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
	)	

COMMENTS

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SUMMARY

ACA and its members bring to this proceeding unique and important knowledge and experience worthy of careful consideration by the Commission. ACA members have more than a decade of experience in delivering broadband Internet access to lower density markets, gaining valuable knowledge in surmounting the challenges of serving those markets. ACA members also have decades of experience as small players in an industry dominated by powerful media conglomerates, companies that use their market power over "must have" content to push distribution of less desirable, thus increasing costs, and reducing choice. ACA members report how the same dynamic is creeping into their broadband Internet access business. Dominant sports programmer ESPN is leading the way with ESPN360, deploying a business model that denies millions of users access to Internet content. Others are following.

Based on these experiences, ACA asks the Commission to make two sets of changes to the proposed regulations.

To preserve an open Internet, the regulations must extend to all providers of broadband content, applications, services, and devices.

Unless the Commission expands the scope of the regulations, powerful owners of content, applications, services, and devices will transform today's open Internet into an increasingly closed Internet, denying entire classes of users access to the lawful content, applications, services, and devices they want. ESPN360 and its ilk are the antithesis of a free and open Internet. These arrangements disrupt the fundamental openness of the Internet and frustrate the Internet experience users have come to expect – unfettered access to Internet content, whether for free or on a direct subscription basis. To achieve the goal of preserving an open Internet, the Commission must extend a nondiscrimination principal to all key participants in delivering the broadband experience.

To achieve the policy goals articulated in the *Notice*, the Commission must make several adjustments to the proposed regulations.

ACA asks the Commission to make several adjustments to the proposed regulations. These adjustments will reduce ambiguity, provide greater clarity for all stakeholders, and reduce the risk of unintended consequences. These adjustments include:

§ 8.1 Purpose and Scope. Section 8.1 should be expanded to bring within the scope of the regulations all providers of broadband content, applications, services, and devices.

§8.3 "Reasonable Network Management." To provide clear guidance for all stakeholders, the Commission should make the following adjustments to the definition of "reasonable network management:"

- The regulations should specify that certain practices are expressly permitted, including: (i) "bandwidth throttling" for high-bandwidth users during periods of congestion; (ii) nondiscriminatory prioritization of traffic during periods of congestion; and (iii) consumption-based billing;

- The regulations should make clear that broadband providers are not obligated to employ any specific practices;

- The regulations should make clear that they do not impose any affirmative obligations dealing with unlawful content or the unlawful transfer of content; and

- The regulations should expressly exempt specialized and managed services.

§8.9 Devices. The Commission should adjust Section 8.9 to add the concept of "technical compatibility." This will clarify that broadband providers are not obligated to support lawful, nonharmful devices that are nonetheless not compatible with a network. For example, a provider of DOCSIS-based broadband Internet access should not be obligated to support a DSL modem.

§8.11 Competitive Options. The Commission should clarify that the regulations do not create common carrier or "open access" obligations. The obligation in the proposed regulation not to "deprive any of its users of the user's entitlement to competition among network providers [or] service providers" is susceptible to broad interpretation. This provision could be construed to require a broadband provider to provide interconnection and other common carrier or open access-like obligations. The regulation should expressly state that it does <u>not</u> impose those obligations on a broadband Internet access provider.

§8.13 Nondiscrimination. The Commission should clarify that the regulation does not prevent broadband providers from offering a wide range of differently priced services and service levels. The *Notice* suggests that nothing in the regulations would prohibit price differentiated offerings. To promote innovation in service offerings and continued investment in networks and technology, the Commission must adopt this proposal, stating it unequivocally, and codifying it in the regulation.

§8.15 Transparency. The regulations should limit transparency obligations to posting network management practices and policies on a broadband provider's website, and a

reasonableness standard should govern the substance of disclosures. Limiting transparency obligations to website disclosure will represent a restrained, incremental approach to broadband regulatory burdens, and will align with current broadband provider communication practices. This approach will maximize the distribution of information at minimal cost, and will avoid imposing on broadband providers the burdens and costs of an entirely new set of compliance and reporting obligations.

Specialized and Managed Services. The Commission should exempt specialized and managed services from network neutrality regulations. Within ACA's constituency, specialized and managed services encompass a growing array of networking and IP-based services distinct from broadband Internet access. Examples include VoIP service, IPTV, website hosting, advertising, virtual private networks for business, institutional and government users, including public safety users, connectivity for telemedicine, high-bandwidth Internet access for enterprise users, distance learning applications, video conferencing, transport for educational and government programming, and more. The Commission can best support this progress by exempting specialized and managed services from regulation.

Enforcement. The Commission should enforce network neutrality regulations under established formal and informal complaint procedures; no basis exists to adopt new and different procedures. The complaint procedures in Section 76.7 will work well for formal complaints, and the informal complaint procedure in Sections 1.716-1.718 – now a web-based complaint process for consumers – is well-tailored for many types of consumer complaints. With these enforcement mechanisms in place, the Commission can evaluate the new regulations through case-by-case adjudication, avoiding the burdens and costs to both the Commission and industry of a report-based compliance regime. If developments later show that more active regulation is warranted, the Commission can take additional steps at that time.

Appendix A to these Comments contains updated text for several regulations.

