

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

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

**COMMENTS OF SUREWEST COMMUNICATIONS**

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## SUMMARY

In these Comments, SureWest Communications urges the Commission not enact the rules proposed in this proceeding. SureWest shares with the Commission the goal to “preserve and promote the open and interconnected nature of the public Internet.” SureWest believes, however, that the U.S. currently has such an Internet, and that the proposed rules are counter-productive and will harm the ability of Internet access service providers (“IASPs”) to give their customers the high quality services that they have come to expect, demand, and in fact receive today. Regardless of the slogan commonly attached to them, the proposed regulations are not “neutral.” Rather, they tilt the marketplace substantially in favor of content, application and service providers, while improperly imposing costs on providers of Internet access service and their customers.

The Internet has grown and succeeded as a result of FCC deregulation. The Commission has never previously sought to regulate the Internet offerings of wireless carriers or of cable television operators (though in the latter case, it has evaluated the regulatory status of cable modem service.) Thus, under Titles III and VI of the Act, Internet access services have been treated as outside regulation *ab initio*. Even with regard to providers otherwise subject to Title II regulation, in its *Computer Inquiries*, the Commission demonstrated a progressive deregulation or non-regulation of data transmission and related services, in order to remove impediments to innovation. Ultimately, in the *Wireline Broadband Services* and related orders, the Commission found that even the remaining requirements were impeding the ability of Internet access providers to deploy innovative new services, and the Commission removed the obligation of such providers to comply with the remaining *Computer Inquiry* requirements. At the same time, the Commission issued its *Internet Policy Statement*. It is notable and important that the Commission purposefully chose therein to enact principles, rather than rules. This “light touch” regulatory approach is consistent with the Congressional directives cited in the *Policy Statement*, and very much in line with policies that foster innovation.

The Commission lacks the authority to adopt the proposed rules. It is elementary that the Commission only has such authority as is delegated to it by Congress. Yet, the Act itself is generally devoid of any reference to the Internet, except in Section 230. However, Section 230 is merely a general policy statement, and as such, does not operate to delegate authority or establish statutory duties, and therefore it cannot be a direct source of authority. The same is true for Section 706(a) of the Telecommunications Act of 1996. The Commission also lacks Title I ancillary authority to act here. In the right circumstances, the Commission’s ancillary authority can be broad and can effectively serve the public interest. However, a considered evaluation of the contours of Title I cases leads to the conclusion that the ancillary authority often available under Title I does not permit these rules to be adopted as proposed. Ancillary authority must be ancillary to some substantive statutory authority. Again, Section 230 of the Communications Act and Section 706(a) of the 1996 Telecommunications Act fail to provide that basis, since they are merely policy statements. Even if the Commission

had ancillary authority, however, it may not enact rules that are completely beyond its authority or inconsistent with other provisions of the Act. Thus, the Commission lacks direct or ancillary authority to grant any “entitlement” to competition or to grant anything that would establish for the public a property right in the private networks of broadband network providers. Similarly, in connection with the proposed non-discrimination rule, as Commissioner McDowell noted “(t)he Commission simply cannot use the generalized provisions of Title I to impose more onerous regulations on providers of broadband Internet access service than it is authorized to impose on common carriers under the specific provisions of Title II.” That assessment should hold as well for Titles III and VI.

Even if the Commission had the requisite authority, the public interest dictates that it should not adopt the rules proposed in this proceeding. First, there is simply no evidence of a pervasive problem that needs to be addressed in this area, and any individual instances can be addressed as they arise without regulations that stifle innovation. Given the given the tremendous publicity that occurred in connection with the Madison River and Comcast/BitTorrent matters, it is very likely that both regulators and the public have been closely monitoring the provision of service by all IASPs. Thus, it speaks volumes that no other similar incidents have been reported. Further, the market has and will continue to provide better control over any isolated anti-competitive actions than potentially counter-productive regulations. Comcast’s reputation was harmed by its actions in connection with BitTorrent. IASPs recognize that customers can and frequently do switch to other providers, and thus IASPs have incentives to please and succeed with consumers. It is also generally in the best interest of an IASP to treat similar traffic from online content, application and service providers (“CAS providers”) similarly. Of course, the Commission itself has recognized (in the National Broadband Plan) the need for handling different applications and services in unique ways that are different from one another. Similarly, there may be situations in which it is economically reasonable for IASPs to impose certain costs or charges on CAS providers, particularly where those providers are the cost causers, and such action is needed to avoid imposing those costs on other network users, including consumers who have no interest in the relevant content, applications or services. Addressing such situations does not require any anti-competitive traffic management techniques, and instead should be viewed as pro-competitive and economically appropriate.

The harm from any non-discrimination principle will outweigh any benefits. Data prioritization for the benefit of customers is essential to network management and is not inherently anti-competitive. In contemplating any rules regarding data prioritization, the Commission should focus on the best interests of end user/consumers, rather than the interests of CAS providers. It is end users that the Commission has a statutory obligation to protect, and they are the “public” in the public interest for which the Commission acts. The interests of individual CAS providers are often not identical to those of end users. Furthermore, CAS providers can usually protect themselves from any pernicious discrimination through the use of negotiated commercial agreements. The public interest would not be served by adding a regulatory “thumb” in their favor on the scale of negotiating leverage. Further, the prioritization that may enhance the

quality and growth of a new innovative CAS product might be considered “discriminatory” by some of its established competitors.

The public interest requires that IASPs be allowed to offer innovative Quality of Service (“QoS”) offerings to customers. Such offerings promote innovation in both the core and the edge of the Internet, and serve a sound economic function in increasing revenues for construction and maintenance of the advanced broadband network that the Commission seeks to facilitate.

There are important and valid economic reasons for IASPs to recover costs from CAS providers, and doing so can maximize economic and social welfare. There can be little doubt that CAS providers are cost-causers in regards to their impact on the operation and costs of constructing a broadband network. While CAS providers have asserted that they do pay for their use of the network, their payment is to their own carrier or IASP, not to the IASP that is incurring the cost of delivering the traffic to the end users, to the economic benefit of the CAS providers. Further, recovering costs from CAS providers reduces the risk that some consumers will be priced out of obtaining broadband services.

Any prohibitions on “discrimination” should apply to the entire Internet ecosystem and value chain from end-to-end: from CAS provider, to intermediate carrier, to content delivery network, to IASP, to end user. The problem with regulating only the last “link” of the transmission is that it artificially ignores the end-to-end nature of the transmission, and the management and transactions associated with that management that occurred “upstream” before the traffic arrived at the IASP’s server. For a variety of economic and technical reasons, IASPs should be able to cache content without being considered improperly “discriminatory.”

While SureWest firmly supports the policy of free and fair competition, the proposed rule on “entitlement” to competition is fatally flawed. The rule as proposed has no substantive content and therefore cannot be fairly understood or followed by IASPs. A consumer’s “entitlement to competition” is no more than a policy rationale underlying the current proceeding, rather than an enforceable right in and of itself. Ultimately, there is a better option than FCC rules for enforcing competition: the nation’s well-developed body of antitrust law.

The “transparency” issue is a complex one that should be resolved through voluntary “best practice” standards developed by all of the stakeholders. Such standards should balance the interest in disclosure against interests in network security and public security, so that transparency does not cause more harm than benefit. While there are potential benefits in providing end users more information regarding network management procedures, the same analysis does not apply to offering that information to CAS providers. IASPs have no apparent legal obligations to CAS providers, and do not owe them the same duties that they owe to end users. Furthermore, the distinction between “edge” (CAS) provider and “core” provider is rapidly becoming blurred. It

would be improper to require IASPs to provide potentially proprietary information to their competitors.

The public interest requires the Commission to either exclude managed services from the definition of “broadband Internet access” that would be subject to the proposed rules, or exempt managed services from those rules. The reason for this is to best meet consumer needs and demands regarding those services. For example, consumers’ expectations for IP-based multichannel video service do not allow that service to be delivered in the “best efforts” manner that occurs in Internet access service under the TCP/IP protocol. Furthermore, content delivery agreements with multichannel video content providers (TNT, HBO, etc.) typically dictate the level at which services must be managed.

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SureWest Communications (“SureWest”), by its attorneys, hereby files these Comments in response to the Notice of Proposed Rulemaking, released October 22, 2009, in the above-captioned proceedings (“*NPRM*”). In these Comments, SureWest urges the Commission not enact the proposed rules. SureWest shares with the Commission the goal to “preserve and promote the open and interconnected nature of the public Internet.” SureWest believes, however, that the U.S. currently has such an Internet, and that the proposed rules are counter-productive and will harm the ability of Internet access service providers to give their customers the high quality services that they have come to expect, demand, and in fact receive today.

**I. Introduction -- SureWest as a National and Market Leader in Innovative Technology and the Provision of Advanced Broadband Services.**

SureWest is a holding company with subsidiaries that operate in California, Kansas and Missouri. These companies provide a variety of services that include incumbent and competitive wireline telecommunications, high-speed broadband Internet access and data services, and IP-based high definition multichannel video services, as well as IP-based telecommunications services. SureWest has become a national and market leader in developing advanced technology and provisioning advanced

broadband services. For example, in 1985, SureWest (then operating as Roseville Telephone Company) began deploying fiber in its distribution plant, and by 1995 it began deploying fiber-to-the-curb deep into selected residential areas. By 2003, SureWest had the then-largest fiber-to-the-home (“FTTH”) deployment of any company in the country. Through use of its FTTH platform, SureWest was the first company in the U.S. to provide 50 Mbps bi-directional symmetrical residential service, and it constantly seeks to be the bandwidth leader in the markets it serves.

SureWest is also widely recognized as a leader in the development and deployment of IPTV technologies and services. In 2006, SureWest was the first company in North America to deliver high-definition IPTV services to residential customers.<sup>1</sup> Before that, when SureWest became one of the first commercial providers of IPTV in January 2004, it had to become its own systems integrator to design and pull its vendors into a collaborative environment, because of the limited availability of integrated IPTV solutions at that time. SureWest established its own pre- and post-production lab capabilities, and has maintained that lab environment since 2003. Vendors and service providers worldwide have visited this lab facility to witness what SureWest is doing with IPTV, and to share ideas. Its engineering and operations personnel are some of the leading experts in the nation regarding real world issues related to the provision of IPTV services.<sup>2</sup>

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<sup>1</sup> In 2007, SureWest became one of the first providers to offer an HD digital video recorder using IPTV protocol.

