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 CENTURYLINK
ON NOTICE OF PROPOSED RULEMAKING

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INTRODUCTION AND SUMMARY

Congress has directed Federal and state agencies to leave the Internet free of regulation, and the Commission has long acknowledged the importance of that directive. Accordingly, the Commission should decline to adopt the rules outlined in the NPRM.[1]

There is no market failure requiring regulation, because competition and the vigorous marketplace make such regulation of broadband service providers unnecessary. Imposing needless regulation creates uncertainty that serves only to discourage investment, reduce subscribership, and harm consumers. While broad principles for service providers may be appropriate, broad rules are not, and a broad nondiscrimination standard is unwarranted and improper. The Commission lacks legal authority to impose the rules, and in any event cannot reasonably apply them differently for wireline and wireless broadband service providers, nor exempt applications, content, and other service providers.

[1] Notice of Proposed Rulemaking, FCC 09-93 (rel. Oct. 22, 2009) ("NPRM").

Fortunately, there is no need to regulate the Internet. The market is already enforcing reasonable practices, and service providers have responded quickly when the Commission has found it necessary to intervene.

I. BROADBAND PROVIDERS NEED THE ABILITY TO MANAGE THEIR NETWORKS AND EARN RETURNS FROM THEIR INVESTMENT.

The NPRM proposes a significant change in Commission policy. Although the NPRM claims the proposed ruled "are not intended to regulate the Internet itself," they would do precisely that. In doing so, the proposed rules would put at risk the high quality and low cost that consumers now enjoy and expect.

Network owners need to be able to manage their networks. Network management is essential to operate networks efficiently and sensibly and to provide customers the quality of service they expect. The NPRM recognizes that congestion and quality of service must be managed, that unwanted and harmful traffic must be addressed, that unlawful content and usage must be limited, and unlawful transfer of content must be addressed.[2] Nevertheless, the proposed rules would impose broad regulation casting a shadow over every decision network owners must make, and would limit their ability to run their networks to generate appropriate investment returns.

The NPRM acknowledges that such network management is necessary, but it overlooks the need of network owners to have opportunities to generate revenue sufficient to support the investment necessary to build, operate, extend, and continually upgrade those networks. In providing broadband services, network owners are not acting as public utilities, and their continued vigorous investment cannot be taken for granted. If the Commission adopts rules that

[2] NPRM at ¶¶ 9, 137-139.

are perceived to restrict their opportunities to earn a return on their investment, ongoing investment inevitably will be reduced, to the detriment of consumers.

Application and content providers press for an "open Internet" and a strict non-discrimination standard for network owners. They themselves, however, have no intention of investing in broadband network. They build their business plans riding on the investment that broadband service providers have paid for, while contributing nothing toward the cost of building, operating, or upgrading those networks. Any regulation "prohibiting broadband Internet access service providers from charging content, application and service providers fees"[3] for tailored services would unquestionably undermine investment and discourage innovation.

II. THE COMMISSION SHOULD NOT IMPOSE NETWORK MANAGEMENT REGULATIONS.

A. There is no market failure requiring regulation.

Congress sensibly expected, and directed, that the Internet should be free from regulation. The preamble to the 1996 Act makes clear that the policy of the United States is to *reduce regulation,* so as "to secure lower prices and high quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[4] Congress was explicit in federal Internet policy. Section 230(b)(2) of the Act states that it shall be the statutory "policy of the United States ... to preserve the vibrant and competitive *free market* that *presently exists* for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*"[5]

[3] NPRM at ¶ 111.

[4] Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[5] 47 U.S.C. § 230(b)(2) (emphasis added).

Certainly, the Commission should not impose regulation unless there is a clear need. The proposed rules are indeed "a solution in search of a problem."[6] The Commission has repeatedly found that the broadband market is dynamic, healthy, and competitive.[7] This reflects a long standing policy of the Commission of not regulating Internet services.[8] The Federal Trade Commission also concluded that the broadband marketplace is dynamic and more than sufficiently competitive, and that regulating it, as well as imposing nondiscrimination rules on it, would do more harm than good.[9] The NPRM asserts regulating the broadband Internet access providers based on purported "emerging challenges to the open Internet,"[10] but there is no real support for that abrupt change in policy. The NPRM presents no facts to support a need for regulation, and it offers no analysis to meet the burden of showing that these rules are necessary or would ultimately benefit the public.

The broadband Internet access market is prospering without network regulation. The market is growing. Investment, at least up to now, has been healthy and extremely vigorous. Competition is thriving. Problems have been rare, and there is no evidence that broadband network owners are acting unreasonably in managing their networks or discriminating in any way that would harm the interests of consumers or the competitive market. The NPRM provided

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[6] NPRM at ¶ 60.

