sep. 27, 2007), www.nytimes.com/2007/09/27/business /27cnd-verizon.html?ref-technology (last viewed Feb. 7, 2008). AT&T garnered unfavorable attention for allegedly censoring portions of a concert that were critical of President George W. Bush, and for including in its terms of service a condition that some interpreted as providing the carrier with grounds to terminate service if a user criticized AT&T or related corporate entities. "AT&T Says it Didn't Censor Rock Band Pearl Jam," Grant Gross, Washington Post, Aug. 9 2007, www.washingtonpost.com/wp-dyn/content/article/2007/08/09AR2007080901436html (last viewed Feb. 7, 2008).

[10] *See, National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission,* 458 F.3d 831 (D.C. Cir. 2006) (court rejects FERC Order for failure to rely upon actual occurrences of harm).

[regulation-proposing] advocates: 'It might!'"[11] Others have also noted "there do not appear to be substantive examples of policy failure in the majority of the markets regarding discriminatory handling of traffic."[12] The Commission must avoid the path toward regulation that is paved only with suspicions and suppositions. The scattered problems that have arisen were resolved under existing regulations, evidencing that future such occurrences, should they arise, can be addressed similarly without promulgating the rules the Commission has proposed. In the absence of actual harms, there exists no justification for adopting regulations that will depress investment incentives for rural and high-cost areas. The "light touch" model to which the Commission has adhered works. Deployment and usage have increased as applications and content have advanced apace. The Commission should recognize its success and refrain from imposing unnecessary regulation.

B. THE MARKET FOR BROADBAND INTERNET ACCESS IS THRIVING

1. The Market for Broadband Internet Access is Exhibiting Growth

Regulation should be reserved for instances in which the market fails to provide adequate protection. The Commission previously recognized the need for a "hands-off" approach to regulation, describing a "dynamic and evolving broadband Internet access market . . . where the current market leaders, cable operators and wireline carriers, face

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[11] "To Regulate, or Not to Regulate: Where is the Broadband Market Failure," Larry F. Darby, The American Consumer Institute, at 4 (Dec. 2009) (available at http://www.theamericanconsumer.org/wp-content/uploads/2009/12/nn-and-market-failuare.pdf (last viewed Jan. 13, 2010) (ACI).

[12] "Financial Markets Perspectives: Network Neutrality Principle 5," Balhoff & Williams, LLC, at 6 (Dec. 15, 2009) (available at http://www.balhoffwilliams.com) (Balhoff & Williams).

competition not only from each other but also from emerging broadband Internet access service providers."[13] The Commission's approach has been successful: users in many instances have access to numerous competing providers.[14] The Commission must not impose constraints that would stifle innovation and investment, limit consumer choice, and generate increased costs.

The Commission must not depress network operators' and financial markets' interest in investing in and deploying new technology. The Commission itself has reported on the success of its policies: its latest broadband report found that high-speed lines (*e.g.*, defined as offering at least 200 kbps in one direction) increased by 10 percent during the first half of 2008, following a 20 percent increase during the second half of

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[13] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC 160(c) with Regard to Broadband Services Provided via Fiber to the Premises, Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises: Report and Order and Notice of Proposed Rulemaking,* CC Docket Nos. 02-33, 01-337, 92-50, 98-10, WC Docket Nos. 04-242, 05-271, FCC 05-150, at para. 84 (2005) (Wireline Broadband Order).

[14] *See, i.e., High-Speed Services for Internet Access: Status as of December 31, 2006,* Industry Analysis and Technology Division, Wireline Competition Bureau (December 2006) at Table 16.

2007.[15] Nearly every type of reported technology demonstrated an increase, including: ADSL; traditional wireline; cable modem; fiber; and satellite and wireless services.[16]

The market is thriving. Current policies have worked, and the Commission should not compromise that success. Providers are inclined toward policies that provide the best service for consumers. Moreover, the fundamental nature of the Internet as a medium for the rapid exchange of information engenders a "self-policing" approach on the part of providers -- providers will be loath to impose operational standards that would interfere inappropriately with the delivery of content and applications, since reports that would tend to drive users to other providers would be disseminated widely and rapidly. Regulatory fiat, no matter how well intentioned, cannot adapt as quickly or efficiently.

