

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

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

COMMENTS OF ADTRAN, INC.

Stephen L. Goodman
Butzel Long Tighe Patton, PLLC
1747 Pennsylvania Ave, NW, Suite 300
Washington, DC 20006
(202) 454-2851
SGoodman@butzeltp.com

Dated: January 14, 2010

Summary

ADTRAN shares the Commission's goal of a robust, widely-deployed Internet that continues to provide entrepreneurial, social and democratic opportunities to all Americans. The current "light touch" regulatory environment -- including the Four Internet Principles -- has served this purpose well. Despite the enormous record compiled to date, only two instances of alleged abuse have been documented, and the Commission (along with industry self-policing) quickly resolved those problems with the tools at hand. Speculation about potential future abuse is not an adequate basis for imposing extensive new rules.

Moreover, adoption of the proposed regulations will stifle investment as a result of possible misguided application of ambiguous rules and/or uncertainty over what practices will be permitted. While theoretically an Internet service provider could wait several years for a body of case law to develop that would flesh out the vague regulations proposed in the *Open Internet NPRM*, Internet service providers need to act quickly to respond to ever evolving risks like viruses and denial of service attacks (not to mention network congestion that varies from moment-to-moment). Recent experiences with implementation of the 1996 Act and the auction of spectrum in the 700 MHz band are a stark reminder of the cost of bad or vague regulations. In light of the absence of a demonstrated need for regulations, combined with the substantial risks imposed by those regulations, ADTRAN urges the Commission not to adopt the proposed rules. ADTRAN does, however, support adoption of greater disclosure obligations.

Finally, if the Commission nevertheless decides to adopt more extensive regulations, it should avoid rules that meddle in the marketplace by favoring some

participants or technologies over others. It makes no sense to regulate broadband Internet access service providers alone, while ignoring other critical gatekeepers like Internet search engines. Likewise, the Commission should not be determining what would constitute acceptable business plans – such as a “two-sided” model – nor should the Commission be deciding what are acceptable “managed services.”

Table of Contents

I.	The Absence of a Demonstrated Need for New Rules	2
II.	“Bad” Rules or Uncertainty will Stifle Investment in Broadband	9
III.	The Commission Should Avoid Picking Winners and Losers in the Marketplace ...	15
IV.	CONCLUSION	19

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

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

COMMENTS OF ADTRAN, INC.

ADTRAN, Inc. (“ADTRAN”) takes this opportunity to address certain issues raised in this Notice of Proposed Rulemaking ostensibly concerning the need for rules to preserve the open Internet.¹ The Commission is undertaking this inquiry as a follow-up to its adoption of the Four Internet Principles in the *Internet Policy Statement*,² and in parallel with its proceeding to develop a National Broadband Plan.³ ADTRAN has participated actively in the *National Broadband Plan NOI* and related proceedings.⁴ As a

¹ *Preserving the Open Internet and Broadband Industry Practices*, GN Docket No. 09-191 and WC Docket No. 07-52, 24 FCC Rcd 13064 (2009) (hereafter cited as “*Open Internet NPRM*”).

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

³ *A National Broadband Plan for Our Future* (Notice of Inquiry), 24 FCC Rcd 4342 (2009) (hereafter cited as “*National Broadband Plan NOI*”).

⁴ See e.g., ADTRAN Comments in GN Docket 09-137, filed September 4, 2009, ADTRAN Comments in Docket 09-51, filed August 31, 2009; Reply Comments of

manufacturer of telecommunications equipment used in the Internet and Internet access networks, ADTRAN supports a dynamic, open and widely available Internet, and supports Commission adoption of greater consumer disclosure obligations. As explained herein, however, ADTRAN is concerned that the wholesale adoption of the rules proposed in the *Open Internet NPRM* unintentionally may impede the goal of a more robust Internet.