[7] *Wireline Broadband Order,* 20 FCC Rcd 14853 at ¶¶ 19, 44, 77-80 (2005).

[8] *See, e.g., Pulver.com Order*, 19 FCC Rcd 3307 at ¶ 19 n.69 (2004); *Local Competition and Broadband Reporting*¸ 14 FCC Rcd 18100 at ¶ 61 (1999); *Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, 17 FCC Rcd 4798 at ¶ 7 (2002); Report to Congress, *Federal State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 at ¶ 82 (1998); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 at ¶ 7 (1980).

[9] FTC Staff Report, *Broadband Connectivity Competition Policy* (June 27, 2007) at 10-11.

[10] NPRM at ¶ 6.

only theoretical justifications for regulating broadband services providers. Regulation cannot be justified to promote innovation and network investment; regulation would serve only to discourage both. There is no justification for regulating how network owners address congestion. There is no justification for claiming a need to regulate to protect speech or "civic participation." There is no problem with the competitive market, and indeed no evidence of any serious problem of unreasonable discrimination. There is no justification for rules that could force broadband service providers into being a "dumb pipe." Consumers seek broadband Internet access service not for itself, but to access content and applications, including those offered by their service provider.

B. Competition and the market make regulating network owners plainly unnecessary.

Indeed, there is no evidence that blocking, purposeful degrading of service or discrimination is, in fact, occurring at all, let alone occurring at a frequency that requires new rules. Adopting Internet regulation rules is unnecessary.

The NPRM cites just two incidents where it needed to intervene against broadband service providers -- that in ten years of dramatic Internet growth.[11] When a rural telecommunications company blocked traffic in a dispute with an over-the-top VoIP provider, the Commission intervened and the blocking stopped.[12] When Comcast imposed restrictions on peer-to-peer traffic, the marketplace forced Comcast to disclose and modify its practices.[13] The Commission also issued an order against Comcast (now under appeal), but the market forced a

[11] NPRM at ¶¶ 32, 36.

[12] *See Madison River Communications LLC,* 20 FCC Rcd 4295 (2005).

[13] *Comcast Tweaks Terms of Service in Wake of Throttling Uproar, Privacy Digest* (Feb. 18, 2008).

change in its policy even if the Commission had not.[14] In today's competitive broadband services marketplace, drawing attention to any unreasonable practices will effectively police the behavior of service providers, even in the absence of rules or indeed of any Commission authority to impose a penalty.

In an increasingly competitive marketplace, network owners have every incentive to ensure customers have full and reasonable access and a high quality of service. Consumers subscribe to broadband services for access to content and applications. If network owners began blocking sites, unreasonably restricting usage, or engaging in unreasonable discrimination -- customers would go elsewhere. A recent analysis explained,[15]

> [Broadband] operators today by definition do not possess a "bottleneck" monopoly over anything. No one has identified the products, services or markets from which foreclosure could take place, or identified either a systematic refusal of access or an economic incentive to refuse access.

The NPRM acknowledges that price and quality discrimination can bring benefits. "[T]he ability of a provider to price discriminate not only will benefit the provider, but may also benefit the public as a whole (although not necessarily in all cases)."[16] Nevertheless. the proposed broad rules would intervene in the broadband market by imposing overbroad

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[14] *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. 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,"* 23 FCC Rcd 13028 (2008), *appeal pending, Comcast Corp. v. FCC,* No. 08-1291 (D.C. Cir.). Comcast challenged the Commission's authority to sanction it for violating federal Internet policy. Turning Commission policy into rules, however, will not solve the Commission's underlying lack of authority. *See Section III(C).*

[15] Adam Thierer, *'Net Neutrality': Digital Discrimination or Regulatory Gamesmanship in Cyberspace?, Policy Analysis*, No 507 (Jan 12, 2004) ("*Net Neutrality - Digital Discrimination"*).

[16] NPRM at ¶ 66.

regulations on network providers to avoid purely hypothetical problems. The nondiscrimination rule could be claimed to preclude surcharges for prioritization or quality of service, or prohibit a network owners' steps to ensure it can manage that network appropriately and generate revenue from its own content and applications. Retail Internet service, as consumers know it today, is very inexpensive, but it cannot remain so if a nondiscrimination regulation limits, even precludes, revenue opportunities and value added services. It makes it uncertain whether IPTV offerings can be viable, because the technology requires prioritizing traffic to ensure video quality.[17] The NPRM also appears to assume that network owners cannot be trusted to manage networks efficiently or responsibly. The market polices network providers already. Consumers will punish providers that behave unreasonably. Most consumers have a choice of providers. Even in the most rural areas, satellite offers an alternative to other service providers.