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COMMENTS

I. INTRODUCTION

In at least two respects, ACA and its members bring to this proceeding unique and important knowledge and experience worthy of careful consideration by the Commission.

First, ACA members bring more than a decade of experience in delivering broadband services in a wide variety of lower density markets. These services range from the first attempts at "high-speed" Internet (downstream cable modem and upstream dial-up) to today's DOCSIS 3.0 cable modem service, along with VoIP, IPTV, and a growing array of IP-enabled services for businesses, governments and institutions, including local and wide-area networks, video and data transport, wireless, enterprise-class Internet access, and more. This impressive progress has been fostered by a regulatory environment characterized by "light touch" regulation.[1]

[1] *See, e.g., In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd. 19,287, ¶ 4 (2000) ("The Commission has heretofore taken a 'hands-off' policy with respect to the high-speed services provided by cable operators."); *In the Matter of IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, ¶ 35 (2004) ("[IP-enabled] services have arisen in an environment largely free of government regulation, and the great majority, we expect, should remain unregulated.").

As the Commission considers a more active regulatory role in broadband, it should keep foremost in mind that the costs and burdens of regulation can hinder broadband progress, especially for smaller providers.

Second, ACA members have decades of experience as small players participating in an industry dominated by a few very powerful companies. ACA has demonstrated to the Commission how media conglomerates use market power over "must have" content to push carriage of, and payment for, content and services ACA members and their customers do not want.[2] The Commission has recognized this dynamic in cable services, and the resultant harm to consumers and competition.[3] Similarly, ACA has repeatedly demonstrated, and the Commission has repeatedly agreed, how denial of access to important content through exclusive arrangements harms consumers and competition.[4]

As discussed in these Comments, the same dynamic is creeping into broadband Internet access, threatening similar harms to competition and consumers.

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[2] *See In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-198, 22 FCC Rcd. 17,791, Comments of the American Cable Association (filed Jan. 3, 2008) (discussing broadcaster and programmer tying, bundling, tiering, and distribution obligations); Reply Comments of the American Cable Association at 18-23 (filed Feb. 12, 2008) (further discussion of broadcaster and programmer tying, bundling, tiering, and distribution obligations) ("*ACA Program Access Reply Comments*").

[3] *See, e.g., In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd. 473, ¶ 4 (2004) ("[O]ur analysis of the principal allegations of competitive harm in the record demonstrates that…vertical integration has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs for two types of 'must have' video programming products – broadcast television station signals and regional cable programming sports networks – in order to secure higher prices for its programming.").

[4] *See, e.g., ACA Program Access Reply Comments* at 3 ("Owners of vertically integrated programming have strong incentives to enter into regional or national exclusive programming contracts…," which "will proliferate, and program diversity in markets served by small cable systems will suffer."); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791, ¶ 42 (2007) ("[A]llowing vertically integrated programmers to enter into exclusive arrangements with their affiliated cable operators will fail to protect and preserve competition and diversity in the distribution of video programming.").

Based on these experiences, ACA asks the Commission to make two sets of changes to the regulations proposed in the *Notice*.[5]

The first set of changes concerns the scope of the regulations. In short, to achieve the goal of preserving an open Internet, the Commission must extend the scope of the regulations to providers of broadband content, applications, services, and devices. Without that change, powerful owners of content, applications, services, and devices will transform today's open Internet into an increasingly *closed* Internet, using wholesale arrangements to deny access to entire classes of users. The flip side of these wholesale arrangements is that broadband providers must pay per subscriber fees for all broadband customers, whether the customer wants the service or not. As explained in these Comments, powerful content owners are deploying these arrangements, and expansion of closed Internet business models is imminent. The Commission cannot achieve the goal of preserving an open Internet without extending a nondiscrimination principal to *all* participants in delivering the broadband experience.

The second set of changes involves several adjustments and clarifications to the proposed regulations. These changes will help reduce ambiguities, minimize unintended consequences, and provide all stakeholders with clear guidance.

When it comes to delivering broadband in smaller markets, and when it comes to the consequences of the exercise of market power by media conglomerates, ACA is in a unique position to inform the Commission's analysis, and ACA offers its resources to assist in this proceeding.

American Cable Association. ACA represents more than 900 small and medium-sized cable companies serving smaller markets and rural areas throughout the United States. ACA's membership encompasses a wide variety of businesses – family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states,

[5] *In the Matter of Preserving the Open Internet*; *Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd. 13064 (2009) ("*Notice*").

and hundreds of companies in between. Together, these companies serve more than 7 million households and businesses. Most ACA members provide broadband Internet access, delivering this critical service across the "digital divide." Many ACA members are offering higher and higher broadband speeds, often with little or no increase in cost to the consumer.

II. TO PRESERVE THE FUNDAMENTAL OPENNESS OF THE INTERNET, THE FCC MUST ENSURE THAT INTERNET USERS CAN ACCESS ALL LAWFUL CONTENT, APPLICATIONS, SERVICES, AND DEVICES OF THEIR CHOICE.