<sup>2</sup> This provision of advanced services, along with SureWest’s deep commitment to customer service, has resulted in high levels of customer satisfaction: recent third-party surveys have ranked SureWest as number one in customer satisfaction in both its Sacramento and Kansas City markets.

It is with this hard-earned, real world experience in the development and operation of advanced broadband networks that SureWest urges the Commission not to enact counter-productive “net neutrality” regulations that will likely not achieve the goals that the Commission has set out. While SureWest shares with the Commission the goal to “preserve and promote the open and interconnected nature of the public Internet,” SureWest does not see the proposed regulations as “neutral”. Rather, they tilt the marketplace substantially in favor of content, application and service providers, while imposing costs on providers of Internet access service (and their customers) and harming the ability of those providers to offer the high quality services that their customers have come to demand.

**II. The Internet Has Grown and Succeeded as a Result of FCC Deregulation.**

As the Commission recognizes, the Internet has been and is currently a tremendously successful facilitator of economic, cultural, social and political discourse, which has led to unprecedented increases in the nation’s productivity. *NPRM* at paras. 20-23. SureWest wants to emphasize, though, that this tremendous success has been the result of deregulation or non-regulation of the Internet and its service providers. In contemplating the enactment of the currently proposed rules, SureWest encourages the Commission to keep in mind that our society succeeded in developing the most advanced communications tool ever conceived in this virtually unregulated environment.

The Commission has never previously sought to regulate the Internet offerings of wireless carriers or of cable television operators (though in the latter case, it has evaluated the regulatory status of cable modem service). Thus, under Titles III and VI of the Act, Internet access services have been treated as outside regulation ab initio. In

those specific arenas, it is clear that Internet services have grown impressively and have delivered significant consumer benefits without any Commission involvement.

Even in the Title II arena, history tells us that deregulation (or non-regulation) of emerging and rapidly-evolving services best serves the public interest. This attitude is particularly noteworthy because it surfaced in an environment where regulation was assumed, since Title II services were fully tariffed, and carriers' activities were highly controlled. In its initial analyses of the role for Title II regulation in the early days of the data transmission market, the FCC explored concerns regarding the need for regulation and the possible discriminatory treatment by carriers against independent providers of data transmission services. The Commission made clear that the emerging data transmission services should not be treated like traditional Title II services, whether they were offered by carriers or by the independent providers. It did not require that those services be regulated. Instead, its initial conclusion in the *Computer I Inquiry* included a requirement only that common carriers offering those unregulated data transmission services do so through separate corporate subsidiaries.<sup>3</sup> And although the Commission applied its separate subsidiary requirement to AT&T and GTE, it began removing impediments to innovation in this market by ruling in the *Computer II* proceeding that independent telephone companies would no longer be required to

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<sup>3</sup> *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services*, Final Decision, 28 FCC 2d 267, 268-270 (1971) ("*Computer I Final Decision*"). It should be noted that in enacting separate subsidiary requirements, the Commission was at least as concerned with potential cross-subsidization as it was with potential anti-competitive discrimination in the management of traffic. See, e.g., *Computer I Final Decision*, 28 FCC 2d at 269-270. Clearly that concern is not relevant at the present time.

comply with structural separation.<sup>4</sup> This was because the Commission found that the independent telephone companies lacked sufficient national market power, manufacturing base and toll facilities to engage in anticompetitive conduct.<sup>5</sup> The Commission recognized that regulation in and of itself can stifle progress and should only be used as a remedy when there is no other method of stemming anti-competitive actions.

In *Computer II*, after discussing the differences between “basic” and “enhanced” services, the Commission found that the enhanced services market was fully competitive. The Commission’s seminal *Computer II* analysis and Order established the fundamental distinction between basic telecommunications and enhanced services that continues to this day, along with the core principle that regulation of enhanced services is not warranted.<sup>6</sup> Furthermore, the Commission completely deregulated the provision of customer premises equipment, regardless of who provided it.<sup>7</sup> The resulting freedom to act quickly and independently led, as the Commission has long recognized, to the robust market in devices such as modems and other hardware, which were critical to the benefits afforded by the use of the Internet.

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<sup>4</sup> *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 467,470-75 (1980) (“*Computer II Final Decision*”).

<sup>5</sup> *Id.* Indeed, immediately upon reconsideration, the Commission exempted GTE from the separate subsidiary requirement. *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Reconsideration Order, 84 FCC 2d 50, 72-74 (1980).

<sup>6</sup> *Computer II Final Decision*, 77 FCC 2d at 433, para. 128.

<sup>7</sup> *Id.* at 439, para. 131. The deregulation of customer premises equipment began with the Commission’s *Carterfone* decision, *Use of the Carterfone Device in Message Toll Service*, 13 FCC 2d 420 (1968).

Only six years later, as the market evolved and flourished further, the Commission once again recognized the need to re-address its treatment of the data transmission market. Finding that the costs of structural separation outweighed the benefits in an increasingly competitive data processing market, the Commission removed these requirements from the companies to which they applied (AT&T and the BOCs), and replaced those requirements with non-structural comparably efficient interconnection (“CEI”) and open network architecture (“ONA”) safeguards.<sup>8</sup> The actions of the Commission in all of these circumstances were directly tied to the specific need in that era to protect the Title II ratepayer, rather than to the need to control the data marketplace.

Ultimately, the Commission recognized that yet further deregulation was necessary. The Commission had been asked repeatedly to grant waivers of its rules to permit the deployment of new and innovative services, services that were continually emerging and that were incapable of being deployed effectively under the then-effective “one-size-fits-all” regime. In its *Wireline Broadband Order*, the Commission recognized that the *Computer Inquiry* separate subsidiary, CEI, ONA and related requirements were developed before separate and different broadband technologies began to emerge

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<sup>8</sup> *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958, 987 (1986) (“*Computer III Phase I Order*”). Again, the Commission declined to impose these requirements on independent telephone companies, finding that such companies lacked the potential of the BOCs to engage in anti-competitive behavior, and thus the cost of regulation would outweigh any benefits. *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072, 3101 (1987) (“*Computer III Phase II Order*”).

and compete for the same customers.<sup>9</sup> The Commission found that these requirements were impeding the ability of wireline providers of broadband Internet services to deploy innovative new services.<sup>10</sup> Accordingly, the Commission removed the obligation of such providers to comply with the *Computer Inquiry* requirements.<sup>11</sup> In related orders, the Commission also classified cable modem service, wireless broadband Internet service and broadband-over-powerline Internet access as information services, removing them

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<sup>9</sup> *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 U.S.C. § 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; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14876 (2005) (“Wireline Broadband Order”), aff’d, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).*

<sup>10</sup> *Id.* at 14877, 14887-890.

<sup>11</sup> *Id.* at 14875-878. The Commission also effected some deregulation of the provision of wireline broadband Internet prior to this in one of its orders on relieving ILECs of certain unbundled network element requirements (“UNEs”) associated with the provisioning of Internet access. In 2003, the Commission: 1) required no unbundling of fiber-to-the-home loops; 2) elected not to unbundle bandwidth for the provision of broadband services for loops where incumbent LECs deploy fiber further into the neighborhood but short of the customer’s home (hybrid loops); and 3) no longer required that line-sharing be available as an unbundled element. *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, (2004) (Triennial Review Remand Order), aff’d, Covad Communications Co. v. FCC, 371 U.S. App. D.C. 283, 450 F.3d 528 (D.C. Cir. 2006).*

from potential common carrier regulation under Title II of the Communications Act.<sup>12</sup>

But, even in a Title II context, the Commission over time recognized that limited or no regulation of these services best served the public interest.

At the same time that the Commission deregulated the provision of wireline broadband Internet access, it issued its *Internet Policy Statement*.<sup>13</sup> Specifically acting to preserve the “vibrant and open character of the Internet,” the Commission set out principles designed to discourage discrimination by Internet service providers and promote competition among ISPs, and application, service, and content providers. SureWest asserts that it is notable and important that the Commission purposefully chose to enact principles, rather than rules.<sup>14</sup> This “light touch” regulatory approach is consistent with the Congressional directives cited in the *Policy Statement*,<sup>15</sup> and very much in line with policies that foster innovation.

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<sup>12</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

<sup>13</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (“*Internet Policy Statement*”).

<sup>14</sup> *Id.* at note 15.

<sup>15</sup> *Id.* at 14987, citing to 47 U.S.C. § 230(b)(2) and to 47 U.S.C. § 157 nt. (Section 706 of the Telecommunications Act of 1996).

In sum, the Commission has, since before 1980, logically favored a hands-off regulatory regime to encourage innovation and rapid response in the development and use of data networks, including the Internet. It has engaged in an affirmative program of non-regulation of computer networks and data services, restraint in regulation of Title III wireless and Title VI providers' cable modem services, and progressive and now near-total deregulation of Title II services associated with the provision of the Internet and data transmission services. Over this period of time, the Internet has become one of the most productive tools ever devised, and its growth has been remarkable.

For example, between 1996 and 2000, IP backbone traffic in the United States increased from 1,500 to 20-35,000 terabytes per month.<sup>16</sup> This growth has continued in recent years. Cisco estimates that IP traffic in North America increased 42% just between 2008 and 2009, from 2,578,000 to 3,666,000 TB/month.<sup>17</sup> Likewise, the number of unique IP addresses in the United States rose 13% from 2008 to 2009 (accounting for more than a quarter of the world's IP addresses).<sup>18</sup> Furthermore, from

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<sup>16</sup> Cisco, *Cisco Visual Networking Index: Forecasting and Methodology*, [http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white\\_paper\\_c11-481360\\_ns827\\_Networking\\_Solutions\\_White\\_Paper.html](http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360_ns827_Networking_Solutions_White_Paper.html) (last visited Dec. 30, 2009); K.G. Coffman and A.M. Odlyzko, *Internet Growth: Is There a "Moore's Law" for Data Traffic*, <http://www.dtc.umn.edu/~odlyzko/doc/internet.moore.pdf> (June 3, 2001) (last visited Dec. 30, 2009), at 4.