CenturyLink, like many other companies, has built a network that delivers Internet services and facilitates the use of many applications. CenturyLink's network requires and continues to require huge capital investment to maintain, to upgrade, and to extend the network to customers it serves. CenturyLink incurs considerable additional expense to operate the network. In an increasingly competitive marketplace, and in a difficult economic environment, it is network owners such as CenturyLink that bear the risk associated with owning such an asset. Accordingly, network owners must ensure the network is utilized efficiently and that it creates value for customers and shareholders. This provides strong incentive for network owners to refrain from imposing restrictions that unnecessarily burden the customer experience and cause the customer to go elsewhere.

[17] CenturyLink has introduced IPTV in two markets and plans additional service in other areas. IPTV technology potentially offers rural consumers a high quality video service in low-density, high cost areas left unserved by cable TV providers.

Naturally, balance is needed between a network perspective and a customer perspective. That fact, however, should not automatically lead to the conclusion that the best course is to prohibit or mandate any particular practices.

> [I]t is perfectly sensible for a network owner to impose use restrictions or differential pricing schemes on its broadband customer. Network owners may want to discourage the use of certain devices on their networks to avoid system crashes, interference, or "signal theft." They may want to vertically integrate content and conduit on their systems, or partner with other firms that can help them reach new customers and offer superior services. And there might exist scenarios in which blocking access to certain sites makes sense for network operators. ... Consumers will consider some restrictions, such as prohibition on the release of viruses on a broadband network, trivial and entirely acceptable.[18]

Prioritization and blocking are done for many beneficial reasons -- preserving network security or integrity, efficient traffic flows particularly during times of congestion, and bandwidth conservation, among others.

For example, CenturyLink uses spam filters on electronic mail systems to block certain messages to provide more efficient traffic flow and meet customer demand for less unsolicited (and often offensive) electronic mail. To address "phishing" -- a growing customer complaint -- CenturyLink has developed a product that alerts and potentially blocks access to fake Internet sites to protect consumers. In addition, routine operations prevent non-CenturyLink customers from using network resources provided exclusively for CenturyLink customers, thereby blocking non-customers from network access. All of these are rational business and customer decisions, but to some parties, similar measures in the future could be inappropriately challenged as "discrimination."

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[18] *Net Neutrality - Digital Discrimination* at 2-3.

C. Internet Regulation would discourage investment and harm consumers.

1. <u>Regulation would discourage investment and deployment</u>.

Nationally, investment in the broadband network has been extraordinary. Broadband service providers are extending network into areas previously unserved, and broadband speeds and network capabilities and bandwidth are increasing. Consumers benefit from this, because exponential growth in usage demands truly huge investment in the network just to maintain the speeds and capabilities consumers expect today, and to support the dramatic growth in bandwidth usage. If network owners do not continue to invest very heavily, consumers will see degradation in service.

Broad Internet regulation creates regulatory uncertainty -- uncertainty that undermines incentives for investment. Creating broad rules to oversee how broadband service providers manage their networks and provide services implies a commoditization of broadband networks, limiting the ability of network owners to manage costs and find new revenues in the Internet services marketplace. Through uncertainty, and an inevitable explosion of industry litigation, The proposed rules would undermine network investment.

It is common knowledge that new regulation is nearly always a drag on investment, and a study by Balhoff and Williams shows that the impact is especially serious for broadband investment.[19] Investment risk is greatest for those investing in *network* -- in the physical infrastructure that makes broadband services possible. Consequently, "policy makers should

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[19] Balhoff & Williams LLC, *Financial Markets Perspectives: Net*work *Neutrality Principle 5* (Dec. 15, 2009). *See http://www.balhoffwilliams.com.*

ensure appropriate incentives for network investment, while avoiding unnecessary disincentives."[20]

> It is clear that the most significant capital commitments are being made by network providers. And, this physical 'layer' is the most critical to the development of a strong Internet economy. Other elements remain important, but companies such as Google or eBay or Yahoo provide services over an Internet which makes their products available to all who are connected. The capital investments of the application and service providers are not remotely as large or as risky as those of the network providers.[21]

By any measure, the investment required is huge. Verizon has risked more than $20 billion on fiber-based network plant.[22] AT&T has been upgrading its U-Verse investment (estimated at $7-10 billion) to provide broadband services with downstream speeds up to 24 Mbps, intending to expand from 17 million homes passed to 30 million in 2011.[23] Cable companies have invested more than $161 billion since 1996, and $14.4 billion in 2009 alone.[24] Wireless carriers are upgrading to Long-Term Evolution network technology,[25] and Clearwire continues to expand its WiMax 4G wireless network in 25 major metropolitan areas around the

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[20] *Id.* at 1.