2. Market Participants Have Strong Investment Histories and Promising Plans for the Future

A report commissioned by the Commission, *Broadband in America: Where It Is, and Where It Is Going* demonstrates that broadband market participants have invested

[15] High-Speed Services for Internet Access: Status as of June 30, 2008," Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, at 2 (Jul. 2009) (2009 Broadband Report).

[16] 2009 Broadband Report at Table 1. To the extent that some technologies suffered losses, it can be assumed reasonably that those losses were compensated by and absorbed into the overall increase in broadband subscriptions – *e.g.,* that subscriber rate decreases, for example, in broadband over powerline, were occasioned when those subscribers transitioned to fiber. Similarly, advanced services lines (those connecting homes and businesses at rates at least 200 kbps in both directions) increased 10 percent during the first half of 2008, and 32 percent for the one-year period ending July 30, 2008. *See,* 2009 Broadband Report at Table 2; *see, also,* "Federal Communications Commission Releases Final Data on High-Speed Services Collected Under the Previous Form 477 Framework," Federal Communications Commission (Jul. 23, 2009).

heavily in their networks, and intend to continue that trend into the future.[17] The report is important because it relies upon data generated by providers, many of whom are publicly-traded companies that are subject to the rigorous standards of Sarbanes-Oxley[18] and whose statements to shareholders and prospective investors are subject to rigorous scrutiny. Overall, the study reinforces a recent assessment that, globally, broadband usage has been identified as having "defied the recession odds."[19] The Commission must ensure that its actions in this proceeding do not disrupt that success.

The CITI report estimates that, industry wide, $60 billion will have been invested in 2009; $30 billion of that amount is estimated to represent cap-ex spending.[20] Mid-size carriers are poised to offer robust broadband services in their territories: Qwest is offering data plans up to 20 mbps,[21] and continuing fiber-to-the-node (FTTN) deployments,[22] while CenturyTel (n/k/a CenturyLink) was found to offer 1.5 mbps video service in rural Alabama[23] and projected 100 percent broadband deployment within three years of its

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[17] "Broadband in America: Where It Is, and Where It Is Going (According to Broadband Service Providers), Robert C. Atkinson, Ivy E. Schultz, Columbia Institute for Tele-Information, New York City (Nov. 11, 2009) (CITI Report).

[18] Public Company Accountability Reform and Investor Protection Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley).

[19] "Internet Traffic, Broadband Growth Defy Recession," Exchange Magazine (Sep. 18, 2009).

[20] CITI Report at 11.

[21] CITI Report at 38, 39.

[22] CITI Report at 46.

[23] CITI Report at 37.

2009 merger with Embarq.[24] Cincinnati Bell projected $30 million in broadband investments in 2007.[25] These deployment figures exemplify current market efforts to keep pace with estimates that consumer Internet use is expected to grow 360 percent over the next five years.[26]

The importance of broadband investment is not limited to the discrete areas where these carriers serve their local customers. Rather, broadband investment and the viability of the companies informs the state of the larger network. As described by the CITI Report, "Qwest is one of the largest backbone operators . . . [i]ts backbone reaches across the US and is available in almost every state. Currently, its backbone operates at a transmission rate of 40 gbps but the speed will be upgraded to 100 gbps during 2009 and 2010."[27] Discouraging investment in broadband networks will affect not only specific carriers, but others who rely upon the interconnected network.

C. THE IMPOSITION OF NETWORK MANAGEMENT REGULATIONS WILL DEPRESS INVESTMENT INCENTIVES

Broadband services have emerged successfully because technical and marketplace development has occurred outside the reach of regulation. Technology developers acting in a free market have developed products to meet consumer demands, and have introduced new ways for citizens to interact, participate in politics, and obtain information, commentary, and entertainment. The Commission itself has noted,

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[24] CITI Report at 27.

[25] CITI Report at 44.

[26] CITI Report at 50.

[27] CITI Report at 56.