In this proceeding, the Commission aims to adopt regulations "to preserve an open Internet,"[6] to safeguard "the essential openness that has been the hallmark of the Internet since its inception,"[7] and to protect the "Internet experience . . . users have come to expect."[8] The *Notice* articulates sound policy reasons for preserving an open Internet.[9] At the same time, the *Notice* proposes regulations that, if adopted, would fall far short of this goal.

The principal problem is one of scope. The proposed regulations do not go far enough. Paradoxically, the proposed regulations threaten to accelerate the *closing* of the Internet, frustrating Internet users that have come to expect unfettered access and choice.

To achieve "the best means of preserving a free and open Internet,"[10] the Commission must expand the regulations to include providers of broadband content, applications, services, and devices. These players have a central role in shaping, or distorting, the broadband Internet experience, and must be prohibited from denying users access to their offerings.

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[6] *Notice*, ¶ 2.

[7] *Id.*, ¶ 15.

[8] *Id.*, ¶ 14.

[9] *See id.*, ¶ 50 ("[The Commission] seek[s] to preserve the open, safe, and secure Internet and to promote and protect the legitimate business needs of broadband Internet access service providers and broader public interests such as innovation, research and development, competition, consumer protection, speech, and democratic engagement.").

[10] *Id.*, ¶ 16.

A. The problem – powerful content owners are using wholesale arrangements and exclusivity to deny access to entire classes of users.

After 15 years of Internet openness, with users having unfettered access to free and subscription content, applications, and services of their choice, powerful content providers are now pushing closed Internet business models, denying millions of users access to content. These media conglomerates block access to their online content, unless a customer's broadband provider agrees to a wholesale arrangement, typically requiring payment for all broadband customers. The most powerful sports programmer in the U.S., ESPN, leads the effort with ESPN360. ESPN denies consumers access to ESPN360, *unless* a consumer's broadband provider has a wholesale distribution agreement with ESPN.[11] Reportedly, ESPN charges broadband providers a per subscriber fee for all broadband subscribers, regardless of whether a particular subscriber wants, or ever uses, the service.[12]

According to press reports, almost 50 million broadband subscribers have access to ESPN360.[13] More important for this proceeding, ESPN denies access to ESPN360 to over 30 million United States broadband customers, based solely on the customer's selection of broadband provider.[14] In this group, even those broadband users that would pay ESPN a subscriber fee directly are denied access to the content.

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[11] ESPN360's website states that "ESPN360.com is available nationwide, but you ***must subscribe to a participating high speed internet service provider***." The website also encourages consumers to "find out more on how you can request access to ESPN360.com or ***switch your service to a participating high speed internet service provider***." *See* http://espn.go.com/broadband/espn360/faq (last visited Jan. 14, 2010) (emphasis added).

[12] *See* Todd Spangler, *Cox Grabs ESPN360.com*, MULTICHANNEL NEWS (Sept. 25, 2009), *available at* http://www.multichannel.com/article/355438-Cox_Grabs_ESPN360_com.php (last visited Jan. 14, 2010) ("ESPN charges distributors a per-subscriber fee to offer the [ESPN360] service.").

[13] *See* John Ourand, *Cox puts ESPN360 near 50M subs*, STREET & SMITH'S SPORTSBUSINESS JOURNAL (Sept. 28, 2009), *available at* http://www.sportsbusinessjournal.com/article/63637 (last visited Jan. 14, 2010) ("ESPN's broadband service, ESPN360, is on the cusp of hitting the 50 million subscriber mark….").

[14] Based on total U.S. broadband subscribers as reported in Organization for Economic Co-operation and Development, Broadband Statistics (June 2009), *available at* http://www.oecd.org/dataoecd/22/15/39574806.xls (last visited Jan. 14, 2010).

Furthermore, the ESPN360 business model threatens the historical neutrality between broadband content providers, a key catalyst for content creation and innovation. By using the market power that only a major sports programmer can wield, ESPN extracts fees for each subscriber of a participating broadband provider, even if a subscriber does not want the content and never views it. This enables ESPN to garner greater resources to further disadvantage less powerful broadband content competitors. This dynamic, combined with foreclosure of entire classes of users, risks decreasing the value of the entire network, decreasing competition and innovation that have been hallmarks of an open Internet.

With ESPN360 leading the way, absent Commission action, more companies will follow. According to prominent Wall Street analyst Richard Greenfield, "'[w]e believe the stage is being set for other programmers to follow in ESPN360's path . . . Fox Sports, Disney, Fox News, Nickelodeon, CNN and other programmers should all be thinking about unique ways of packaging content online that has enough leverage to drive monthly broadband sub fees from ISPs. . . ."[15]

Content providers are listening. Press reports indicate that NBC Universal is planning a similar service for the 2010 Olympic Games in Vancouver, restricting all live online video streams and some archived video only to users that have a subscription with a participating MVPD.[16] Everyone else will be denied access to the online Olympic content.

ESPN360 and its ilk are the antithesis of a free and open Internet. These arrangements disrupt the fundamental openness of the Internet and frustrate the Internet experience users have come to expect – unfettered access to Internet content, whether for free or on a direct subscription basis.

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[15] *See* Georg Szalai, *Opinion: Online Video's Impact Remains Unclear*, ADWEEK (July 3, 2009), *available at* http://www.adweek.com/aw/content_display/news/media/e3if52b9a5b28d70b335ffe8f533c42b814 (last visited Jan. 14, 2010).