<sup>17</sup> Cisco, *Cisco Visual Networking Index: Forecasting and Methodology*, [http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white\\_paper\\_c11-481360\\_ns827\\_Networking\\_Solutions\\_White\\_Paper.html](http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360_ns827_Networking_Solutions_White_Paper.html) (last visited Dec. 30, 2009).

<sup>18</sup> See, Akamai's *The State of the Internet*, (2<sup>nd</sup> Quarter, 2009), at p. 22; available at <http://www.akamai.com/stateoftheinternet/> (last visited December 30, 2009).

2005 to 2009, Internet retail sales grew by 64%.<sup>19</sup> Of course, the growth and success of the Internet is not only measured in size, but also in innovation. A wide array of innovative and valuable Internet technologies and applications has emerged in recent years: VoIP, social networking, mapping, reference (Wikipedia), mobile networks, cloud computing, and many others.

The link between deregulation and the growth of the Internet is not a coincidence. Economist Thomas Hazlett has analyzed and compared the growth in broadband Internet access subscriptions subsequent to the Commission's Orders deregulating cable modem service and wireline broadband Internet access. According to Hazlett, "[u]nregulated cable modems sprinted to a commanding lead among broadband subscribers, dominating regulated DSL networks nearly two-to-one, 1999 through year-end 2002. When DSL network access obligations were reduced in early 2003, however, the trend quickly switched. By 2004, new DSL subscribers pulled even with new cable modem customers. By 2005, DSL subscriber additions surged ahead."<sup>20</sup>

In sum, SureWest urges the Commission to remember that the success and growth of the Internet in the U.S. are the fruits of enlightened and light regulation.

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<sup>19</sup> See, U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales Third Quarter 2005* (Nov. 22, 2005), available at <http://www.census.gov/mrts/www/data/pdf/05Q3.pdf>; U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales Third Quarter 2009* (Nov. 18, 2009), available at <http://www.census.gov/retail/mrts/www/data/pdf/09Q3.pdf>; showing increase from \$22 billion to \$34 billion for the third quarter of each year.

<sup>20</sup> See, Thomas W. Hazlett, *Neutering the Net*, FT.COM, Mar. 20, 2006 (last viewed January 4, 2010), available at <http://www.ft.com/cms/s/2/392ad708-b837-11da-bfc5-0000779e2340.html>. Mr. Hazlett is a former Chief Economist at the FCC. Details of the empirical review underlying these assertions are available in Mr. Hazlett's paper *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, AEI-Brookings Joint Center Working Paper No. 05-07 (March 2005), pages 22-25, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=707633](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=707633).

### **III. The Commission Lacks the Authority to Adopt The Proposed Rules.**

One of the core assumptions of the Commission in this proceeding is that it has the authority under the Act to adopt rules, and that it further has the authority to adopt them in the way in which they are presented here. Whether the Commission has the power to adopt these rules at all is an important and legitimate threshold question. Yet, the Commission addresses this issue in only twenty-seven lines of primary text in the *NPRM*.

The Commission tentatively concludes that it has jurisdiction “to regulate the network practices of facilities-based broadband Internet access service providers.” *NPRM* at para. 83. It appears to claim power to act under Section 201(b), *NPRM* at note 199, as both an independent authorization and a trigger for ancillary jurisdiction. However, its main conclusions are focused on ancillary jurisdiction under Title I.<sup>21</sup> To support its claim of ancillary jurisdiction, the Commission points primarily to three sections of the Act: (i) the policy statement adopted by Congress in the Communications Decency Act (codified as Section 230(b) of the Communications Act), (ii) the broadband goals set out in Sections 706(a) of the Telecommunications Act of 1996, and (iii) Section 201(b) of the Communications Act. *NPRM* at para. 84 and footnotes therein. As discussed below, these provisions do not support the Commission’s attempt to extend jurisdiction over Internet traffic management.

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<sup>21</sup> The Commission tentatively concludes that it has additional Title III authority with respect to Internet access services offered over spectrum-based facilities. *NPRM* para. 86.

A. The Commission Lacks Direct Authority to Enact Internet Traffic Management and Related Regulations.

It is elementary that the Commission only has such authority as is delegated to it by Congress. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). The Act is laid out in Titles, with substantive regulatory obligations located in Titles II (common carriers), III (provisions related to radio broadcast and spectrum uses), and VI (cable communications) (for purposes of these comments, the “Substantive Titles”). Yet, the Act itself is generally devoid of any reference to the Internet, except in Sections 230 and 271(g)(2). Section 271(g)(2) is not relevant to this proceeding.

Section 230 is a general policy statement, added as part of the Communications Decency Act of 1996, primarily addressing the blocking of obscene, violent, harassing and similarly offensive material. However, a statement of policy does not operate to delegate authority or establish statutory duties, and therefore it cannot be either a direct source of power or a catalyst for Title I authority. *Cf. Assn. of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (holding that a preamble does not enlarge or confer powers on administrative agencies).

Indeed, even as a policy statement, the references in that Section specifically anticipate *freedom* from any regulation rather than the imposition of new regulation. Section 230(b)(2) states that the Commission should “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation . . .*”(emphasis added). Section 230(a)(4) also states that “the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” If there is any guidance that can be derived from Section 230, it is that the

Internet was intended by Congress to be treated as an information service, and that none of the Substantive Titles should apply to it directly. The plain language of these provisions of Section 230 presumptively takes the Internet outside the scope of all regulation under the Act.

This is well-justified. The operation of the Internet does not match that of traditional common carrier, radio or cable television networks. The connections among end users and their sources of information are infinitely unique, can vary from click to click within the same connection, and can be almost random in their routing. These connections are manifestly not Title II, Title III nor Title VI connections.

It should be noted further that an Internet connection is far different from a generic broadband connection, and the presence of a broadband connection does not add any basis for FCC jurisdiction. A broadband connection, however offered, is capable of many uses — to access the Internet, certainly, but also to receive cable service, to engage in telecommunications, or to do other things completely outside the Substantive Titles, such as participation in private carriage. These uses are discrete and regulatory treatment of them is easily severable. A broadband connection itself does not create a basis for Internet-related regulations, since the Commission can meet its substantive obligations with respect to the other non-Internet uses within its jurisdiction under the Substantive Titles that apply to those uses, without regulating Internet service or Internet connections. Importantly, since DSL service was removed from Title II regulation in the Commission's *Wireline Broadband Order*, there is no

Substantive Title that now applies to the way in which a broadband connection is used to deliver Internet service.<sup>22</sup>

B. The Commission Lacks Title I Ancillary Authority to Act Here.

Lacking any direct delegation of power here, the Commission can only search for some indirect source of authority, and so it seeks to build a case that these rules can be enacted using Title I “ancillary” authority. As noted in the *NPRM* para. 83, the exercise of ancillary authority is appropriate in circumstances where: (i) the Commission’s general grant of authority under Title I covers the subject of the proposed regulations; and (ii) the regulations are reasonably ancillary to the effective performance of the Commission’s statutorily mandated responsibilities. *American Library Assn. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

In the right circumstances, the Commission’s ancillary authority can be broad and can effectively serve the public interest. However, a considered evaluation of the contours of Title I cases leads to the conclusion that the ancillary authority often available under Title I does not permit these rules to be adopted as proposed here.

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<sup>22</sup> On a more general note, as discussed above, the Commission has historically steered away from any interest in the affirmative regulation of the Internet or of the facilities or equipment dedicated to it. This is consistent with the Commission’s historical treatment of other networks that are outside its jurisdiction, such as the private networks of gas and electric utilities, the data networks of airlines and financial firms, and the private networks of large businesses. Indeed, the Commission appears never to have commenced a thorough evaluation of the structure, operation, addressing, routing, capital demands, operating parameters or optimization of the Internet. Its newfound interest here appears to suffer from a serious lack of antecedent work – from any official investigation and detailed assessment of the Internet’s physical or virtual structure, the role and activities of the many participants at various hierarchical levels of the Internet, the relative burden placed on established multi-use networks by applications providers and content providers, the impact of the rules proposed here on those networks, and the way in which the Commission will assure that action here will not interfere with its other mandates under the Act.

Title I of the Act does not provide a “general grant of power to take any action necessary and proper” to fulfill the Commission’s goals. *NARUC v. FCC*, 533 F.2d 601, (D.C. Cir, 1976), at note 77 (holding that the “residual delegation” of power in 47 U.S.C. § 152(a) was restricted to that reasonably ancillary for broadcasting purposes). Title I does not provide to the Commission an independent source of authority. Instead, the existence and exercise of any powers under Title I are limited to that which Title I covers, and that are also “reasonably ancillary” to the effective performance of the Commission’s various statutorily mandated responsibilities under other enumerated Titles of the Act. *Southwestern Bell v. FCC*, 19 F.3d 1475,1479 (D.C. Cir. 1994) (citing *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). In other words, there must be a Commission responsibility established and authority granted under one of the Substantive Titles to justify and validate the exercise of Title I power. Congress has never altered this fundamental structural characteristic of the Act. Indeed, having elected not to allow the Commission to rewrite the Act through Title I, Congress should be presumed to be unwilling to allow the Commission to engage in the fundamental reinterpretation going on here without Congress’ affirmative authorization.

The Commission relies primarily upon Section 230(b), discussed above, as the source through which it can assert ancillary power. As discussed above, Section 230 only recites general policy, and as such does not operate to delegate authority or establish statutory duties. Therefore it cannot be either a direct source of power or a catalyst for Title I authority.

Even taking the Internet references in all of the policy statements of Section 230 together, there can really be derived no substantive mandate that anticipates the

imposition of new or expanded regulation. The most that can be said is that one subsection, Section 230(a), recognizes the existence of *some* regulation, but that language specifically references a “minimum of government regulation.” Such regulation, where it existed at the time of enactment, was overwhelmingly regulation in areas *outside* the Commission’s sphere of authority — in areas like that covered by child pornography laws, prevention of fraudulent conduct, protection of intellectual property and the like. Further, the reference to the Internet in Section 230(b) as an “interactive computer service” suggests that Congress intended that the Commission should *not* impose policies of a more regulatory nature than are applied to other, preexisting interactive computer services – services that historically have been completely outside any of the Substantive Titles, and where the Commission has assiduously avoided regulation.