[21] *Id.* at 2.

[22] *See, e.g.,Verizon is Rewiring New York, Block by Block, in Race for survival, New York Times (Aug. 14, 2006), available at http://www.nytimes.com/2006/08/14/technology/ 14verizon.html?_r=1.*

[23] *See* News Release, *AT&T to Invest More than $17 Billion in 2009 to Drive Economic Growth* (Mar. 10, 2009).

[24] *See http://www.ncta.com/StatsGroup/Investments.aspx.*

[25] Wireless subscribers with advanced service lines (more than 200kbps each direction) more than tripled from 2007 to mid-2008. Federal Communications Commission, *13th Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* at note 7.

country.[26] CenturyLink, too, has been investing heavily. It has more than $10.3 billion invested in its network, and it continues to invest in broadband deployment and upgrades wherever it can be economically justified.

The Commission cannot take such high levels of industry investment for granted, however. Network owners are hard-pressed to demonstrate the necessary returns on investment, the economy is in difficulty, and many network owners are facing significant economic pressures. ILECs, in particular, face continuing line loss due to vigorous competition.[27]

Moreover, the Commission cannot ignore the particular obstacles to investment in rural areas. In those areas, the necessary investment per potential subscriber is higher. Much of rural America is simply uneconomic to serve even for more traditional voice service. The problem is made worse by the fact that existing universal service support systems are under assault, and the Commission has, however inadvertently, contributed to uncertainty about future high cost USF support and intercarrier compensation -- the explicit and implicit support that is critical to ILECs serving rural areas and to carrier of last resort service.

At the same time, many investors and analysts would prefer if network owners did not invest any more than absolutely necessary in network. Some rationally prefer harvesting existing operations over investing in network when it is uncertain whether that investment will generate a satisfactory return. Investors have other places to put their money, and today's investment market reacts badly to regulatory requirements that pose uncertainty -- especially to those

[26] News Release: *Clearwire Launches Retail and Expands Sales for CLEAR(TM) 4G Mobile Internet Service in Honolulu and Maui* (Dec. 1, 2009).

[27] CenturyLink, for example, lost 9% of its access lines last year. Competitors target the low cost areas to serve, so ILEC line loss is concentrated in areas with the lowest costs to serve.

imposed solely on broadband service providers, and potentially against wireline network owners in particular.[28]

2. Regulation would harm consumers and reduce subscribership.

Network owners must manage networks to provide the Internet experience that consumers expect. The Internet is not static but constantly changing, with more and more users, rapidly growing usage and demand for bandwidth. It is no longer used merely for delay-tolerant applications such as web surfing or electronic mail. Today's Internet is used for bandwidth-intensive applications that are highly sensitive to delay, including downloading videos, gaming, video conferencing, and voice services. Consumers accordingly expect from their providers that traffic will be prioritized and managed to deliver quality that these services and applications require. Discrimination is not necessarily unreasonable.[29]

It is unrealistic to expect that network owners can invest in sufficient capacity to make such issues irrelevant. Today's Internet broadband access services are cheap. Unlimited usage is the norm, and costs are artificially low, a reflection of competition and the need to win subscribers to justify broadband network capital expenditures and, for ILECs, to offset falling revenues from traditional telephone services. Nationwide, ILECs have been losing lines for many years, putting pressure on traditional telephone business.[30] Investing in broadband capacity, and extending broadband networks to reach new subscribers, is sustainable only if

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[28] *See Section IV, infra.*

[29] *See MCI Telecomms. Corp. v. FCC,* 917 F.2d 30, 37-46 (D.C. Cir. 1990); *Orloff v. FCC,* 352 F.3d 415 (D.C. Cir. 2003).

[30] Similar to other ILECs, CenturyLink's 2009 revenue decline stemming from access line loss was only partly offset by an increase in broadband Internet subscribers, despite extensive investment in broadband network and marketing.

those investments can yield sufficient returns from a variety of sources, not just end user revenues.