[16] *See* John Ourand*, Olympics a test case for Web video?,* STREET & SMITH 'S SPORTSBUSINESS JOURNAL (Apr. 13, 2009), *available at* http://www.sportsbusinessjournal.com/article/62188 (last visited Jan. 14, 2010).

B. With powerful content owners leading the way toward a closed Internet, owners of dominant applications, services, and devices will follow.

Online content plays like ESPN360 are just the beginning. Absent regulation, owners of dominant applications, services, and devices have every incentive to follow, conditioning user access to wholesale arrangements with the user's broadband service provider. Customers of smaller broadband providers like ACA members are most vulnerable.

For example, nothing would prevent a search engine or social network provider that has reached market dominance from then requiring a small broadband provider to begin paying wholesale subscriber fees for access to their services and applications. If a small broadband provider declined to pay such fees, then the company could deny the broadband provider's customer base access to popular services or applications, just as ESPN does with ESPN360. Even more threatening, dominant applications or services providers could enter into exclusive agreements with the largest broadband providers, shutting out smaller broadband providers and their customers altogether. Competition and consumer choice would suffer.

The same incentives exist for device providers. Rather than make popular devices available to all users, device providers can follow the ESPN360 model and require wholesale arrangements and payments for all customers before any of a broadband provider's customers could use a device. Further, exclusive arrangements between device providers and the largest broadband providers could cut out smaller providers' customers completely.

C. The solution – extend a nondiscrimination principal to all providers of broadband Internet access-based content, applications, services and devices.

To preserve a free and open Internet, the Commission must act to halt this creeping trend of powerful companies denying access to classes of users. The solution is straightforward: <u>a nondiscrimination principal must cut across the entire online platform and all its key participants</u>. Users must be permitted to access the lawful content, applications, services, and devices of their choice. For online subscription services like ESPN360, that means a user may be required to pay a

fee to the online content provider and agree to terms and conditions – a common form of Internet transaction now ingrained into the expectations of users.[17] An effective nondiscrimination principle must entitle users to access all lawful Internet content, applications, services, and devices of their choice – protecting users from being shut out by wholesale arrangements or exclusive agreements.

III. TO ACHIEVE THE POLICY GOALS ARTICULATED IN THE *NOTICE*, THE COMMISSION MUST MAKE SEVERAL ADJUSTMENTS TO THE PROPOSED REGULATIONS.

The *Notice* articulates several additional important policy goals.[18] These include:

- Promoting and protecting the legitimate business needs of broadband providers;
- Encouraging continued innovation, investment, research and development;
- Promoting competition;
- Consumer protection; and
- Promoting and protecting Internet-based speech and democratic engagement.

To advance these policies, the proposed regulations require several adjustments. These adjustments will reduce ambiguity, provide greater clarity for all stakeholders, and reduce the risk of unintended consequences. The following sections detail the specific adjustments proposed by ACA. Appendix A to these Comments contains updated text for several regulations.[19]

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[17] Online content and application providers generally charge broadband subscribers direct subscription fees for access to online content, applications, or services. In other words, consumers can access the online content, applications, and services of their choice no matter which broadband service provider they use. For example, ESPN's "Insider" online service allows consumers to pay subscription fees directly to ESPN. *See generally* https://r.espn.go.com/espn/signup/step1 (last visited Jan. 14, 2010). Major League Baseball also provides out-of-market games on an individual end-user basis. By purchasing a $129.99 annual subscription, an end-user can watch any out-of-market baseball game live and, ironically, receive free access to ESPN Insider. *See* http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=espn&c_id=mlb&affiliateId=mlbMENUESPN (last visited Jan. 14, 2010). The National Hockey League and National Basketball Association provide similar services. *See* https://gamecenter.nhl.com/nhlgc/secure/registerform?intcmpid=nhl.com:gcl:vdsbnv&nav-video-gcl (last visited Jan. 14, 2010); http://www.nba.com/leaguepass/online.html (last visited Jan. 14, 2010).

[18] *See Notice*, ¶¶ 50, 60-80.

[19] *See* Appendix A, *infra*.

A. <u>§ 8.1 Purpose and Scope</u>: To ensure that Internet users can access the legal content, applications, services, and devices of their choice, the Commission must expand the scope of the regulations.

As discussed in Section II, fashioning the "best means of preserving a free and open Internet"[20] means the Commission must extend the regulations to providers of broadband content, applications, services, and devices. Failure to do so will result in powerful players using wholesale arrangements and exclusivity to deny users access to a growing array of content, applications, services, and devices. With ESPN360, the Commission already has evidence of how tens of millions of broadband users cannot access lawful content, even when they are willing to pay direct subscription fees for access. The Commission must not miss the opportunity in this proceeding to protect users' rights of access, truly preserving the Internet experience users have come to expect.

The first step is to revise the language of proposed Section 8.1 to include broadband Internet content, applications, services, and device providers. Appendix A contains the proposed language for the revised regulation.

B. <u>§8.3 "Reasonable Network Management"</u>: To provide clear guidance for all stakeholders, the Commission should provide additional clarification on reasonable network management practices.