The other references in the NPRM are to no avail. The Commission’s reference to Section 706 of the Telecommunications Act of 1996 fails to justify the exercise of ancillary power because of the fact that it, too, is only a policy statement, that does not enlarge or confer power. Indeed, the Commission has expressly held that “[S]ection 706 does not constitute an independent grant of authority.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion and Order, 13 FCC Rcd. 24012, 24047 (1998), at para. 77.

The reference to Section 201(b) also does not provide a basis for ancillary authority in this case. To the extent that the Commission may need at some time to adopt rules that specifically address the provision of regulated Title II telecommunications services over a broadband connection, it may have Title I authority

to adopt such rules, consistent with the Act. Even if that were the case, it would not give the Commission the power to regulate Internet services or connections or to regulate any of entities outside Title II, such as cable operators, who do not offer Title II services.<sup>23</sup> Any rules, then, would do more harm than good, generating artificial competitive advantage and skewing the competitive marketplace.

The sections upon which the Commission purports to base its ancillary authority therefore do not provide broad authority to regulate Internet access service. The claim of ancillary authority to support specific provisions at issue here is likewise without merit. For example, proposed rule 8.11 establishes a basic requirement that “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.” No one would question the benefits of competition and the Commission’s commitment to its promotion. However, the use of the word “entitlement” creates an independent issue of Commission authority. The word “entitlement” can have a unique meaning in the law, establishing an enforceable property right and an expectancy that cannot be denied without due process,

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<sup>23</sup> Some net neutrality proponents may point to a statement in *NCTA v Brand X*, 545 U.S. 967 (2005) as justification for the proposed rules here. However, the general description of Title I authority usually cited, at 975, is capable of multiple interpretations, is conclusory in nature, and is recognized as dictum for good reason. It was unnecessary to the *Brand X* decision, and there is no background or legal analysis presented. Thus, it has no legal effect.

particularly if independently granted under the law. See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).<sup>24</sup>

The Commission lacks direct or ancillary authority to grant the unique “entitlement” right in this case, and certainly lacks authority to grant anything that would establish for the public a property right in the private networks of broadband network providers. The government is not the owner of the property of companies under regulation, and it is not clothed with the power of management incident to ownership. See *Pub. Serv. Comm’n of Missouri*, 262 U.S. 289 (1922). The relevant statutory provisions are simply an inadequate foundation upon which to base such ambitious rules.

C. Even With Ancillary Authority, the Commission May Not Enact Rules That Are Inconsistent with the Act.

Though the Commission may adopt rules using its Title I ancillary power in an appropriate circumstance, that action must nevertheless be consistent with, and not in conflict with, the Act. Ancillary jurisdiction cannot be upheld where it contravenes another provision of the Act. See *FCC v. Midwest Video*, 440 U.S. 689, 705-6 (1979). The Commission’s assertion of that authority must be rejected in cases where it would defeat the express requirements of the Act.

That would appear also to be the case as well if the assertion of Title I authority operates to change the fundamental structure or assumptions of one of the Substantive

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<sup>24</sup> In this case, the use of the word “entitlement” is inappropriate at best. The Commission is well aware of the problems that can arise when it seeks to grant entitlement rights, even in those areas where the Act permits it. See *Qualcomm v. FCC*, 181 F. 3d 1370 (D.C. Cir. 1999) (mandating award of “pioneer’s preference”). Would this rule require a holder of a patent for a revolutionary Internet processor waive its exclusive rights while seeking Commission equipment registration? Does this rule mandate that cellular spectrum used for Internet service be open to all? Adoption of the proposed rule would trigger a host of such issues.

Titles even if not in direct conflict with any specific provision, or if it operates in ways inconsistent with any other Federal law as well.

Proposed rule 8.13 requires “a provider of broadband Internet access service to treat lawful content, applications, and services in a nondiscriminatory manner.” To the extent that the Commission seeks to put in place a rule that is in conflict with a recognized limit that appears elsewhere in the Act, it is beyond the Commission’s power. The core fact here, as a jurisdictional matter, is that the Commission has already determined after a searching review (in the *Wireline Broadband Order* and related Orders) to change the classification of broadband Internet access service from Title II common carriage and to recognize it as a Title I information service instead. Having done that, it is inconsistent with the Act for the Commission now to turn around and use ancillary authority, derivative in nature, to impose an obligation that is stricter and more burdensome than the obligation that is operative in the very Substantive Title from which it seeks to derive that Title I power.

Title II outlines a structure for relationships between common carriers and their customers. It does not call for strict and unconditional non-discrimination. This is significantly less burdensome than the inflexible non-discrimination obligation in the Commission’s proposed rule 8.13. Furthermore, in the Title II context, carriers have obligations only to their customers, while the proposed rule 8.13 would impose a more burdensome obligation on Internet access service providers (“IASPs”), expanding their

responsibility to a wide range of entities with which they have no privity, such as application and content providers.<sup>25</sup>

As Commissioner McDowell noted in footnote 2 to his separate Statement on the *NPRM*, “[t]he Commission simply cannot use the generalized provisions of Title I to impose more onerous regulations on providers of broadband Internet access service than it is authorized to impose on common carriers under the specific provisions of Title II.” That assessment should hold as well for Titles III and VI. Thus, in the Title VI context, there is a significant difference in the burden placed on a provider that seeks to negotiate individualized arrangements for the carriage of content over its network from the burden placed that would be placed on such provider by proposed rule 8.13 to treat all lawful content in a completely non-discriminatory manner. Title VI outlines a structure for relationships between cable communications providers and content providers, but it does not call for strict non-discrimination in those relationships.

In sum, the Commission lacks the statutory authority necessary to adopt the rules proposed in this proceeding. It clearly lacks the direct statutory authority to regulate Internet traffic management and related matters. Furthermore it lacks ancillary authority because in this case, such authority is in fact ancillary to no substantive provisions where any Title I action is appropriate, and it would in fact contravene the statutory scheme contained in other parts of the Act.

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<sup>25</sup> The proposed rule, if enacted, would create a perverse incentive for some providers to want to return the affected services to the more flexible arrangements of Title II status in order to operate efficiently and to serve customers.

**IV. Even if the Commission Had the Authority to Adopt the Proposed Rules, It Should Not Do So as a Matter of Policy.**

As was demonstrated above, the Commission lacks the authority to adopt the proposed rules. However, for a variety of reasons, even if it had such authority, the public interest dictates that it should not adopt the rules.

**A. There is No Evidence of Any Pervasive Problem That Calls for New Rules.**

One basic reason why the Commission should not adopt the proposed rules is that there simply is no pervasive problem that needs to be addressed in this area, and any individual instances can be addressed as they arise without stifling innovation.

It is frequently overlooked that neither the Commission nor any other party has identified any recurring circumstance or significant pattern of anti-competitive discrimination in traffic management by IASPs. For example, the *NPRM* states (at para. 50), that “some conduct is occurring in the marketplace that warrants further attention, and could call for additional action by the Commission ....” Yet, the only examples provided of such conduct are the same two that are always referred to: the matters involving Madison River and Comcast/BitTorrent.<sup>26</sup> These are isolated and unique matters, and there is no evidence that other IASPs have engaged in similar behavior. Indeed, given the tremendous publicity that occurred in connection with each of these matters, it is very likely that both regulators and the public have been closely monitoring

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<sup>26</sup> *NPRM* at note 113, citing *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (EB 2005) (“*Madison River Order*”); and *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,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (“*Comcast/BitTorrent Order*”).

the provision of service by all IASPs. Thus, it speaks volumes that no other similar incidents have been reported.

B. Market Controls Discourage Anti-Competitive Behavior.

The Commission should recognize that the market has been and will continue to provide better control over any isolated anti-competitive actions than potentially counter-productive regulations. IASPs recognize that customers can and frequently do switch to other providers, and thus IASPs have incentives to please and succeed with consumers.<sup>27</sup> Given the many choices that consumers have available to them, public notoriety penalizes providers that act improperly. The marketplace exerts its own discipline. As a result, the proposed rules are unnecessary.

For example, Comcast clearly was harmed by the backlash and bad publicity that resulted when their improper treatment of P2P traffic was publicized in 2007 and 2008. Indeed, the Associated Press' widely read report on Comcast's management of P2P traffic resulted in the filing of complaints that led to the *Comcast/BitTorrent Order*.<sup>28</sup> This widespread negative publicity was itself damaging,<sup>29</sup> but when combined with the

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<sup>27</sup> See, Rob Freiden, *Network Neutrality and Its Potential Impact on Next Generation Networks* (Nov. 2007) at page 14 ("...if AT&T deliberately dropped or delayed Google packets, some customers might migrate to the faster delivery options paid for by MSN or Yahoo, but other customers might abandon AT&T in light of its shoddy performance."). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1026635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026635).

<sup>28</sup> Saul Hansell, *F.C.C. Vote Sets Precedent on Unfettered Web Usage*, N.Y. Times, August 2, 2008, at C1.

<sup>29</sup> See, Daniel Roth, *The Dark Overlord of Broadband*, WIRED, February 2009, at p. 54 *et. seq.* ("On October 19, 2007, the AP story broke with the headline 'COMCAST ACTIVELY HINDERS SUBSCRIBERS' FILE-SHARING TRAFFIC, AP TESTING SHOWS.' Bloggers called for protests and boycotts; the Electronic Frontier Foundation said Comcast was using tricks formerly used by 'malicious hackers.' .... The public beatings were beginning to hurt.... It drove [CEO Brian] Roberts crazy to see Comcast getting trashed, to have his family's business maligned.")

negative publicity generated by the FCC's investigation, it forced Comcast to enter into an agreement to work with BitTorrent Inc., even before the Commission completed its proceeding.<sup>30</sup> Underlying all of that, though, was Comcast's concern about the harm that it had suffered in the eyes of its subscribers and potential subscribers.<sup>31</sup> It is this sort of harm, and the resulting harm of subscribers taking their business to a competing IASP, that most constrains IASPs from engaging in anti-competitive traffic management practices.<sup>32</sup>

Given everything that has occurred, IASPs recognize that their customers are watching. Any anti-competitive behavior will be noticed and it will be publicized. No IASP wants to hazard the consequences.