Consequently, inexpensive, unlimited access will quickly become obsolete if network owners are not able to innovate and to offer and charge end users, content providers, and other network users for the variety of services and quality of service options desired. The increasing demand for broadband services and higher bandwidth requires significant investment in broadband infrastructure. Some studies show that increasing bandwidth alone without allowing for increased intelligence in the network could increase the per-subscriber cost of providing service by $300 to $400 per month, assuming high bandwidth application popularity continues to grow.[31] Demand for broadband services is elastic, for penetration will be significantly eroded if end user prices for those services are the only means of recovering these increased costs.[32]

To prevent this, network owners need the freedom to build the network in the most efficient manner, to manage the network effectively, and the flexibility to gain cost recovery from all users of their facilities and not just end users. There is no rational reason why upstream providers that benefit from and use the network should not share in the cost of the network. Otherwise, this burden is placed solely entirely on network owners and end users -- at future prices that will not be sustainable, at least not for most Americans, regardless of how affordable the price is today.

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[31] George Ford, Thomas Koutsky, Lawrence Spiwak, *The Efficiency Risk of Network Neutrality Rules*, Phoenix Center Policy Bulletin No 16 (May 2006) at 3.

[32] "[S]everal studies have shown that American consumers are very sensitive to price for broadband services. As a result, actions that would increase the cost of these networks could have a significant effect on broadband penetration.... we review publicly available engineering and financial models, and these models show that a government policy to mandate 'stupid' networks could increase the cost of providing broadband services to households by hundreds of dollars per month." *Id.*

It is unreasonable, and unrealistic, to expect any business to invest in a network with little or no expectation that customers can or will fully pay for it. Instead, network owners should be allowed the flexibility to innovate -- to meet varying customer needs through offers that prioritize services or provide quality of service standards that not every customer and every application needs or wants.

> Bottom line: there is no free lunch. [Network owners] need to find a way not only to pay off their investments and investors but also to generate the revenues necessary to invest in next generation broadband networks and technologies. In pursuit of that goal, they may experiment with a wide range of network access schemes and pricing methodologies that might be forbidden or discouraged if a Net neutrality rule were on the books.[33]

Competition will protect upstream providers from excessive charges.

Not only would Internet regulation lead to an inefficient network architecture and increased societal cost, one study suggests Internet regulation's cost increasing or revenue reducing mandates will materially impact broadband deployment generally and, in fact, disproportionately, in rural high cost areas.[34] The study found that Internet regulations burden high cost markets by a factor of six.

> Increasing the costs of building or operating a broadband network by a regulatory mandate unquestionably will result in lower broadband network construction across the board. But our analysis shows that this decline in construction will not be evenly spread across the country as a whole -- in fact, deployment in high cost areas will be harmed disproportionately by any such cost-increasing mandate.[35]

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[33] *Net Neutrality -Digital Discrimination* at 12-13.

[34] George Ford, Thomas Koutsky, Lawrence Spiwak, *The Burden of Network Neutrality Mandates on Rural Broadband Deployment,* Phoenix Center Policy Paper No. 25 (July 2006).

[35] *Id*. at 18.

That result is directly contrary to the federal priority to increase broadband investment and deployment, especially in rural areas.

III. THE COMMISSION SHOULD LIMIT ITSELF TO A STATEMENT OF POLICY.

A. Broad principles are appropriate, but broad rules and a strict anti-discrimination standard are not.

Having broad principles guiding the industry on network management is not unreasonable. Although CenturyLink prefers industry standards to those imposed by government, CenturyLink supports the Commission's existing statement of Internet policy. CenturyLink, and other network owners, would be pleased to work with the Commission on reasonable policy statements on transparency and nondiscrimination. Codifying rules in this area, however, is inappropriate.

As statements of policy, general statements are not unreasonable. As rules, the proposed language is unduly vague as to what is "reasonable network management," what is adequate transparency, and what is reasonable "discrimination." Security and business reasons compel limits on the extent of transparency, which some could claim the proposed rules would prohibit. Most seriously, the proposed rules appear to prohibit "discrimination" that is essential not merely to manage networks efficiently and maintain the quality of service that network customers expect, but also to ensure network owners can receive a reasonable return while providing service at low costs to consumers.

The proposed broad rules, and particularly the broad antidiscrimination rule, would put network owners in an uncertain position. Consumers currently enjoy inexpensive broadband service, despite extraordinary investment by network owners. Today, unlimited usage is the norm, and rates are typically averaged and low, even while bandwidth demand is exploding.[36] That cannot be sustainable if general rules are used to prevent network owners from finding new revenues. Network owners cannot invest without a hope of return, and the Commission, application providers, content providers, and other service providers that benefit from that network cannot expect that broadband service providers will be able to invest themselves out of capacity constraints indefinitely.

B. The Commission should not adopt the strict nondiscrimination standard.

The Commission should not adopt a strict nondiscrimination rule. Even as a policy statement, the proposed nondiscrimination rule appears too broad. The Commission should instead limit its attention to "unreasonable" or "anticompetitive" forms of discrimination -- and only when shown that to be adversely affecting consumers.