ADTRAN, founded in 1986 and headquartered in Huntsville, Alabama, is a leading global manufacturer of networking and communications equipment, with an innovative portfolio of more than 1,700 solutions for use in the last mile of today's telecommunications networks. ADTRAN's equipment is deployed by some of the world's largest service providers, as well as distributed enterprises and small and medium businesses. Importantly for purposes of this proceeding, ADTRAN solutions enable voice, data, video and Internet communications across copper, fiber and wireless network infrastructures. ADTRAN thus brings an expansive perspective to this proceeding, as well as an understanding of the impact of regulation on network operators' investment decisions.

I. The Absence of a Demonstrated Need for New Rules

The *Open Internet NPRM* fails to make the case for codification of the "Four Internet Principles" into rules, and the addition of two new rules. The Internet has been working remarkably well with the minimal regulation that has been applied to date. As

ADTRAN in Docket 09-51, filed July 21, 2009; Ex Parte Notice of ADTRAN in Docket 09-51, filed June 23, 2009; Ex Parte Notice of ADTRAN in Docket 09-51, filed May 22, 2009; Ex Parte Notice of ADTRAN in Docket 09-40, filed April 13, 2009; Ex Parte Notice of ADTRAN in Docket 09-40, filed April 6, 2009; Ex Parte Notice of ADTRAN in Docket 09-29, filed March 13, 2009.

the *Open Internet NPRM* acknowledges, the Commission has compiled a “substantial record” through multiple proceedings over several years encompassing literally thousands of comments and numerous hearings – and that vast record reveals only two isolated instances of alleged abuse by providers of Internet access service: (i) one small telephone company (Madison River) blocked a port at its switch, which had the effect of blocking voice-over-IP calls, and (ii) Comcast used “reset packets” to disrupt or throttle back BitTorrent and other select peer-to-peer protocols during times of congestion on its network.

Those two examples constitute the totality of alleged abuses that have been identified over the years. Thus, the *Open Internet NPRM* would appear to be guilty of exaggeration when it asserts that “some conduct is occurring in the marketplace that warrants closer attention and could call for additional action by the Commission, including instances in which *some Internet access service providers* have been blocking or degrading Internet traffic”.⁵

The *Open Internet NPRM* attempts to bolster the need for new rules by claiming that there is a “potential” for harm, asserting that Internet access service providers “may have both the incentive and the means to discriminate in favor of or against certain Internet traffic and to alter the operation of their networks in ways that negatively affect consumers, as well as innovators trying to develop Internet-based content, applications, and services.”⁶ However, Internet access service providers have had the same incentives and capabilities for years, and yet only the two isolated instances of alleged abuse have

⁵ *Open Internet NPRM* at ¶ 50 (emphasis added).

⁶ *Open Internet NPRM* at ¶ 8.

been identified.

Moreover, as the *Open Internet NPRM* recognizes (albeit buried in a footnote), even some of that speculation of potential “harm” may be specious. Quoting former FCC Chief Economist Faulhaber, the *Open Internet NPRM* acknowledges “proving that a vertical practice is on the net deleterious is usually quite difficult and highly dependent upon the models assumed.”⁷ So even the *Open Internet NPRM’s* speculation concerning potential risks appears to be overstated. In sum, there simply is no evidence of widespread abuse that would justify new rules, nor is there a valid basis for presuming that any such abuse will emerge.

Indeed, the record reflects the fact that the Commission, using the tools already at hand – in combination with industry self-policing -- successfully addressed the two instances of alleged abuse. In the case of Madison River, following a complaint by Vonage, the Enforcement Bureau initiated an investigation, and less than three weeks later the Commission approved a consent decree in which Madison River agreed to halt the port blocking and pay a voluntary fine of \$15,000.⁸

In Comcast’s case, the Commission “shone a spotlight” on the complained-of practices by conducting a thorough examination, and then issuing an order requiring detailed disclosures by Comcast and submission of a compliance plan to halt the traffic management practice found by the Commission to be unreasonable pursuant to the Four

⁷ *Open Internet NPRM* at n. 167, citing Gerald Faulhaber, *Network Neutrality: The Debate Evolves*, 1 INT’L J. OF COMM. 680, 691 (2007).