ACA supports the Commission's conclusion that regulation of network management practices should remain "flexible" and avoid standards that are "unnecessarily restrictive."[21] ACA members report a wide variety of network management practices, ranging from basic network monitoring for the smallest providers, to much more sophisticated congestion management technology for larger systems. To accommodate the wide range of network management practices employed across

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[20] *Notice*, ¶ 16.

[21] *Id.*, ¶ 137. The Commission previously proposed that for a network management practice to be considered "reasonable", it "should further a critically important interest and be narrowly or carefully tailored to serve that interest." *See 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 Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*," Memorandum Opinion and Order, WC Docket No. 07-52, 23 FCC Rcd. 13,028, ¶ 47 (2008).

hundreds of distinct broadband networks, any network management regulation should support innovation, flexibility, and practices tailored to a specific network.

Beyond this, to provide clear guidance for all stakeholders, we ask the Commission to make four adjustments to the network management regulations:

- The regulations should specify that certain practices are expressly permitted;
- The regulations should make clear that broadband providers are not obligated to employ any specific practices;
- The regulations should make clear that they do not impose any affirmative obligations dealing with unlawful content or the unlawful transfer of content; and
- The regulations should expressly exempt specialized and managed services.

We discuss each issue in sequence below.

1. The Commission should make clear that certain network management practices are permitted.

Concerning managing congestion, ACA members report three general practices that the Commission should make clear are permitted: (i) "bandwidth throttling" for high-bandwidth users during periods of congestion; (ii) nondiscriminatory prioritization of traffic during periods of congestion; and (iii) consumption-based billing.

Bandwidth throttling. Some ACA members with more sophisticated networks report that during peak traffic periods, management practices include reducing bandwidth or "bandwidth throttling" for high-bandwidth users. Network monitoring software can detect modems that exceed bandwidth consumption thresholds, then temporarily reduce bandwidth available for those modems. As traffic volume abates, based on either actual measurement or predicted times of peak usage, the network monitoring software resets the limits on the affected modems. This practice allows all Internet access users to receive best efforts performance during peak traffic periods. Without this practice, a small set of high-bandwidth users would seriously degrade the Internet experience of all users.

The *Notice* appears to suggest that this practice falls within the scope of reasonable network management practices.[22] ACA asks the Commission to expressly recognize bandwidth throttling as a reasonable network management practice.

Nondiscriminatory prioritization of traffic. Some ACA members report using packet inspection to prioritize voice traffic or other latency-sensitive traffic during periods of congestion. This ensures that voice calls, each with the potential of being an emergency call, maintain higher priority over other types of traffic when the network becomes congested. ACA members report deploying this technology in a nondiscriminatory manner, meaning any packet coded as voice traffic receives the same priority.

The *Notice* includes traffic prioritizing within the discussion of network management practices, but reaches no conclusion.[23] ACA asks the Commission to expressly recognize nondiscriminatory traffic prioritization as a reasonable network management practice.

Bandwidth- or consumption-based billing. Some ACA members report managing congestion through bandwidth- or consumption-based billing. Essentially, customers purchase a level of service, either based on maximum speed or gigabits consumed per month. Those that want higher speed or a higher gigabit limit upgrade to a higher level of service.

The *Notice* appears to include bandwidth- or consumption-based billing within the scope of reasonable network management practices.[24] ACA asks the Commission to expressly recognize bandwidth- or consumption-based billing as a reasonable network management practice.

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[22] *Notice,* ¶ 137. ("For example, if cable Internet subscribers in a particular neighborhood are experiencing congestion, it may be reasonable for an Internet service provider to temporarily limit the bandwidth available to individual users in that neighborhood who are using a substantially disproportionate amount of bandwidth until the period of congestion has passed.").

[23] *Id.* ("Some have suggested it would be beneficial for a broadband provider to protect the quality of service for those applications for which quality of service is important by implementing a network management practice of prioritizing classes of latency-sensitive traffic over classes of latency-insensitive traffic (such as prioritizing all VoIP, gaming, and streaming media traffic).").

[24] *Id.* ("Alternatively, a broadband Internet service provider might seek to manage congestion by limiting usage or charging subscribers based on their usage rather than a flat monthly fee.").

2. The Commission should make clear that the regulations do not impose obligations to employ any specific network management practices.

ACA asks the Commission to expressly state that the regulations do not mandate a broadband provider to employ any specific network management practices. Many small broadband providers operate basic networks and employ very basic network management. The regulations should not obligate these providers to employ any additional network management technology or be subject to complaints if they do not. More sophisticated broadband providers employ a variety of techniques to manage congestion. So long as a network management technique does not otherwise conflict with the regulations, the selection of techniques should remain solely within the provider's discretion. If the Commission does not make this clear, ACA fears its members will be targets of FCC complaints for each instance of network congestion that was not "managed" to a user's satisfaction.

3. The Commission should make clear that the regulations do not impose any affirmative obligations on how broadband providers deal with unlawful content or the unlawful transfer of content.

The inevitable dark side of an open Internet is that a user can access unlawful content made available online. ACA asks the Commission to clarify that the regulations do not impose any affirmative obligations relating to unlawful content or the unlawful transfer of content. Unlawful content, and how network owners deal with it, should remain the province of law enforcement and the courts. The Commission should not get in the business of adjudicating complaints arising from allegations that the broadband provider somehow wrongly managed unlawful content by failing to use "reasonable network management practices."