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<sup>30</sup> Bob Fernandez, *FCC Chief Seeks Action Against Comcast*, PHILADELPHIA INQUIRER, July 12, 2008, at A1 ("Reeling from the negative publicity generated during the FCC investigation, which included two public hearings, Comcast reached a truce with BitTorrent Inc.... It signed an agreement in March saying the two companies would work together."). Of course, the harm Comcast suffered in the eyes of regulators was an obvious problem as well. See, e.g., Chris Soghoian, *Congressman to Comcast: Stop Interfering with BitTorrent.*, CNET NEWS, Oct. 25, 2007, available at [http://news.cnet.com/8301-13739\\_3-9804158-46.html?tag=mncol](http://news.cnet.com/8301-13739_3-9804158-46.html?tag=mncol) (quoting Rep. Rick Boucher, D-Va., as saying that "Comcast has made a major mistake in attempting to hinder peer-to-peer file sharing as an aspect of its network management."). See also, Freiden, *supra* note 26, ("[IASPs would surely discontinue anti-competitive management strategies] when such strategies are publicly disclosed by news media possibly triggering closer scrutiny of such tactics by legislative, regulatory and judicial authorities.").

<sup>31</sup> Roth, *supra* note 28 ("Roberts hadn't anticipated the backlash. Subscribers accepted that cable TV was just entertainment, but the Internet felt more essential, like water or electricity, and consumers were starting to think of broadband as a constitutional right.").

<sup>32</sup> See, e.g., *Testimony of J. Gregory Sidak*, United States Senate, Committee on Commerce, Science and Transportation (February 7, 2006), at page 7; available at <http://commerce.senate.gov/pdf/sidak-020706.pdf> ("... the overarching reason why anticompetitive [traffic management] behavior of any sort is implausible is that competition will constrain the market power of any given carrier. In most geographic markets, four or more separate firms will supply broadband Internet access. It will be supplied over the fixed network of the [RBOC] or other local telephone company, over the fixed network of the local cable television operator, and over two (if not three) wireless networks in addition to the wireless network affiliated with the local RBOC.").

C. It is in the Best Interest of IASPs to Treat Similarly-Situated Content, Application and Service Providers Similarly.

Similar to and in addition to the market controls discussed above, it is generally in the best interest of an IASP to treat similar traffic from on-line content, application and service providers (“CAS providers”) similarly. First, such an approach avoids conflicts with the IASP’s customers. IASPs do not want angry customers, who would be inclined to discontinue service and go to a competing IASP.<sup>33</sup> Most importantly, however, IASPs generally lack an incentive to block or degrade particular application or content providers, because content and transmission of content are not substitutes for each other, but rather are complementary goods that must both be in place in order for the service to be acceptable to consumers.<sup>34</sup>

Of course, as discussed further below, there are situations where reasonable network management requires that the transmission of content from one provider be managed differently than the transmission of another provider. Of course, the Commission itself recognizes the need for handling different applications and services in unique ways that are different from one another. See the Staff Presentation at the September 29, 2009 Commission Meeting on the National Broadband Plan, Section 4 (Applications).<sup>35</sup> Therein, rather than advocating a rigid and inflexible framework, the Commission’s staff made it clear that different applications required different network services and arrangements in order to operate at their intended optimum performance. Specifically, the Staff noted that “different applications require different performance

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<sup>33</sup> See Freiden, *supra* note 27.

<sup>34</sup> See, e.g., Testimony of J. Gregory Sidak, *supra* note 33, at page 6.

<sup>35</sup> Available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf).

parameters” (slide 19), that “broadband speeds vary by application type” (slide 23), and that while “speed is not the only critical characteristic” (slide 24), “different application use cases result in varied speed and performance demands” (slide 250). In essence, the presentation emphasized the wide variety of specialized needs of individualized applications, beyond simple speed.

Similarly, there may be situations in which it is economically reasonable for IASPs to impose certain costs or charges on CAS providers, particularly where those providers are the cost causers, and such action is needed to avoid imposing those costs on other network users, including consumers who have no interest in the relevant content, applications or services. Addressing such situations does not require any anti-competitive traffic management techniques, and instead should be viewed as pro-competitive and economically appropriate.

**V. The Harm From Any Non-Discrimination Principle Will Outweigh Any Potential Benefits.**

SureWest recognizes that the Commission proposes the enactment of a non-discrimination principle in order to protect consumers from anti-competitive IASP traffic management practices. However, as discussed above, there is no evidence of a pervasive problem, market controls constrain the ability and incentive of IASPs to engage in anti-competitive traffic management, and it is in the best interest of IASPs to generally treat similarly situated CAS providers similarly. Thus, there is little benefit to be gained from the enactment of a non-discrimination principle. As discussed below, though, the enactment of such a principle can cause real harms that will outweigh any potential benefits.

A. Data Prioritization For the Benefit of Customers is Essential to Network Management, and is Not Inherently Anti-Competitive.

SureWest is greatly concerned about the misuse of the term “discrimination” in this proceeding. As one analyst has noted, “[u]nfortunately, engineers, economists, and lawyers have different definitions for discrimination.”<sup>36</sup> Because of this, SureWest believes that it is more precise and productive to use the term “data prioritization” in connection with Internet traffic management. However defined, the ability to deal with various situations uniquely is essential to the management of Internet traffic and to the optimal presentation and handling of the content, applications and services of a wide range of entities.

The management of any network (roads, airlines, telephone or Internet) requires the management of congestion. With regard to the Internet in particular, network resources such as the capacity of transmission media and router buffer memory are finite. Thus, data transmitted on the Internet must be continually prioritized, in order to minimize congestion and provide a workable service that meets the needs of all users.

As the Federal Trade Commission has recognized:

With increasing numbers and sizes of transmissions to increasing numbers of users, congestion -- especially at the last mile -- can be a problem. From the perspective of end users, the best-efforts delivery approach provides an adequate experience for many uses, but congestion in a best-efforts context may render use of certain content and applications undesirable, and perhaps even impossible. Some content and applications, such as live streaming

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<sup>36</sup> Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality and the Quest for A Balanced Policy*, 34<sup>th</sup> Research Conference on Communication, Information & Internet Policy 5-6 (2006), available at

[http://web.si.umich.edu/tprc/papers/2006/574/Peha\\_balanced\\_net\\_neutrality\\_policy.pdf](http://web.si.umich.edu/tprc/papers/2006/574/Peha_balanced_net_neutrality_policy.pdf)

(hereafter, “*Peha*”). Consistent with this, it also should be noted that while our culture generally associates the term “discrimination” with pernicious behavior, it is essential in the management of Internet traffic to “discriminate,” in the non-pernicious sense of making distinctions.

video, some VoIP services, and online games, are latency-sensitive; that is, if packets do not arrive sufficiently close together, the communications will be unsuccessful [citation omitted]. Some transmissions, such as software downloads or movies, might be large enough that interference due to congestion would cause user frustration and cancellation.<sup>37</sup>

While some observers blithely suggest that the solution to this congestion is for network operators to just build in more capacity, that approach is highly inefficient and would ultimately burden all end users. It also would remove any incentive for content, applications and service providers causing such congestion to take steps to reduce the burden that they place on provider networks. Network operators, including SureWest, are continually adding capacity to their networks.<sup>38</sup> Yet, it will be extremely difficult for operators to keep up with the rapid growth in traffic and to address the issue of Internet congestion through capital investment alone. For example, Cisco estimates that IP traffic will increase by a factor of five from 2008 to 2013, driven largely by increased video traffic.<sup>39</sup> And of course, there are also economic limits on the rate at which capacity can reasonably be added to a network.

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<sup>37</sup> *Broadband Connectivity Competition Policy*, FTC Staff Report (June 2007) at 84-85, available at <http://www.ftc.gov/reports/broadband/v070000report.pdf> (hereinafter "*FTC Staff Report*").

<sup>38</sup> In just the past three years, SureWest has passed an additional 43,000 homes with fiber, which includes the upgrade of 14,300 homes from copper-based DSL. In addition, growth of network traffic necessitated the move to 10 Gigabit optics in SureWest's network core, as well as an upgrade to 10 Gigabit capacity with its exchange carriers for Internet-bound traffic. In those areas still served by DSL, SureWest made investments to rollout twisted pair bonding that effectively doubles the bandwidth available to consumers at a given loop length. During the audited years 2006-2008, SureWest expended about 34% of revenues for capital expenditures to expand and enhance its network. This is well over the average for service providers, and reflects intense growth and upgrade of facilities for broadband activities.

<sup>39</sup> Cisco, *Five-Fold Increase in Net Traffic*, [http://www.cisco.com/en/US/netsol/ns827/networking\\_solutions\\_sub\\_solution.html#~forecast](http://www.cisco.com/en/US/netsol/ns827/networking_solutions_sub_solution.html#~forecast) (last visited Dec. 30, 2009). In the period between August 2008 through August 2009, overall traffic on SureWest's California network increased by 50%.

Thus, for the foreseeable future, it will be necessary for IASPs to manage Internet traffic in order to meet the needs and expectations of their customers. This management cannot be accomplished without data prioritization. Thus, while it is conceptually possible that data prioritization can be used in an anti-competitive manner, given that there is no evidence of wide-spread anti-competitive traffic management, it is important to recognize that the data prioritization that allows the Internet to operate efficiently every day is not inherently anti-competitive.

**B. Any Concerns Regarding Discrimination Should Focus on the Interests of End Users, Not on the Interests of CAS Providers.**

While data prioritization is not inherently anti-competitive, SureWest accepts that the Commission may have an interest in assessing the presence of any anti-competitive use of data prioritization. However, if it elects to do so, the Commission should focus on the best interests of end user/consumers, rather than the interests of CAS providers.

It the Commission has any statutory obligation here, it is to protect end users. It is end users that are the “public” in the public interest for which the Commission acts. Section 1 of the Communications Act provides that the Commission’s purpose is to “make available . . . to all the people of the United States . . . a communications service . . . .”<sup>40</sup> In contrast, there does not appear to be any provision whatsoever in the Act specifically recognizing the existence of applications providers. Thus, the only possible justification for the Commission acting to protect CAS providers is to the extent that such action provides public interest benefits for end users. SureWest urges the Commission to be mindful of this distinction for a number of reasons.

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<sup>40</sup> 47 U.S.C. § 151 (emphasis added).