⁸ *Madison River Communications*, 20 FCC Rcd 4295 (EB 2005).

Internet Principles.⁹ Equally important, during the pendency of the investigation, a number of Internet service providers and peer-to-peer applications providers got together to develop a more efficient framework to enable those service providers and content distributors to work jointly and cooperatively – the P4P business practices.¹⁰ Comcast modified the particular traffic management techniques found to be discriminatory and unreasonable, and the industry voluntarily developed more efficient peer-to-peer traffic control techniques to help reduce the congestion created by P2P traffic.

Comcast has appealed the Commission’s decision, challenging the ability of the Commission to enforce “principles.”¹¹ While the Court of Appeals could rule in Comcast’s favor, such a holding would not be a valid basis for codifying the principles. As noted above, the *status quo* has worked very well to date, with widespread deployment of broadband Internet, rapid adoption by consumers and businesses alike of broadband services, and the development of a wealth of broadband applications. The limited instances of alleged abuse were quickly rectified through Commission intervention and voluntary industry actions. And even if the Commission cannot “enforce” the Four Internet Principles, it still retains the ability to “jawbone” and shine a spotlight on conduct it believes to be harmful. In addition, if problems become

⁹ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008)(“Comcast Decision”).

¹⁰ See, <http://www.openp4p.net/>.

¹¹ See, e.g., <http://research.lawyers.com/news-headline/FCC-Seen-Taking-Loss-Vs.-Comcast-BitTorrent-Case-Appeal-1:1096745124.html>.

widespread, the Commission always retains the ability to adopt rules targeted to eliminate demonstrated abuses. Isolated allegations of a problem, or speculation about problems that might develop, however, are not a sufficient basis for adopting the wide-ranging prophylactic rules proposed in the *Open Internet NPRM*.

Equally important, if Internet access providers engage in anticompetitive conduct, such activities would be subject to general antitrust and other competition laws. Those laws are enforceable by the Justice Department, the Federal Trade Commission and states attorneys general, as well as through private lawsuits that provide for the recovery of treble damages and attorneys fees. In addition, private parties have the ability to bring class-action lawsuits to protect the rights of consumers, and the deregulated interexchange carriers and commercial mobile radio service providers can attest to the willingness of parties to initiate such lawsuits.

Moreover, to the extent the Commission is concerned that Internet access service providers may have the ability to discriminate against application providers that compete with services offered by the Internet access service provider,¹² any such discriminatory conduct (such as degradation of a competitor's content) would need to be sufficiently significant to be effective, but thus would be readily discoverable. After all, if customers did not notice any difference in service, then the Internet access service provider presumably would gain no competitive advantage from such a tactic. And if such discriminatory treatment is readily apparent to consumers (and thus competitors), then it can be policed through government or private lawsuits.

On the other hand, if the Commission adopts the rules as proposed in the *Open*

¹² *Open Internet NPRM* at ¶ 72.

Internet NPRM, then it would appear that the antitrust laws would no longer apply. The *Open Internet NPRM* raises this issue and seeks comment on the impact of two Supreme Court decisions on the applicability of antitrust laws – *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (“*Trinko*”)¹³ and *Credit Suisse Securities (USA) LLC v. Billing* (“*Billing*”).¹⁴ The *Trinko* decision concerned alleged violations of the interconnection obligations imposed by the 1996 Act. The Court indicated that the “savings clause” in the 1996 Act prevented any implied repeal of the antitrust laws, although it did not operate to expand antitrust law obligations to interconnect. The Court did suggest that in the absence of the “savings clause,” traditional implied repeal/preemption analysis would have likely resulted in the inapplicability of antitrust law.¹⁵ In this proceeding, there is no similar “savings clause,” because the Commission is not implementing the 1996 Act.