A narrower approach to discrimination -- addressing only unreasonable and anticompetitive forms of discrimination that materially harm consumers -- would allow service providers to innovate, developing options for consumers as well as application and contents providers. The Commission would respond on a case-by-case basis to allegations of discrimination that can be shown to be unreasonable or anticompetitive. In contrast, a strict rule against discrimination would handicap broadband service providers. It would prevent them from innovating to ensure more efficient use of networks, to improve quality of service, and to offer new services in competition with other application, content, and service providers.

[36] The NPRM notes the problem of congestion involves "costs" (and "in some cases large costs") to increase capacity, and that "revenue opportunities might not justify the required investment" to maintain the quality of service that consumers now enjoy. NPRM at ¶ 80. It fails to appreciate, however, the magnitude of those costs driven by bandwidth demand growth, and the significance of regulations that limit those revenue opportunities.

The proposed rules would prohibit charging "a content, application, or service provider for enhanced or prioritized access to subscribers"[37] -- even precluding voluntary agreements to provide value-added service to some application or content providers that may want to improve their customers' experiences with their services. That effectively precludes demand-based pricing -- pricing that saves consumers money, promotes fair and efficient network usage, and enables innovations like bursts in speed for cost-effective access to large content downloads or specialty applications. The NPRM speculates that network owners could act collectively and charge unreasonably high prices, discouraging innovation at the "edge,"[38] but the Commission offers no analysis to support this assumption -- or to show that market forces (and existing antitrust laws)[39] would not prevent that result. In fact, broadband Internet access providers have every reason to maximize access to any non-harmful content and applications, in order to maximize the value of their networks and to keep subscribers satisfied with their service experience.

The nondiscrimination rule would frustrate pricing, service, and network innovation and delay investment by preventing service providers from offering services that are neither unreasonable, anti-competitive, nor harmful to consumers.

[37] NPRM at ¶106.

[38] *Id.* at ¶¶ 68-69.

[39] Many economists view antitrust laws as a better solution to potential abuses than "net neutrality" regulations. *E.g.,* William Baumol, *et al.*, *Economists Statement on Network Neutrality Policy* (March 2007). *See http://www.brookings.edu/papers/2007/03regulation_litan.aspx.*

C. The Commission lacks legal authority to impose these rules.

The NPRM has just four short paragraphs on legal authority for regulation.[40] The Commission is unwise to presume it has authority to prescribe rules imposing federal Internet policy. The NPRM suggests the Commission can exercise *ancillary authority* over facilities-based Internet access providers. The NPRM claims section 230(b) and the broadband goals of section 706(a) of the 1996 Act provide such ancillary authority.[41] It also claims video is increasingly delivered over the Internet, and that the Commission has traditionally regulated video and video services. It claims further that it has authority under Title III of the Act to regulate spectrum based facilities.

The truth is, however, that the Commission has no statutory foundation for these proposed rules. The exercise of ancillary authority is permissible only when "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[42] The Commission has no statutory mandate -- indeed no statutory authority -- to impose these rules. Asserting regulatory power here would be tantamount to claiming virtually limitless regulatory power for the agency, changing Congress to the role of prohibiting agency action rather than affirmatively authorizing it. In effect, it would render all but Section 1 of the Communications Act unnecessary.[43]

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[40] NPRM at ¶¶ 83-87.

[41] 47 U.S.C. § 230(b). Section 706(a) is a footnote to the 1996 Act, codified at 47 U.S.C. § 157 nt.

[42] *American Library Ass'n,* 406 F.3d 689, 700 (D.C. Cir. 2005).

[43] Section 1 authorized the creation of the Federal Communications Commission for the purpose of executing and enforcing the provisions of the Communications Act. *See* 47 U.S.C. § 151.

Section 230(b) and section 706 do not support exercise of ancillary authority. Section 230(b) simply outlines "the policy of the United States" as to "the Internet and other interactive computer services and other interactive media," while calling for the Federal and state regulators to leave it "unfettered by ... regulation."[44] Section 706 instructs the Commission and state commissions to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[45] These provisions call on the Commission to *deregulate* and to *promote* broadband network investment, when the proposed rules would do the opposite.

The NRPM does not establish that Commission action here is actually related to the effective implementation of either section 230(b) or section 706. That is not surprising, given that neither of them is, by itself, a provision that can be implemented in rules. Section 230(b) and section 706 are plainly statements of policy. Congressional statements of policy are no different than statutory "preambles." They are not operative parts of the statutes. A statutory *statement of policy* cannot support the exercise of ancillary authority.