> [t]he Internet has evolved at an unprecedented pace, in large part due to the absence of government regulation . . . To ensure that the Internet is available to as many persons as possible, the FCC has adopted a "hands-off" Internet policy . . . policymakers should avoid actions that may limit the tremendous potential of Internet delivery.[28]

As described below, however, governmental interference in network management will wreak adverse affects on investment incentives, particularly in rural areas. A recent white paper summarizes the effects succinctly:

> [I]nvestors in both debt and equities are likely to view new regulation as negative for capital formation if those rules *unnecessarily* limit the return potential of network infrastructure investment, restrict the competitive options available to network providers, and inject government "regulation" into an industry that was largely unregulated.[29]

The Commission must avoid this outcome. Unquestionably, "policymakers are going to have to make some hard policy trade-offs between the regulation of how broadband operators manage their networks and the efficient obtainment of ubiquitous broadband coverage."[30] The Commission must make the right choice to enable providers to manage their networks in a manner that preserves investment incentives for rural and high-cost areas.

By contrast, disincentives to investment strike their first effects in rural areas. Rural areas are particularly susceptible to these regulatory side-effects because bandwidth costs far more in rural areas than in urban areas. Therefore, policies that diminish investment incentives or opportunities to obtain capital have exponentially larger impacts

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[28] http://www.fcc.gov/connectglobe/sec9.html (last viewed Jan. 5, 2010).

[29] Balhoff & Williams, at 1 (emphasis in original).

[30] "Expanding the Digital Divide: Network Management Regulations and the Size of Providers," George S. Ford, Lawrence J. Spiwak, Esq., Michael L. Stern, Ph.D., Phoenix Center Policy Bulletin No. 23, at 3 (Oct 2009) (Phoenix Bulletin No. 23).

in rural areas. It has been estimated that backhaul costs of $4.00 (four dollars) (per megabit, per month) in urban areas can rocket to $300.00 (three hundred dollars) in rural areas.[31] In addition to backhaul costs, population density in rural areas affects deployment costs: the Government Accountability Office (GAO) found that "[t]he most frequently cited cost factor affecting broadband deployment was the population density of a market," and that "the cost of building a broadband infrastructure in areas where people live farther apart is much higher than building infrastructure to serve the same number of people in a more urban setting."[32] Overall, financial analysts note, "capital risks apply in all geographic areas, but policymakers should be aware that the risks are exacerbated in lower-density rural markets that are particularly costly to serve."[33] The Commission and Congress "have maintained policies that, in terms of advanced networks and broadband, ensured that competitive markets would be determinative of the outcomes."[34] Successful deployment of broadband in rural and high-cost areas to date can be attributed to the fact that markets are not "factoring any policy-related risk into broadband network commitments today."[35] The Commission should adhere to its finding that "the public interest is best served if we permit competitive marketplace conditions to

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[31] Phoenix Bulletin No. 23 at 9, *citing* B. Glass, *Ensuring Effective Broadband Stimulus: An Analysis of the Broadband-Related Provisions of the American Recovery and Investment Act 2009* (Jan. 22, 2009), at 7 (http://brettglass.com/bbstim.pdf).

[32] GAO, *Broadband Deployment Is Extensive throughout the United States, But it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas,* at 19 (May 2006) ("*GAO Report*").

[33] Balhoff & Williams at 3.

[34] Balhoff & Williams at 5.

[35] Balhoff & Williams at 5.

guide the evolution of broadband Internet access services,"[36] and reject unnecessary regulations that are founded more on fear than fact. Stated bluntly by one mid-size carrier, "ISPs relegated to the status of dumb pipes would lose significant economic incentives to invest in broadband expansion."[37]

The nature of broadband Internet usage by today's consumer demands measures that ensure adequate quality of service. Restrictions will either create unreasonable (and, yet, avoidable) cost demands, or leave all users subject to whims of those whose unfettered use is to the detriment of others. Peer-to-peer (P2P) usage, especially, creates enormous strains on the network by repositioning content from central servers to end-user locations, from which the data is then uploaded for other users. Providers of residential broadband Internet access services have generally allocated transmission speed asymmetrically, opting for higher "downstream" rates and lower "upstream" rates. This model is consistent with general residential end-user habits, where "mouse clicks" and typed content constitutes the majority of uploaded data, while downstream courses are for music, video, and content-laden websites. By contrast, P2P usage clogs the upstream with unusually large amounts of data. Rational network management can manage these dynamics effectively. Networks of all types that must accommodate traffic exceeding usual volumes must incorporate management. Similar practices can be seen on the Nation's highways where, by way of example, an Advanced Traffic Management System

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[36] Wireline Broadband Order at para. 85.