The other case mentioned in the *Open Internet NPRM – Billing* – also addresses the situation where extensive federal regulation preempts application of the antitrust laws. The Supreme Court there discussed the four-part standard for determining whether the federal regulations displace antitrust law:

The preceding considerations show that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) that were present in *Gordon* and *NASD* are satisfied in this case as well. Unlike *Silver*, there is here no question of the

¹³ 540 U.S. 398 (2004).

¹⁴ 551 U.S. 264 (2007).

¹⁵ 540 U.S. at 406 (“In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency’s regulatory scheme ‘that might be voiced by courts exercising jurisdiction under the antitrust laws.’”).

existence of appropriate regulatory authority, nor is there doubt as to whether the regulators have exercised that authority. Rather, the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC's administration of the Nation's securities laws?¹⁶

The Court in *Billig* went on to find incompatibility in that case because of extensive regulation that requires expert interpretation. If the Commission adopts the rules proposed in the *Open Internet NPRM*, there is a similar risk of chaos because of the likelihood that different judges and juries could reach differing conclusions on the lawfulness of Internet service provider conduct.

By way of example, application of antitrust law on top of the regulations proposed here could result in judicial determinations on the reasonableness of traffic management techniques that varied on a Circuit-by-Circuit (or even for a time on a District-by-District) basis. Thus, the Supreme Court would likely find the four-part standard for non-applicability of antitrust laws to be met if the Commission were to adopt the rules proposed in the *Open Internet NPRM*. On the other hand, if the Commission does not adopt the far-reaching regulations proposed in the *Open Internet NPRM*, then any anticompetitive action by an Internet Service Provider that rises to the level of an antitrust violation can be effectively addressed through private or government antitrust lawsuits.¹⁷ In the absence of extensive regulations, antitrust actions would serve as a strong deterrent that would rein in any anticompetitive proclivities of Internet service providers.

¹⁶ 551 U.S. at Section II.B.

¹⁷ Nor is there a likelihood of widely differing standards resulting from such cases, because the courts (and juries) would be applying well understood competition laws, not deciding whether particular conduct qualified for a "reasonable network management" exemption from a strict ban on discrimination.

II. “Bad” Rules or Uncertainty will Stifle Investment in Broadband

In addition to the absence of a demonstrated need for new regulations, ADTRAN is concerned that simply adopting the rules proposed in the *Open Internet NPRM* will likely reduce investment in broadband facilities by Internet service providers. ADTRAN has first-hand experience of the adverse effect on investment decisions of burdensome or vague regulations, having lived through the downturn in investment by the incumbent carriers following adoption of rules in implementing the 1996 Act that required extensive unbundling at rates that were very favorable to the competitive carriers.¹⁸ As the Table below reflects,¹⁹ although the “dot.com boom” buoyed telecommunications industry investment in 1999-2001 (including investment by the wireline carriers), there was a precipitous decline in investment by the wireline telecommunications carriers in 2002, followed by further declines until 2005. Investment by the incumbent carriers did not pick up until the Courts had rejected the Commission’s unbundling rules and the Commission adopted new rules in response to the remand.

¹⁸ See, e.g., *Illinois Bell v. Charles E. Box*, 548 F.3d 607, 609 (7th Cir. 2008):

Such a rate (of which the best-known version is called "TELRIC") is highly favorable to the competitors of the incumbent local exchange carrier. The Supreme Court has described it as a rate just above the confiscatory level. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002).

¹⁹ Because consistent statistics were not available for the entire period at issue, the Table reflects different sources and differing investment categories in order to provide some information on the overall trends that occurred. However, it is the trends, rather than the absolute values, that are relevant.