Similarly, unlawful use of copyrighted works on broadband networks is addressed, in part, in the carefully constructed mechanism contained in the Digital Millennium Copyright Act ("DMCA").[25] Since 1998, the DCMA has provided a measure of protection from online infringement for copyright holders' works, while at the same time providing Internet service providers with immunity from

[25] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

damages for certain copyright infringement occurring on their networks.[26] Beyond that, the courts retain jurisdiction over copyright infringement allegations on broadband networks and by broadband providers.[27] The Commission should make clear that its regulations do not create any jurisdiction at the Commission over the unlawful transfer of content on broadband networks.

4. The Commission should make clear that the regulations do not extend to specialized and managed services.

The Commission should make clear that the limits of "reasonable network management practices" apply to management of broadband Internet access service, not to traffic arising from specialized and managed services. ACA members are providing a growing array of managed and specialized IP-based services. These include VoIP, IPTV, website hosting, advertising, virtual private networks for business, institutional and government users, including public safety users, connectivity for telemedicine, high-bandwidth Internet access for enterprise users, distance learning applications, video conferencing, transport for educational and government programming, and more. To meet the demands of business, institutional, and government users, broadband providers must be free to manage these services for the highest possible security and quality of service, without the regulatory restraints that apply to broadband Internet access service.

To codify the points raised above, Appendix A contains a revised definition of "reasonable network management."

C. §8.9 Devices: The Commission should adjust proposed Section 8.9 to add the concept of "technical compatibility".

ACA requests that the Commission incorporate an additional concept into Section 8.9 – "technical compatibility." The proposed regulation is susceptible to the interpretation that a broadband provider must support all lawful, non-harmful broadband devices, even those not

[26] The "safe harbor" provisions of the DMCA exempt qualified online service providers from claims of copyright infringement made against them that result from the conduct of their customers. As a result, only the customer is liable for monetary damages for copyright infringement; the owner of the network through which the alleged copyright infringement took place is not liable. *See* 17 U.S.C. § 512.

[27] *See* 17 U.S.C. § 501 *et seq*.

supported by the broadband provider's network.[28] For example, a DSL modem is a lawful, non-harmful device, but it is technically incompatible with the DOCSIS-based broadband service deployed by most ACA members. Requiring a cable operator to support DSL modems, or any other technically incompatible device, would be unreasonably costly, unnecessary, and nonsensical.

To avoid this result, the Commission must include technical compatibility as a prong of a broadband provider's device support obligations. Appendix A contains a revised Section 8.9 addressing this issue.

D. <u>§8.11 Competitive Options</u>: The Commission should clarify that the regulations do not create common carrier or "open access" obligations.

As proposed, Section 8.11 prohibits broadband providers from "depriv[ing] any of its users of the user's entitlement to competition among network providers [or] service providers. . . ."[29] We interpret this to mean that a broadband provider could not prohibit a customer from subscribing to a different broadband service provided over a competing network. But the language of the regulation could be interpreted more broadly. "Competition among service providers" could mean *competition among broadband service providers on the broadband provider's own network*. Put another way, the proposed regulation might be interpreted as imposing common carrier obligations, "open access," or physical interconnection obligations.

We acknowledge that the *Notice* does not express this intent, and it would represent an extraordinary policy reversal if it did, raising serious questions concerning Commission authority and network owners' civil rights. Still, to avoid the upheaval and disputes that would result from the misinterpretation of proposed Section 8.11, ACA asks the Commission to clarify that the regulation does not impose any common carrier, "open access," or physical interconnection obligations.

Appendix A contains a revised Section 8.11 containing this clarification.

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[28] *Notice*, ¶ 92.

[29] *Id.*

E. <u>§8.13 Nondiscrimination</u>: The Commission should clarify that the regulation does not prevent broadband providers from offering a wide range of differently priced services and services levels.

Concerning Section 8.13, the *Notice* states, "We propose that this rule would not prevent a broadband Internet access service provider from charging subscribers different prices for different services."[30] To promote innovation in service offerings and continued investment in networks and technology, the Commission must adopt this proposal, stating it unequivocally, and codifying it in the regulation. This is especially important for ACA's constituency – hundreds of individual broadband providers, serving diverse markets across the United States, including thousands of small communities and rural areas. The Commission must preserve and promote the ability of these companies to develop new and evolving service offerings to better serve consumers and businesses in their markets.

ACA members report a growing variety of differently priced broadband service offerings and service levels. These include:

- Consumption-based billing, where a customer chooses among different gigabyte thresholds for monthly downloading;
- Bandwidth-based billing, where a customer chooses among different maximum download and upload speeds; and
- "Boosting," where a customer can opt for priority downloading of content, like movies, enabling faster downloads.

These are illustrative examples only; new offerings continue to emerge. As broadband providers upgrade networks and technology, and as competition and demand spur more innovation, the variety of service offerings and service levels with continue to multiply.

Consumers, businesses, governments, and our society benefit from network investment and innovation, and the Commission policies must continue to promote both. To that end, and to provide clarity for broadband providers and all stakeholders, the Commission should adopt and codify a policy supporting price differentiated offerings. Appendix A includes a revised Section 8.13.