First, as discussed more fully below, the interests of individual CAS providers are often not identical to those of end users. For example, an end user may affirmatively choose an enhanced experience of one CAS provider, in a manner that disadvantages his experience of another CAS provider. While this may not please the second CAS provider, it is the interest of the end user that the Commission must protect in this case, not the interest of the competing CAS provider. Likewise, a CAS provider that operates inefficiently or causes costs for a provider would harm the end user's Internet experience, and cause end users' rates and charges to increase unnecessarily.

Second, CAS providers can usually protect themselves from any pernicious discrimination through the use of negotiated commercial agreements. It is hard to conceive of a party to a commercial negotiation regarding the Internet that has significantly more leverage than Google. The same could largely be said for Amazon, Yahoo, MSN, ESPN, E-Bay, and numerous other major CAS providers. The public interest would not be served by adding a regulatory "thumb" in their favor on the scale of negotiating leverage. SureWest recognizes that the Commission is trying to enhance innovation by new, start-up, CAS providers who may not have the resources of a Google. However, we should not forget that Google itself was once an unknown start-up, and yet it rose to a position of market dominance, without need for the rules proposed in this proceeding. As for the "next" Google, still but a gleam in its start-up founder's eyes, it is very possible that some sort of data prioritization may promote its growth and spread its innovation. The *FTC Staff Report* noted that "allowing content and applications providers to purchase quality-of-service assurances and prioritization may allow new content and application providers to counteract the competitive

advantages typically enjoyed by incumbent [CAS] providers, such as the ability to pay for large server farms, or third-party data caching services.”<sup>41</sup> Yet, the prioritization that may enhance the quality and growth of this new innovative CAS product might be considered “discriminatory” by some of its established competitors.

C. The Public Interest Requires that IASPs Be Allowed to Provide Innovative Quality-of-Service Offerings to Subscribers.

Consistent with the need to focus on end users, one category of data prioritization that clearly serves the public interest consists of what are called are Quality of Service (“QoS”) assurances and offerings. Such offerings offer confidence to customers about the performance of fundamental Internet transport and operating metrics, promote innovation in both the core and the edge of the Internet, and serve a sound economic function in increasing revenues for construction and maintenance of the advanced broadband network that the Commission seeks to facilitate.

Let us offer an example: an IASP may develop the facilities necessary to provide enhanced throughput for a particular application, say two-way streaming video conferencing, that would significantly enhance a subscriber’s experience of that video, as compared to streaming video received through regular “best-efforts” transmission. The IASP makes this enhanced throughput QoS offering available to the subscriber on a per-use or on a monthly basis. In either case, the subscriber must affirmatively choose to take this service.

In some network architectures, the subscriber’s use of the enhanced throughput service may not result in any reduction of throughput for other applications being used

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<sup>41</sup> *FTC Staff Report, supra* note 35, at pages 65-66 (emphasis added). *See also, Report* at page 96 (noting that “[p]rioritization may aid innovation in applications or content that need higher QoS to operate effectively.”).

by the subscriber at the same time (*i.e.*, the “pipeline” to the subscriber is “expanded”). In this case, clearly the public interest is served by the use of this QoS offering — it’s good for the subscriber (who is receiving an enhanced experience), it’s good for the entire over-the-top video market, because subscribers will be more likely to download video if they know that they can do so without long downloading times and spotty performance, and will have no impact on any other CAS provider. In some other network architectures or circumstances, it may be that the subscriber’s use of the enhanced throughput service may result in a reduction of throughput for other applications being used by the subscriber at the same time (*i.e.*, the “pipeline” to the subscriber is not “expanded”). Yet, this case still clearly serves the public interest, though unfortunately, some advocates of net neutrality may argue that this should be a sort of prohibited “discrimination.” This case serves the public interest because it fulfills the end user’s explicit choice for an enhanced experience. As the Chairman himself stated in initiating this proceeding, “Internet users should have the final say about their online experience . . . [including] the software, applications or services they choose . . . .”<sup>42</sup> There can be no valid claim of improper discrimination where the customer has knowingly stated a preference for high-quality video, at the possible cost of temporarily slowing use of other applications at the same time. The IASP is merely implementing the customer’s instructions.

Thus, QoS offerings can serve the public interest by promoting innovation at the core of the network, and can result in innovation by CAS providers seeking to take advantage of this new capability, with the end users being the ones to ultimately benefit.

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<sup>42</sup> Statement of Chairman Julius Genachowski, page 3 (page 92 of the *NPRM*).

But in addition to benefiting CAS providers and end users with innovation, QoS offerings can be a form of product differentiation that can satisfy customers who are willing to pay extra for enhanced service,<sup>43</sup> as well as increase the revenue stream to IASPs, which is necessary for the build out and maintenance of the advanced broadband network that the Commission seeks to facilitate. In fact, a “*virtuous circle*” is created here, in which innovative use of QoS leads to enhanced revenue, which provides the resources for further innovation and advanced services.

This use of product differentiation to enhance the revenue stream is core to maintaining the investment necessary to promote Internet innovation. As Sidak has discussed, building an advanced broadband network requires substantial sunk investment that will not be maintained without a reasonable expectation of return on that investment.<sup>44</sup> Marginal cost pricing is insufficient to recover the sunk costs of such a network, but the offering of multiple products with differing price elasticities of demand can make a significant contribution to the recovery of those costs.<sup>45</sup> Product differentiation also maximizes economic welfare because “it enables a firm to lower the price to consumers who would otherwise be priced out of the market if the firm were

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<sup>43</sup> See, e.g., *The Internet’s Coming of Age* (National Academies Press, 2001) at page 150 (noting, in connection with potential Internet QoS offerings that “in a free market, it is reasonable to have differentiation of services to satisfy customers who want to pay more for a service that they deem better.”) (hereinafter “*National Academies Report*”). This *Report* was written by a committee of the National Research Council, the primary operating agency of the National Academy of Sciences and the National Academy of Engineering, whose purposes are the furthering of knowledge generally, and specifically, advising the federal government on science and engineering policy.

<sup>44</sup> Testimony of J. Gregory Sidak, *supra* note 32, at page 2-3.

<sup>45</sup> *Id.* at pages 3-4.

constrained to charge a higher uniform price.”<sup>46</sup> Sidak goes on to note that “differential pricing is commonplace in competitive markets ... because competition *compels* firms to adopt rival strategies to lower, to the maximum extent possible, the prices that they charge price-sensitive consumers. [citation omitted] It would be perverse to prohibit owners of broadband networks from employing the same differential pricing methodology that is routinely used by firms in competitive markets.”<sup>47</sup>

In sum, SureWest asserts that the public interest requires that IASPs be able to provide QoS services to subscribers. Such offerings can satisfy the wishes of end users, promote innovation in both the core and the CAS of the Internet, and provide increased revenues for investment in advanced broadband networks, while reducing the cost for end users who might otherwise be unable to take broadband service. These innovative and beneficial offerings should not be prohibited under a misguided interpretation of “discrimination” or “neutrality”.<sup>48</sup>

D. There Are Important and Valid Economic Reasons For IASPs to Recover Costs From CAS Providers.

In paragraph 111 of the *NPRM*, the Commission asks whether a rule prohibiting IASPs from charging CAS providers would maximize social welfare. The answer is no

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<sup>46</sup> *Id.* at page 4 (emphasis added).

<sup>47</sup> *Id.* Examples cited by Sidak of the competitive markets that use product differentiation include airlines, hotels, package delivery and personal computers.

<sup>48</sup> Consistent with this, SureWest notes that Robert Kahn, co-developer of TCP/IP and a core figure in the development of the Internet, has rejected the term “net neutrality” as an unhelpful slogan, and stated that the need for experimentation at the edges should not come at the expense of improvements in the core of the network. He went on to state that he is “totally opposed to mandating that nothing interesting can happen inside the net.” See, Andrew Orlowski, *Father of the Internet Warns Against Net Neutrality*, THE REGISTER (Jan. 18, 2007), available at [http://www.theregister.co.uk/2007/01/18/kahn\\_net\\_neutrality\\_warning/](http://www.theregister.co.uk/2007/01/18/kahn_net_neutrality_warning/) (last viewed January 4, 2010).

— there are important and valid economic reasons for IASPs to recover costs from CAS providers, and doing so can maximize economic and social welfare.

First, it must be noted that constructing the advanced broadband network that the Commission seeks to facilitate will be very expensive. The Commission's Broadband Task Force has estimated that constructing a nationwide network capable of delivering 100 Mbps will require an investment of \$350 billion.<sup>49</sup> While the provision of Internet access is not a Title II common carrier service, the economics of constructing a broadband network are similar to those of constructing a Title II telephone network. It is a long-standing Commission principle that in regards to Title II services, costs should generally be recovered from cost-causers.<sup>50</sup> Economic efficiency is generally enhanced in such situations.

There can be little doubt that CAS providers are cost-causers in regards to their impact on the operation and costs of constructing a broadband network. As noted above, Cisco estimates that IP traffic will increase by a factor of five from 2008 to 2013, driven largely by increased video traffic.<sup>51</sup> This video traffic will primarily be supplied by CAS providers, and will presumably create economic benefits for those providers. IASPs will have to spend a substantial amount of money in order to be able to carry that increased traffic.

In addition to the general costs associated with carrying the traffic of certain CAS providers, some CAS providers can generate additional unnecessary costs by using an

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<sup>49</sup> News Release, *Broadband Task Force Delivers Status Report On Feb. 17 National Broadband Plan*, September 29, 2009, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293719A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293719A1.pdf).

<sup>50</sup> *Cf. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1304 (D.C. Cir. 1988).

<sup>51</sup> Cisco, *Five-Fold Increase in Net Traffic*, *supra* note 39.

application that is highly inefficient, with respect to the amount of bandwidth necessary for the IASP to facilitate use of that application. For example, assume that a content provider has developed an application that delivers video content to end users utilizing a very inefficient protocol. A large percentage of SureWest customers elect to purchase subscriptions for the service directly from the content provider, and start downloading the content on a regular and continuous basis. Due to the significant increase in Internet traffic on the SureWest network, SureWest would be forced to increase capacity on its access network, and also increase capacity on the interconnection links to its Internet backhaul providers. Its alternative would be to allow access service to degrade for all customers – including customers who have not purchased these subscriptions.