As for the Commission "traditional authority" over video and video services, that authority is based on Title VI. That title includes nothing to give the Commission statutory authority to regulate broadband Internet access services -- information services governed by

[44] 47 U.S.C. § 230(b).

[45] 47 U.S.C. § 157 nt.

Title I.[46] The mere fact that some information is transmitted for video does not somehow make the service provider a cable television provider. Moreover, the Commission cannot expect to rely on Title VI to impose these regulations on non-cable TV broadband Internet access providers that are unquestionably outside the scope of that title.

Likewise, the Commission's authority over spectrum is based on Title III. Title III does not include any grant of statutory authority sufficient to regulate the management of broadband Internet access services as the NPRM suggests. Whether or not the Commission might claim such a basis for authority over *wireless* providers, the Commission cannot reasonably expect to rely on Title III to impose these regulations on non-wireless broadband Internet access providers.

It is not enough for the Commission to say it has some unspecified regulatory authority in this area. To exercise ancillary authority, it must have a clear statutory foundation. Congress has not provided it, and the Commission cannot expect appellate courts to allow any agency to claim broad regulatory power in this way. The NPRM's allusion to ancillary authority based on traditional regulatory authority over video and spectrum is simply too broad. It would allow the agency to do virtually anything within its subject matter jurisdiction under the Communications Act. Such a broad claim of agency authority, however well-intentioned, is incompatible with the test for ancillary authority outlined by the courts.[47] With such an expansive regulatory reach, the

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[46] The Commission found broadband Internet access is not subject to Title II, but it an information service under Title I. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 at ¶ 5 (2002), *aff'd in part, vacated in part, Brand X Internet Servs. v. FCC,* 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom National Cable & Telecoms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2002). The Supreme Court expressly upheld that finding. 545 U.S. at 986-1000.

[47] *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 695-96 (1979) (rejecting claim of ancillary authority lacking statutory basis); *American Library Ass'n,* 406 F.3d at 708 (same); *MPAA v. FCC,* 309 F.3d 796, 807 (D.C. Cir. 2002) (same); *Home Box Office v. FCC*, 567 F.2d 9, 26 (D.C. Cir. 1977) (same), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

role of Congress would be changed from authorizing agency action, and instead limited to prohibiting it, something the D.C. Circuit found "untenable."[48]

Basic principles of statutory interpretation confirm the Commission cannot claim such broad authority. The NPRM's assertion of ancillary authority would render needless all substantive provisions in Titles II, III, and VI -- which grant specific authority directed to particular industries. "It is a cardinal principle of statutory construction that a statute ought ... to be so construed that ... no clause, sentence, or words shall be superfluous, void, or insignificant."[49]

The Commission cannot use ancillary authority to impose common carrier regulation on non-common carrier services. The Commission has itself acknowledged Congress "inten[ded] to maintain a regime in which information service providers are not subject to Title II regulations as common carriers."[50] Section 153(44)'s definition and the common carrier provisions of Title II also show that common carrier provisions apply only to "common carriers."[51]

The Commission's claim of authority is based on generalities, when the law requires more. Why should the Commission attempt to impose regulations that are unneeded, that will create uncertainty, and that will discourage network investment, when they are assured to be

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Inc., 467 U.S. 837 (1984).

[48] *MPAA,* 309 F.3d at 805-06. *See also Railway Label Execs Ass'n v. National Mediation Bd*., 29 F.3d 655, 671 (D.C. Cir. 1994) ("Were courts to presume a delegation of *power* absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original).

[49] *TRW v. Andrews*, 534 U.S. 19, 31 (2001).

[50] *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks,* 22 FCC Rcd 5901 at ¶ 41 (2007).

[51] 47 U.S.C. § 153(44).

overturned on appeal anyway? It is not enough to believe rules could be helpful in the future to address problems that the NPRM shows are chiefly hypothetical today. Federal agencies do not enjoy carte blanche to regulate industries. There is no need to exercise it. The Commission's Internet Policy Statement[52] provides a more than sufficient bully pulpit to help the market discipline broadband service providers.

IV. IF THE COMMISSION IS TO REGULATE THE INTERNET, IT CANNOT REASONABLY APPLY RULES MORE LENIENTLY FOR WIRELESS BROADBAND PROVIDERS, NOR EXEMPT OTHER PROVIDERS OF APPLICATIONS, CONTENT, AND SERVICES.