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[30] *Id.*, ¶ 106.

F. <u>§8.15 Transparency</u>: The regulations should limit transparency obligations to posting network management practices and policies on a broadband provider's website, and a reasonableness standard should govern the substance of disclosures.

The following facts must guide the Commission's evaluation of any proposed transparency regulation:

- The vast majority of broadband providers are small companies, including at least 800 companies that are ACA members.
- The Commission has a longstanding policy of minimizing the administrative burdens and costs of compliance on smaller entities.
- Posting network management practices on a company's webpage will make the information available to every Internet user – consumers, businesses, applications, services, and device providers, researchers, and governments.

These facts lead to one conclusion, at least where smaller providers are concerned: transparency obligations should begin, and end, with posting network management practices on a company website or webpage. This approach will maximize the distribution of information at minimal cost.

Limiting transparency obligations to website disclosure will represent a restrained, incremental approach to broadband regulatory burdens, and will align with current broadband provider communication practices. Broadband providers, large and small, commonly use webpages to inform customers and potential customers on a wide range of similar matters. ACA members report using their websites to communicate pricing and service offerings, acceptable use policies, terms and conditions of service, and copyright infringement notice procedures and policies. Adding a description of network management practices to the information on a broadband provider's website would enable any user to review and evaluate that company's practices, all at a minimal additional cost to all stakeholders. Moreover, this approach will avoid imposing on broadband providers the burdens and costs of an entirely new set of compliance and reporting obligations.

Concerning the substance of network management disclosures, ACA supports the standard in proposed Section 8.15, "such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the

protections specified in this part."[31] By starting with a reasonableness standard, the regulation will flexibly accommodate the wide range of network management practices employed across hundreds of broadband providers. As stakeholders and the Commission develop experience with the efficacy of this approach, adjustments may be made, if necessary, through industry initiative or through Commission intervention.

Finally, any disclosure obligations should have a clear exception for network management practices that protect the network from harmful traffic. For example, some ACA members report blocking traffic from sources of viruses, malware, or spam. Disclosing the specifics of these practices would enable spammers, hackers, and others to more easily breach network security. To avoid this, the regulations should expressly exempt practices aimed at maintaining network security.

In Appendix A, we provide a revised Section 8.15, addressing the concerns discussed above.

G. Specialized and Managed Services: The Commission should exempt specialized and managed services from network neutrality regulations.

Within ACA's constituency, specialized and managed services encompass a growing array of networking and IP-based services distinct from broadband Internet access. Examples include VoIP service, IPTV, website hosting, advertising, virtual private networks for business, institutional and government users, including public safety users, connectivity for telemedicine, high-bandwidth Internet access for enterprise users, distance learning applications, video conferencing, transport for educational and government programming, and more. Specialized and managed services represent an important subset of services ACA members provide, from which they derive revenue, in turn, supporting further investment and innovation.

Concerning specialized and managed services, the *Notice* asks "if rules are appropriate in this area."[32] Our firm input is: ***No***. Managed and specialized services must remain under the exclusive control of the broadband provider. No factual, legal, or policy basis exists for imposing

[31] *Id.*, ¶ 119.

[32] *Id.*, ¶ 152.

regulations on this nascent, dynamic, and rapidly evolving area of service. No complaints have arisen, no public interest harm has been shown, and neither Congress nor the Commission has ever articulated policy principles governing these services, other than to generally encourage their development.[33]

For communities served by ACA members, unregulated specialized and managed services over IP networks deliver palpable public interest benefits. These include more competition in video and voice service, lower cost and more robust networking, and a growing array of innovative communications and data transfer technologies for businesses, institutions, governments and schools.

The *Notice* also expresses concern about the impact of specialized and managed services on the open Internet and the investment in broadband network deployment and upgrades.[34] For ACA's constituency, broadband Internet access remains the core broadband service. ACA estimates that between 80-95% of most members' broadband revenues come from providing broadband Internet access service, primarily to consumers. Consequently, strong incentives exist to continue investment to upgrade and expand broadband Internet access service.

The Commission can best support this progress by exempting specialized and managed services from regulation. The Commission can accomplish this in a straightforward manner, with a broad definition and an express exemption. To that end, in Appendix A, we propose a new Section 8.16. By adopting this, the Commission will provide certainty to the regulatory status of specialized and managed services, and promote continued investment and innovation.

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[33] *See, e.g.,* 47 U.S.C. § 230(b)(1) ("It is the policy of the United States…to promote the continued development of the Internet and other interactive computer services and other interactive media….").

[34] *Notice*, ¶ 153.

H. Enforcement: The Commission should enforce network neutrality regulations under established formal and informal complaint procedures; no basis exists to adopt new and different procedures.

ACA asks the Commission not to adopt new or different complaint procedures to enforce network neutrality regulations. Existing formal and informal complaint procedures are familiar, time-tested, and provide adequate procedural protection for complainants and respondents alike.