Telecommunications Industry Investment (in \$ Billions)

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
BEA*	80.1	87.0	105.6	138.1	119.8	73.8	66.2	71.4	76.9	92.2	100.1	100.1
FCC**		50.6	59.8	74.2	72.0	34.8	26.8	24.0	27.1	32.1		
CITI ⁺										23.5	25.9	24.9

* Department of Commerce, Bureau of Economic Analysis - Investment for Broadcasting and Telecommunications Industry

** FCC, Statistics of Common Carriers – Capital Expenditures for Wireline Telecommunications Carriers

+ CITI Study Table 5 – RBOC Wired CapEx

ADTRAN’s own anecdotal experiences were consistent with these industry-wide statistics. On several occasions during this period, ADTRAN’s incumbent wireline carrier customers indicated that projects were being canceled or deferred as a result of the Commission’s unbundling obligations.

Of course, the Commission need not go back that far to find a specific, concrete and recent example of the impact of regulation on investment incentives. In early 2008, the Commission auctioned spectrum in the 700 MHz band that was being vacated as a result of the transition to digital television. It is possible to measure the “cost” of regulatory decisions in that auction, insofar as one of the blocks – the C-Block – was uniquely burdened with an “openness” requirement that the winner ensure their networks are compatible with the applications and devices of the customer’s choice. Because all other significant factors were equal (*e.g.*, the timing of the auction, the propagation characteristics of the spectrum), it is possible to compare the price brought by the C-Block with the price fetched by other bands in that auction to see the cost of the “openness” requirement.

The C-Block raised a total of \$4.74 Billion for its 22 MHz of spectrum, while the B-Block (without any openness requirement) raised a total of \$9.1 Billion for its 12 MHz of spectrum. Comparing the B-Block and the C-Block on a common measure (price per MHz per pop) for that auction reveals that the price paid for the C-block (\$.70 per MHz per pop) was less than a third of the price paid for the B-Block (\$2.48 per MHz per pop). Clearly the auction participants required a substantial discount -- a discount in excess of 70% -- to offset the additional regulatory burden placed on the C-Block. The *Open Internet NPRM* discusses the C-Block in the context of addressing the history of “openness” requirements,²⁰ but fails to acknowledge the impact that decision had on the bidders willingness to invest in that spectrum.

The proposed codification of the Four Internet Principles, along with the addition of the two new rules on nondiscrimination and disclosure, runs the risk of similarly dampening investment incentives, particularly because the *Open Internet NPRM* proposes to apply them to only one sector of the Internet ecosystem. Moreover, the proposed rules are likely to have a stifling effect as a result of their ambiguity. To some extent, the ambiguity appears to be deliberate – the Commission wants the flexibility to determine the lawfulness of particular activities as they arise:

We propose to codify the four principles at their current level of generality. Doing so will help establish clear requirements while giving us the flexibility to consider particular circumstances case by case. In that way, we will be able to generate over time a body of law that develops as technology and the marketplace evolve.²¹

²⁰ *Open Internet NPRM* at ¶ 42.

²¹ *Open Internet NPRM* at ¶ 89.

Of course, until that “body of law” develops, the Internet service providers have no way of telling whether their operations fall of the “right” or “wrong” side of these very “general” rules. However, many of the service providers’ decisions, including implementing traffic management techniques, need to be done on a rapid and dynamic basis, and cannot await the development of a “body of law” over time.

Nor is it even clear how much clarity any of the enforcement decisions will provide, to the extent they will depend on the specific facts of the case being decided. One need only look at the single case decided to date interpreting the Four Internet Principles to see the potential confusion a service provider faces. Would Comcast’s traffic management technique be deemed reasonable if it had disclosed the practice? Was it the particular technique used (*i.e.*, sending a “reset” packet)? Would it be okay to “throttle back” all peer-to-peer traffic, so long as no particular protocols (*e.g.*, BitTorrent) are targeted? Moreover, the Comcast decision mentioned, but then explicitly declined to provide any guidance on the reasonableness of, other practices (such as providing higher priority to real-time communications packets (*e.g.*, VoIP) than other packets) that one would think fall on the “right” side of the law.²²