The costs described in the example above will have to be recovered — should they be recovered only from the end users? We believe that the answer is no. This is because the CAS provider has benefited from this as much as the end user. In essence, this is the “two-sided market” described by economists, where there are two distinct parties that provide each other with network benefits. As noted by Sidak, in this situation “[t]here is no basis in economic theory to presume that it would be socially optimal for end users to pay for all of the cost of building a high-speed broadband network while the companies that deliver content or applications to those same end users over that network — and therefore derive substantial economic advantage from its use — pay nothing.”<sup>52</sup> SureWest recognizes that in response to this argument, CAS providers have asserted that they do pay for their use of the network. But, their

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<sup>52</sup> Sidak, *supra* note 32, at page 5.

payment is to their own carrier or IASP, not to the IASP that is incurring the cost of delivering the traffic to the end users.

Another reason why social and economic welfare is maximized if CAS providers contribute some of the costs is that doing so reduces the pressure to recover costs from consumers, thus reducing the risk that some consumers will be priced out of obtaining broadband services. As noted in the *FTC Staff Report*, “ISPs receiving payments from content and applications providers for priority service might choose to lower access prices for users and thus increase broadband penetration, providing even greater value to providers.”<sup>53</sup> This concern that ill-drafted net neutrality rules could negatively impact the subscription rates of lower income users is not abstract, and not unnoticed by members of the minority community. For example, recently the national executive director for the League of United Latin American Citizens published an article raising this very concern, and stating that:

net neutrality standards should protect against broadband providers engaging in anticompetitive behavior by blocking or inhibiting access to competing Web sites or content. But beyond that, online applications companies should not be able to exploit these rules for their own parochial benefit and, in particular, should not be able to use net neutrality rules to shift the costs for building broadband networks onto consumers.... That would hit non-adopters in the Latino community and elsewhere particularly hard, as considerable data show that such cost-shifting onto consumers would deter adoption.<sup>54</sup>

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<sup>53</sup> *FTC Staff Report*, *supra* note 37, at 90.

<sup>54</sup> Brent A. Wilkes, *Net Neutrality Rules Shouldn't Be Used to Shift Costs to Consumers*, January 5, 2010, available at [http://www.mercurynews.com/opinion/ci\\_14127209?nclick\\_check=1](http://www.mercurynews.com/opinion/ci_14127209?nclick_check=1) (last visited January 6, 2010).

Recovering some costs from CAS providers will not result in anti-competitive behavior by IASPs, or quash innovation by new CAS providers. As noted in the *FTC Staff Report*, even if IASPs provide a commercial enhanced transmission service to some CAS providers, “ISPs have incentives to maintain sufficient best-efforts service that allows access to all content and applications providers because the value of an ISP priority service to a provider would be affected by the size of the ISP’s customer base. ISPs may lose customers if they do not provide sufficient access.”<sup>55</sup>

In sum, there are valid economic reasons for IASPs to recover some of the costs of constructing advanced broadband networks from the CAS providers who benefit from such networks. Such an approach would maximize economic and social welfare.

E. Any Prohibitions on Internet-Related Discrimination Should Apply to All Involved Participants, Not Just to the Connection Between the IASP and the End User.

In paragraph 107 of the *NPRM*, the Commission states that the scope of the proposed non-discrimination rule would be the connection between a broadband IASP and the end user. SureWest asserts that due to the economics and architecture of the Internet, limiting the focus in this manner is misguided, and will result in irrational distortions of architecture and market behavior. Accordingly, any prohibitions on discrimination should apply to the entire Internet ecosystem and value chain from end-to-end: from CAS provider, to intermediate carrier, to content delivery network, to IASP, to end user.

Internet architecture has an end-to-end design. This design provides for transmission from CAS providers through multiple networks, ultimately to the IASP, and

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<sup>55</sup> *FTC Staff Report*, *supra* note 37, at 91.

then to the end user. The problem with regulating only the last “link” of the transmission is that it artificially ignores the end-to-end nature of the transmission, and the management and transactions associated with that management that occurred “upstream” before the traffic arrived at the IASP’s server.

A good example of this problem involves caching and content delivery networks (“CDNs”). As described in the *National Academies Report*:

In a response to the difficulties of providing large quantities of data or a high quality of service to end users, the Internet is being overlaid by application-specific delivery networks and caching services. Content or service providers may, for example, enter into an agreement with a company that delivers specialized content services located throughout the Internet so as to improve the quality of the connection seen by their end users... Also, depending on the particular technical and business model, such networks may only be available to those providers who are willing and able to pay for specialized services.<sup>56</sup>

There are numerous considerations to account for in evaluating where certain content should be stored. If some form of content needs to be widely dispersed but is infrequently accessed by only a small number of users, it would be more cost effective to architect the network to store the content at the core of the network. Conversely, if certain content is accessed with a high-degree of frequency and accessing that content consumed a lot of bandwidth, then it might be more effective to store it at the edge of the network. If an application called for very low-latency for a satisfactory experience, it may be better to store it closer to the edge of the network.

The point is that the architecture of the network and the location of “caching” can significantly influence the cost of delivery, and more importantly, the customer

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<sup>56</sup> *National Academies Report*, *supra* note 43, at page 144.

experience, of the content. But proper caching requires flexibility, as access needs are constantly changing. Business considerations including workforce availability, power, network reliability, and cost of backhaul are only a few of the relevant factors regarding where to best store content. Furthermore, a single event may cause content that was relatively static and rarely accessed to take “center stage” and be accessed at extreme rates.

Thus, while caching is typically a service provided by CDNs to CAS providers, there may be circumstances when it is most effective to cache content more locally with a direct connection to a broadband Internet access service provider’s network or on that local network. The IASP should be able to store content in the same way that a CDN or intermediary provider does, and this should not be considered discriminatory. If an IASP’s placing content locally drives a better customer experience, increases service reliability, and reduces costs that get passed to consumers, IASPs should be given the flexibility to use this management technique, just the same as other network operators are allowed. Conversely, if IASPs are prohibited from caching, it calls into question the logic of allowing CDNs and other entities to do so, since the net result in end user experience should not be any different.

In addition to generating irrational distortions of network architecture and management, as described above, the Commission’s proposal to only focus on the final link of the network (between IASP and end user) triggers other troubling questions. For example, caching is clearly an important network management tool, yet is it inherently “discriminatory”? If caching by an IASP is improperly discriminatory, why isn’t caching by a CDN or other intervening network operator (such as certain interexchange carriers)

improperly discriminatory? Or, should only CDNs and other intervening network operators be allowed to “discriminate”? Why should CDNs and other operators be able to collect significant revenues providing caching services, but IASPs should not?

Of course, caching is only one example of the troubling issues raised by the Commission’s unwise focus on only a narrow portion of the Internet. Other examples can certainly be raised. Furthermore, as the distinction between “CAS” and “core” provider continues to blur, the Commission’s myopic approach will break down even more.

## **VI. The “Entitlement to Competition” Proposal Is Fatally Flawed.**

The original four net neutrality principles contained in the *Internet Policy Statement* set out the Commission’s Internet policy in terms of consumer “entitlement.”<sup>57</sup> In the current proceeding, however, the Commission—seeking to create unambiguously enforceable rules — discarded the “entitlement” language in favor of provisions that would impose direct obligations on IASPs. Strangely, however, it proposed to retain the “entitlement” language in the proposed rule Section 8.11: “. . . 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.” *NPRM* at Appendix A. SureWest has outlined above why the Commission lacks jurisdiction to adopt the proposed rule, and this rule in particular. Assuming that the Commission has the requisite jurisdiction, it should nevertheless not adopt this rule. If it adopts any rule promoting competition generally, it should do so with different language that does not purport to establish an

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<sup>57</sup> *Internet Policy Statement*, *supra* note 13, 20 FCC Rcd at 14987–88, para. 4.

“entitlement.” While SureWest firmly supports the policy of free and fair competition, this proposed rule is fatally flawed.

The rule as proposed is vague and highly ambiguous in its intended effect, which will lead to misinterpretation.<sup>58</sup> Moreover, the rule also has no substantive content, and therefore cannot be adequately followed, or enforced. To SureWest’s knowledge, an Internet user’s “entitlement to competition” has no statutory or regulatory definition, and no useful relevant FCC case precedent.<sup>59</sup> The provision therefore crosses the line from “necessary generality” (which would be necessary in a term like “reasonable network management”) into impermissible vagueness. How should an IASP act in order to deliver, comply with or fulfill an “entitlement to competition”?

A consumer’s “entitlement to competition” is no more than a policy rationale underlying the current proceeding, rather than an enforceable right in and of itself. It is one of several policy goals upon which the other, substantive provisions of the *NPRM* are based, as the Commission makes explicit: “we seek comment on each of these points and how they can be resolved in a manner that will further innovation, investment, research and development, competition, and the interests of consumers.” *NPRM* para. 50. Notably, the Commission does not propose to create consumer entitlements to innovation, investment, or research and development. Such “entitlements” would be completely unworkable, as is a consumer entitlement to competition.

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<sup>58</sup> In its essence, the Commission appears here to seek to re-emphasize the benefits of competition in the Internet access market. If that is the intent, the Commission should rely on existing Act provisions that similarly seek simply to recite that oft-stated policy promoting competition to benefit end users. See, e.g., Section 230(b)(2) of the Act.

<sup>59</sup> *Comcast/BitTorrent Order*, *supra* note 26.

Ultimately, there is a better option than FCC rules for enforcing competition: the nation's well-developed body of antitrust law. Any CAS provider that believes that an IASP is acting in an anti-competitive manner towards it can file an anti-trust suit in civil court. Accordingly, for all these reasons, SureWest suggests that competition remain as a guiding policy behind any substantive net neutrality principles, rather than as a standalone rule. Proposed rule Section 8.11 should not be enacted. If a rule dealing with competition in connection with Internet-related services is nevertheless adopted, it should be reworded to eliminate any suggestion of an "entitlement", and instead reaffirm the Commission's existing policy to promote competition with respect to areas within its jurisdiction.

**VII. Transparency Must Be Balanced to Ensure That It Does Not Cause More Harm Than Benefit.**

At paragraph 118 *et seq.*, the Commission seeks comments on codifying a principle of transparency. SureWest believes that this complex issue should be resolved through voluntary "best practice" standards developed by all of the stakeholders involved in this issue.<sup>60</sup> Such standards should balance the interest in disclosure against certain other interests, as discussed below.