Concerning formal complaints, the procedures set forth in Section 76.7 of the Commission's rules provide a model the Commission should adopt for this proceeding.[35] Section 76.7 sets forth pleading requirements,[36] pleading cycles,[37] rules governing additional procedures and submissions,[38] and specifies the Commission's discretionary authority to order discovery or refer a case to an ALJ.[39] The Commission has adjudicated hundreds of complaints under Section 76.7; the well-established procedural protections in Section 76.7 and the Commission's deep experience in administering the process support adopting Section 76.7 as the enforcement mechanism for network neutrality.

The Commission can resolve some enforcement questions, especially those raised by individual consumers, most efficiently through the existing informal complaint process under Sections 1.716-1.718.[40] The current process enables a consumer to file a complaint via the Commission's web-based form, minimizing the burden on the complainant and Commission staff.[41] The respondent then has the opportunity to resolve the informal complaint to the complainant's satisfaction, reporting

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[35] 47 C.F.R. § 76.7.

[36] 47 C.F.R. § 76.7 (a)-(c).

[37] 47 C.F.R. § 76.7 (a)-(c).

[38] 47 C.F.R. § 76.7 (e).

[39] 47 C.F.R. § 76.7 (f), (g).

[40] 47 C.F.R. §§ 1.716 – 1.718.

[41] *See* the Commission's web-based complaint form, *accessible at* http://esupport.fcc.gov/complaints.htm (last visited Jan. 14, 2010).

the resolution to the Commission.[42] If the respondent fails to adequately resolve the informal complaint, the complainant may escalate matters to a formal complaint.[43]

As the Consumer & Governmental Affairs Bureau can attest, the majority of informal complaints are resolved between the parties, with little Commission intervention, preserving staff resources for other matters.[44]

With these enforcement mechanisms in place, the Commission can evaluate the new regulations through case-by-case adjudication, avoiding the burdens and costs to both the Commission and industry of a report-based compliance regime. If developments later show that more active regulation is warranted, the Commission can take additional steps at that time.

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[42] 47 C.F.R. § 1.717.

[43] 47 C.F.R. § 1.718.

[44] *See In the Matter of Establishment of Rules Governing Procedures To Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, CI Docket No. 02-32, 17 FCC Rcd. 3919, ¶ 2 (2002) ("[T]he vast majority of consumer complaints filed pursuant to…informal complaint rules are resolved…in a manner satisfactory to the complaining consumers with little direct involvement by Commission staff.").

IV. CONCLUSION

The *Notice* provides a thoughtful first step in adopting regulations to preserve an open Internet. But to achieve that important policy goal, the Commission must expand the scope of the regulations to include all key participants in the broadband Internet experience – providers of content, applications, services, and devices.

The Commission should also incorporate the specific adjustments to the regulations proposed in Appendix A. These changes will provide clear guidance for all stakeholders, reduce ambiguity, and help minimize the risk of unintended consequences.

Respectfully submitted,

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APPENDIX A

PROPOSED REGULATIONS

§ 8.1 Purpose and Scope.

The purpose of these rules is to preserve the open Internet. These rules apply to:

(a) broadband Internet access service providers only to the extent they are providing broadband Internet access services;

(b) content providers only to the extent they are making content available to users over broadband Internet access services;

(c) application and service providers only to the extent they are making applications or services available to users over broadband Internet access services; and

(d) device providers only to the extent they are making devices available to users for use over broadband Internet access services.

§ 8.3 Definitions.

* * *

"Reasonable network management" consists of:

(a) reasonable practices employed by a provider of broadband Internet access to:
- (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;
- (ii) address traffic that is harmful to the network;
- (iii) prevent the transfer of unlawful content;
- (iv) prevent the unlawful transfer of content; and

(b) other reasonable network management practices, including, without limitation:
- (i) reducing bandwidth available for high-bandwidth users during periods of congestion;
- (ii) nondiscriminatory prioritization of traffic during periods of congestion.

(c) Nothing in this part regulations shall be construed as:
- (i) imposing any obligations on a provider of broadband Internet access to employ any network management practices;
- (ii) imposing any additional obligations on a provider of broadband Internet access to prevent the transfer of unlawful content or prevent the unlawful transfer of content, except as otherwise required by law; or
- (iii) imposing any obligations with respect to a provider of broadband Internet service's management of managed and specialized services.

§ 8.9 Devices.

Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that: (i) are technically compatible with the network; and (ii) do not harm the network.

§ 8.11 Competitive Options.

Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers. Nothing in this part shall impose any interconnection, collocation, or resale obligations on a provider of broadband Internet or otherwise obligate a provider of broadband Internet access service to provide network capacity to another provider of broadband Internet access service.

§ 8.13 Nondiscrimination.

Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner. Nothing in this regulation shall restrict a provider of broadband Internet access from offering different services and levels of service at different prices.

§ 8.15 Transparency.

(a) Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

(b) A provider of broadband Internet access service may comply with this section by posting the required disclosure on the provider's website.

(c) Nothing in this part shall obligate a provider of broadband Internet access service to disclose network management and other practices employed to protect the network or users from harmful or unlawful traffic.

§ 8.16 Specialized and Managed Services

(a) Definition. Specialized and managed services are any Internet protocol-based service offered by a provider of broadband Internet access service, other than broadband Internet access service.

(b) Exemption. Specialized and managed services shall be exempt from regulation under this part.