[37] *Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators; Petition for Declaratory Ruling Regarding Internet Management Policies: Comments of Frontier Communications,* WC Docket No. 07-52, at 6 (Feb. 13, 2008).

on the New Jersey Turnpike monitors road and weather conditions and manages traffic speeds accordingly.[38] Alternatively, various freeway systems across the Nation employ High Occupancy Vehicle (HOV) and toll roads to manage traffic efficiently.[39] Yet, that is precisely the sort of solution apparently rejected by organizations that demand unfettered access to the broadband capability providers have deployed.[40] The supposed justification for such efforts is specious, at best. USTelecom offered the Commission an insightful perspective on the issue, discussing,

> . . . claims that various principles set out in the *Policy Statement* have been broken because *some* users, at *some* times, appear to have experienced *some* limitations on their access. Citizens who must wait in line for a reasonable period before voting have not been denied their right to the franchise. Litigants who must comply with page limits have not been denied their due process rights. Likewise, broadband users who experience short-term or incidental impediments to their use of a particular online offering on an occasional basis cannot be automatically understood to have been denied their ability to access content, run applications, or use services of their choice as the petitions seem to assume.[41]

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[38] *See,* "Best Practices for Road Weather Management, Version 2.0: New Jersey Turnpike Authority Speed Management," US Department of Transportation, Federal Highway Authority (http://ops.fhwa.dot.gov/Weather/best_practices/CaseStudies/016.pdf (last viewed Jan. 13, 2010).

[39] For example, the Dulles Toll Road in Virginia offers users a direct link to the Dulles International Airport.

[40] The irony was noted by CTIA President Steve Largeant: "It is troubling that we are debating a filing on investment and job creation from an organization such as Free Press. The industry I represent directly or indirectly employs more than 2.4 million Americans and contributed over $140 billion in direct economic benefit to the U.S. economy over the last three years." Quoted in Communications Daily, "Large Number of Tonal Changes Circulated by Genachowski in Net Neutrality Draft," p.2 (Oct. 22, 2009).

[41] *Broadband Industry Practices; Vuze, Inc., Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators; Free Press, et al. Petition for Declaratory Ruling: Comments of the United States Telecom Association,* WC Docket No. 07-52, CC Docket No. 02-33, et al., at 14 (Feb. 13, 2008) (internal citation omitted).

The nature of broadband Internet technology also supports the proposition that the Commission should avoid regulatory imposition. The rapid evolution of network technologies and end-user devices creates greater investment risks as "the competitive performance of the technologies grows shorter and shorter . . . ."[42] The exponential growth of network usage demands carriers' freedom to manage their networks. As needs outpace growth, carriers must be assured that their authority to manage their networks in the most efficient manner possible remains preserved. As described by the U.S. Department of Justice,

> Packets of traffic on the Internet are processed on a "best effort" basis, which does not provide any guarantees regarding speed, delivery, service quality, or priority treatment when the network is congested. When routers have more packets to process than capacity to do so, the overflow packets are queued up for processing in the order they arrive, up to the router's physical capacity. Any additional packets beyond the router's capacity are lost.[43]

Traffic management practices that can mitigate these problems should not be proscribed. Nor should the Commission be misled into thinking that network operators can simply "invest themselves out of" capacity constraints. Growing use of capacity consuming applications creates persistent demands for network capacity.[44] Transmission

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[42] Balhoff & Williams at 3.

[43] *Broadband Industry Practices: Ex Parte Filing of United States Department of Justice,* Docket No. 07-52, at n.17 (filed Sep. 6, 2007).

[44] For example, one commenter described previously to the Commission, "Most cell towers are served by DS1 connections, which have a capacity of 1.544 megabits per second. A typical acceptable-quality Slingbox video to a mobile phone can use between 220 and 400 kbps. Therefore, just four to seven users receiving Sling stream to a mobile phones [sic] from the same cell tower would be enough to block all other traffic over that tower." *Broadband Industry Practices; Vuze, Inc., Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators: Comments of Hands off the Internet,* WC Docket No. 07-52, at 10, 11 (Feb. 13, 2008).

capacity is finite, and absent network management, access to some latency-sensitive applications could be foreclosed.[45] As noted by research academics, "[P]rudent broadband policy should reduce deployment and operational costs wherever possible, thereby inducing private investment and maximizing the payoff of government investments in broadband networks."[46] The Commission should refrain from implementing proposals that will increase cost or result in diminished consumer experience, results that are opposite industry achievements to date.