The proposed rules are admittedly vague, in order to preserve flexibility. In addition (and in ADTRAN’s view commendably so), each of the rules recognizes the need for Internet service providers to manage traffic on their networks. All six of the proposed rules include the “qualifier” of “[s]ubject to reasonable network management”. ADTRAN agrees with the Commission that network operators must be allowed to

²² *Comcast Decision* at n. 202.

manage Internet traffic on their networks. The problem with the proposed rules, however, is that adding the “reasonable network management” provision creates even more ambiguity (and uncertainty), particularly in light of the definition incorporated into the proposed rules. Section 8.3 of the proposed rules defines “reasonable network management” as:

Reasonable network management. Reasonable network management consists of:
(a) **reasonable** practices employed by a provider of broadband Internet access service to:
 (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns;
 (ii) address traffic that is unwanted by users or harmful;
 (iii) prevent the transfer of unlawful content; or
 (iv) prevent the unlawful transfer of content; and
(b) **other reasonable network management practices**.²³

An Internet service provider who looks to the rules to try to determine whether a contemplated traffic management technique will be deemed lawful learns that (i) four types of practices would be deemed “reasonable network management” if they are “reasonable,” and (ii) that “reasonable network management” also includes “other reasonable network management practices.”

This vague and circular definition is not very helpful for divining lawful network management practices. While theoretically a service provider could wait several years for a body of case law to develop that would flesh out this vague definition, Internet service providers need to act quickly to respond to ever evolving risks like viruses and denial of service attacks (not to mention network congestion that varies from moment-to-moment). The Internet service providers’ need for dynamic and prompt action is inconsistent with a scheme that relies on case-by-case reviews.

²³ *Open Internet NPRM* at Appendix A (emphasis added).

In developing the proposed rules, the Commission apparently was attempting to meet two different goals – providing clarity and providing flexibility.²⁴ Unfortunately, the *Open Internet NPRM* fails to recognize that there is an inherent tension between these two goals, making it exceedingly difficult (if not impossible) to craft rules that provide both clarity and flexibility. Particularly in light of the absence of any demonstrated and widespread problems, ADTRAN urges the Commission to abandon its proposal to codify the Four Internet Principles, and add a nondiscrimination rule and a broad disclosure rule.

On the other hand, ADTRAN supports the adoption of a consumer disclosure obligation. ADTRAN believes that consumers should have access to meaningful information with regard to the capability and reliability of an Internet service provider’s offerings. As ADTRAN explained in previous comments to the Commission, the use of terms like “up to” speeds does not allow consumers to make informed choices.²⁵

²⁴ In discussing the proposed nondiscrimination rule in paragraph 108 of the *Open Internet NPRM*, the Commission indicated:

Our intent is to provide industry and consumers with clearer expectations, while accommodating the changing needs of Internet-related technologies and business practices. Greater predictability in this area will enable broadband providers to better plan for the future, relying on clear guidelines for what practices are consistent with federal Internet policy. ... [R]easonable network management would provide broadband Internet access service providers substantial flexibility to take reasonable measures to manage their networks, including but not limited to measures to address and mitigate the effects of congestion on their networks or to address quality-of-service needs, and to provide a safe and secure Internet experience for their users. We also recognize that what is reasonable may be different for different providers depending on what technologies they use to provide broadband Internet access service (*e.g.*, fiber optic networks differ in many important respects from 3G and 4G wireless broadband networks). We intend reasonable network management to be meaningful and flexible.

²⁵ See *e.g.*, ADTRAN Comments in GN Docket Nos. 09-51 and 09-137, filed

ADTRAN likewise supports a generalized disclosure obligation to permit consumers to understand the nature of an Internet service provider's network management practices, although any such disclosure requirement should not be so detailed as to provide malefactors with a "roadmap" to evade those practices.