The NPRM states the principles the Commission "propose[s] to codify" as regulations "should apply to all platforms for broadband Internet access, including mobile wireless broadband, while recognizing that different access platforms involve significantly different technologies, market structures, patterns of consumer usage, and regulatory history."[53] The NPRM implies that the proposed rules would be applied more leniently on wireless carriers than on their wireline competitors. Every case may reflect different facts, and giving wireless technology automatically more lenient treatment shows how unreasonably broad these regulations would be.

Disparate treatment in the application of vague rules is bad policy, and is commonly unlawful. If standards are necessarily so variable, they do not belong in regulations. Wireline broadband service providers face the same problems as wireless providers -- including the need to protect networks, manage capacity, and find incremental revenue. Wireless providers must

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[52] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC Rcd 14986 (2005).

[53] NPRM at ¶ 13.

expect to compete on the same playing field. The Commission cannot reasonably apply the proposed rules -- whether on network management, transparency, nondiscrimination, or any aspects -- more leniently based on a broadband service provider's technology.

It is even more unreasonable to apply regulations to only one segment of the Internet ecosystem. The Internet involves many companies, and many have huge shares within their markets.[54] Microsoft, for example, overwhelmingly dominates the markets in desktop operating systems and in Internet web browsers. In hardware, Intel overwhelmingly dominates the microchip market. Google overwhelmingly dominates the Internet search engine market; two-thirds of U.S. Internet searches (and even more worldwide) are made through Google. YouTube, purchased by Google in 2006, dominates the online video market -- and is responsible for nearly 10% of all Internet traffic. In contrast, no broadband services provider accounts for more than a small part of the nation's broadband subscribers.[55]

These companies are central to the Internet, and each of them dominates its markets. No federal agency imposes any prescriptive economic regulation on them. No federal regulator tells Microsoft how to open its software code to enable it to run on non-Microsoft applications, even though Microsoft operates under consent decrees arising from findings of antitrust law violations. No federal regulator directs Google to publish its search algorithms to ensure it is not

[54] *See, e.g., http://marketshare.hitslink.com/operating-system-market-share.aspx?qprid=8; http://marketshare.hitslink.com/browser-market-share.aspx?qprid=0; http://marketshare.hitslink.com/search-engine-market-share.aspx?qprid=4; http://www.marketingpilgrim.com/2007/05/google-market-share-up-again.html*; *http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070618005912&newsLang=en; http://www.robabdul.com/amd-vs-intel-market-share-revenue.asp.*

[55] CenturyLink has 2.2 million broadband subscribers scattered in more than 30 states, out of 69.9 million broadband subscribers nationwide. *http://www.internetworldstats.com/am/us.htm.*

discriminating in favor of some advertisers or websites, even though Google has more impact than any broadband service provider over what content and applications end users find on the Internet, and over which online businesses succeed or fail.

By all accounts, Google has taken advantage of its unique position in the market. In its services agreement, it "reserves the right ... to pre-screen, review, flag, filter, modify, refuse or remove any or all Content."[56] It favors paid advertisers in its searches, and news items show it discriminates to favor political messages that suit its own purposes, including directing searches to content intended to promote its views on Internet regulation and translate its dominance of the search market into political power in this very debate.[57] It has also systematically blocked Google Voice calls to rural areas.[58]

CenturyLink opposes regulation of any participant in the Internet ecosystem. The Internet has succeeded -- generating ongoing innovation and winning huge investment -- precisely because it has been free of regulation. The Commission would make a mistake by changing to a policy of regulation. If it is to regulate, however, it cannot rationally impose these rules more leniently on wireless broadband providers, nor solely on broadband network owners. It would need to impose the same standards -- including non-discrimination -- equally on all Internet players, including all application providers, content providers, and service providers.

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[56] Google Terms of Service, § 8, *http://www.google.com/accounts/TOS?loc=US.*

[57] *Google Web Search: Do No Evil?,* Multichannel Newsday (June 12, 2006)

[58] *E.g., http://www.pcworld.com/businesscenter/article/173405/google_voice_in_trouble_over_blocked_rural_calls.html.*

CONCLUSION

Congress has directed the Commission to leave the Internet free of regulation, and the Commission has long acknowledged the importance of that directive. When it comes to the Internet, regulatory restraint is essential, because overbroad rules or limitations can serve only to discourage investment, slow deployment, diminish innovation, and ultimately disserve consumers, especially in rural areas where investment is most difficult to justify. The NPRM's rules, particularly its overbroad nondiscrimination requirement, would likely undermine Commission Internet policy, because they exceed agency authority. Fortunately, there is no need to regulate the Internet. The market is already enforcing reasonable practices, and service providers have responded quickly when the Commission has found it necessary to intervene.

Respectfully submitted,

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