D. THE FOUR-PRINCIPLES ARE SUFFICIENT

1. The Market Has Thrived Under a "Light Touch"

The current Broadband Policy Statement is suited aptly to the services to which it applies, since it establishes broad guidelines that can accommodate with flexibility the evolving broadband Internet market. The Statement provides "room to grow," as well as guidance for providers that move forward with increased deployment and access to new content and applications. Existing law can be invoked to ensure consumer protection, without the need for an additional layer of Commission regulation. For example, the Federal Trade Commission (FTC) has noted that Internet service contracts can be addressed under existing legal mechanisms.[47] The FTC described the application of general anti-trust law to Internet services:

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[45] *See, i.e.,* Broadband Connectivity Competition Policy, United States Federal Trade Commission Staff Report, at 84, 85 (Jun. 2007) (FTC Broadband Report).

[46] "Expanding the Digital Divide: Network Management Regulations and the Size of Providers," George S. Ford, Lawrence J. Spiwak, Esq., Michael L. Stern, Ph.D., Phoenix Center Policy Bulletin No. 23, at 2 (Oct 2009) (Phoenix Bulletin No. 23).

[47] FTC Broadband Report, *citing Orkin Exterminating Company v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

> [B]locking access to the Internet by a content or application providers or discriminating in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship would be analyzed, for example, under either Section 1 of the Sherman Act, as an exclusive dealing relationship, or under Section 2 of the Sherman Act, as a unilateral refusal to deal.[48]

The Commission must avoid imposing additional regulatory strictures that prohibit discrimination beyond the Communication Act's general proscription against "unjust and unreasonable" discrimination.[49] Such regulation would foreclose carrier opportunities to enter into reasonable and lawful commercial agreements that could boost deployment efforts. Rather, the Commission should encourage, as it has historically, the market's development unencumbered by regulation. In particular, the imposition of so-called "Fifth Principle"-type regulation would stall development and deployment, and should be rejected.

2. Extensive Network Management Regulation is Inconsistent with the Act's Vision of a Deregulatory Environment for the Internet.

Network management regulation would be inconsistent with the deregulatory intent of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively, Act) which directs the Commission to "promote competition and *reduce regulation.*"[50] Moreover, network management regulation would be inconsistent with explicit Congressional policy to "preserve the vibrant and competitive free market that presently exists for the Internet."[51] The Commission has to date refrained from

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[48] FTC Broadband Report at 121 (internal citations omitted).

[49] 47 U.S.C. § 202(a).

[51] 47 USC 230(b)(1).

imposing expansive regulation upon Internet access or Internet Protocol-enabled (IP-enabled) services. The Commission has "preserve[d] and promote[d] the vibrant and open character of the Internet"[52] by generally refraining from using its Title I ancillary jurisdiction to impose regulatory burdens on Internet service providers (ISPs).[53] At the same time, the Commission articulated the Broadband Policy Statement to guide growth in spheres wisely left unregulated. These policies have been successful and should be maintained.

III. CONCLUSION

As broadband usage continues to grow, providers must have the ability to manage their networks in the most efficient manner possible to ensure customer needs are met. Broadband services have flourished because technology and the marketplace have been allowed to develop in a largely unregulated environment. Regulation of broadband network management practices would be inconsistent with the deregulatory view of the Communications Act, and it is unlikely that regulation would be able to keep pace with rapid technological and market evolution. The market is competitive and has

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[52] *See* Broadband Policy Statement, *supra* n.2, at 3.

[53] Information services and information service providers, such as Internet service providers (ISPs), are not subject to mandatory Title II common carrier regulation. *See, National Cable & Telecommunications Association v. Brand X Internet Services,* 125 S. Ct. 2688, slip. op. at 3 (2005). The Commission has imposed some Title II-type obligations on voice over Internet protocol (VoIP) providers but, unlike ISP service which is clearly an information service offering, the regulatory status of VoIP is unclear. *See, e.g., IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers: First Report and Order and Notice of Proposed Rulemaking,* WC Docket Nos. 04-36 and 05-196, FCC 05-116, at para. 22 (2005).

demonstrated that it responds swiftly and effectively to consumer needs. Accordingly, and for the reasons stated above, the Commission should refrain from imposing unnecessary regulation.

Respectfully submitted,

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