III. **The Commission Should Avoid Picking Winners and Losers in the Marketplace**

As explained above, the record fails to support the need for the proposed rules, and ADTRAN is concerned that the rules (and the uncertainty about how they will be applied) will stifle investment. If the Commission nevertheless decides to move forward with adopting rules, it must do so in a manner that does not favor particular technologies or rivals. ADTRAN is concerned to the extent that application of some of the proposed rules in the *Open Internet NPRM* could have the Commission meddle in the marketplace, giving preference to some participants over others.

The *Open Internet NPRM* discusses the need to apply the rules to all Internet access technologies, although the Commission also indicates that the rules may need to be applied differently to take account of the "significantly different technologies, market structures, patterns of consumer usage, and regulatory history" of the different platforms.²⁶ While ADTRAN recognizes the need, in some circumstances, to take account of some of the differences in technologies, the Commission must also be sensitive to the fact that such discriminatory regulatory treatment can affect the competition between technologies. By way of example, if the Commission affords

September 4, 2009.

²⁶ *Open Internet NPRM* at ¶ 13. See also discussion of varying standards that may apply to different platforms at ¶¶ 154-157.

wireless Internet service providers with significantly greater flexibility than wireline providers to address capacity shortages by “throttling back” traffic, then wireless providers would have an artificial cost advantage because they could “manage” their way through congestion, rather than having to construct more capacity. Thus, if it adopts the proposed rules, the Commission must carefully calibrate the extent to which it treats different platforms differently.

More troubling is the *Open Internet NPRM* proposal to subject only one segment of the Internet ecosystem to the new regulations. The proposed rules would apply just to “a provider of broadband Internet access service,” not to other services that equally affect consumer experiences and with which Internet access service providers may be competing.²⁷ ADTRAN does not contend that the proposed rules are necessary to rein in harmful conduct by content, applications, and service providers, insofar as the record does not reflect widespread abuses by those entities, in the same way that it does not reflect widespread abuses by Internet access service providers. However, the application of the new rules to only one participant in the Internet ecosystem ignores the impact of the other players on consumers’ experience, and would adversely impact competition between Internet service providers and the other entities.

²⁷ *Open Internet NPRM* at Appendix A. At ¶ 101 of the *Open Internet NPRM* the Commission tersely asks whether the rules should apply more broadly, but the extensive discussion of the applicability of the rules, as well as the proposed rules themselves, make clear the Commission is proposing only to apply the new rules to providers of broadband Internet access service. In contrast, in its earlier Notice of Inquiry, the Commission was examining the behavior of all participants, “including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others.” *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894, 7896 (2007).

For example, the *Open Internet NPRM* operates under the assumption that the Internet at present, “[a]s a platform for speech, ... offers the same potential audience to a blogger on her couch and to a major newspaper columnist.”²⁸ This notion that all speakers on the Internet have the same “soapbox” ignores the important role Internet search engines play as a gatekeeper to content.²⁹ Despite the importance the *Open Internet NPRM* places on maintaining an open Internet to protect speech and civic participation,³⁰ the proposed rules would not apply to these critical gatekeepers. It simply makes no sense to focus solely on broadband Internet access service providers in order to address the concerns purported to justify the new rules.

In a similar vein, the *Open Internet NPRM* appears to operate under the unfounded assumption about the Internet presently that “[a]s a platform for commerce, it does not distinguish between a budding entrepreneur in a dorm room and a Fortune 500 company.”³¹ In fact, the “budding entrepreneur’s” customers are likely to have a vastly different experience than that of the customers of a Fortune 500 company – which can afford to deploy multiple servers and direct connections to various Internet service providers’ networks – unless that “budding entrepreneur” is willing to pay for the services of a content delivery network (CDN), like Akamai or Limelight, which also use multiple servers and direct, very high capacity connections to enhance the speed and

²⁸ *Open Internet NPRM* at ¶ 4.