SureWest agrees that customers deserve access to reasonable information regarding the IASP's network management practices. Indeed, SureWest already provides five paragraphs of such information to its customers.<sup>61</sup> SureWest is unsure what additional information may be useful to customers. For information to be useful to

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<sup>60</sup> Indeed, one option to address all of the issues in the *NPRM* would be for the promotion of voluntary industry standards, rather than forcing into place a set of counter-productive and unnecessary rules.

<sup>61</sup> See, "Network Management -- Dealing with Bandwidth, Data Storage and Other Limitations" available at [http://www.surewest.com/legal/acceptable\\_use\\_policy.php](http://www.surewest.com/legal/acceptable_use_policy.php).

the vast majority of customers, it cannot be so extensive or so detailed that customers other than technical experts would get lost or give up attempting to read it. Certain detailed protocols of network management would not be of any use to subscribers, and thus providing extensive descriptions of such protocols would not only not be necessary for subscribers, but would be affirmatively harmful.

In addition to not burying the majority of customers in overwhelming details, IASPs must be mindful of the need to protect network security and public security. By network security, SureWest means that transparency should not require an IASP to provide information that could be used to harm the network, subvert spam filters, etc. SureWest notes that the Commission appears to recognize similar interests in para. 119 of the *NPRM*, that transparency should be subject to “the needs of law enforcement, public safety and homeland and national security.”

While SureWest agrees that there are potential benefits in providing end users more information regarding network management procedures, the same analysis does not apply to giving additional network information to CAS providers. First, while IASPs have entered into a contractual relationship with end users, that is generally not the case in regards to CAS providers. Absent such a relationship, IASPs have no apparent legal obligations to CAS providers, and do not owe them the same duties that they owe to end users.<sup>62</sup> Furthermore, as the Commission well knows, the distinction between

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<sup>62</sup> As is the case in connection with transparency requirements, if the Commission enacts its proposed rule giving end users an “entitlement” to competition (and SureWest believes that such a rule would be deeply flawed), the IASP’s obligations under such a rule would be to the end user, not to the edge provider.

“edge” (CAS) provider and “core” provider is rapidly becoming blurred.<sup>63</sup> A significant portion of content is now or will in the future be provided by IASPs. It would be improper to require IASPs to provide potentially proprietary information to their competitors. It’s one thing to say that IASPs may not act in an anti-competitive manner towards CAS providers — it is quite another to say that IASPs must give up information to CAS providers that can be used by CAS providers against the IASP in an anti-competitive manner. That would be improperly turning a “shield” into a “sword.”<sup>64</sup>

Thus, there are complex issues here that will not easily or adequately be resolved by the Commission’s rulemaking process. Networks vary greatly, both within the same category of platform, and across platforms (wireline vs. cable modem vs. wireless). End user needs are similarly varied. While there are a variety of stakeholders with an interest here, this is the sort of issue that SureWest believes can best be addressed by meetings among those stakeholders to collaborate and agree upon

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<sup>63</sup> See, e.g., Statement of Commissioner Robert McDowell, page 3 (page 98 of the *NPRM*).

<sup>64</sup> In paragraph 127 of the *NPRM*, the Commission asks whether *Computer III* ONA and CEI requirements would be useful guides for the network information that IASPs should disclose to CAS providers. Surely this question must be a typographical error: it was barely four years ago, in the *Wireline Broadband Order*, that the Commission found that it contrary to the public interest to apply those very same requirements in this very same context. *Wireline Broadband Order*, 20 FCC Rcd at 14875-879. The Commission found that the *Computer Inquiry* obligations (specifically including ONA and CEI), are “inappropriate and unnecessary” for a number of reasons, including that they are technologically “outmoded,” and that they “diminish a carrier’s incentive and ability to invest in and deploy broadband infrastructure investment.” *Id.* at paras. 42 and 44. There is no evidence that the facts underlying these rationales have significantly changed in the last four years. Accordingly, any attempt to re-impose ONA and CEI on IASPs would be arbitrary and capricious.

voluntary “best practices” standards. SureWest urges the Commission to allow this process to occur.<sup>65</sup>

**VIII. The Public Interest Requires the Exclusion or Exemption of Managed Services From Obligations of the Proposed Rules.**

The status of managed services, and their relationship to the definition of “broadband Internet access,” are critically important issues in this proceeding. The public interest requires the Commission to either exclude managed services from the definition of “broadband Internet access” that would be subject to the proposed rules, or exempt managed services from those rules. Complete exclusion is the better option. Managing a service for a customer, even a service with direct or indirect Internet connections, makes the customer’s service experience unique, as the management function itself is fundamentally inconsistent with the inflexible lockstep ideas that appear in the *NPRM*.

As the Commission well knows, there is a substantial difference between services that are provided over a broadband network and broadband Internet access; the former is a broad category of services, and the latter is a particular service that does not include the entire category. SureWest is encouraged that the Commission appears to recognize the operational/logical distinction: that certain services provided over a broadband network, particularly “managed” services, are not Internet access service,

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<sup>65</sup> SureWest is also concerned about the proposal in para. 128 of the *NPRM* that IASPs might have to report network management practices to the Commission and perhaps other agencies. While the concerns are not precisely the same as those applied to the provision of network information to end users and CAS providers, SureWest urges the Commission to remember that all reporting requirements create real costs for the regulated entity. These costs must be weighed against potential benefits, and none appear to be provided in the *NPRM*. The Commission should also be mindful that any information provided to the Commission or other agencies could contain competitive proprietary information, or network security information (if that information is more detailed than that provided to end users). The Commission would need to stringently protect that information.

just because Internet access service is otherwise and additionally provided over the same network. See *NPRM* at para. 108:

[W]e recognize that some services, such as services provided to enterprise customers, IP-enabled “cable television” delivery, facilities-based VoIP services, or a specialized telemedicine application, may be provided to end users over the same facilities as broadband Internet access service, but may not themselves be an Internet access service and instead may be classified as distinct managed or specialized services.

SureWest is concerned, though, that while the Commission clearly recognizes the *operational/logical distinction* between managed services and Internet access services, it is unclear if the Commission is committed to fully recognizing the necessary resulting *regulatory distinction*, when it states only that “as these may not be “broadband Internet access services,” none of the principles that we propose would necessarily or automatically apply to these services.” *Id.* (emphasis added). SureWest urges the Commission to follow through on the necessary regulatory consequences of the operational/logical distinction, and exclude managed services from the definition of “broadband Internet access” that would be subject to the proposed rules, or exempt managed services from those rules.

The reason to manage Internet and managed service traffic separately always has been, and always should be, to best meet consumer demand. Content delivery and network access have historically been physically and/or logically separated at various points on the network, and this separation may be because of a variety of reasons.

The Commission’s mention of IP-based television provides a good way to understand the issue. SureWest’s current IPTV service is meeting consumer demand for high-quality and highly reliable multichannel video entertainment service at a

reasonable cost. Going forward, the most cost effective way for a facilities-based provider to deliver voice, data and video is over a single IP-based network. But, consumers' expectations for multichannel video service do not allow that service to be delivered in the "best efforts" manner that occurs in Internet access service under the TCP/IP protocol.<sup>66</sup> The latency and jitter that would occur would not be acceptable to consumers. Multichannel video IPTV services require guaranteed levels of latency and quality over loss of packets. Placing services such as IPTV on the managed portion of the network can help insure a high-quality HDTV service with the ability for near instantaneous channel change. It should be noted that managing these services separately do not detract from the expected quality of service or experience on the Internet access portion of the network. The Internet traffic is managed to a completely different set of parameters to ensure the Internet service meets common Internet standards and customer demands.<sup>67</sup> It should also be noted that past investments made by service providers into their networks have been justified by revenues associated with managed services. Due to the shared nature of IP networks, many of these upgrades have resulted in improved Internet access for consumers and would not have been financially sustainable to perform without the additional income provided by managed services offered to consumers from the service provider.

Thus, in order to meet the quality and reliability expectations of consumers, IP multichannel video services are provided to end users over a different logical network,

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<sup>66</sup> The same could be said for other managed services, such as facilities-based voice and certain managed private network services, especially those provided to public safety agencies.

<sup>67</sup> One additional public interest benefit of delivering managed services over a different logical network is that it removes that significant amount of traffic from being mixed with traditional Internet traffic, allowing for better quality provision of Internet service.

though over portions of the same physical network. But customer expectations are not the only reason for providing such services on this managed basis. Content delivery agreements with multichannel video content providers (TNT, HBO, etc.) typically dictate the level at which services must be managed. All of SureWest's IPTV content agreements have some contractual requirement for the level of quality and security that results in a need for SureWest (and similar providers) to use active management. For instance, most of SureWest's managed IPTV service requires some level of encryption to insure that the high-quality video content is not pirated. The same level of encryption may not be required for other forms of video that may be streamed over the Internet.

"Managed services" is inadequately defined, and the proposed rule fails to recognize the wide variety of activities that may come under its umbrella. One issue that may make the distinction on managed services more clear is the use of private addresses. The Commission proposes to define "Internet" for these purposes in part as a system of networks that reaches "a globally unique Internet address assigned by the Internet Assigned Numbers Authority" ("IANA"). This is a valid approach. In contrast, however, SureWest's managed IPTV service uses private IP addresses, that is, addresses not assigned by the IANA. So, one solution to this issue is that managed services are implicitly excluded from the definition of "broadband Internet access," and thus not subject to the proposed rules. However, for the sake of clarity, it may be best to state the matter explicitly in any rules, by explicitly excluding managed services from the definition of "Internet access," or by separately exempting managed services from the proposed rules. This may require a definition of "managed services" that includes more than just the private/public address distinction.

**IX. Conclusion.**

SureWest shares with the Commission the goal to “preserve and promote the open and interconnected nature of the public Internet.” SureWest believes, however, that the U.S. currently has such an Internet, and that the proposed rules will harm the ability of IASPs to give their customers the high quality services that they have come to expect, demand, and in fact receive today. Accordingly, the Commission should not enact the counter-productive rules proposed in this proceeding.

Respectfully submitted,

SUREWEST COMMUNICATIONS

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