²⁹ See e.g., BBC News, “Google censors itself for China,” <http://news.bbc.co.uk/2/hi/technology/4645596.stm>.

³⁰ *Open Internet NPRM* at ¶¶ 75-78.

³¹ *Open Internet NPRM* at ¶ 4.

reliability of its customers' downloads. Those CDNs, however, would not be subject to the proposed rules, notwithstanding their potential impact on the users' Internet experience.

One of the ways the “budding entrepreneur” theoretically could also enhance its customers' experience would be to pay an Internet service provider for prioritized, premium service. However, the *Open Internet NPRM* specifically indicates that such a service would violate the rule against discriminatory conduct.³² The Commission's proposal to prohibit such a service arbitrarily eliminates this form of Internet service provider competition with CDNs, and also precludes the Internet service providers from adopting a “two-sided” business model (similar to magazine publishers that charge both subscribers and advertisers), despite the evidence in the record that such practices are beneficial.³³

In seeking to justify this prohibition, the *Open Internet NPRM* seemingly assumes that Internet service providers would act in an irrational manner. The *Open Internet NPRM* speculates that if an Internet service provider was allowed to charge for premium service, it would be motivated to degrade (or at least not seek to improve) the capacity available for its standard “best efforts” service.³⁴ However, assuming the Commission adopts meaningful consumer disclosure requirements, including accurate information on capacity (as ADTRAN supports), then the Internet service provider's degraded service would be public knowledge, and would scare off new customers and cause current

³² *Open Internet NPRM* at ¶ 106.

³³ *Open Internet NPRM* at ¶ 66.

³⁴ *Open Internet NPRM* at ¶ 71.

customers to look for alternatives. Commission speculation that presupposes such irrational behavior on the part of Internet service providers is hardly a valid basis for prohibiting adoption of a particular business model.

The *Open Internet NPRM* does recognize the desire of some customers to obtain premium, prioritized services, and acknowledges the value of such services.³⁵ It proposes to create a potential exception from the nondiscrimination rule for “managed” or “specialized” services. ADTRAN fully supports the Internet service providers’ ability to provide such offerings, which could be used for a myriad of beneficial services like smart grids and telehealth. However, the uncertainty surrounding such *ad hoc* exemptions is likely to limit an Internet service provider’s willingness to invest in the capabilities that would support such offerings. Moreover, ADTRAN believes that the deployment of such specialized offerings should depend on marketplace demand, not on whether a regulator decides that any particular service is worthy of a “managed service” exemption from the nondiscrimination rule. This is yet another reason for the Commission to decline to adopt the rules proposed in the *Open Internet NPRM*.

IV. CONCLUSION

The extensive record compiled in this and earlier Commission proceedings fails to demonstrate widespread problems that would require adoption of the vague and extensive regulations proposed in the *Open Internet NPRM*. The Commission has been able to handle the isolated alleged instances of abuse with the tools already at hand, and can continue to do so in the future. Moreover, the adoption of such rules is likely to produce harmful (*albeit* presumably unintended) consequences, including the stifling of

³⁵ *Open Internet NPRM* at ¶¶ 148-153.

investment by Internet service providers. Finally, adoption of the proposed rules runs the risk of Commission meddling in the marketplace, to the detriment of consumers and competition. Thus, ADTRAN urges the Commission not to adopt wholesale the rules proposed in the Open Internet NPRM, although ADTRAN does support the adoption of meaningful consumer disclosure obligations.

Respectfully submitted,

ADTRAN, Inc.

By: _____/s/_____
Stephen L. Goodman
Butzel Long Tighe Patton, PLLC
1747 Pennsylvania Ave, NW, Suite 300
Washington, DC 20006
(202) 454-2851
SGoodman@butzeltp.com

Dated: January 14, 2010